

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**PRIME HEALTHCARE SERVICES -
ENCINO, LLC d/b/a ENCINO HOSPITAL
MEDICAL CENTER,**

Respondent,

SEIU LOCAL 121RN,

**Cases: 31-CA-066061
31-CA-070323**

Union,

and,

**SEIU UNITED HEALTHCARE
WORKERS-WEST,**

Case: 31-CA-080554

Union; and

**PRIME HEALTHCARE SERVICES –
GARDEN GROVE, LLC d/b/a
GARDEN GROVE HOSPITAL & MEDICAL
CENTER,**

Case: 21-CA-080722

Respondent,

**SEIU UNITED HEALTHCARE
WORKERS-WEST,**

Union.

REPLY TO SEIU-UNITED HEALTHCARE WORKERS WEST'S ANSWERING BRIEF

The Answering Brief of the SEIU- United Healthcare Workers West (“UHW”) to the Exceptions Brief filed by Respondents Prime Healthcare Services – Encino LLC d/b/a Encino Hospital Medical Center (“Encino”) and Prime Healthcare Services – Garden Grove LLC d/b/a Garden Grove Hospital & Medical Center (“Garden Grove”) (collectively, the “Hospitals”) is little more than an attempt to whitewash its own conduct through misdirection and misrepresentation. UHW’s brief concentrates its efforts on trying to rewrite facts and history concerning (1) the conflict of interest created by its partnership with Kaiser Permanente (“Kaiser”) which disqualifies UHW from representing unit employees at the Hospitals and (2) UHW’s pervasive and contumacious subpoena misconduct in this matter.

Unfortunately for UHW, the record in this matter does not correspond with its sanitized version of events. Despite UHW’s assertions that its relationship with Kaiser is innocuous and consists of protected conduct, evidence demonstrated at trial shows that UHW and Kaiser had gone far beyond the bounds of a typical labor-management partnership. Critically, UHW and Kaiser had a binding contractual agreement under which:

The parties are committed as partners to the advancement of each other’s institutional interests. This includes an understanding that no party will seek to advance its interests at the expense of the other party. The parties have also agreed to a joint decision-making process in which they will attempt to reach consensus on a broad range of business issues.

(RX-435 at E-25-26.) In furtherance of the UHW-Kaiser enterprise created by this agreement, UHW had committed itself to taking action to harm Kaiser’s competition—namely the Hospitals and their parent company Prime Healthcare Services, Inc. (“Prime”).

UHW also tries to evade the consequences of its subpoena misconduct in this matter, both by attempting to rebrand its flagrant and admitted subpoena non-compliance as “substantial compliance” and by arguing against the proper application of evidentiary inferences that were

richly earned as a result of that non-compliance. Contrary to its claims of “substantial compliance” in the conduct of the hearing, UHW’s efforts to keep evidence of the nature of its relationship with Kaiser from coming to light by flatly refusing to comply with subpoenas and court orders are amply reflected on the record. Given UHW’s admitted active concealment of evidence, any protestations by UHW that the Hospitals have not provided evidence on certain aspects of the Hospitals’ conflict of interest defense should fall on deaf ears. The Hospitals reply to correct UHW’s pervasive mischaracterization of the record.

I. ARGUMENT

A. UHW Mischaracterizes its Disqualifying Conflict of Interest

Throughout its answering brief, UHW tries to conceal the true nature and effect of its partnership with Kaiser. First, UHW glosses over or flatly ignores the evidence presented by the Hospitals that establishes that the integration of UHW and Kaiser was so complete that UHW became a *de facto* competitor of the Hospitals. Second, UHW hides behind conclusory labels to bathe its conduct in the most innocuous light. As shown below, both of these tactics run contrary to the evidence and the law and should be summarily rejected.

Even in the face of UHW’s non-compliance with the subpoenas in this matter, the Hospitals were able to present documentary evidence of UHW’s conflict of interest that resulted from its partnership with Kaiser. Pursuant to the 2012 National Agreement to the UHW-Kaiser Labor-Management Partnership, UHW and Kaiser made a binding contractual commitment under which:

The parties are committed as partners to the advancement of each other’s institutional interests. This includes an understanding that no party will seek to advance its interests at the expense of the other party. The parties have also agreed to a joint decision-making process in which they will attempt to reach consensus on a broad range of business issues.

(RX-435 at E-25-26.) As a part of this unitary UHW-Kaiser enterprise, UHW made striking and extraordinary commitments to promote Kaiser's market dominance. To that end, UHW is obligated by the National Agreements to the UHW-Kaiser partnership to:

- commit itself to the "advancement" of Kaiser's "institutional interests." (RX-435 at E-25-26.)
- "market[] Kaiser Permanente as the ... care provider of choice[.]" (RX-435 at 6.);
- make efforts to "expand Kaiser Permanente's membership in current and new markets[.]" (RX-435 at 24.);
- "market Kaiser ... to ensure the joint Labor Management Partnership marketing effort ... result[s] in increased enrollment in Kaiser Foundation Health Plan." (RX-435 at 24-25.); and
- "emphasize the unique advantage of the Kaiser Permanente model." (RX-435 at 7.)

As if these commitments were not a clear enough indication of the distorted and improper relationship between UHW and Kaiser, the Leadership Action Plan between UHW and Kaiser makes the inherent conflict even more obvious. That "action plan," which UHW president Dave Regan helped to prepare, explicitly commits UHW to take on Kaiser's competition in furtherance of the UHW-Kaiser partnership, directing the parties to:

Focus our respective constituencies on real *external threats- competition*, public policy and financing changes, the economic crisis and high unemployment, etc.

(RX-819 at 1.) (emphasis added).

UHW repeatedly glosses over these critical documents, treating them as if they did not exist. It fails to address them specifically, dropping them in a list of exhibits as if they represented garden variety commitments undertaken in the ordinary course of a typical labor-management partnership. SEIU-UHW-West's Answering Brief in Opposition to Respondent's Exceptions to the Decision of the Administrative Law Judge ("UHW Answering Brief") at 36. There is nothing garden variety, however, about a commitment by a union to take actions at the behest of one company to competitively harm another. Nor were the UHW's efforts to harm the

Hospitals merely an incidental by-product of its commitment to advance the interests of Kaiser. The documents presented by the Hospitals show that the disparagement campaign waged by UHW against the Hospitals was an intended and primary objective of the UHW-Kaiser partnership.

Such a partnership creates an obvious “clear and present danger” of a conflict of interest, casting doubt on UHW’s ability to fulfill its bargaining obligations. Contrary to UHW’s contentions, it would not take the creation of new law to conclude that the UHW-Kaiser partnership creates a disabling conflict. The Board and the courts have long been able to look at these matters in context and find a conflict when a union “has acquired a special interest which may well be at odds with what should be its sole concern – that of representing the interests of Respondents’ employees.” *Bausch & Lomb Optical Co.*, 108 N.L.R.B. 1555, 1559 (1954).

To get around its inherent conflict, UHW applies a set of conclusory labels to try to immunize its conduct. UHW claims it is not a “business competitor in direct competition” with the Hospitals. UHW Answering Brief at 33. As an initial matter, UHW ignores that the Board and the courts have found disqualifying conflicts in matters ranging beyond direct competition.¹ Even so, as the documented evidence above presented at the hearing shows, the UHW-Kaiser partnership so integrated and aligned UHW and Kaiser that indeed UHW is a *de facto* competitor of the Hospitals.

UHW relies on its lack of an “ownership interest” in Kaiser. UHW Answering Brief at 34. This is both legally and factually irrelevant. As a matter of law, the Hospitals are not required to show an ownership interest to establish that UHW has a disabling conflict of interest. As has been repeatedly shown by the Hospitals, while an ownership interest would create a *per se* conflict of interest, it is not the only type of relationship found to create a disabling conflict.

¹ See cases cited at page 28 of the Hospitals’ Exceptions Brief.

Also, despite UHW's assertions that no responsive documents exist concerning any UHW ownership interest in Kaiser, it is impossible to assess this claim given UHW's selective and piecemeal non-complaint response to the Hospitals' subpoenas.²

UHW tries to characterize its relationship with Kaiser as a legal and innocent Labor-Management Partnership pursuant to the Labor Management Cooperation Act, 29 U.S.C. § 173(e). However, this characterization ignores the extraordinary commitments made pursuant to the National Agreements and the Leadership Action Plan to take action against Kaiser's marketplace competitors. ALJ Wedekind said that these actions might "strain the purposes and policies" of the LMCA, only referring to the portions of the UHW-Kaiser compact relating to marketing and mergers and acquisitions. (ALJ Decision at 23:25-29) The ALJ missed the mark by not discussing the active disparagement campaign waged in furtherance of the UHW-Kaiser partnership. Such actions, which subvert the role that UHW is obligated to fulfill under the NLRA as representative of unit employees at the Hospitals and heighten labor-management conflict, surely strain the purposes and policies of the LMCA well past the breaking point.³

UHW goes on to say that the Hospitals have not shown that "UHW was not working in the best interests of the employees at Encino or Garden Grove" and that there was "no evidence presented that UHW wants to run Encino or Garden Grove out of business." UHW Answering Brief at 37. This mischaracterization of the record blatantly ignores the extensive hearing

² The question of whether or not UHW has an actual ownership stake in Kaiser Permanente does little more than distract from the relevant record evidence regarding UHW's financial incentive to follow through on its commitments to Kaiser. The Hospitals presented evidence of the millions of dollars funneled into the Taft-Hartley trust fund for SEIU Unions set up and funded by Kaiser, (RX-98 at 40-41, RX-436 at 26), which provides a financial motive for UHW to harm Kaiser's competitors.

³ UHW seems to claim that the Hospitals are precluded from making arguments relating to the LMCA because the Hospitals did not previously argue the issue. UHW's assertion is both false and irrelevant: 1) the Hospitals had indeed addressed the issue in their November 23, 2013 Opposition to Request for Special Permission; 2) there is no obligation that the Hospitals anticipate and preempt every argument made in the simultaneously submitted post-hearing briefs; and 3) the Hospitals treated the issue at length in their Exceptions' Brief. *See* Exceptions Brief at 39-41.

evidence put forth of the systemic and anti-competitive campaign waged against the Hospitals in furtherance of the UHW-Kaiser partnership. UHW's failure to comply with the Hospitals' subpoenas on subjects relating to its campaign against Prime, (Tr. 29-30), and its refusal to make UHW President Dave Regan available to testify made it impossible for the Hospitals to provide further evidence on these issues. Under the scope of the ALJ's sanctions order, evidentiary inferences should have accordingly been applied in favor of the Hospitals.

Even if it were not this record evidence and the proper application of inferences, such evidence of actual misconduct is not necessary to establish that a union should be disqualified for its disabling conflict of interest. "Disqualification of a bargaining representative whose independence and loyalty are properly drawn into question should not await proof of actual misconduct." *R&M Kaufmann v. NLRB*, 471 F.2d 301, 304 (7th Cir. 1973). It is enough that there is "sufficient power and temptation to commit such abuse." *NLRB v. David Buttrick Co.*, 361 F.2d 300, 307 (1st Cir. 1966). This is because the development of a conflicting interest, "if proximate enough, without evidence of present abuse, can poison the collective bargaining process by subjecting every issue to the questioning of ulterior motives...." *Id.*

UHW then proceeds to run through the laundry list of activities that were a part of its disparagement campaign in furtherance of its partnership with Kaiser. It claims that each of these items, taken individually, has been found not to be disqualifying. UHW Answering Brief at 37-44. UHW's attempts to view each incident in isolation is merely another attempt to sidestep what makes its partnership with Kaiser a conflict of interest.

It is not that any one of the parts of its campaign against the Hospitals and Prime is disqualifying, taken in a vacuum. Rather, UHW's disparagement campaign must be examined in the larger context of UHW's partnership with Kaiser. When these acts are viewed through the

lens of the commitments made by UHW as a part of its partnership with Kaiser, the relevance of these acts to the Hospitals' conflict of interest defense becomes clear. These are the actions of a *de facto* competitor committed to "focusing" on external competitive threats in the market. (RX-819 at 1.)

The UHW-Kaiser partnership not only provides the evident motive for these attacks, but the timing of the disparagement campaign lines up with what we know about the UHW-Kaiser partnership. That the attacks were made in furtherance of the UHW-Kaiser partnership is borne out by the date of and obligations undertaken under the Leadership Retreat Action Plan. The disparaging attacks began a mere five months after the January 2010 retreat (RX-819), starting in June 2010 with the Septicemia at Prime Hospitals report (RX-91).

UHW negated any ability for the Hospitals to provide further evidence to connect the campaign to their partnership with Kaiser, through their subpoena noncompliance and failure to make Dave Regan available to testify at the hearing. Accordingly, the Hospitals were entitled to an inference that those missing documents and the testimony of Dave Regan would have further shown that the disparaging attacks waged by UHW were in furtherance of the UHW-Kaiser partnership. (Tr. 76-77, 304-306.) That ALJ Wedekind failed to properly apply such an inference in favor of the Hospitals represents clear error.

UHW also claims that the Hospitals cannot now raise its disqualifying conflict as a defense, citing *Ridgewell's Inc.*, 334 NLRB 37 (2001), a case having nothing to do with conflicts of interest. According to UHW, the Hospitals have developed "a sudden concern" and had not made any "timely protests" about the UHW-Kaiser partnership. UHW Answering Brief at 1-2. This is yet another case where UHW's arguments conflict with the record evidence. In May 2011, the Hospitals expressed to UHW their concerns about the union's relationship with Kaiser

in writing. (RX-22, RX-22A.) The Hospitals expressly stated that they were concerned that the relationship had compromised the bargaining process. *Id.* Rather than simply refuse to bargain, the Hospitals sought information from UHW to allay their concerns, but UHW refused to provide the information. *Id.* The Hospitals' witness, Mary Schottmiller, also testified that the union's relationship with Kaiser was the exact concern that led her to question the legitimacy of UHW's requests for information that, in part, comprise UHW's allegations in this matter. (Tr. 329, 517.) Further, any uncertainty on the part of the Hospitals as to the precise nature of the conflict before they asserted it as a defense in this matter is directly attributable to UHW and Kaiser's efforts to conceal it, efforts which continue to this day.

B. UHW's Claims of "Substantial Compliance" With Subpoenas Are Utterly and Demonstrably False

UHW's continuing efforts to mask the nature of its relationship with Kaiser also included its admitted non-compliance with the subpoenas *duces tecum* issued in this matter and their failure to provide a subpoenaed witness at the hearing. Now UHW comes forward to attempt to paper over this misconduct in its answering brief, claiming over and over that they "substantially complied" with the subpoenas and even that they "complied" with the ALJ's Order concerning the subpoenas. This is demonstrably untrue. Indeed, UHW's subpoena non-compliance was so open and egregious that it resulted in the imposition of evidentiary sanctions against it.

While UHW's conduct that led to the evidentiary sanctions against it⁴ is clearly laid out in depth on the record, (Tr. 45-52), and in the Briefs filed in this matter by the Hospitals, it takes only a brief glance at the record to completely discredit UHW's laughable claims of compliance. At the time of the hearing, UHW was faced with multiple court orders compelling compliance with the Hospitals' subpoena requests. It had represented that it had "voluminous" responsive

⁴ The ALJ also applied the sanctions against the General Counsel.

materials to certain of those subpoena requests and had promised production in compliance with the court orders. Despite all of this, counsel for UHW stood before the ALJ at the hearing and openly acknowledged that UHW would not produce those materials in defiance of the ALJ's orders. (Tr. 29-30.) For this and other "contumacious" conduct, the ALJ sanctioned UHW – sanctions which precluded UHW from rebutting the Hospitals' case and which were supposed to grant the Hospitals the benefit of evidentiary inferences on the conflict of interest issue.

Against this backdrop, UHW's notion of "substantial compliance" is a ludicrous euphemism for flagrant non-compliance with the ALJ's orders and Board procedures. UHW chose to produce a limited handful of publicly available documents, rather than responding in full as required by the ALJ's April 29, 2013 Order. UHW's paltry and selective production of materials supports the very rationale for the evidentiary inferences that were supposed to be, but were not, applied by the ALJ in this matter. Namely, UHW only produced materials and witnesses that were either favorable to it or publicly available. Anything that was unfavorable to its case, UHW simply withheld. That is not compliance, "substantial" or otherwise. Such a pick-and-choose approach has been excoriated not only by the courts, *Perdue Farms, Inc., Cookin' Good Div. v. N.L.R.B.*, 144 F.3d 830, 834 (D.C. Cir. 1998), but by the ALJ in announcing the sanctions to UHW in this matter. (Tr. 55).

The specific examples cited by UHW of its "substantial compliance" with testimonial subpoenas are likewise preposterous. UHW tries to excuse Dave Regan's failure to appear at the hearing, despite Mr. Regan's having been subpoenaed to testify and the representations of UHW counsel that Regan would appear. UHW now claims that Kim Davis would somehow have been an adequate replacement for Mr. Regan. UHW Answering Brief at 22. Just as it is not up to UHW to pick-and-choose what documents to produce in response to the Hospitals' document

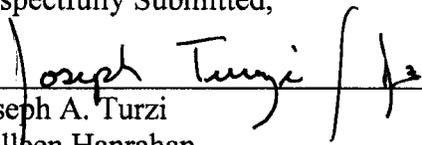
subpoenas, nor is it UHW's place to pick-and-choose what witnesses the Hospitals present in their case. And it absolutely strains credulity for UHW to claim that Ms. Davis, a unit employee at Garden Grove, would have been any kind of substitute for Mr. Regan, the **President** of the union with unique first-hand factual knowledge of the UHW-Kaiser partnership, including leadership activities involving top-level Kaiser management.

UHW tries throughout its answering brief to soft-sell the effect of its non-compliance on the Hospitals' ability to present evidence relating to UHW's conflict of interest. ALJ Wedekind allowed UHW to have its cake and eat it too, by not properly applying the evidentiary inferences against UHW even in the face of its contumacious conduct. The Board should rectify this clear error.

II. CONCLUSION

For these foregoing reasons and the reasons raised in Respondents' Brief in Support of Exceptions to Administrative Law Judge Jeffrey D. Wedekind's Decision, the ALJ abused his discretion in finding that the Hospitals did not meet their burden of establishing a conflict of interest and that the Hospitals violated the Act as alleged in the Complaint. Accordingly, the ALJ's decision should be reversed and the Complaint should be dismissed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

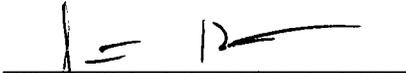
I hereby certify that on this 7th day of April, 2015, a copy of the foregoing Reply to SEIU-United Healthcare Workers-West's Answering Brief was filed electronically and served upon the following:

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