

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

KITSAP MENTAL HEALTH SERVICES

and

SEIU HEALTHCARE 1199NW

Cases 19–CA–32269  
19–CA–32368  
19–CA–32392

Ann-Marie Skov, Esq., for the General Counsel.  
Joseph G. Marra, Esq., (Davis Grimm Payne & Marra),  
of Seattle, Washington. for the Respondent.  
Paul Drachler, Esq., (Douglas Drachler McKee &  
Gilbrough, LLP) of Seattle, Washington,  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Seattle, Washington, on April 20–22, 2011. SEIU Healthcare 1199NW (the Union) filed the first charge on December 16, 2009,<sup>1</sup> and the General Counsel issued the complaint on February 14, 2011. The complaint alleges that Kitsap Mental Health Services (KHMS) violated Section 8(a)(1) by instructing employees to inform their supervisors if they were contacted by anyone from the Union and by informing employees that they could not talk to nonbargaining unit employees about supporting the Union. The complaint also alleges that KHMS violated Section 8(a)(5) and (1) by making Union access to its facility more difficult, failing or delaying in providing relevant information to the Union, dealing directly with unit employees, withdrawing recognition from the Union and changing its handbook by stating that the employees were working at-will. KHMS filed an answer that, as amended at the hearing admitted the allegations in the complaint concerning filing and service of the charges, jurisdiction, labor organization status, agency status, appropriate bargaining unit, and the 9(a) status of the Union until KHMS withdrew recognition; KHMS denied that it committed any unfair labor practices. It did, however, admit that after it withdrew recognition from the Union it unilaterally made changes to the employee handbook.

---

<sup>1</sup> All dates are in 2009 unless otherwise indicated.

5

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, KHMS and the Union, I make the following

10

## FINDINGS OF FACT

### I. JURISDICTION

15

KHMS, a not-for-profit corporation, provides mental health services throughout Kitsap County, Washington, including at its main campus facility in Bremerton, Washington, where it annually derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5000 directly from points outside the State of Washington. KHMS admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

20

### II. ALLEGED UNFAIR LABOR PRACTICES

#### Background

25

30

KHMS is a community mental health agency that provides mental health needs for the most severely mentally ill people in Kitsap County, including persons suffering psychotic disorders, schizophrenia, severe bipolar disorder, and severe depression. It provides these services to children, adults, and older adults. Some of these persons have histories of substance abuse, some children have histories of abuse and neglect, and some patients are involuntarily detained at KHMS after being found to be a danger to self or others. KHMS offers outpatient services, residential services and has two inpatient units, a 10-bed youth unit and a 15-bed adult unit. It provides psychiatric medical service and medication management services to its patients. It offers 24/7 crisis services to the community and has an outreach program that assists people in their homes, nursing homes, primary care clinics, Head Start programs, and even in jails. KHMS provides therapeutic foster homes for children who have nowhere to live and are very behaviorally challenged. KHMS contracts with schools to operate a classroom day program for children who are not able to make it in regular classrooms or even special needs classrooms. KHMS provides housing services because its clients are at high risk of homelessness. KHMS provides these services to about 6000 people per year.

35

40

45

KHMS operates a campus that consists of several buildings. The main campus consists of two buildings. It also has a newer facility that is replacing an older building. KHMS has an office several miles away. Members of the public seeking access to these facilities check in at a reception area before they are allowed beyond the reception area; typically an employee escorts the visitor to the area where the visitor is allowed. Finally, KHMS has a number of houses and apartments located throughout the county in which its clients reside.

50

As indicated, KHMS is a not-for-profit enterprise. It receives Federal and Sstate Medicaid funds through entities called regional support networks that contract with enterprises

5 such as KMHS to provide health services. KMHS also receives funds through direct Medicare billings and from contracts that KMHS has with other entities to provide services.

For about 10 years KMHS had recognized the Union as the collective-bargaining representative in the following unit:

10

All professional, technical, and non-professional employees employed by Kitsap at its Kitsap County operations, but excluding business office clerical employees, temporary employees, on-call employees, confidential employees, guards and supervisors as defined in the Act.

15

There are about 200 employees in this bargaining unit.

### Bargaining

20

Although there is no allegation of bad- faith bargaining, a description of the recent collective-bargaining efforts by KMHS and the Union provides useful context in resolving the allegations of the complaint. The most recent collective-bargaining agreement between the Union and KMHS ran from April 1, 2007 to March 31, 2009. The negotiation process began in February 2009 and ended when KMHS withdrew recognition on December 11. Geoff Bate was the Union's chief negotiator for a successor contract; Joseph Marra headed the KMHS negotiation team.

25

30

The first negotiation session was on March 10. Representing the Union were Bate, Jason Beauchene, union organizer, and several KMHS employees. Representing KMHS were Marra, Laura Holloway, KMHS' human resources director, and others. The Union suggested that the contract be extended 2 months until May 31. According to Bate, this would allow the Union to focus on its lobbying efforts to secure funding during the budget process then underway in the state legislature. The next day, March 11, KMHS sent a bargaining update to unit employees detailing its version of what had occurred during bargaining the day before. The Union likewise sent bargaining updates to employees throughout the bargaining process. On March 26 the parties agreed to extend the contract to May 31.

35

40

At the next bargaining session on June 9 the Union offered a proposal to again extend the contract, this time until March 31, 2010, but KMHS rejected this proposal. On July 7, KMHS sent the Union a comprehensive proposal with an explanation that follows.

45

In follow-up to our last meeting, we wanted to let you know that KMHS appreciates your efforts in trying to negotiate an extension of the collective bargaining agreement. As you correctly pointed out at our meeting, these are very, very difficult times economically – if not the worst we have seen in the State of Washington since the Great Depression – certainly the worst we have experienced in the history of KMHS.

50

We have carefully considered your package proposal in light of these unprecedented economic conditions. Under your proposal, KMHS would have to absorb an additional increase of \$370,000.00 in health insurance costs and \$401,174.00 for a full year of step increases (which by contract actually ended on June 1, 2009) – in addition to having to deal with the adverse effect of these conditions. We believe it would be contrary to the

5 best interests of KMHS employees and the population we serve to agree to a financial  
package that could have an adverse impact on staffing levels and services. In that regard,  
the KMHS leadership team has formulated a proposal that we hope will maintain staffing  
levels and still provide critical services to our consumers. In considering our proposal,  
10 please bear in mind that in 2007 KMHS significantly *decreased* the insurance premium  
costs paid by employees and in 2008 KMHS significantly *increased* the amount it pays in  
employee premiums.

These are tough times and everyone involved in community mental health has to make  
tough decisions. While the proposal is not what we would like to offer employees, it is  
the best we can do under the circumstances. Please keep all these factors in mind as you  
15 consider the proposal and be assured that we remain willing to work hard and do what is  
best for KMHS employees.

Among other things, the proposal that followed would extend that contract through  
March 31, 2010 but would increase the amount employees paid for their health insurance  
20 premiums, any required increase in pharmacy costs would be paid by employees, annual step pay  
increases would end May 31, and employees “will have the option of discontinuing Union  
membership during the ‘window period’ of December 1, 2009 through December 8, 2009.” On  
July 13 the Union rejected KMHS’ proposal.

25 The parties did not meet again until September 22. The Union presented a proposal that  
step increases be reinstated retroactive to May 31 and that gave the employee members of the  
Union’s bargaining team a total of 320 paid hours for bargaining the contract. KMHS replied by  
offering 120 hours of paid time for bargaining and indicating that it needed to deliberate and  
consider the cost of the Union’s proposal concerning step increases. No agreements were  
30 reached at this bargaining session.

The next bargaining session was on October 13, but not much bargaining was  
accomplished as the employee-members of the Union’s team raised concerns about morale etc..  
The next bargaining session was on October 29. The Union presented its proposal concerning all  
35 noneconomic matters. What happened next becomes important for reasons explained below.  
The parties broke for lunch around noon and KMHS negotiators returned to the conference room  
and waited for the Union negotiators to return from the lunch. When they had not returned by  
1:30 p.m., Marra called Bate who said the Union needed more time. Marra called later and Bate  
again said that they needed more. So at around 2:30 p.m., given that bargaining was only  
40 scheduled to last until 3p.m., Marra called again but Bate did not answer. Marra left a message  
indicating that because it was close to 3 p.m. they were done bargaining for the day and that Bate  
should contact him so they could schedule the next bargaining session. These facts are based on  
Marra’s credible testimony. According to Bate, around 12 noon he suggested to Marra that they  
take a long break until about 2:30 p.m.; again according to Bate, Marra agreed. Around 2 p.m.  
45 Bate received a telephone message from Marra indicating that KMHS felt that they were done  
for the day. I do not credit Bate’s testimony. His demeanor was unconvincing. Also, during the  
bargaining process it was KMHS that wanted to quickly reach agreement so that its economic  
needs would be addressed; it was the Union that stalled in bargaining in an effort to secure  
additional funding. It therefore seems likely that KMHS would quickly ask for new bargaining  
50 dates and the Union would respond slowly to that request. Moreover, Holloway’s notes taken at

5 the time support Marra's testimony that the parties agreed to return from lunch at about 1 p.m. and that Marra twice called Bate after that time.

On November 12 KMHS sent the Union the following email message:

10 We last met with you on October 29<sup>th</sup>. At that session, we provided you more financial information and explained why, up until now, KMHS had concluded it was unable to budget for salary increases in this year's budget.  
The Union presented KMHS with a non-economic proposal on October 29<sup>th</sup>. The Union's proposal included eliminating employees' right to opt out of Union membership  
15 as a condition of employment. After our lunch break on October 29, we waited for approximately 2 hours for the Union to return and continue bargaining. Finally we left you a voicemail message asking that the Union email us additional dates for bargaining. It's now been two weeks and we haven't received *any* proposed bargaining dates from the Union. In fact, we haven't received any communication from the Union about issues  
20 at the bargaining table. While we would have preferred to explain our new proposal at the bargaining table, we haven't heard from the Union about future bargaining dates. We do not want to continue to wait. In the interests of everyone at KMHS we would like to move this process along and hopefully have a new agreement in place before the holidays. We urge the Union to accept this proposal which, due to the unexpected  
25 developments described below, is much better than we had anticipated.

...

30 Just this month, KMHS learned of unexpected funding available to KMHS *on a one-time only basis*. This unanticipated funding is primarily the result of KMHS' under-utilization of Western State Hospital beds, additional federal block grant funds and RSN revenues exceeding initial projections. Just as in past years, KMHS is proposing to share this unexpected funding with employees. We hope that the Union will agree to KMHS' proposal which includes a 2-year extension of the existing contract . . . except as  
35 described below.

KMHS then proposed an extension of the existing contract until March 31, 2011. During the first year of the extended contract KMHS proposed a \$1000 one-time lump sum payment for employees upon ratification of the contract and employee premiums for health insurance would  
40 remain unchanged through June 30, 2010. During the second year of the extended contract KMHS proposed a -percent wage increase for employees on their anniversary dates with employees' health insurance premiums increasing by from \$5.72 to \$25.32 per month, depending on the nature of the employee's coverage. KMHS also proposed language changes to section 13.5, described below that served to restrict the Union's access to KMHS' facilities. KMHS also  
45 proposed opt-out dates from the union security section. Finally, KMHS indicated that the proposal would remain on the table until November 20. That same day the Union replied by email and informed KMHS that it had received the message, was reviewing the proposal and would respond.

50

5

## Direct Dealing Allegation

The next day, November 13, at 8:38 a.m. KMHS sent an email message to bargaining unit employees. The message, labeled as a bargaining update, was dated November 12 and read:

10

SUBJ: Proposal to the Union: \$1000 Lump Sum For All Staff; 3% Anniversary increase in 2<sup>nd</sup> Year

15

We last met with SEIU for bargaining on October 29th. At this session, we provided further financial information and explained why the agency was unable to budget for salary increases in this year's budget.

20

The union presented us with a non-economic proposal. The union's proposal included eliminating your right to opt out of union membership as a condition of employment. At the end of the meeting, we asked the union to email additional dates to continue bargaining. It's now been two weeks and we haven't received any dates from the union. In fact, we haven't received any communications from the union about issues at the bargaining table. Finally, in an effort to reach an agreement, we sent the union an email containing the proposal described below. For the benefit of all of us here at KMHS, we hope the union accepts this offer.

25

We regret some of the rhetoric the union has been using against KMHS during negotiations. Despite the fact that KMHS' funding is dependent upon what happens at the Legislature, KMHS has always done all it could to provide employees pay increases and avoid layoffs.

30

Just this month, we learned of unexpected funding available to KMHS on a *one-time only basis*. This unanticipated funding is primarily the result of KMHS' under-utilization of Western State Hospital beds, additional federal block grant funds and RSN revenues exceeding initial projections. Just as in past years, KMHS is proposing to share this unexpected funding with employees. We hope that the Union will agree to KMHS' proposal.

35

The message then described the contract proposal that KMHS had sent to the Union the day before. The message ended:

40

We've communicated to the Union that this offer will remain on the table until November 20. Thereafter, KMHS reserves the right to revise the offer based upon the passage of time, changed circumstances and/or developments in bargaining. We hope the Union accepts this proposal as soon as possible so that employees receive this lump sum before the holidays.

45

At 4:45 p.m. on November 13 the Union sent KMHS an email message that read:

50

I am writing to respond to your email of yesterday. Our team will be reviewing your new proposal. We believe the best place to discuss proposals is at the bargaining table. We propose November 23<sup>d</sup> or November 24<sup>th</sup> as bargaining dates.

...

5

[W]ith respect to how things were left at the last bargaining session, I remind you that in the early afternoon of Oct. 29th the Union requested that we reconvene the parties at 2:30 PM. You did not indicate a problem with that plan. Later, you called and left me a message saying that you had decided to end the session.

10

We hope that you are available to bargain on November 23d or 24<sup>th</sup>. Please confirm on Monday if possible, as we want to ensure supervisors receive the 7 days notice described in our agreement concerning paid bargaining time.

#### Analysis

15

The complaint alleges that the communication described above from KMHS to the employees was direct dealing in violation of Section 8(a)(5).

20

I examine the factual context in which the November 13 communication to employees was made. As the General Counsel points out, the substance of KMHS' proposal to the Union was dramatically different from what it had been earlier proposing at the bargaining table. KMHS suddenly had money to spend for its employees and was making an entirely new proposal. But remember, there is no contention that the sudden discovery of additional money was not accurate. The General Counsel correctly points out that KMHS made the proposal to the Union and then communicated it to the employees at a time when the parties had not scheduled a time to meet again. But as I have determined above, this was the fault of the Union, who had been requested to supply bargaining dates and had failed to do so. The General Counsel argues that in the November 13 communication to employees KMHS disparaged the Union by blaming it for the failure of the parties to meet; for reasons already described, this was an accurate statement of fact and not disparagement. The General Counsel next argues the November 13 communication "resulted in employees believing that could get better terms and conditions of employment from Respondent by rejecting the Union." I see nothing in that communication that would lead to such a result. To the contrary, the communication clearly indicated that the proposal had been made to the Union and also clearly expressed KMHS' hope that the new proposal would lead to a new contract.

35

40

As indicated, KMHS communicated the proposal to the Union the day before and the Union replied back that same day that it would consider the proposal. Although this did not occur at the bargaining table, both parties understood that this was part of the bargaining process. The proposal was short and quickly understandable. And as I conclude below, KMHS' communication occurred in a context free of other unfair labor practices. Both the Union and KMHS regularly supplied employees with updates of bargaining sessions both before and after the November 13 communication. Employers are allowed to communicate their bargaining proposals to employees so long as the proposals are first presented to the Union as part of the bargaining process. *United Technologies*, 274 NLRB 1069 (1074 (1985)).

45

50

The General Counsel and the Union rely heavily on *Detroit Edison Co.*, 310 NLRB 584 (1993). In that case the employer presented the proposal to the union's negotiator at his home while he was on vacation and painting his house. The employer then distributed its proposal to employees. That unusual fact pattern is not present in this case. Bate was not on vacation and no one from KMHS went to his home and present its proposal there. In the factual context of

5 this case, I conclude the November 13 communication did not constitute direct dealing and I  
dismiss this allegation.

### Information Requests

10 The complaint alleges that on September 22 the Union requested certain information, that  
on November 20 and December 1 by letter and on November 23 at the bargaining table repeated  
its request for that information and clarified that some of the requested information was for 2008  
only, and that since September 22 KMHS has “failed, refused and/or delay(ed) in furnishing the  
Union with the requested information.

15

The story, however, actually begins on February 20, before the first bargaining session,  
when the Union requested the following information from KMHS:

20

In preparation for negotiating a new collective bargaining agreement at Kitsap Mental  
Health Services, and as part of our ongoing representation duties, the Union requests the  
following information:

25

A. The total bargaining unit payroll for 2007 and 2008, including specific dollar amounts  
for each of the following cost areas:

regular wages  
overtime wages  
shift differentials  
weekend premiums  
paid educational leave

30

B. A current roster for all bargaining unit employees, to include for each bargaining unit  
member:

35

name, address, telephone numbers, email, date of birth, job title, department or program,  
worksite location

shift, pay step, pay rate, FTE status  
date of hire and hours worked since date of hire  
gross wages in 2007  
gross wages in 2008

40

number of non-overtime hours worked in 2007  
number of non-overtime hours worked in 2008  
number of overtime hours worked in 2007  
number of overtime hours worked in 2008

45

the number of paid Mental Health Advocacy Days taken during the current (2007-2009)  
collective bargaining agreement

employer contribution to the employee’s retirement account in 2007  
employer contribution to the employee’s retirement account in 2008  
employee contribution to the employee’s retirement account in 2007  
employee contribution to the employee’s retirement account in 2008

50

5  
 10  
 15  
 20  
 25  
 30  
 35  
 40  
 45  
 50

- C. Information related to health and retirement benefits.  
 The summary plan benefits for each health insurance plan (medical, dental, and vision) offered to employees, and for each retirement plan offered to employees  
 The renewal dates, if any, for each of the plans  
 The overall current monthly premium cost for each of the health insurance plans, and the effective dates of those costs. If you have received rates commencing at a future date for any of the plans, then provide those rates as well, along with effective rates.  
 A spreadsheet showing the following information for each employee:  
 the health insurance and retirement plan(s) that they are enrolled in  
 the type of health insurance coverage they have selected (i.e. individual, spouse/partner, child/children)  
 for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, monthly vision coverage premium, if applicable, that is paid by the *employer*  
 for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, monthly vision coverage premium, if applicable, that is paid by the *employee*
- D. A copy of all current personnel policies and/or manuals that apply to bargaining unit members.
- E. Copies of all current job descriptions for all bargaining unit positions

...

Please provide this information to us as individual items become available. If the information can be given to us in electronic form then we request that it be provided in such a format  
 We appreciate your timely request to this first request. I request that you provide all of this information by no later than March 2, 2009.  
 This information request is not intended to be exhaustive; the Union reserves the right to make additional information request during the negotiation process.

Among the many items of information requested by the Union and described above, the complaint identifies the following:

- E-mail addresses of unit employees.
- Department or program information for each bargaining unit employee.
- Worksite location for each bargaining unit employee.
- Gross wages for each bargaining unit employee for 2007 and 2008.
- Non-overtime hours worked for each bargaining unit employee in 2007 and 2008.
- Overtime hour worked for each bargaining unit employee for 2007 and 2008.

5

Number of mental health advocacy days taken during the most recent contract for each bargaining unit employee.

Hours worked since date of hire for each bargaining unit employee.

10

Renewal dates for each medical, dental, vision and retirement plan offered to unit employees.

15

A spreadsheet showing the health insurance and retirement plan(s) that each unit employee is enrolled in, the type of health insurance coverage ( i.e. individual, spouse/partner, child/children) that each unit employee has selected, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid by the employer for each unit employee, and the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid by each unit employee.

20

Again, it is this information that is the subject of the complaint allegations. At the March 10 bargaining session KMHS provided the Union with some of the information it had requested on February 20. On March 16 KMHS sent the Union additional information responsive to the Union's February 20 request. The cover letter from KMHS to the Union ended "We believe we have fully responded to your information request but certainly let us know if there's anything we've overlooked." Sheila Gilliam is KMHS' finance director. She explained that in response to the February 20 request KMHS provided the Union with a copy of KMHS' payroll data base covering fiscal years 2007 and 2008 for unit employees that included the individual employee's staff identification number and codes indicating reporting units (consisting of about 30–35 descriptions such as crisis response team, adult inpatient unit, youth inpatient unit, residential services medical services, nursing services). The information included for each employee the wage information that Union had requested. This information was provided in an Excel spreadsheet format. On March 24, 2009, KMHS sent the Union information setting forth the employee and KMHS' contribution made to the retirement fund for each unit employee and the date those contributions were made. There is no evidence that the Union complained that KMHS failed to give it any of this information until more than 6 months later.

30

40

At the September 22 bargaining session that bargaining session the Union again gave KMHS another copy of its February 20 request for information. Bate indicated that the Union was resubmitting the request in light of the need to bargain over economic matters. Bate did not recall specifically discussing any of the bullet points, set forth above, at the September 22 meeting. In other words, there is still no evidence that the Union informed KMHS that it had not provided any of the items of requested information described above despite KMHS' request that it be informed of any information that it had not furnished. Rather, by resubmitting the February 20 request the General Counsel will argue that later that KMHS should have known that the narrow list of items described above had yet been provided. On September 29 KMHS responded as follows:

45

50

5 In response to the second information request dated February 20, the following information is provided:

The total bargaining unit payroll for 2007 & 2008, including specific amounts for each of the cost areas: regular wages, overtime, differentials. Please note that the only cost area not provided is paid educational leave. This information is not available.

10 Employer and employee contributions to employee retirement accounts for 2007 & 2008. I should be able to forward the remaining information requested by the end of this week.

15 On November 20, the Friday before the scheduled bargaining session on Monday, November 23, the Union sent KMHS another request for information. I set forth the request in its entirety.

20 Recently KMHS has proposed an economic proposal and made new assertions about agency finances. In this context and as part of our negotiations for a new collective bargaining agreement at Kitsap Mental Health Services, the Union requests the following information:

Please provide in the format of an excel spreadsheet.

Updated bargaining unit cost data. The total bargaining unit payroll for 2009 year to date, including specific dollar amounts for each of the following cost areas:

- 25 regular wages
- overtime wages
- shift differentials
- weekend premiums
- lead differential
- paid educational leave

30 A current roster of all bargaining unit members, to include for each bargaining unit member:

name, address, telephone numbers, email, date of birth, job title, department or program, worksite location

- 35 shift, pay step, pay rate, FTE status
- date of hire, hours worked since date of hire
- gross wages for 2009 year to date

number of non-overtime hours worked 2008 and 2009 year to date

number of overtime hours worked in 2008 and 2009 year to date

40 the number of paid Mental Health Advocacy Days taken during the current (2007-2009) collective bargaining agreement

Updated information related to health and retirement benefits for 2009-2010

The summary plan of benefits for each health insurance plan (medical, dental, and vision) offered to employees, and for each retirement plan offered to employees.

The renewal dates, if any, for each of the plan.

45 The overall current monthly premium cost for each of the health insurance plans, and the effective dates of these costs. If you have received rates commencing at a future date for any of plans, then provide those rates as well, along with the effective dates.

A spreadsheet showing the following information for each employee:

- 50 i) the health insurance and retirement plan(s) they are enrolled in
- ii) the type of health insurance they have selected (i.e. individual, spouse/partner, child/children)

5           iii) for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid for by the *employer*

10           iv) for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid for by the *employee*

Further medical financial and experience data.

15           On November 12, 2009, you indicated that maintaining current medical premiums entails a cost to the employer of \$347,000. Previously on July 7th 2009 you had quoted those costs as \$370,000. Please clarify the actual number for us and provide any and all documents supporting this projection.

What Health Benefit Plan design changes, if any, are proposed by the Employer for 2009-2010?

Financial and cost information.

20           An accurate and complete understanding of the financial situation of the agency is critical in this bargaining. Items a-c below are reiterations our September 22nd 2009 information. We request the following information:

Agency's completed annual budget for the fiscal year July 2008-July 2009. This is not addressed in [KMHS'] Sept 23d response.

25           Agency's complete annual income and expense report for fiscal year July 2008-June 2009. On Sept. 23d [Kitsap] said this information would be available mid to late November 2009.

30           Agency's income and expense report for fiscal year July 2009 to year-to-date. On Sept. 23d [KMHS] said this information would be available mid to late November 2009. In your emailed proposal of November 12th 2009 with regard your bonus proposal you made reference to new unexpected funding sources. We reiterate my request of November 13th to provide details and documentation concerning this new funding.

Please provide details and documentation including but not limited to amounts, sources, and/or any restrictions on this funding.

35           In a July 7th, 2009 email communication you referred to a full year of step increases as representing a cost of \$401,174.00. On October 29th, 2009 you referred to the cost of steps as \$407,244.00 and equated this 8-10 positions. Please provide details and documentation to show the assumptions, data and methodology to make these calculations.

40           ...

Please provide this information to us as individual items become available. If the information can be given to us in electronic form we request that it be provided in such a format.

45           Please provide what you can at bargaining on Monday November 23d, 2009. We request all items by Monday November 30th, 2009.

This information request is not intended to be exhaustive; the Union reserves the right to make additional information requests during the negotiation process.

50           Sheila Gilliam is KMHS' finance director and was responsible for gathering much of the information that the Union had requested. Gilliam was at the November 23 bargaining session

5 and she answered questions the Union had about the information KMHS had supplied. Marra  
 asked Bate whether KHMS was up-to-date on the Union’s information requests. Bate said the  
 union response will be forthcoming. Also at this session the Union presented its first  
 comprehensive economic proposal. At this meeting KMHS gave the Union a roster with the  
 10 names, addresses, telephone numbers, date of birth, job title, date of hire, FTE status, and hourly  
 wage rate. At this bargaining session the Union presented its bargaining proposals that included,  
 among other things, adding a holiday, maintaining current premium levels for the duration of the  
 contract, a 4- percent pay increase retroactive to July 1, 2008, and the restoration of step  
 increases. Neither party accepted the other’s proposals. At this point there is still no evidence  
 15 that the Union had notified KMHS that the information described in the complaint that was  
 among the voluminous information first requested on February 20 and then again identically  
 requested on September 22 had not been provided to the Union.

That same day, November 23, KMHS responded in writing to the Union’s November 20  
 request for information as follows:

20

With respect to the information request dated November 20, 2009, the following is  
 provided:

25

Per our discussions this morning, you are requesting bargaining unit payroll information  
 for two periods of time: July 1, 2008 thru June 30, 2009 & July 1, 2009 to year-to-date.

25

Heather estimates that she will have this information available to me by December 4th.

30

Current roster of all bargaining unit members. The attached report reflects the  
 information requested with the exception of e-mail addresses, worksite location, shift,  
 pay step, and hours worked since date of hire as this information is not available. The  
 summary plan descriptions for the medical, dental, vision and TSA benefits are enclosed.  
 30 The annual renewal date for the medical & dental is September 1 of each year. The health  
 insurance costs have increased by \$347,000 over last year’s budget. The only plan design  
 changes that took effect September 1, 2009 include: elimination of the \$20.00 co-pay for  
 annual wellness exam & mental health parity.

30

Enclosed is the FY 09 budget thru AP-12. As stated previously, the agency’s audit for  
 35 this fiscal year has not been completed. This is not a final report but is all we have at this  
 time. With respect to the cost of agency-wide step/anniversary increase, \$407,244 is the  
 amount.

35

On November 25 KMHS provided additional information to the Union that it had  
 40 requested on November 20.

40

At this point I note that the General Counsel concedes in its brief that “the Union had  
 received spreadsheets employees wages for 2007 and 2008 in March” but complains that the “the  
 spreadsheets did not list the employees by name as the Union had requested.”<sup>2</sup> The General  
 45 Counsel concedes that on September 29 again supplied the Union with this information, but

45

---

<sup>2</sup> In his brief the General Counsel asserts that KMHS “had indicated that the data might be accurate.”  
 This apparently refers to a notation on the documents “This may not be completely accurate because I had  
 to manually edit the entire payroll database to exclude all staff not in the bargaining unit.” As credibly  
 explained at trial, this notation merely allows for the possibility of human error.

5 again complains that that the employees were not identified by name but instead by employees identification number.

On December 1 the Union sent the following to KMHS:

10 On November 23d, we made various information requests, which were generally reiterations of requests made Nov 20th, 2009. We also reiterated our request that where possible you provide us with data in the format of an excel spreadsheet.

I am following up on my Nov 23d 2009 information requests made at the table, and taking into account your Nov 23d partial response to our request, which we had the opportunity to review after bargaining.

15 Outstanding requests are below. I have made comments below each request. Our understanding is that on Nov 23d you believed that all the information would be made available by Dec 4th, 2009. There are two requests below (3.c.i and 3.c.ii) which are new requests, although they are similar to earlier requests. We would appreciate receiving this data by December 4th, 2009, if possible.

20 Our goal is to have clarity around requests and make sure we are on the same page. As you know, this information is critical to the discussions of the economic proposals. We appreciate your work in providing this information.

25 (1) Updated bargaining unit cost data. The total bargaining unit payroll for July 1st through June 20th, and 2009 year to date, including specific dollar amounts for each of the following cost areas:

- 9a) regular wages
- (b) overtime wages
- (c) shift differentials
- 30 (d) weekend premiums
- (
- f) paid educational leave

You indicated item (1) will be available Dec 4th, with the exception of paid educational leave, which is not tracked or would be difficult to go and compile.

35 (2) A current roster of all bargaining unit members, to include for each bargaining unit member:

- (a) name, address, telephone numbers, email, date of birth, job title, department or program, worksite location
- 40 (b) shift, pay step, pay rate, FTE status
- (c) date of hire, hours worked since date of hire
- (d) gross wages for 2009 year to date
- (e) number of non-overtime hours worked 2008 and 2009 year to date
- (f) number of overtime hours worked in 2008 and 2009 year to date
- 45 (g) the number of paid Mental Health Advocacy Days taken during the current (2007-2009) collective bargaining agreement

50 On November 23d you provided a hard copy roster with this information, except e-mail addresses, department or program, worksite location, shift, pay step, hours worked since date of hire, gross wages 2009 to date, number of OT hours worked 2008 and 2009 year to date, and number of Mental Health Advocacy Days. We have withdrawn the request from November 20th, 2009 for the total hours worked since date of hire, based on our

5 November 23d conversation. We would like to receive the complete request (sic) in an excel spreadsheet format. Your hardcopy appears to be a printout of an electronic spreadsheet.

(3) Updated information related to health and retirement benefits for 2009–2010

10 (a) Please confirm that the premium rates provided November 23d are the current rates.

(b) What will be the total premium in effect July 1st, 2010 (proposed implementation date of new employee premiums under management’s proposal)?

15 (c) In your November 23d, 2009 letter you indicated that health insurance costs have increased by \$347,000 over last year’s budget (for the agency as a whole). Please provide any documentation, analysis or claims data that demonstrates the reasons for this increase. Please also provide the following information (this is a new request not made on November 23d, based on reviewing your November 23d letter);

(i) Total cost FY 2009 and budgeted cost for 2010 for health insurance for the agency.

20 (ii) Total cost FY 2009 and budgeted cost for 2010 for health insurance for our bargaining unit.

(d) Please provide a spreadsheet showing the following information for each employee:

(i) the health insurance and retirement plan(s) they are enrolled in

(ii) the type of health insurance they have selected (i.e. individual, spouse/partner, child/children

25 (iii) for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid for by the employer

30 (iv) for each employee, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid for by the employee

Financial Information: You provided the following data related to our November 20th request: (1) Agency income and expense statement and budget for FY 2010YTD (Q1, through September 30th, 2009), and (2) Agency income and expense statement and budget for FY 2009, unaudited.

35 On November 23d, 2009, we clarified our request for financials as referring to financial statements, including not only the income and expense statements and budget, but also cash flow statements and balance sheets for FY 2009 and FY 2010 YTD and we reiterate that request here. We wish to facilitate your efforts by making the request as clear as possible, and to request materials that are consistent with the format Kitsap has provided in the past for purposes of comparison over time.

40 Please provide a complete “draft” (i.e. unaudited) copy of KMHS’ financial statements for **FY 2009** (the period from July 1, 2008 through June 30, 2009). These draft statements should conform to the reporting format incorporated in KMHS’ past *audited* financial statements, and should include the following:

45 (i) “Statement of Financial Position June 30, 2009 with comparative totals for the year ended June 20, 2008”

(ii) “Statement of Activities June 30, 2009 with comparative totals for the year ended June 20, 2008”

50 (iii) “Statement of Cash Flows June 30, 2009 with comparative totals for the year ended June 20, 2008”

- 5 (iv) “Statement of Functional Expenses June 30, 2009 with comparative totals for the year ended June 20, 2008”
- (v) *Complete* “Notes of Financial Statements, June 30, 2009.”
- 10 b) Please provide a complete copy of KMHS’ interim financial statements for **Q1 FY 2010** (the period from July 1, 2009 through September 30, 2009). These interim financial statements should conform to the reporting format incorporated in KMHS’ past *audited* financial statements, and should include the statements identified as 1.a. 1.d. above (except, of course, that the comparative totals should be for the period July 1, 2008 through September 30, 2008). The interim financial statements for Q1 FY 2010 should also include the budgeted amount for each line item in the income statement (“Statement of Activities”).
- 15 c) (New Request) Please provide a copy of KMHS’ interim financial statements for **October of FY 2010** (the period from October 1, 2009 through October 31, 2009). These interim financial statements should conform to the reporting format incorporated in KMHS’ past *audited* financial statements, and should include the statements identified as 1.a. 1.d. above (except, of course, that the comparative totals should be for the October of FY 2010). The interim financial statements for October of FY 2010 should also include the budgeted amount for each line item in the income statement (“Statement of Activities”).
- 20 (d) (New Request) In order to better understand the financial performance of the various operating units that comprise KMHS, we would also like to receive an income statement that shows the revenue and expense associated with each operating unit (for example, “residential treatment center”) of KMHS for the following periods:
- 25 (i) FY 2007
- (ii) FY 2008
- 30 (iii) FY 2009
- (iv) Q1 of FY 2010
- (v) October of FY 2010

35 Information concerning the financial performance for each of KMHS’ 30-35 reporting units starting back in 2006! I must conclude that the Union was making these requests for information not for purposes of informed bargaining but in the hope that KMHS would finally refuse and commit an unfair labor practice.

40 On December 7 at 8:04 a.m. KMHS provided the Union spreadsheets setting forth the wage data the Union had requested for each employee. Again, the information n listed each employee by their employer identification number and not by name. At the December 7 bargaining session KMHS brought a box of material in response to the Union’s latest information request. Included in that information was the name of each unit employee who used mental health advocacy days and the dates those days were used. Also include was information as of December that listed the named of each unit employee, the type of medical coverage the employee had, the percent the employee paid , and the cost paid by the employee. Marra said he believed that KMHS had complied with all of the Union’s information requests and asked Bate if the Union agreed. Bate again said that he would get back to KHMS on the matter. On

45 December 8 KMHS provided the Union with information concerning medical insurance information that contained the employee monthly contribution for the various levels of coverage

50

5 as well as other information concerning medical insurance costs. It did not contain a description of the level of coverage that each bargaining unit employee had chosen.

### Analysis

10 An employer must furnish requested information to a union that is relevant for the union to carry out its obligations as the collective bargaining representative of the employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Certain types of information such as the names of unit employees, their job classifications, hours, wages, addresses, etc. are presumptively relevant; no special showing of relevance is required for that information to be furnished. *Miller Processing Services*, 308 NLRB 929 ((1992).

I assess the allegations of the complaint in the factual context present by this case. I begin by agreeing with Marra’s observation that the Union’s information requests were “long, detailed, (and) redundant.” I note that during 2009 furnished the Union with boxes of information that the Union had requested; KMHS also supplied a huge amount of information in electronic form. KMHS supplied information again and again despite the fact that the Union’s requests seemed repetitive. Remember the duty to supply information comes from an employer’s obligation to bargain in good faith. I conclude the KMHS surely made a good faith attempt to furnish the information requested by the Union. If anything, it seemed the Union was not acting in good faith by making the repetitive requests. I now address each of the items listed in the complaint.

E-mail addresses of unit employees.

On November 23 KMHS informed the Union that this information was not available. Remember the Union had long ago been provided with the name, address and telephone number of each unit employee.

Department or program information for each bargaining unit employee.

Holloway and Gilliam explained to the Union that KMHS does not classify its employees by department; instead due to the nature of the work performed by employees KMHS uses the employee’s reporting unit. The reporting unit for each bargaining unit had been provided to the Union and the Union had an opportunity to question Gilliam about that information.

Worksite location for each bargaining unit employee.

On November 23 KMHS informed the Union that this information was not available. At trial Holloway explained that KMHS did not separately maintain records of the worksite location of bargaining unit employees but it does have access to information relating to where employees work.

Gross wages for each bargaining unit employee for 2007 and 2008.

Overtime hour worked for each bargaining unit employee for 2007 and 2008.

Non-overtime hours worked for each bargaining unit employee for 2007 and 2008.

The Union did receive information concerning this, but the Union wanted the information in a roster format, preferably in a spreadsheet, that included rows with the employee’s name, address and other information in a single row. Admittedly, the information that

5 KMHS provided was linked to the employee's staff identification number and not name. But the Union never requested information on how to convert the staff identification number to an employee name, despite having been given every opportunity to do so. Had it done so I am confident, based on this record, that KMHS would have provided that information.

10

Number of mental health advocacy days taken during the most recent contract for each bargaining unit employee.

KMHS furnished this information to the Union on December 7.

15

Hours worked since date of hire for each bargaining unit employee.

At the November 23 meeting KMHS indicated that this information was not available and the Union accepted this explanation. Holloway explained to the Union that some employees have worked for KMHS for over 20 years and KMHS simply did not maintain records that went back so far.

20

Renewal dates for each medical, dental, vision and retirement plan offered to unit employees.

On November 23 Kitsap informed the Union that the annual renewal date for the medical and dental plans was September 1 of each year.

25

A spreadsheet showing the health insurance and retirement plan(s) that each unit employee is enrolled in, the type of health insurance coverage ( i.e. individual, spouse/partner, child/children) that each unit employee has selected, the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid by the employer for each unit employee, and the dollar amount of the monthly medical insurance premium, monthly dental insurance premium, and monthly vision coverage premium, if applicable, that is paid by each unit employee.

30

On December 8 KMHS provided the Union with information concerning medical insurance information that contained the employee monthly contribution for the various levels of coverage as well as other information concerning medical insurance costs. It did not contain a description of the level of coverage that each bargaining unit employee had chosen.

35

40

To summarize, the only information that KMHS had and that was requested but not supplied was the workplace location of each unit employee and some information concerning the level of coverage that employees had chosen for their medical insurance. As to the former, KMHS did not keep records of the locations, so it would have had to manually survey its facilities to gather this information. And as to the latter, in the context of this case, I conclude this is an insignificant matter that cannot form the basis of an unfair labor practice; the information not provided to the Union did not in any way impact on the Union's ability to represent employees or bargaining on their behalf. All the other information was supplied to the Union, albeit not in the form requested by the Union, but an employer is not obligated to do so.

45

50

What remains is the allegation that KMHS unlawfully delayed supplying some information or informing the Union that the information was not available by taking from two to two and a half months. Keep in mind the volume of information requested. Keep in mind the volume of

5 information supplied in a timely fashion. Keep in mind the confusing and repetitive nature of the requests. Under these circumstances the modest delays are insufficient to show KMHS breached its obligation to bargain in good faith. The cases cited by the General Counsel are not to the contrary. In *El Paso Electric Co.*, 355 NLRB No. 71 (2010), the employer delayed furnishing any of the requested information for a 3-month period. In *Woodland Clinic*, 331 NLRB 736, 737  
 10 (2000), the employer did not provide any information for a simple request for a period of time. In *Bundy Corp.*, 292 NLRB 671 (1989), the employer provided only a handbook and delayed supplying other information. In this case KMHS furnished almost all of the information quickly. I dismiss the allegations that KMHS did not act in good faith by unreasonably delaying furnishing information to the Union.

15

#### Union Access Allegations

The complaint alleges that in starting in October KMHS changed its practice regarding Union access to its facilities in violation of Section 8(a)(5).

20

The most recent collective-bargaining agreement provided:

25

A duly authorized representative of the Union shall be permitted to enter upon the Employer's non-consumer care areas at reasonable times and upon first notifying the Employer before entering upon the premises for the purpose of providing representation to employees, provided, however, that no interference with the work of employees or the proper operation of the Employer shall result. Said Union Representative may with the permission of the Employer enter upon consumer care areas.

30

Laura Close worked a field organizer for the Union from January 2008 to January 2010. In October 2009 she was assigned to assist in servicing the employees at KMHS. At times she met with those employees while they were on KMHS' campus. Sometimes Close would call the employees, either at their work number or their personal mobile phone number, and then arrange to meet with them in a KMHS parking lot. Other times she would arrange for the employee to meet her at a reception area and have the employee "escort" her to a location inside the facility where they would meet. Close met with the employees without regard for whether they were on working time or not. Once inside the facility Close attempted to meet with other employees; those employees had not allowed Close to enter the facility and were not all interested in talking to Close. Robert Beckwith works as a facilities technician; he has worked at KMHS for about 14  
 35 years. He credibly testified that while the employees were taking lunch Close joined them and introduced herself. Close talked to the employees about the Union although no one at the table had invited there. Tina D'Astoli was responsible for circulating the petition among employees that resulted in the withdrawal of recognition; this will be described in more detail below. D'Astoli credibly testified that Close called her while she was working and then later came on her worksite uninvited and asked to talk with her while she was working. D'Astoli indicated that she did not want to talk with Close, but Close persisted in attempting to engage D'Astoli in a discussion about the Union. Close sat in the supervisor's chair. When D'Astoli's supervisor came into the room and introduced himself Close left. In order to get to D'Astoli's work area Close had to walk through nonpublic areas where patients congregate and medications are  
 40 dispensed. The supervisor then complained to Holloway that when he got to work that day a strange woman was sitting in his chair and identified herself as Laura Close. In sum, Close was  
 50

5 blatantly violating the terms of contractual provisions dealing with the circumstances under which a union agent is allowed access to KMHS' facilities.

10 Not surprisingly, by late October the process changed in that the receptionists began explaining to Close that they had to report her presence to the human resources department. The receptionist would then contact that department and report Close's presence. Close was then given a badge and was allowed to enter the facility and meet with the employee.

15 On another occasion a support services supervisor called Holloway in human resources and expressed concern that someone had been parked in KMHS parking lot parking lot outside the adult in-patient unit for a long time so Holloway went to the parking lot to look into the matter. Holloway knocked on the window of the car. Close was in the car and she opened the window. Holloway introduced herself and Close introduced herself and said she was a union organizer. Holloway then described her concern that Close was entering the campus without first notifying her or her department about when and where Close would be on campus.

20 Holloway mentioned that KMHS had sent an email (described below) specifically asking the Union for that notice. Holloway asked Close to respect those terms and that she was raising this issue out of concern for the safety of the patients. Close acknowledged that the Union had received the email that Holloway mentioned and would be responding to it. Holloway thanked Close and the conversation ended.

25 I credit Close's testimony only to the extent set forth in the preceding paragraphs. To the extent that her testimony goes beyond my factual conclusions in those paragraphs I do not credit her testimony. On many occasions she claimed an inability to recall information on matters contrary to the Union's interest, but readily volunteered details when they suited the Union's case. Her demeanor was not impressive.

30

On October 26 KMHS sent an email message to the Union as follows:

35 I have been advised that Jason (Beauchene) and other agents acting on behalf of the Union have been entering upon KHMS premises without any notice and engaging employees during their scheduled work time. This conduct demonstrates a lack of respect for KMHS operations and violated the terms of your Agreement with KMHS which provides:

40 We request that you cease engaging in this activity immediately and comply with the terms set forth above. The terms are not onerous and actually amount to a requirement that you simply be courteous. If you fail to do so, you will be asked to leave the premises. Laura Holloway is your contact person for any and all requests to enter upon the premises.

45 The next day Beauchene sent Holloway the email message that follows.

50 This letter is to inform you that union representatives, myself and Laura Close will be on KMHS property today in order to represent our members. We will be in appropriate areas per our Collective Bargaining Agreement. If you have any questions feel free to contact me.

5

Not surprisingly, Holloway responded:

10

While I appreciate the e-mail the “notice” is meaningless if we do not know what time you will be here and where you will be. Your e-mail does not comport with the letter or spirit of our contract. It certainly does not constitute any reasonable interpretation of the term “notice” which must have; otherwise, you will be directed to leave the premises.

On November 2 KMHS sent the Union an email message that explained in pertinent part:

15

Simply notify Laura Holloway “where and when.” The “where” part of giving notice is important because KMHS is a mental health facility. Patients undergoing treatment may react differently to a stranger entering into their area. Similarly, the “when” part of giving notice is important because vulnerable individuals may be in that particular area at that time. I think you would agree that just saying, in effect, “we’ll be somewhere on your premises tomorrow” does not comport, at the very least, with the spirit of the access provisions.

20

KMHS does not intend to deny Union representatives their right to access as set forth in the CBA. It is only asking for the Union to take into account the needs of its clients and the mission of the Agency.

25

30

Meanwhile, prior to the bargaining session on October 29 Bate arrived at the reception area of KMHS’ facility where the Union was to meet with KMHS. Bate was told by the receptionist that he had to wait until Laura Holloway, KMHS’ human resources director, arrived to escort him to the room. According to Bate, this was different from previous bargaining sessions. On those occasions after Bate announced that he was from the Union, signed in, and was given a visitor’s badge, he was either allowed access into the facility or an employee-member of the Union’s bargaining team would be summoned to the reception area and then would walk with Bate to the conference room being used by the Union for its pre-bargaining discussions and where the employee-members of the bargaining team already were assembled.

35

On October 29, according to Bate, he had to wait 15–20 minutes until Holloway arrived; Holloway then walked with Bate to the conference room. Yet Bate admitted that he first visited the facility for the March 10 bargaining session and next visited the facility for the September 22 bargaining session. So his testimony concerning his past access was actually limited to two occasions. Bate also testified that if the receptionist recognized him then he was buzzed in, but

40

certainly at his first visit to the facility on March 10 the receptionist could not have recognized him (unless somehow the receptionist knew Bate apart from his visits to the facility). And I conclude that it would be very unlikely that the receptionist would recognize Bate as a union official over 6 months later, at the next bargaining session, even assuming it was the same receptionist. On cross, Bate could no longer remember whether the employee-member of the

45

Union’s bargaining team that came to the reception area to identify Bate actually walked with Bate to the conference room. Also Bate’s demeanor was not convincing; he seemed to be both exaggerating and withholding information. I do not credit his testimony concerning this matter

50

except to the extent that on October 29 Bate had to wait some minutes for Holloway to arrive and then Holloway walked with him to the conference room. Bruce Jackson was presented by the General Counsel as a witness to support this allegation of the complaint, but it is clear from his

5 testimony that he had no first knowledge of any matter that would assist in the resolution of this matter.

10 Jason Beauchene likewise works for the Union as an organizer. He serviced the unit employees at KMHS for about 4 years. He testified that during that period of time he visited employees at KMHS about 200 times. He testified that he never gave KMHS advance notice before entering its facilities. Instead, he simply notified an employee of his presence and the employee would allow him access into the facility. However, prior to the October 29 bargaining session as he sought entrance to the facility the receptionist informed him that she had to contact human resources before she could allow Beauchene inside the facility. He claimed to have  
15 waited 20-30 minutes until Holloway arrived and accompanied him to the conference room being used by the Union. I conclude Beauchene exaggerated both the number of times he had entered KMHS' facilities over the years and the time he waited for Holloway to arrive on October 29. In any event, there is no evidence that anyone from management was aware that he had been entering the facilities without first notifying KMHS.

20

Holloway denied instructing the receptionists that human resources had to be contacted if union officials were checking in. However, in the notice sent to the Union KMHS indicated that Holloway was the contact person so I conclude that KMHS did require the receptionists to contact Holloway before allowing union agents access into the facilities.

25

#### Analysis

30 The complaint alleges that KMHS violated Section 8(a)(5) by changing its practice regarding union access, making access to its facility more difficult. The General Counsel argues that KMHS unilaterally changed the past practice by requiring union agents to notify KMHS when and where they would be seeking access. But this argument fails for several reasons. In order to shown a unilateral change it is first necessary to establish that an employer knew of and tolerated an existing practice that it later unilaterally changed. There is no evidence whatsoever that KMHS knew Beauchene was entering its premises without the contractually-required notice.  
35 And when KMHS discovered that Beauchene and Close were doing so, and that Close at least was wandering through its facilities, disrupting the work of employees and making herself at home in a supervisor's work area, it properly sought to have the Union abide by its contractual obligations. KHMS business is, after all, to treat the most severely mentally ill persons in the community. Again, it is not surprising that KMHS sought to identify who was entering its  
40 premises and that whoever did so was not disrupting the work of its employees and not disturbing the severely mentally ill who use its services. What remains of this issue is a matter of contract interpretation. The Union sought to interpret the contractual access language strictly while KMHS sought to have the Union agree to the spirit of the language. Not having reached agreement, KMHS then sought to modify the language through the collective-bargaining  
45 process. The General Counsel also points out that on one occasion Holloway walked Beauchene to the conference room and did the same with Bate on two occasions. But having Holloway accompany them instead of an employee is not a material change in the access policy. And I have already concluded Bate and Beauchene exaggerated the delay occasioned by Holloway arriving to the reception area. Keep in mind that there is no evidence that KMHS ever denied  
50 any union agent access to its facilities.



5 testimony. I conclude that Holloway’s testimony on this matter was more persuasive; she seemed more certain and confident of what she had said.

#### Analysis

10 As explained, the complaint is narrowly phrased to allege that KMHS told unit employees that they could not talk to nonbargaining unit members about union issues. I have concluded above that Holloway did not make that statement. It follows that I must dismiss this allegation in the complaint. In his brief they General Counsel cites *Teledyne Advanced*  
 15 *Materials*, 332 NLRB 539 (2000). In that case, the employer prohibited employees from talking about a union. The General Counsel also cites *Ryder Transportation Services*, 341 NLRB 761 (2004), and similar cases. There the employer solicited employees to report union harassment. None of those cases deal with the fact situation litigated here, where an employee voluntarily complained to management under circumstances where that employee felt harassed and where the employer advised another employee to respect the wished of the complaining employee. In  
 20 the absence of case authority or even a legal rationale that addresses the circumstances of this case I decline to create one, especially given apparent increased sensitivity to workplace harassment.

#### Withdrawal of Recognition Allegation

25 Meanwhile, on about December 4 Tina D’Astoli began circulating a petition among employees and on December 11 she presented that petition to KMHS. The General Counsel stipulated that on its face the petition showed that a majority of employees no longer wished to be represented by the Union. On December 11 Joe Roszak, KMHS’ executive director, emailed the staff the following message:

35 Today Kitsap Mental Health Services (KMHS) received a petition signed by a majority of bargaining unit employees in which the employees state that they no longer wish to be represented by SEIU 1199NW. Because the Union no longer represents a majority of the bargaining unit employees, KMHS has withdrawn recognition of the Union as their exclusive collective bargaining representative. This is effective immediately. Please be assured that this change in circumstances will not impact your compensation and benefits. In fact, we are pleased to inform you that we will be processing checks for a \$1,000 lump sum payment (prorated on fte) by the end next week to those staff who  
 40 have not yet received this. In addition, deductions for union dues will cease immediately.

#### Analysis

45 Because a majority of employees in the bargaining unit indicated that they no longer wished to be represented by the Union, and because this occurred in a context free of unfair labor practices, I conclude KMHS lawfully withdrew recognition from the Union. I dismiss this allegation of the complaint. I also dismiss the allegation in the complaint concerning the changes KMHS thereafter made in the handbook.

50

5

## Inform Management Allegation

The complaint alleges that on or about December 11 KMHS instructed employees to inform their supervisors if they were contacted by anyone “from or about the Union.”

10

On December 11, the same day that KMHS withdrew recognition from the Union, employees in the facilities department had a meeting. Bob Bowling, KMHS’ facilities manager, lead the meeting by saying that they would have a visitor who would arrive and explain what was going on concerning the Union. Bowling said that because he was a supervisor and it involved a union issue he did not want to be involved. At that point Joe Roszak, KMHS’ executive director, arrived. Roszak announced that the employees had signed a petition that they did not want to be represented by the Union and the Union no longer represented the workers. Roszak said that if the “union members came on campus and they were bothering the staff, we were to tell our supervisors.” Roszak may have referenced increased security at the facility. These facts are based on the testimony of Paul Fitzpatrick who was called as a witness by the General Counsel. Fitzpatrick has worked for KMHS for almost 12 years as a facilities technician. Especially in answering questions that I put to him, Fitzpatrick’s demeanor convinces me he was giving an honest accounting of what Roszak said at that meeting.

15

20

25

Steven Cherrone worked at KMHS until February 21, 2010, as a facilities technician. According to Cherrone, Roszak said that he was sure that the employees were aware that the Union had been voted out by the employees, so they no longer had a union. Roszak said that KMHS did not expect any issues, but “that if anybody contacted us regarding it afterwards we were supposed to get in touch with management and notify them.” Cherrone then added that Roszak said that “if we felt we were being harassed by anyone in particular regarding it, that we should say something. Cherrone explained that “it” referred to the petition and the Union being voted out. Cherrone then said that it was “reiterated that if anybody contacted us in any way, you know, regarding the union not being with Kitsap Mental Health anymore, that we should let somebody know.” I do not credit this testimony. Cherrone’s testimony seemed uncertain and his demeanor was not convincing.

30

35

Although Roszak was called as a witness by KMHS, he did not directly testify concerning whether he made the comments attributed to him. Rather, KMHS submitted his calendar for December 11 in an apparent effort to show that he did not meet with the facilities department staff.

40

## Analysis

45

The credited evidence does not support the allegation in the complaint. Roszak’s reference to union “members,” in context, could not reasonably be understood by employees to mean fellow employees. After all, fellow employees were of course allowed on campus. Rather, employees were being asked to report the presence of any union agents on campus. Union agents at that point were mere strangers and trespassers on campus. I dismiss this allegation.

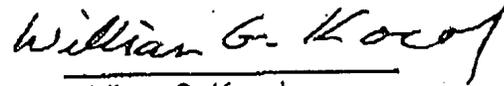
5

ORDER

The complaint is dismissed.

Dated: Washington, D.C. July 27, 2011

10

Handwritten signature of William G. Kocol in black ink.

William G. Kocol  
William G. Kocol  
Administrative Law Judge