

**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 COUNSEL FOR THE GENERAL COUNSEL’S ANSWERING BRIEF

Evidence presented at the hearing in this matter conclusively demonstrated that the partnership between SEIU-United Healthcare Workers West (“UHW”) and Kaiser Permanente (“Kaiser”) creates a disabling conflict of interest, disqualifying UHW from representing unit employees at 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”). 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.) The institutional interests that UHW committed itself to advance included ensuring that Kaiser was the market leader in healthcare and neutralizing competitive threats to Kaiser. The UHW-Kaiser relationship thus fundamentally distorts the role that UHW is required to fulfill under the NLRA. In his decision, ALJ Wedekind made critical errors in his review and weighing of this evidence and the law relating to UHW’s disabling conflict.

In the same vein, the Counsel for the General Counsel’s (“GC”) Answering Brief to the Respondents’ Exceptions to the Decision of the Administrative Law Judge (“GC’s Answering Brief”) seems to fundamentally misunderstand the Hospitals’ conflict of interest defense. The GC ignores the critical evidence presented at the hearing that shows the pernicious nature and intent of the UHW-Kaiser partnership. Not only does the GC seem to sweep this key evidence under the rug, it also argues that the UHW-Kaiser partnership did not irreparably taint UHW’s ability to represent unit employees under a mistaken and unjustifiably narrow analysis of Board law.

The GC is also wrong about the law and the evidence adduced at the hearing relating to the expiration of the anniversary wage increases in the collective bargaining agreement between the Hospitals and SEIU-121RN and UHW. As demonstrated at the hearing and shown in the Hospitals' Exceptions Brief, the Hospitals' had concluded in good faith that the anniversary step increases had expired with the contracts. Thus, under established Board law, there can be no unfair labor practice based on this sound interpretation of the agreements.

I. ARGUMENT

A. The GC Is Wrong About the Evidence and Law Concerning UHW's Conflict of Interest

The GC's Answering Brief is riddled with critical misstatements of the evidence and the law relating to the disabling conflict created by the UHW-Kaiser partnership. The most glaring of these factual and legal errors are addressed below.

1. The GC Deliberately Ignores Critical Evidence Presented at the Hearing and Mischaracterizes the UHW-Kaiser Relationship

The GC continually describes the relationship between UHW and Kaiser in the most vanilla of terms. In so doing, the GC is overlooking or attempting to sweep aside key evidence adduced at the hearing that shows that the relationship between UHW and Kaiser is anything but the typical union-employer relationship. Prominent among the evidence ignored by the GC is the 2012 National Agreement to the UHW-Kaiser Labor-Management Partnership, a binding contractual commitment between UHW and Kaiser 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.) The UHW-Kaiser partnership created by this commitment so distorts UHW's role as a bargaining representative that it fatally compromises UHW's ability to represent unit employees at the Hospitals.

The GC also ignores other pieces of evidence presented at the hearing that shed light on some of the most dangerous features of the UHW-Kaiser partnership. As a part of this unitary UHW-Kaiser enterprise, UHW made 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 improper relationship between UHW and Kaiser, the Leadership Action Plan between UHW and Kaiser makes the inherent conflict even more obvious. That "action plan" 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). Because they do not mesh with the GC's theory of the case, the GC pretends as if this and other crucial pieces of record evidence simply do not exist.

The GC repeatedly protests that the Hospitals provided "no evidence" of certain aspects of the UHW-Kaiser relationship. The GC's claims are factually and legally irrelevant to the

Hospitals' conflict of interest defense. The Hospitals are not required to show that UHW had become a "direct business competitor," that it had an "ownership stake" in Kaiser, or that they had made "bargaining demands calculated to put respondents out of business" in order to prove that UHW had a disqualifying conflict. GC Answering Brief at 19, 21, 26. This attempt by the GC to limit the factual circumstances in which disabling conflicts of interest arise is at odds with Board law, where conflicts of interest have been found in a variety of circumstances. The evidence put forth by the Hospitals showed that UHW had become a *de facto* competitor of the Hospitals through its partnership with Kaiser and had taken actions in furtherance of that partnership to inflict competitive harm on the Hospitals and their parent corporation Prime Healthcare Services, Inc. ("Prime"). This was factually and legally sufficient to demonstrate that UHW had "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). The GC is simply trying to distract from the Hospitals compelling evidence establishing UHW's conflict.

To the extent that any ambiguities exist in the evidentiary record which need to be resolved, they are directly attributable to UHW's admitted non-compliance with the Hospitals' documentary and testimonial subpoenas. As a result of this subpoena misconduct, evidentiary sanctions were imposed by the ALJ against UHW and the GC. The ALJ, in clear error, failed to properly apply the evidentiary inferences in favor of the Hospitals that were supposed to be a part of those sanctions.

2. The GC Misstates the Law Relating to Disqualifying Conflicts of Interest

Not only does the GC ignore critical factual evidence that demonstrates the nature and extent of UHW's disabling conflict, it takes a narrow, legally unsupported view of what

represents a disqualifying conflict under Board law. The GC claims that only certain precise factual circumstances could ever possibly establish a disabling conflict under the law. Of course, given the selective recitation of the material facts in this case, the GC argues that no conflict exists.

The GC echoes ALJ Wedekind's incorrect conclusion that the Hospitals cannot raise UHW's conflict of interest as a defense because the Hospitals failed to withdraw recognition from the Union. The GC and ALJ Wedekind both cite *Greyhound Lines, Inc.*, 319 N.L.R.B. 554, 556-57 (1995), as if it enunciated a kind of *per se* rule requiring withdrawal of recognition. GC Answering Brief at 17. This is simply an incorrect reading of *Greyhound* and a misstatement of Board law.

The *Greyhound* ALJ made it clear that withdrawal was not an absolute prerequisite to asserting a conflict defense when he inquired as to whether there was any record evidence "that Respondent withdrew recognition for this reason *or explained its allegedly violative actions by reference to any conflict of interest on the part of the Union.*" *Id.* at 557 (emphasis added). The *Greyhound* ALJ did not end his analysis after finding that the employer had not withdrawn.¹ Rather, what he actually did was view a whole host of factors to determine if the alleged conflict of interest had a nexus to the alleged unfair labor practices. *Id.* at 556-57. As indicated in the Hospital's Brief in Support of its Exceptions, the Hospitals amply demonstrated the connection between UHW's conflict and the underlying allegations by UHW. *See* Hospitals' Exceptions Brief at 43.

¹ This is consistent with litany of cases cited by the Hospitals, including *Bausch & Lomb*, in which the Board reviewed the conflict of interest defense even though the employer had not withdrawn recognition. *Bausch & Lomb*, 108 N.L.R.B. at 1558-59, *Western Great Lakes Pilots Ass'n*, 341 N.L.R.B. 272, 273 (2004); *Atlas Transit Mix Corp.*, 323 N.L.R.B. 1144, 1155 (1997); *Holmes Detective Bureau, Inc.*, 256 N.L.R.B. 824 (1981); *The Adrian Daily Telegram*, 214 N.L.R.B. 1103, 1103 (1974).

The GC then, without support, tries to limit the circumstances in which a conflict could arise to narrow factual circumstances present in previous Board decisions. First it claims that the Board has limited the conflicts defense to two circumstances: (1) cases of direct business competition and (2) cases in which the union has acted to decimate the union it represents. GC Answering Brief at 18. While these are certainly examples of disabling conflicts, the Board and courts have actually found disabling conflicts in a variety of circumstances extending beyond the those circumstances.² The proper analysis is whether the union has developed an interest inconsistent with what should be its “sole concern”- representing the interests of bargaining unit employees. *Bausch & Lomb*, 108 N.L.R.B. at 1559. As the Hospitals have shown, UHW’s relationship with Kaiser creates such an inconsistent interest.

The GC further proposes that two cases where no conflict was found, *Supershuttle Int’l Denver Inc.*, 357 NLRB No. 19 (2011) and *Roadway Package System, Inc.*, 292 NLRB 376 (1989), establish that there is no disqualifying conflict in this case under Board law. The facts of these cases, however, are inapposite to this matter and further illustrate the GC’s lack of understanding about what makes the UHW’s conflict so disabling.

The GC cites *Supershuttle* for the proposition that a union’s representation of employees at two competitors does not create a disabling conflict of interest. A mere representation of employees of two employers in the same market is not what creates the conflict here. More than that, it is that UHW has become a *de facto* competitor to the Hospitals by virtue of its partnership with Kaiser. A partnership that, among other things, dictates that UHW work to neutralize competitive threats to Kaiser even at the expense of its own interests. *See, e.g.*, Leadership Action Plan (RX-819 at 1).

² See cases cited at page 28 of the Hospitals’ Exceptions Brief.

The GC also tries to analogize this case to *Roadway Package Systems*. In *Roadway*, the employer raised a conflict of interest as an affirmative defense to the initial certification of a union based on the union's alleged alliance with a competitor of the employer. The goal of the *Roadway* alliance was to organize the employer and to make it accept the same terms as the competitor. Unlike the union in *Roadway*, UHW is not merely trying to get the Hospitals to accept the same deal that it had with Kaiser. Not only had UHW made a documented contractual commitment to promote Kaiser and to take action against Kaiser's competition, it had indeed acted in furtherance of that commitment. The ALJ in *Roadway* recognized that if the employer there had shown facts similar to the operational integration at the foundation of the UHW-Kaiser partnership, the outcome would have been different, noting "[c]ertainly if Respondent were arguing *an institutional or inherent financial relationship* between [the union] and [the employer's competitor], a relevant issue would be joined." *Roadway*, 92 NLRB at 426. (emphasis added).

The GC then claims that the Hospitals are claiming "a hostility towards Prime" as a "second prong" in the conflict of interest analysis.³ GC Answering Brief at 26. This is another fundamental misunderstanding of the nature of the disabling UHW conflict. This is no mere labor-management antagonism, nor a separate "prong" requiring the creation of new law. On the contrary, UHW's hostility, as embodied by its disparagement campaign against the Hospitals, cannot be viewed in isolation from the UHW-Kaiser partnership, as documented in the National Agreements and the Leadership Action Plan. The evidence of UHW's fraudulent and

³ In its analysis, the GC never identifies what it claims to be the "first prong" of UHW's conflict.

disparaging campaign against the Hospitals demonstrates that the anti-competitive goals envisioned as a part of this partnership were indeed being put into action by UHW.⁴

UHW has created a situation where it was impossible for it to act with the required “the single minded purpose of protecting and advancing interests of the employees who have selected it as their bargaining agent.” *Bausch & Lomb*, 108 N.L.R.B. at 1559. By its actions, UHW has “drastically change[d] the climate at the bargaining table from one where there would be reasoned discussion ... upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the Union’s motives would be engendered.” *Id.* at 1561. The Hospitals are not looking for new law to be created, as the GC suggests. The Hospitals are only asking for the Board to correctly apply the existing law to a situation involving an evidently compromised employee representative.

B. The Hospitals Were Not Obligated to Continue the Expired Anniversary Wage Step Increases

1. The Hospitals Have a Sound Arguable Basis for Discontinuing the Wage Increases

The ALJ and the GC both apply a faulty and legally invalid “clear and unmistakable waiver” analysis to the anniversary wage increases, applying the Board’s analysis from *Finley Hospital*, 359 N.L.R.B. No. 9 (2012). However, after the Supreme Court’s opinion in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board’s *Finley Hospital* decision has been vacated. Accordingly, the “clear and unmistakable waiver” precedent from *Finley Hospital* does not

⁴ The GC claims that there is no evidence that the disparaging reports created by UHW relating to septicemia were false and thus were in good faith. The GC, like the ALJ, completely misunderstands the Hospitals’ position. The Hospitals never argued that the data used in the report was incorrect. The Hospitals’ expert, Dr. Fairley testified that he had not even reviewed any of the underlying data or attempted to determine if the data was incorrect. (Tr. 666.) Rather, what Dr. Fairley explained at length was that UHW failed to follow even the most basic procedures necessary to conduct any kind of statistical analysis. (Tr. 670, 669-72.) These errors were so basic that the approach could only be designed to produce a false result.

apply to contractual provisions like the anniversary wage increases that were plainly intended to expire at the end of the contract term.

Under Board law, discontinuation of the wage increases consistent with the Hospitals' reasonable interpretation of the CBAs cannot be an unfair labor practice.⁵ "[A] mere breach of the contract is not in itself an unfair labor practice." *NCR Corp.*, 271 N.L.R.B. 1212, 1213 n.6 (1984). Where an employer has a "sound arguable basis" for its interpretation of the contract and is not "motivated by union animus or acting in bad faith," its application of a contract provision, even if erroneous, is not an ULP. *Bath Iron Works Corp.*, 345 N.L.R.B. 499, 502 (2005). Accordingly, when both parties "present[] reasonable interpretations of the applicable contract language," the NLRB will not inject itself into the dispute, recognizing that "the arbitration process and the courts are well equipped to deal with such matters...." *Bath Iron Works*, 345 N.L.R.B. at 503.

In this case, even assuming that the Hospitals' application of the Anniversary Step Increase provision is incorrect or subject to disagreement, there has been no showing that its interpretation was unreasonable or made in bad faith. Indeed, as shown in the Hospitals' Exceptions Brief, the Annual Hospital Wide Increase and the Anniversary Step Increase provisions are inextricably linked in both language and operation, and it is more than reasonable to interpret both provisions as having expired at the same time. Exception Brief at 45.

2. Testimony at the Hearing Indicated that there Were No Oral Agreements for the Expired Provisions to Continue

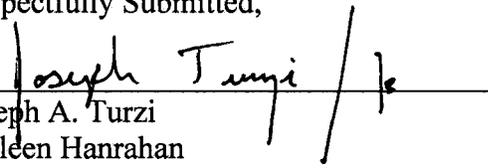
⁵ The Hospitals did not explicitly address the sound arguable basis for discontinuing the anniversary wage step increases in its initial brief, but the Hospitals did provide ample support that the increases had lawfully expired. The Board should not accept the GC's urging that it disregard the Hospitals' exceptions on this subject. Section 102.46 only states that exceptions "may be disregarded." The Board has exercised its discretion to consider exceptions that did not technically comply with Section 102.46 where there doing so was not prejudicial. *Cantor Bros., Inc.*, 203 N.L.R.B. No. 116, FN 1 (1973); *Baptist Hospital, Orange and Elisa Williamson*, 328 N.L.R.B. No. 82, FN 1 (1999). There is no prejudice here. The GC had sufficient notice from the argument in the Hospitals' Post-hearing brief that it was able to respond and indeed did respond. GC Answering Brief at page 5.

The GC argues that “Respondents introduced no evidence to rebut” the allegation that there were oral agreements in place to continue the anniversary wage provisions. GC Answering Brief at 7. This is simply untrue and yet another example of the GC’s selective recitation of facts. There was record testimony at the hearing that the Hospitals had only adopted these contracts from their predecessor and had uncertainty over the operation of the anniversary wage increases. Given the opportunity to further review the provisions, they realized that they were to expire with the agreement. (Tr. 573-574.) Therefore, there was no oral agreement that the anniversary wage increases would continue.

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,



Joseph A. Turzi
Colleen Hanrahan
DLA Piper LLP (US)
500 8th Street, NW
Washington, DC 20004

Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2015, a copy of the foregoing Reply to Counsel for the General Counsel's Answering Brief was filed electronically and served upon the following:

John Rubin
Board Agent
National Labor Relations Board
11500 West Olympic Boulevard, Suite 600
Los Angeles, CA 90064
john.rubin@nlrb.gov
Counsel for NLRB General Counsel

Jonathan Cohen
Rothner Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101-3115
jcohen@rsglabor.com
Counsel for SEIU, SEIU United Healthcare Workers – West, and SEIU 121RN

Monica Guizar
Weinberg, Roger & Rosenfeld
800 Wilshire Boulevard, Suite 1320
Los Angeles, CA 90017-2623
Mguizar@unioncounsel.net
Counsel for SEIU United Healthcare Workers West

David Adelstein
Bush Gottlieb
500 North Brand Blvd, 20th Floor
Glendale, CA 91203-9946
dadelstein@bushgottlieb.com
Counsel for SEIU-121RN



Jonathan Batten