

Baptist Hospitals, Inc., d/b/a Western Baptist Hospital and Kentucky Nurses' Association, Petitioner.
Case 9-RC-12492

October 19, 1979

DECISION ON REVIEW

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Cassius B. Gravitt, Jr., of the National Labor Relations Board. On July 13, 1978, the Regional Director for Region 9 issued a Decision and Direction of Election in which he found, *inter alia*, that Petitioner, herein also called KNA, is a labor organization within the meaning of Section 2(5) of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, a request for review of the Regional Director's Decision and Direction was filed by the Employer, contending that the Regional Director erred in finding that Petitioner is a labor organization and that the Employer's head nurses are not supervisors. Petitioner filed a statement in opposition thereto.

By telegraphic order dated August 15, 1978, the Board granted the request for review only with respect to Petitioner's status as a labor organization.

Thereafter, on March 30, 1979, the National Labor Relations Board issued its Supplemental Decision and Order in *Sierra Vista Hospital, Inc.*,¹ in which the Board set forth its policy regarding conflict-of-interest issues raised by the active participation in the affairs of a labor organization by supervisors of the employer with whom the labor organization seeks to bargain, or of third parties. Inasmuch as these issues had also been raised in the instant proceeding, the Board afforded the parties the opportunity to submit statements of position on these issues in light of *Sierra Vista, supra*.² The Employer and Petitioner submitted timely statements of position.

The Board has considered the entire record in this case, including the statements of position, and makes the following findings:

KNA, a state constituent association of the American Nurses Association, is a professional association of registered nurses, including registered nurses in supervisory positions. According to its bylaws, KNA exists, in part, to advance the economic and general welfare of nurses and "[a]ct as a collective bargaining agency for members in accordance with the policies

and procedures of the organization." KNA consists of the members of district nurses associations which are recognized as constituent associations of KNA. The district serves as the organization's entry level. Each district is located within any one of five designated geographic regions. Thus, District 5, a constituent association of KNA, is located in Region 5 and encompasses the area in which the Employer is located.³ Although each district has its own officers and board of directors, the district serves a geographic function only. It has no relationship to the local units and plays no role in collective bargaining or negotiations. Below the district level is the local unit which is designated by the name of the individual institution where a contract is sought. The local unit at the Employer's hospital consists of nonsupervisory nurses.

At the state level, KNA's board of directors, which has approximately 24 voting members, is comprised of KNA's executive committee, the chairpersons of the commissions, the chairpersons of the divisions of practice, and a representative from each of KNA's geographical regions.⁴ While the record is unclear as to the exact number of directors who hold supervisory positions in various hospitals and health care institutions—the Employer contends it is eight, the Petitioner, seven—it is undisputed that none of them is employed in any capacity by the Employer. The record does reveal, however, that one supervisor employed by the Employer is treasurer of District 5 and another supervisor is on the board of directors of District 5. Additionally, a number of other supervisors employed by the Employer are members of KNA.

KNA's collective-bargaining arm is its economic and general welfare commission (hereinafter called EGWC). The bylaws provide that EGWC is to be comprised of six members: one representative from each region and one representative from a collective-bargaining unit, "all of whom shall be active in the practice of nursing and in *non-supervisory positions* [emphasis supplied]." The purpose of the EGWC is to foster the economic and general welfare of nurses and, to this end, the EGWC establishes economic policies and procedures. To achieve its goal, the EGWC may assist local units in bargaining but does not get involved in the collective-bargaining process itself. Under the bylaws, EGWC is the *only* commission which is not accountable to KNA's board of di-

³ Apparently the Employer and Lourdes Hospital, which is also located in Paducah, Kentucky, are the only hospitals coming within the purview of District 5.

⁴ The executive committee is comprised of KNA's officers. There are seven commissions in the state organization, each with responsibility for "developing and implementing a program of activity" in areas that concern nurses, such as nursing services, continuing education, etc. Additionally, KNA has six divisions of practice "responsible for the improvement and protection of nursing" in areas requiring specialized nursing knowledge and skills.

¹ 241 NLRB 631.

² The Board also advised the parties that, upon a proper showing, it would entertain a request for further hearing.

rectors; instead, EGWC is accountable only to the membership of KNA.

Pursuant to its function of establishing general policies that relate to collective bargaining, EGWC has developed its own statement of policies and procedures. This document states, in part, that the KNA, working through its EGWC, "is prepared to assist registered nurses in establishing and implementing their economic and general welfare goals." The record indicates that such assistance includes the services of KNA's executive director, who also serves as EGWC's staff representative and who has professional expertise in the area of collective bargaining. EGWC's statement of principles and policies specifically states that "the Executive Director provides consultation and assistance to nurses to achieve their economic and general welfare objectives." Although KNA's executive director is employed by and has her compensation fixed by KNA's board of directors, she does not represent the board of directors in collective-bargaining matters but, rather, she represents the general membership through the EGWC.

The record establishes that, after a local unit which decides to engage in collective bargaining has been recognized by KNA, it develops its own bylaws and committees, and selects its own officers. With regard to the collective-bargaining process, each local unit proposes its own contractual goals, elects a negotiating committee and a grievance committee, and processes grievances. The negotiating committee usually consists of three persons who are always unit employees. KNA's executive director, Sharon Smith, acts as chief spokesperson for the negotiating team which includes the local unit members at the bargaining table with her. The local unit members make all of the decisions at the bargaining table, although Smith may offer suggestions which the local unit members are free to adopt or reject. After approval by the negotiating committee, the contract is ratified by the local unit. Smith, as KNA's representative, and the negotiating team then sign the contract. Thereafter, grievances will be processed by the local unit which will also make its own decisions on such matters as whether to call a strike. The board of directors of KNA plays no role whatsoever in the collective-bargaining process.⁵

The Employer contends that, under these facts and in light of the Board's latest ruling in *Sierra Vista, supra*, "it is clear that the KNA is *not* qualified to represent the Hospital's registered nurses because of a proscribed conflict of interest, and thus its petition herein should be dismissed forthwith." In support of its contention, the Employer argues that the active

participation of its supervisors as well as supervisors of its competitor, Lourdes Hospital, in KNA, "creates an intolerable conflict between the KNA and the Hospital's nurses whom it is seeking to represent, as well as between the Hospital and its own supervisors." In the alternative, the Employer argues that the Board should order another hearing to resolve certain factual issues. Contrary to the Employer, Petitioner contends that there is no possibility of supervisory domination in KNA and that, therefore, the conflict-of-interest issue does not arise herein. Additionally, Petitioner contends that the Employer has failed, as required by *Sierra Vista, supra*, to sustain its heavy burden of establishing a disqualifying conflict of interest. Finally, Petitioner argues that any further hearing is unnecessary since the "conflict of interest issues raised by *Sierra Vista Hospital* have already been the subject of a hearing in this case"

In *Sierra Vista, supra*, the Board found that the presence of supervisors in a nurses association does not bear upon its statutory status as a labor organization. However, in certain instances, depending upon the identity and role of those supervisors in the internal affairs of the labor organization, that labor organization could be disqualified from bargaining. Initially, the Board expressed concern that "active participation" by an employer's *own* supervisors in the internal affairs of a labor organization which seeks to bargain with that employer could raise doubts as to that labor organization's ability to deal with that employer at arm's length.⁶ Furthermore, the active internal union participation of supervisors employed by a third party "may impinge upon" the employees' rights to a bargaining representative whose undivided concern is for their interests.⁷ However, the Board emphasized that a heavy burden is imposed upon an employer to adduce probative evidence demonstrating that supervisory participation in a labor organization's internal affairs "presents a clear and present danger of interference with the bargaining process,"⁸ thus disqualifying that labor organization from bargaining.

In the instant case, the uncontradicted evidence indicates that, although KNA does have some officers and directors who are supervisors, none is employed by the Employer.⁹ While there are some supervisors

⁶ The Board noted that the presence of even one of the employer's supervisors on the state association's board of directors could, depending on the role of that supervisor, conceivably present a conflict-of-interest problem.

⁷ Whether or not a conflict of interest exists in this situation depends upon a "demonstrated connection" between the employer of the unit employees and the employer of those supervisors. The Board determined that, even if third-party supervisors constituted a majority of the board of directors, this would not necessarily require disqualification, for the Board will not assume an inherent conflict of interest under these circumstances.

⁸ *Sierra Vista, supra* at 634.

⁹ Nor are they employed by Lourdes Hospital, the Employer's alleged "competitor."

⁵ Smith testified that, although she regularly attends meetings of the board of directors, there is no discussion regarding contract proposals made by or negotiations carried on by the local collective-bargaining units.

of the Employer and of Lourdes Hospital who serve as officers and directors of KNA's District 5, the record indicates that there is nothing in KNA's organizational structure which allows for district officers and directors to interfere with the collective-bargaining process of a local unit. Furthermore, according to EGWC's statement of policies and procedures, the local unit cannot involve the district in that unit's activities.

The record also fails to substantiate the Employer's contention that, in the future, KNA could be controlled and dominated by supervisors who, as officers and directors, could take a more active role in contract negotiations, including being elected to the EGWC. Indeed, the record points in just the opposite direction. Thus, as outlined above, KNA has taken precautionary steps to insure that the collective-bargaining process is insulated at all levels from supervisory participation or influence. The EGWC is the only committee or commission responsible for developing collective-bargaining policy and the bylaws specifically state that it is to be comprised of *nonsupervisory nurses only*. The local unit formulates its own bargaining demands and selects a negotiating committee from its ranks to participate in negotiations. Although the EGWC's staff negotiator may provide suggestions during the course of negotiations, the record indicates that the final determination of the contents of the contract proposal which is to be presented to the unit is made solely by the local negotiating team. The local unit ratifies the agreement without any interference or veto by KNA.

The Employer contends that its supervisors and the supervisors employed by Lourdes Hospital may be future officers and directors of KNA and, as such, could control what KNA's executive director does in negotiations because KNA's board of directors has the power to hire, fire, and compensate its executive director. Further, the Employer maintains that, under the bylaws, KNA retains the power to suspend or discipline members for violation of the bylaws of KNA, the American Nurses Association, or the constituent associations. The Employer argues that, given this situation, the Hospital's supervisors could have KNA discipline any members of the local unit's negotiating team who did not engage in collective bargaining in a manner deemed appropriate by those supervisors. We find those contentions entirely too speculative and, hence, lacking in merit.¹⁰

Alternatively, the Employer contends that a further hearing is necessary "to resolve relevant factual issues" such as the development at [its] Hospital and in the KNA since the original hearing. . . ." In support of this contention, the Employer states only "that

there have been some changes in [its] complement of registered nurses and . . . in the KNA's personnel subsequent to that hearing." We find, however, that the Employer has failed to adduce probative evidence to substantiate its claim that a further hearing is warranted.

Based upon the foregoing, we find that KNA is not disqualified because of an alleged conflict of interest from representing the Employer's employees for the purposes of bargaining collectively with the Employer. Considering all the circumstances, the Employer has failed to sustain the burden required by us in *Sierra Vista* of showing that "there is a clear and present danger of a conflict of interest which comprises [Petitioner's] bargaining integrity"¹¹

Accordingly, in accordance with the record as a whole, we find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act and we hereby remand this proceeding to the Regional Director for the purpose of opening and counting the ballots in the election held herein and for further appropriate action.

All registered nurses employed by the Employer at its Paducah, Kentucky, hospital, excluding all other employees and all guards and supervisors as defined in the Act.

MEMBER TRUESDALE, concurring:

On July 13, 1978, the Regional Director for Region 9 issued a Decision and Direction of Election in this proceeding, finding that Petitioner, Kentucky Nurses' Association (KNA), is a labor organization within the meaning of Section 2(5) of the Act. Today, after detailed analysis of KNA's internal operations, the majority again directs the election in the unit found appropriate by the Regional Director.

Although I agree with my colleagues that there is no impediment to processing KNA's election petition at this time, I believe, for the reasons stated in my partial dissent in *Sierra Vista, supra*, the majority's inquiry into KNA's operations was not only unnecessary, but also unfortunate in that the employees' exercise of their right to select a bargaining representative has been delayed, and the parties', as well as this Agency's, time and resources have been spent in litigation of matters more properly the subject of an unfair labor practice proceeding. The Employer has not controverted the Regional Director's determination that KNA is a labor organization within the meaning of the Act, and that determination, in the circumstances of this case, was and is a sufficient basis for the Region to proceed to an immediate election.

¹⁰ *St. Rose de Lima Hospital, Inc.*, 223 NLRB 1511, 1512 (1976).

¹¹ *Sierra Vista Hospital, Inc.*, *supra* at 635.

As more fully set forth in my partial dissent in *Sierra Vista*, I believe that the majority's approach to participation of supervisors in nurses' associations is misguided, and their characterization of the issue as one involving "conflict of interest" is in error. While participation of this Employer's own supervisors in KNA may in fact be perceived as a conflict in the supervisors' loyalties, it is a conflict which may operate to the detriment of the Employer's employees, not to the detriment of the Employer. The Employer should not be heard to complain about its own supervisors' conduct. For if the Employer is concerned that its supervisors are not "loyal" to it, the remedy is within the Employer's control, and Board intervention is unwarranted. If, however, the employees themselves regard the participation of the Employer's supervisors as compromising KNA's ability to represent them with single-minded loyalty, the employees may either reject KNA as their bargaining representative or bring charges under Section 8(a)(1) and (2) of the Act against the Employer, alleging that the Employer, through its supervisors, is interfering with and dominating KNA. To delay this representation proceeding by inquiry, on the Employer's behalf, into KNA's internal operations and the role of the Employer's supervisors in those operations is at odds with the principle that an employer may not bring 8(a)(2) charges against itself, the Board's policy precluding litigation of unfair labor practices in representation proceedings, and the interest of all concerned in speedy resolution of representation matters.

The majority's further inquiry into the role of supervisors of *other* employers in KNA's operations and the insulation of those supervisors from the collective-bargaining process is, in my opinion, equally unwarranted in this case. The Employer has merely alleged that there is an inherent conflict between the interests of those supervisors and the interests of its employees. Although the Employer named Lourdes Hospital as "a competitor," there is no allegation that KNA or its agents have financial or other business interests which compete with those of the Employer. Absent such an allegation, which would raise the issue of economic conflict of interest litigable under the *Bausch & Lomb* doctrine¹² in a representation proceeding, the Board need not inquire into the identity and role of supervisors of other employers in KNA's internal operations. The majority's inquiry and analysis herein are superfluous.

This case illustrates the "wrong path" which I fear my colleagues are taking in their approach to the issue of supervisory participation in nurses associations. Supervisory domination and control of a labor organization is a concern that an employer may not raise against a union, and the Employer has not asserted facts indicating an economic conflict of interest. In this case, the majority's detailed investigation and analysis of the internal operations of a statutory labor organization has served only to delay and impede the employees' right to choose a bargaining representative.

¹² *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).