

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: April 30, 2007

TO : Wayne Gold, Regional Director  
Region 5

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Kaiser Permanente & Kaiser Foundation  
Health Plan of the Mid-Atlantic States  
Cases 5-CA-33382, 33383, 33384 536-2560-0000  
536-2572-0000  
OPEIU & OPEIU, Local 2 530-6050-7000  
Cases 5-CB-10089, 10090, 10091

These Section 8(a)(2) and 8(b)(1)(A) cases were submitted for advice as to whether: (1) under Majestic Weaving,<sup>1</sup> the parties unlawfully agreed to apply either the National Agreement or Local Agreement to optician employees if they selected OPEIU Local 2 as their bargaining representative; (2) Local 2 unlawfully promised the opticians benefits by stating that they would be covered by existing contract terms if they selected the Union; and (3) Local 2 breached its duty of fair representation under Beck<sup>2</sup> and General Motors<sup>3</sup> when its membership clerk told opticians that Union membership was required, and that employees would be discharged if they did not sign membership cards and pay back dues.

We conclude that (1) the parties did not agree to apply either the National or Local Agreements to the newly formed optician unit prior to their Union representation; (2) Local 2 lawfully advised opticians about the terms in existing contracts with the Employer because Local 2 was stating what it would attempt to secure if it became the opticians' representative; and (3) Local 2 breached its duty of fair representation under California Saw<sup>4</sup> when the Union's clerk stated that opticians were obligated to sign membership and authorization cards and pay back dues under threat of discharge because Local 2 did not provide notice of the employees' Beck/General Motors rights when or before

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<sup>1</sup> 147 NLRB 859 (1964).

<sup>2</sup> CWA v. Beck, 487 U.S. 735 (1988).

<sup>3</sup> NLRB v. General Motors, 373 U.S. 734 (1963).

<sup>4</sup> 320 NLRB 224 (1995).

it attempted to enforce the union-security clause in the Local contract.

### **FACTS**

#### **A. The Parties' Pre-Recognition Agreements**

Kaiser (Employer), a regional health care institution, along with affiliated Medical Groups and Kaiser Foundation Hospitals, comprise the national organization Kaiser Permanente. Local 2 is member of the Coalition of Kaiser Permanente Unions (Coalition). In August 1999, the Employer and the Coalition entered into an agreement concerning union recognition known as the National Labor-Management Partnership Recognition and Campaign Rules (Rules). The Rules establish ground rules for organizing and campaign communications, and state in pertinent part:

The parties agree that communication to the employees (including recognition cards) will clearly indicate that signing a card is a vote for union recognition ... An employees may revoke their card, either by request to the Union or through the neutral Umpire, at any time up to the date of a card count . . . Kaiser Permanente agrees to recognize the Union as the sole and exclusive bargaining representative of employees when a jointly selected third party has verified that a majority of employees in the unit has clearly and unambiguously expressed the wish to be represented by the Union . . . The parties also agree that in the event the Union is recognized, they will bargain in good faith and, in accordance with the principles of the Partnership, expeditiously reach a final agreement.

Local 2 is also a party to the current 2005 National Agreement (National Agreement) between the Employer and the Coalition, effective October 1, 2005 through September 30, 2008. The National Agreement addresses a variety of employment terms beyond the various local agreements, and states in two pertinent Sections:

#### **A. COVERAGE**

This Agreement applies only to bargaining units represented by local unions that Kaiser Permanente and the Coalition mutually agreed would participate in the national common issues bargaining process and who, prior to the effective date, agreed to include this Agreement as an addendum to their respective local collective bargaining agreement . . . The parties

agree that when a local union signatory to this Agreement is recognized to represent a new bargaining unit of an Employer pursuant to the [Rules], the local parties shall use an interest-based process to negotiate the terms of a local collective bargaining agreement and the appropriate transition to this Agreement.

B. THE NATIONAL AGREEMENT AND LOCAL AGREEMENTS  
Provisions of local collective bargaining agreements and this Agreement should be interpreted and applied in the manner most consistent with each other and the principles of the Labor Management Partnership. If a conflict exists between specific provisions of a local collective bargaining agreement and this Agreement, the dispute shall be resolved pursuant to the Partnership Agreement Review Process in Section 1.L.2. . . If there is a conflict, unless expressly stated otherwise, this Agreement shall supersede the local collective bargaining agreements . . .

In addition to being parties to the Rules and the National Agreement, Local 2 and the Employer have a local agreement (Local Agreement) covering a broad service and technical unit comprised of about 700 clerical, technical, administrative and other non-professional employees in the Washington, DC and Baltimore areas. The Local Agreement, effective October 1, 2005 through December 15, 2011, contains a check-off article and union-security clause. The only technical employees not included in this bargaining unit were opticians and related optical technicians, apparently because contractor staff handled their work when the unit was initially established.

B. The Organizing Campaign

In early 2006,<sup>5</sup> Local 2 advised the Employer that it wished to conduct an organizing campaign in and seek recognition for a unit of optometrists and a unit of opticians in accordance with the Rules. The Employer would not agree to a Rules recognition process for the professional employees, who ultimately voted for Union representation in a Board election. The Employer did agree to a Rules recognition process for a unit of nonprofessional optical department employees, consisting of dispensing opticians and eyewear consultants located at Kaiser retail centers throughout the Mid-Atlantic Region,

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<sup>5</sup> All subsequent dates are in 2006 unless noted otherwise.

and manufacturing opticians located at Kaiser's Burtonsville, MD laboratory.

In early April, Kaiser HR Director Chuck Phillips and Local 2 organizer Lou Wolf jointly sent the optical department employees a letter regarding the ongoing campaign and potential card count. The letter advised employees, in accord with the Rules, that their signature on an authorization card was the equivalent of casting a vote in favor of representation by Local 2, and that cards could be revoked at any time prior to the actual card count. The letter also stated that as of April 17, employees wishing to choose Union representation could do so by signing a card, and that the card count would be conducted on or about June 15 to determine whether a majority of the employees signed cards. The letter explicitly advised the opticians that if Local 2 demonstrated majority status, the Employer would recognize Local 2 and the parties would enter into contract negotiations.

On or about May 31, Wolf sent a letter to the opticians stating that the National Agreement between Local 2 and the Employer provides for: guaranteed 3% across-the-board wage increases through 2010, language for Performance Sharing Bonuses at 3% in each of the next four years, and job security language. This letter described other contractual benefits and how existing pension benefits, tax-sheltered annuities, and leave time would remain vested under Local 2's contract with Kaiser. The letter further stated that Local 2 and Kaiser would completely evaluate all optician jobs to determine the proper wage rate, grade, and classification, and that any wage changes would be adjusted up, not down.

Enclosed with the letter was a copy of the expired Local 2 contract, and a notation that a new contract would issue soon. The letter also included a spreadsheet detailing Local 2 benefits and a brochure that summarized the 2005 National Agreement. Wolf also traveled to Kaiser's Burtonsville lab and distributed copies of the Local Agreement, along with documents describing the parties' agreements then in effect.

On or about June 9, Wolf sent the opticians a second letter stating that his earlier letter had enclosed a contract and a summary of "potential" benefits for the employees if they succeeded in getting the Union. This letter enclosed a two-page example of how an optician with five years experience would benefit with the Union by comparing the contract's "guaranteed wages, not bonus" and certain fringe benefits with "no guaranteed wages" and

certain fringe benefits without the Union. The letter stated that opticians must sign a card to make this happen and enclosed a Local 2 Authorization Card with a stamped envelope.

On June 22, pursuant to the parties' agreement under the Rules, a neutral arbitrator certified that Local 2 was the majority representative of the optical employees. Local 2 and the Employer subsequently agreed that the opticians would come into the existing bargaining unit. The arbitrator then issued a certification reflecting that the opticians were in the existing unit. Thereafter, the parties applied most of the contract, including the union-security clause, currently covering the unit to the opticians while beginning to bargain over changes to certain of their terms and conditions of employment. The parties have not reached agreement to date on economic terms including pensions, benefits, and wages.

C. Local 2's Post Recognition Conduct Concerning Membership and Dues Check-off Cards

On or about July 25, Local 2 Secretary Treasurer Michael Cowan, Wolf, and other Local 2 representatives held a meeting at the Burtonsville lab with about 6 or 7 optical employees. Cowan distributed Local 2 Application for Membership cards and Local 2 Union Check-off Authorization cards and told the employees that if they signed the cards by a certain date, their initiation fee and the first month of dues would be waived. Cowan did not provide the optical employees with their Beck rights at this time.

Cowan and Charging Party employee Sutton subsequently exchanged various e-mails. In a September 18 e-mail to Sutton, Cowan stated that opticians were notified in July, at meetings and in handouts, that opticians hired prior to June 22 would have their first month's dues waived if they turned in their (membership and check-off) cards in August, and that opticians who turned in cards thereafter would not get a waiver and would be obligated to start paying dues effective August 1.

On October 23, Sutton called Local 2 membership clerk Rachel with some questions about Cowan's statements. Rachel assured Sutton that the \$40 initiation fee for lab employees had been waived, and also said the Union would be charging back dues to August unless Cowan agreed to waive the back dues. Sutton asked Rachel what would happen if employees refused to make back payments or refused to sign the membership card or dues deduction form. Rachel said reminder notices would be sent to the employees, and finally termination information would be sent to the

Employer. After the conversation, Rachel faxed Sutton a 5-page new hire letter signed by President Dyer, together with membership application cards and dues check-off authorization cards. The letter advised employees of all their Beck rights, and asked employees to read them carefully.

Sutton summarized her conversation with Rachel and other things about the Union in a typewritten document that she prepared for other lab opticians, and which she personally distributed to lab employees. Sutton attached the application for membership cards, the dues check-off authorization forms, and a packet of information about the Union including the full Beck notice. Sutton also told other lab opticians what Rachel had told Sutton, i.e., that if employees did not sign the cards, the Union could give a 30-day notice, followed by a 10-day notice, and then a request that Kaiser terminate them.

### **ACTION**

#### **I. The Majestic Weaving allegation**

We conclude that the parties did not agree to apply either the National of Local Agreements to the newly formed unit prior to Union representation.

In Majestic Weaving, the Board held that an employer and union violate the Act by negotiating an agreement before the union is the majority representative, even though the execution of the agreement is conditioned upon the union's obtaining majority support from the employer's employees. In that case, the employer was willing to engage in negotiations so long as the union could show at the "conclusion" that it represented a majority of the unit employees.<sup>6</sup> The parties reached agreement and, prior to executing the contract, the union presented the employer with cards signed by 26 of 37 unit employees.<sup>7</sup> The Board held that the employer unlawfully supported the union in violation of Section 8(a)(2) by negotiating a contract at a time when the union did not represent a consenting majority of the unit employees.<sup>8</sup> The Board found it "immaterial" that the parties had conditioned the actual signing of the contract on the union's obtaining majority support from the employees. The instant case is clearly distinguishable as

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<sup>6</sup> Majestic Weaving, 147 NLRB at 860.

<sup>7</sup> Id. at 867.

<sup>8</sup> Id. at 860.

the parties did not agree to apply either the National or Local Agreement to the opticians before Local 2 became their lawful representative, and the terms of the National Agreement do not make it automatically applicable to these employees upon their union representation.

A. The 2005 National Agreement

Section A (Coverage) requires the parties to "transition" to the National Agreement after reaching their own collective-bargaining agreement. This language is lawful under Majestic Weaving because it explicitly requires bargaining for a separate agreement; it does not mandate application of the National Agreement in and of itself. Section B (The National Agreement and Local Agreements) also does not require application of the National Agreement. Thus, Section B explicitly permits parties to provide for terms and conditions wholly different from the National Agreement and then specifies how parties will resolve any conflict between their local agreement and the National Agreement. It is only when parties do not "expressly state" that the terms of their local agreement resolve any conflict with those in the National Agreement that the National Agreement will supersede the local agreement. In sum, neither Section requires application of the National Agreement to a group of newly represented employees that becomes part of the National Agreement unit. On the contrary, these Sections, read separately or together, grant parties the right not to apply the National Agreement and any of its terms.

B. The Local Agreement

The evidence shows that the parties' decision to extend the existing Local 2 agreement to the newly formed optician unit was made only after Local 2 had already established majority status and had been recognized. After the card count established Local 2's majority status, Local 2 and the Employer then agreed that the opticians would come into the existing bargaining unit and the terms of the Local Agreement would apply. This agreement to apply the Local 2 contract, after the Union's establishing majority status and the Employer's grant of recognition, clearly did not violate the Act under Majestic Weaving.

Accordingly, the Region should dismiss, absent withdrawal, the allegation of a violation under Majestic Weaving.

II. Local 2 alleged unlawful promises

We conclude that it was not unlawful for Local 2 to tell employees about the terms in its existing contracts with the Employer because the Union was stating what it would attempt to secure for the employees if it became their representative.

The Board has held that a union may promise employees any benefit which the employees are otherwise qualified to receive if the union succeeds in representing them.<sup>9</sup> Such promises do not cause employees to feel they are obligated to support the union where, if the union becomes their representative, all employees would be entitled to the benefit. Moreover, a union may lawfully promise benefits over which it does not have exclusive control and must bargain to obtain.<sup>10</sup>

The Charging Parties allege that Local 2 promised the opticians guaranteed wages and benefits if they signed an authorization card. However, Local 2 in fact merely advised the opticians of the contents of the existing agreements, and asserted that it would be beneficial to the opticians if they were covered by those agreements. It further advised them that it expected to obtain that result after obtaining majority status. Thus, Local 2 was only lawfully extending to the opticians the possibility of benefits that any new union member would receive by coming into the unit.

The joint letter to the opticians from Local 2 and Kaiser in April and Local 2's subsequent letters were also lawful. The joint letter specifically states that the parties would enter into contract negotiations if the Union established majority status. Local 2's May 31 and June 9 letters convey the message that Local 2 planned to have these employees covered by the existing agreements, not that the parties had already agreed to do so. These statements indicate that Local 2 did not have exclusive control over whether the opticians would be added to the existing unit, and did not guarantee that they would be

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<sup>9</sup> Electrical Workers IBEW Local 103 (Drew Electric), 312 NLRB 591, 592-593 (1993).

<sup>10</sup> FleetBoston Pavilion, 333 NLRB 655, 655 (2001) ("Employees are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining.") Compare Alyeska Pipeline Service Co., 261 NLRB 125, 127, n.4 (1982) (unlawfully promised benefit of membership in referrals where union hall effectively controlled access to all construction sites).

entitled to all of the benefits in the contracts. The alleged guaranteed benefits were actually nothing more than possible benefits.<sup>11</sup> Local 2 lawfully advised the opticians about terms in the existing contracts, and was only "promising" that it would attempt to obtain for them benefits that it had already secured for other employees.

Accordingly, the Region should dismiss this allegation, absent withdrawal.

### III. The Beck violation

We conclude that Local 2 violated its duty of fair representation when the Union's membership clerk told Sutton that employees were obligated to sign membership and authorization cards and to pay back dues, and would be fired if they failed to do so, because the statement constituted an attempt by the Union to enforce the union-security clause before Local 2 advised the opticians of their rights under Beck/General Motors.

Under California Saw, a union's duty of fair representation requires that, when or before the union seeks to enforce a union-security clause, it must inform employees that they have the rights under Beck to be a nonmember and that nonmembers have the right:

- (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities;
- (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and
- (3) to be apprised of any internal union procedures for filing objections.<sup>12</sup>

Here, the Union allegedly violated Section 8(b)(1)(A) on two occasions by failing to provide the unit employees with their Beck rights before attempting to enforce the union-security clause in the parties' agreement.

First, Cowan on July 25 told lab optical employees that if they signed the Local 2 Application for Membership cards and Union Check-off Authorization cards by a certain date, their initiation fee and the first month of their dues would be waived. Cowan clearly did not tell the

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<sup>11</sup> Local 2's June 9<sup>th</sup> letter explicitly characterized the example contract as "potential" benefits.

<sup>12</sup> California Saw, above, 320 at 225.

employees that they were required to sign the cards or were required to become members of the Union. The initiation fee and dues waiver by Cowan was merely an attempt to persuade the employees to join the Union voluntarily. Cowan did not reference or threaten to enforce the union-security clause. Since Cowan was not required to provide the employees with their Beck rights before soliciting voluntary full Union membership, his failure to provide employees with their Beck rights was not unlawful.

Second, the Union's membership clerk on October 23 told employee Sutton that if employees failed to become members, or refused to make back dues payments owed from August, they first would receive warning notices and, upon noncompliance, the Union would send termination information to the Employer. After the conversation, the clerk faxed Sutton a letter which fully recited employee Beck rights.

The clerk's statement threatening employees with discharge for failing to sign membership and authorization cards and nonpayment of back dues from August constituted a threat to unlawfully enforce the union-security clause. Local 2 could lawfully threaten discharge under a union-security provision to compel membership and payment of back dues only if it had provided affected employees with the requisite notice of their Beck/General Motors rights on or before the date it sought to enforce the clause.<sup>13</sup>

Here, after the clerk made her statement to Sutton, the clerk faxed Sutton a letter explicitly setting forth employee Beck/General Motors rights, which Sutton distributed to the other employees on the same day. However, when Sutton distributed the Union's faxed letter, she simultaneously re-enforced the clerk's unlawful statement by repeating the clerk's message both orally and also in a document she gave to the opticians while distributing the faxed letter. Since the faxed letter containing those rights occurred contemporaneously with Sutton's restatements of the clerk's threatening statement, the employees received conflicting information about their rights and their obligations. We conclude that the provision of conflicting information did not fulfill the Union's obligation to provide notice of employee Beck/General Motors rights.<sup>14</sup> Therefore, since Local 2

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<sup>13</sup> Id. at 232-33.

<sup>14</sup> The inadequacy of the clerk's faxed letter to provide notice of Beck/General Motors rights is underscored by Sutton's conduct. Sutton repeated the clerk's unlawful statement to the opticians even after Sutton had already

provided no prior notice of Beck/General Motors rights before attempting to enforce the union-security clause, the clerk's statements violated Section 8(b)(1)(A).

Accordingly, the Region should issue complaint, absent settlement, alleging that Local 2 breached its duty of fair representation when it failed to inform the opticians of their Beck rights prior to threatening to enforce the union-security clause to demand Union membership and collect back dues owed from August 2006.

B.J.K.

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received the faxed letter which contradicted those statements.