STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. COUNTY OF VENTURA, Respondent.	Case No. LA-CE-337-M PERB Decision No. 2067-M September 29, 2009

Appearances: Lawrence Rosenzweig, Attorney, for Union of American Physicians & Dentists; Matthew A. Smith, Assistant County Counsel, for County of Ventura.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Union of American Physicians & Dentists (UAPD) and the County of Ventura (County) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ found that the County was a joint employer of the clinic physicians, and as such its failure to process UAPD's request for recognition under the County's local employer/employee relations rules was a violation of Meyers-Milias-Brown Act (MMBA)[1] sections 3507(c), 3509(b), 3502 and 3506,[2] and PERB Regulation 32603(a) and

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] The ALJ held no violation of MMBA section 3507.1(c), finding that it was premature to determine whether the County should have granted UAPD exclusive or majority jurisdiction, as UAPD never got that far in the process, and the issue is beyond the factual scope of the complaint.

(g).[3] Additionally, the ALJ found that the County did not violate its own local employer/employee relations rules when it refused to process UAPD's appeal to the Civil Service Commission, since the local rules specify it is the unit determination that may be appealed, and not the refusal to process a request for recognition.[4]

The Board has thoroughly reviewed the proposed decision and the record in light of the parties' exceptions, responses, and the relevant law. Based on this review, we find the ALJ's proposed decision to be a correct statement of the law and well reasoned, and therefore adopt it as the decision of the Board itself, as supplemented by the discussion below. [5]

BACKGROUND

The ALJ's proposed decision contains a thorough and accurate recitation of the facts underlying the unfair practice charge and complaint. We briefly summarize the facts.

The Ventura County Medical Center (VCMC) oversees the Ventura County Hospital (Hospital) and its Ambulatory Care Department (Ambulatory Care). Ambulatory Care provides for outpatient primary care services via eleven Ambulatory Care Clinics (Clinics) located throughout the County. Each Clinic is operated by a private corporation (usually solely owned by an individual physician who acts as the Clinic Medical Director), pursuant to a

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[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[4] No exception was filed regarding the ALJ's determination that the County did not violate its own local employer/employee relations rules when it refused to process UAPD's appeal to the Civil Service Commission, therefore this issue will not be addressed herein.

[5] The County's request for oral argument pursuant to PERB Regulation 32315 is denied. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.) These criteria are met in this case.

contract with VCMC. The Clinics in turn enter into employment agreements with physicians to provide medical services at the Clinics.

In October of 2006, UAPD filed a petition for recognition with the County, seeking to represent all full and part-time primary care physicians working at the Clinics. The County refused to process the petition, stating that the individual Clinics themselves, and not the County, are the employers of the physicians.

In November 2006, pursuant to the Ventura County Personnel Rules and Regulations, UAPD appealed the refusal and requested the County refer the matter to the County Civil Service Commission. The County refused this request as well, stating again that County is not the employer of the physicians, and therefore the matter is not under Civil Service Commission jurisdiction.

DISCUSSION

MMBA section 3501(d) defines a "Public employee" as follows:

> any person *employed by* any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

(Emphasis added.)

The County does not dispute that it is a public agency pursuant to the MMBA. Instead, the County points to provisions of the service contracts between the County and the Clinics, which declare that the physicians are employed by the individual Clinics themselves, and not by the County, thereby making the MMBA inapplicable to the County in this matter. The County further argues that new contracts have been executed with each of the Clinics which

clarify the intent that the physicians are not "employed by" the County.[6] However, as the Board discussed in *Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*), when determining whether or not certain individuals are "employees" of an agency, the Board is not bound by the agency's intent, nor by declarations made in contracts between the agency and a third party. Thus, the County cannot unilaterally circumvent the rights guaranteed to its employees by the MMBA through the provisions of a contract with the clinic medical directors. The question of whether or not the County is the employer of the clinic physicians is for the Board to determine, based on the record and the applicable law.

Joint Employer Analysis

We agree with the ALJ that the County is a joint employer of the clinic physicians. PERB has acknowledged that a "joint employer" situation arises "where two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (*Ventura*; *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1128 [citing to *N.L.R.B. v. Browning-Ferris Industries, Inc.* (3rd Cir. 1982) 691 F.2d 1117, 1124].) The joint employer analysis is focused on the relationship between the County and the physician employees. Specifically, the question is whether or not the County retains the right to "control both what shall be done and

[6] Copies of the new contracts were admitted only to show that subsequent to the filing of the petition, the agreements had changed. The County excepts to this ruling, arguing that the new contracts should have been admitted as evidence of the parties intent that the clinic physicians are not employees of the County. We agree with the ALJ's finding that the new contracts do not reflect the status of the employment relationship at the time the petition for recognition was filed and are therefore irrelevant for this purpose. Furthermore, as discussed herein, even if the contracts had been admitted to reflect the intent of the County, the Board is not bound by the intent of the County, and the County had ample opportunity to put on evidence regarding the relationship between the County and the clinic physicians at the time the petition for recognition was filed.

how it shall be done," such that it retains the "right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed." (*Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761.)[7] This is essentially a factual determination.

The County argues in its exceptions that by holding that the County raised its lack of employer status as an affirmative defense, the ALJ improperly created a presumption that the County is a joint employer of the clinic physicians, thus shifting the burden of proof to the County to prove that it was *not* a joint employer. The County argues that this improperly relieved the UAPD of the burden to prove, as an element of its case, that the clinic physicians were public employees subject to the protections of the MMBA. Accordingly, the County raised numerous factual exceptions, and argues that the UAPD failed to meet its burden of proof in this regard.

Based on a thorough review of the pleadings, we find that the County did not raise its lack of employer status as an affirmative defense, but rather asserted that the UAPD failed to establish a prima facie case by failing to establish that the County was the employer of the physicians. However, while the decision characterized the County's assertion as an affirmative defense in the procedural history, it was not treated as such in the analysis. The Board finds nothing in the record or the ALJ's analysis to suggest that the ALJ shifted the burden of proof as alleged. Therefore, the County's argument in this regard has no merit.

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[7] The joint employer question is determined irrespective to any determination of the nature of the connection between the two companies in question. This is distinct from the "single employer" analysis which looks to whether or not two purportedly independent companies are in actuality a single enterprise, such that they are equally subject to the relevant labor relations statutes.

Additionally, the County argues that the ALJ "failed to apply the correct legal standard" because under the joint employer analysis UAPD was required to prove "actual control" over the clinic physicians, and that the ALJ "confuses the contractual obligations that the clinic operators assumed as part of their agreement with the County, with exercise of control by the County over clinic physicians." These arguments also lack merit.

While the Board in *San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928 does discuss the notion of "actual control," the Board does not establish an "actual control" test of any kind. Rather, the term is used in discussion when distinguishing the significance of the conduct between the parties from mere recitals in operational documents. The question of whether or not a company exerts sufficient control over the terms and conditions of employment such that it is deemed a joint-employer is primarily factual, based on the entire record. Ultimately, the County fails to support its assertion of an "actual control" test, arguing instead that the ALJ failed to adequately consider evidence of the conduct between the parties, and that the ALJ's factual determinations that the County exercised control over the clinic physician's employment were not supported by the record.

Moreover, while one purpose of the services contracts between the County and the Clinics is to set forth obligations that the clinic operators assume as part of their agreement with the County, this does not preclude the determination that the County retains power over the physicians as employees. The Board in *Ventura, supra*, acknowledged the distinction between the reservation of the right to control the result sought, and the right to control the manner and means by which this result is accomplished (*Ventura* citing *News Syndicate Co., Inc.* (1967) 164 NLRB 422). The Board determined that when an agency retains the right to control the manner and method in which the work is performed, that agency retains its status as an employer. In the case at hand, the ALJ found that the County retained and exercised control

in areas such as hiring practices, review of individual employment agreements, salaries and specialty pay, time base reduction, discipline, restrictions regarding patient care, and operational policies such as fees and dress code. In doing so, the County retained control over the manner and method in which the work is performed by the clinic physicians, and is therefore a joint employer of the clinic physicians.

Therefore, based on a thorough review of the record, we find that the ALJ's findings are supported by the record, and that the County is a joint employer of the clinic physicians.

Identification of Specific Negotiable Terms and Conditions of Employment

The County argues that the ALJ erred in making a general finding of the County's status as a joint employer of the clinic physicians without identifying the specific terms and conditions of employment over which the County is required to bargain. This argument is similarly without merit. The County's status as an employer of the clinic physicians such that the County is subject to the MMBA and the obligation to process UAPD's request for recognition in accordance with the MMBA and the County's local employer/employee relations rules, is the proper issue in this matter. A determination of specific bargaining obligations at this point would be both premature and outside the factual scope of the complaint.

UAPD's Exception to the Proposed Remedy

UAPD filed a single exception to the ALJ's proposed remedy, arguing that the order to proceed through the recognition process in accordance with County employer/employee relations rules would result in further unfair delay and that the County should be ordered to move directly to a representational election.

We agree with the ALJ's reasoning that it is premature to direct the County to recognize UAPD or to conduct an election. Accordingly, the ALJ's remedy is appropriate.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the County of Ventura (County) violated the Meyers-Milias-Brown Act (MMBA) when it refused to process the Union of American Physicians & Dentists' (UAPD) petition for recognition. By this conduct, the County violated Government Code, MMBA sections 3507(c) and 3509(b), and PERB Regulation 32603(g) (Cal. Code Regs., tit. 8, § 31001 et seq.), and interfered with employee rights in violation of MMBA sections 3502 and 3506, and PERB Regulation 32603(a). All other allegations are DISMISSED.

Pursuant to MMBA section 3509(a) and (b), it is hereby ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to process UAPD's petition for recognition according to its local employer/employee relations rules.

2. Interfering with the clinic physicians' right to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer/employee relations.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Within thirty (30) workdays following the date this Decision is no longer subject to appeal, process the request for recognition by UAPD according to the County's employer/employee relations rules.

2. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the

County, indicating the County will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The County shall provide reports, in writing as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UAPD.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-337-M, *Union of American Physicians & Dentists v. County of Ventura*, in which all parties had the right to participate, it has been found that the County of Ventura (County) violated the Meyers-Milias-Brown Act (MMBA) when it refused to process the Union of American Physicians & Dentists' (UAPD) petition for recognition. By this conduct, the County violated Government Code, MMBA sections 3507(c) and 3509(b), and PERB Regulation 32603(g) (Cal. Code Regs., tit. 8, § 31001 et seq.), and interfered with employee rights in violation of MMBA sections 3502 and 3506, and PERB Regulation 32603(a).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to process UAPD's petition for recognition according to its local employer/employee relations rules.

2. Interfering with the clinic physicians' right to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer/employee relations.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Process the request for recognition by UAPD according to the County's employer/employee relations rules.

Dated: _____ COUNTY OF VENTURA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. COUNTY OF VENTURA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-337-M PROPOSED DECISION (1/10/2008)

Appearances: Lawrence Rozenzweig, Esq. for Union of American Physicians & Dentists; Noel A. Klebaum, County Counsel, by Matthew A. Smith, Assistant County Counsel for County of Ventura.

Before Shawn P. Cloughesy, Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges a public employer's refusal to process an employee organization's petition for recognition and subsequent appeal of the public employer's refusal to the Civil Service Commission under a local employer-employee relations rule. The employer denies committing any unfair practices; as an affirmative defense, it contends that it is not the public employer of the employees the employee organization seeks to represent.

On December 13, 2006, the Union of American Physicians & Dentists (UAPD) filed an unfair practice charge against the County of Ventura (County). On March 19, 2007, UAPD withdrew the allegations that the County violated MMBA section 3543.5(a) and (b). On March 19, 2007, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that the County violated the Meyers-Milias-Brown Act (MMBA or Act) by refusing to process UAPD's petition for recognition on the basis that it was not the public employer of the physicians providing patient care at the outpatient medical

clinics that UAPD sought to represent, and refusing to process UAPD's appeal of the County's decision to the County Civil Service Commission pursuant to a local employer-employee relations rule. It is alleged that, by these actions, the County violated MMBA sections 3502, 3506, 3507(c), 3507.1(c), and 3509(b), and PERB Regulation 32603(a), (b), and (g).[1]

On April 3, 2007, the County answered the complaint denying any violation of the MMBA, local employer-employee relations rules, or PERB Regulations, and affirmatively alleging that the charges and relief requested were not within the subject matter jurisdiction of PERB as it was not the public employer of the employees. An informal settlement conference was conducted on May 2, 2007, but the case was not resolved.

On June 12, 2007, the County filed a motion to dismiss the complaint on the basis that the County was not the clinic physicians' employer; the current contracts between the County and the private corporations operating the outpatient medical clinics were substantially revised to eliminate any perception that the County is the clinic physicians' employer; and PERB did not have jurisdiction over the dispute as the employer was a private corporation. UAPD filed its opposition to the motion to dismiss on June 15, 2007, and the County filed its reply on June 22, 2007. On June 27, 2007, Chief Administrative Law Judge (ALJ) Bernard McMonigle denied the motion to dismiss as the issues addressed were more properly reserved for formal hearing. On July 19, 2007, Chief ALJ McMonigle transferred the hearing to the undersigned for formal hearing and determination.

On October 16 and 17, 2007, formal hearing was held. At the end of the last day of hearing, post-hearing briefs were scheduled for submission on December 14, 2007. On November 20, 2007, the ALJ requested the parties to address a recent PERB joint employer

[1] Unless otherwise indicated, all statutory references are to the Government Code. MMBA is codified at Government Code section 3500 and following. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 and following.

decision (San Jose/Evergreen Community College District (2007) PERB Decision No. 1928, issued November 16, 2007). On December 11, 2007, the Charging Parties in that Decision filed a petition for writ of extraordinary relief with the Sixth Appellate District Court of Appeal pursuant to Government Code sections 3509.5(b) and 3542, and the appellate court now has "jurisdiction of the proceeding."

FINDINGS OF FACT

Jurisdiction

The County is a public agency within the meaning of MMBA section 3501(c). UAPD is an employee organization within the meaning of MMBA section 3501(a).

Background

The County Health Care Agency (HCA) oversees inpatient and outpatient medical services to the uninsured and underinsured (Medi-Cal covered) of the County. The HCA acts as an umbrella agency over a number of County health care departments including the Ventura County Medical Center (VCMC). The VCMC administration oversees the VCMC Hospital (Hospital) and the VCMC Ambulatory Care Department (Ambulatory Care).

The Hospital is licensed as a general acute care hospital by the California Department of Health Services and accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO). The licensing and the accrediting agencies each have their own regulations/standards with which the Hospital must comply to maintain its licensure and accreditation status. Pursuant to licensure requirements, the Hospital has a hospital privilege system where a medical practitioner must possess hospital privileges to treat patients at the hospital.

The Hospital's license also authorizes providing outpatient services in other facilities.[2] These outpatient services are administered by VCMC Ambulatory Care which oversees numerous satellite ambulatory care clinics (Clinics) located throughout the County to provide primary care to County residents. Those Clinics include the Conejo Valley Family Care Center; Las Islas Family Medical Group; Magnolia Family Health Center; Mandalay Bay Children's Medical Center; Moorpark Family Care Center; Pediatric Diagnostic Center; Piru Family Medical Clinic; Santa Paula Medical Clinic; Santa Paula Medical Clinic-West; Sierra Vista Family Medical Center; and West Ventura Medical Clinic. The Clinics are viewed as an integral part of the healthcare safety net provided to County residents.

Since the Clinics derive their licensure from the Hospital, all medical practitioners who provide outpatient health care services to patients must obtain privileges through the hospital privilege system set forth in the Medical Staff of VCMC Bylaws (Medical Staff Bylaws). The Medical Staff Bylaws explicitly define VCMC as including not only the inpatient hospital, but also the Clinics. The patients of the Clinics are defined to be the patients of VCMC and the license that it operates under. The "medical staff," under the bylaws, include all those physicians that hold privileges to attend patients at VCMC. While the governance of the Medical Staff is conducted by a mixture of elected medical staff and HCA/VCMC administration, the final authority regarding the decision to obtain or revoke privileges belongs to the "Governing Board," the County Board of Supervisors. The privilege revocation appeal process is elaborate and requires a hearing.

Each Clinic is operated by a private corporation (Clinic Corporation) which has a contractual agreement with VCMC to provide primary care to its patients in accordance with

[2] Extending the Hospital's licensure to outpatient facilities allowed the HCA to obtain federal and state program monies to fund these facilities.

the requirements of the Hospital's licensure and accreditation.[3] Each Clinic Corporation employs a Clinic Medical Director, who usually solely owns the corporation and contracts with physicians through employment agreements to be employed at the Clinics. Each Clinic Corporation must accept Medi-Cal, Medicare, private insurance, and direct pay patients.

The Clinic Medical Director is responsible for overseeing the delivery of health care to the patients serviced and operates the individual Clinics in compliance with the agreement with VCMC. Each month, the Clinic Medical Directors meet as a group with the VCMC Ambulatory Care administration where quality assurance, licensure, and accreditation regulations/standards for the Hospital and Clinics are discussed.

Since the end of March/beginning of April 2006, Paul Lorenz (Lorenz), the Deputy Director of the Ambulatory Care, provided overall administrative oversight to the Clinic system. Lorenz was assisted by Ambulatory Care Medical Director, Dr. Robert Gonzales (Dr. Gonzales),[4] and two operations managers, Jonette Duchai (Duchai) and Kim Graves (Graves). Dr. Gonzales acted as a resource and medical advisor to the Clinic Medical Directors. Graves monitored the financial standing and performance of Ambulatory Care and Duchai assured that the day-to-day operations of the Clinics remained intact.

Agreements between VCMC and Clinic Corporations

At the time of UAPD's request for recognition, the most current agreements between VCMC and the Clinic Corporations approved by the County Board of Supervisors were executed between January and July 2005 and were almost identical. According to the

[3] While the Clinic may be operated by the private corporation, the Hospital remains the "licensed operator" of the Clinic.

[4] Dr. Gonzales was not a County civil service employee, but an independent contractor. He did not report to Lorenz on matters of medical policy and the determination of whether the Clinics were operating within the appropriate standard of care of medicine to satisfy the JCAHO.

agreements, the Clinic Corporations were to identify themselves by the name of the VCMC clinic and that they were "a clinic of the Ventura County Medical Center." The Clinic was considered to be a "unit" of VCMC. In summary, the Clinic Corporations were to operate the Clinics by providing the professional medical services to patients in compliance with VCMC's governing body, VCMC hospital administrator, the Medical Staff Bylaws, and the regulations/standards applicable to VCMC's licensure and accreditation.

The Clinic Corporations were to prepare annual operating budgets jointly with and subject to the approval of VCMC, which included monthly projections of planned "allowable" operating expenses. The budget included such budgetary allocations as physicians compensation. The agreement specified that the physicians hired to provide medical services at the Clinic were subject to the approval of VCMC. The Clinic Corporations were not to pay its physicians more than Ventura County prevailing rates without VCMC approval. VCMC owned all revenues and accounts receivable generated by the Clinics and set the fee levels for services to be provided. VCMC provided monthly cash advances to the clinic so that the Clinic Corporation could pay for its "allowable" operating expenses. Those allowable expenses were set forth in the agreement and were to be paid out of the Clinic's operating funds. VCMC also directly paid for biohazardous trash removal, general liability insurance, professional liability insurance, telephone services, and computer access. Depending on the Clinic, the maximum annual operating advances were not to exceed either $500,000 or $1,000,000.

VCMC leased, repaired, and maintained the actual physical Clinic facilities and equipment. The Clinic Corporation was to use those premises/equipment only for the treatment of Clinic patients unless VCMC had approved otherwise. VCMC also agreed to provide support services or reimbursement for housekeeping, laundry, utilities, medical record

forms, facsimile services, computer systems, software, parking, laboratory services, radiology services, physical therapy services, occupational therapy services, pharmaceuticals, and medical supplies. VCMC also agreed to provide the Clinic physicians with educational opportunities meeting in-service education requirements.

The VCMC agreement also dictated that the Clinic Corporations were to have written employment agreements with its physicians specifying compensation and performance criteria. The physician employment agreements were to be submitted to VCMC for advance approval if a Clinic Corporation were to request that a physician's compensation be allowed as expenses. All revenue received by the Clinic Corporations in excess of allowable expenses were considered the property of VCMC.

The Clinic Corporations were to provide a minimum of two physicians at any time with at least ten half-day clinics per week with an average of ten patient visits per each half-day. The Clinics were also to provide physicians that would participate in a "shared call" pool so that all hospital admission and other in-patient questions as well as off-hour Clinic patient questions could be answered.

The Clinic Corporations were responsible for paying the Clinic physicians' payroll taxes and benefits. Various bookkeeping and statistical services were to be reported to VCMC such as providing monthly reports on payroll, number of clinical patient visits, gross revenues, physician time studies for Medicare, financial statements (balance sheet, income statement and statement of cash flows), and other accounting statements.

While the Clinic Corporation could independently discipline its physicians, VCMC had its own contractual disciplinary track regarding Clinic physicians. If VCMC believed the physician failed to follow VCMC policy and procedures, was disruptive and antagonistic, and/or performed other acts inconsistent with the proper functioning of the Clinic or VCMC,

VCMC merely had to send a "Cause Letter" to the Clinic Corporation specifying the "cause" for discipline. If VCMC was not satisfied with the remedial action taken by the Clinic Corporation, the Clinic Corporation had to remove the physician from employment. At all times, VCMC maintained the authority to take whatever action was reasonably necessary to operate the Clinic under VCMC licensure and governance.

Agreements between Clinic Corporations and Physicians

A number of physician employment agreements with the Clinic Corporations were submitted as exhibits; they were executed around April 2006 and had uniform terms with slight variations on compensation. The physicians were expected to comply with all of the VCMC regulatory requirements. The physician's work schedule could change at the request of the physician with approval of the Clinic Corporation. The Clinic Corporations could terminate its physicians without notice and for cause. The physician employment agreements also allowed the agreement to be modified by agreement of both physician and the Clinic Corporation.

The Clinic physician was to conduct at least nine half-days of scheduled patients visits a week. The base pay fluctuated from $7,414.67 to $8,333.34 for which the physician had to average 18 or 20 patient visits a day.[5] All physician employment agreements required Clinic physicians to be paid $260 per weekday and $500 per weekend for participating in shared call work. Each of the physicians had a provision for "incentive-based compensation" based on the amount of Work Relative Value Units (RVUs) completed by the physician that month. The RVU incentive compensation system assigned a numeric value to a specific medical service provided to the patient. The more RVUs the physician amassed, the higher the bonus received as broken down into quantity segments on a table grid in the agreement. The grid reflected the

[5] Some physician employment agreements required 18 patient visits a day and some required 20.

amount of RVUs worked and the monetary value bonus assigned to that production level changed from one employee to the other. After six months, the incentive-based compensation structure would be re-examined and individualized by the Clinic Corporations with input from the VCMC Ambulatory Care administration. The agreement usually contained a compensation enhancement for Spanish language proficiency. The vacation leave and sick leave provisions were uniform: three weeks for less senior physicians and up to five weeks for the most senior.

Various physicians proposed changes to their physician employment agreements. Some changes were not approved by Ambulatory Care even when the Medical Director had voiced support for the change. One physician who specialized in deliveries and caesarean sections was able to obtain extra pay in her initial employment agreement in July 2001 due to her experience when she approached Dr. Gonzales directly as to the validity of such an increase. Another physician after speaking with Dr. Gonzales directly was able to work out a student loan matching repayment program from December 2003 to December 2006. When one of the physicians wanted his time reduced to 3/4 time, it was finally approved as a job share position by Dr. Gonzales and not the physician's Medical Director.

VCMC Policies and Practices Between Ambulatory Care and the Clinics

VCMC issued various employment policies to the Clinics which regulated dress, hair, tattoos, jewelry, uniform style, and personal grooming. Other personnel policies issued by VCMC to Clinics regulated the medical treatment of fellow employees. One of the Medical Directors testified that he chose to adopt these policies.

The practice of operating the Clinics and the relationships with VCMC and Clinic physicians were not that different than set forth in the agreements with only a few exceptions. Regarding the hiring of physicians, the VCMC website posted "physician opportunities" for physician openings at the Clinics. One Medical Director hired his physicians by indicating his

need to Dr. Gonzales who then shared with him the names of physicians which Dr. Gonzales felt best met the Clinic's need. The Medical Director would interview the candidate and decide whether to hire the candidate or not. Other physicians who were hired between the years of 2000 and 2004, testified that in general they were offered their positions directly by Dr. Gonzales and were then interviewed by the corresponding Medical Director. Some physicians were recruited by Dr. Gonzales while they were still serving as a resident with the Hospital. Occasionally, the Medical Directors also had some physician applicants apply to them directly.

Medical Directors have taken disciplinary/corrective action against the Clinic physicians. On the other hand, VCMC Ambulatory Care administration has met with Clinic physicians outside the presence of their Medical Directors to discuss productivity.

Occasionally, Medical Directors have offered variations of the physician employment agreements to a physician such as offering family coverage where normally its coverage had to be supplemented by the physician.

Every year all of the Clinics operated at a loss. The Clinics were allowed to submit a justification for an advance if a Clinics' revenues did not cover their expenses. Some clinics just absorbed the losses themselves.

Request for Recognition and Appeal to Civil Service Commission

The County has its own "Employer/Employee Relations" rules (sections 2001 et seq.) found in the County Personnel Rules and Regulations. Those rules include unit determinations (section 2008) and the acknowledgement of employee organizations (section 2009). Section 2009 provides in part:

Formal Acknowledgement of Recognized Employee Organizations:

Any employee organization seeking to obtain or retain formal acknowledgement by the County as a recognized employee organization or seeking to register as an employee organization, or filing its petition for certification, shall furnish the Director-Human Resources with:

A. Its name and mailing address.

. . . . . .

G. A petition for certification must be accompanied by proof of employee approval equal to at least 30 percent of the employees within the proposed unit. Proof may be shown by payroll dues deductions, membership cards, signed authorization cards or petitions or statements of intent signed by the employees.

H. Description of unit or units requested. The Director-Human Resources shall file such description with the Board.

I. Upon receipt of the aforesaid documents from an employee organization, the Director-Human Resources shall within 30 days establish a unit or units based upon the criteria as set forth in Section 2008 of this Article[6] and shall issue a certificate to the employee organization a copy of which shall be filed with the Board, setting forth such unit or units, provided that verification of the proof submitted established that a majority of the employees involved have designated such employee organization to represent them.

J. If the applying employee organization or any other employee organization desires to prote[s]t the determination of the Director-Human Resources, it shall within 10 days file its protest with the Director-Human

[6] Employer/Employee Relations section 2008 "Units" sets forth the determination of employee units in terms of setting forth rights of professional employees to belong to their own unit as well as setting forth the various factors to be considered in determining a unit such as community of interest, largest feasible units, history of employee relations in the unit within County and similar public employment, the efficient operation of the County, and the effect of the classification structure.

> Resources, requesting a review by the Commission.[7] The Director-Human Resources may request review upon his own motion.
>
> K. The Commission may sustain, modify or reverse the unit determination of the Director-Human Resources. It may then conduct an election in accordance with the rules and procedures of the State Conciliation Service and certify the results therein, or the matter may be returned to the Director-Human Resources for appropriate action. (Emphasis added.)

On October 6, 2006, Regional Administrator of UAPD, Joe Bader (Bader), and Lead Organizer of UAPD, Jorge Rodriguez (Rodriguez), wrote the County's Chief Deputy Executive Officer John Nicoll (Nicoll) demanding:

> In accordance with the provisions of Section 2009 of the Ventura County Personnel Rules and Regulations and applicable state law, the Union of American Physicians and Dentists (UAPD) hereby demands recognition as the exclusive representative for all regularly employed full and part-time primary care physician providers working at the various clinics contracted with the Ventura County Healthcare Agency excluding supervisors, and irregularly employed and/or on-call employees. We are filing this demand letter within the window period for filing certification petitions as defined in Section 2010 of the Ventura County Rules and Regulations. These physicians are currently unrepresented and not covered directly or indirectly by the MOU between the Service Employees International Union and the County of Ventura or any other MOU. We believe that the control exercised by the County over the salaries, benefits, and working conditions of the primary care physicians working with the contractors who run the outpatient clinics with the Ventura County, the legal employer of these physicians . . . .
>
> . . . We are willing to submit proof of our support as the majority representative for the above-described bargaining unit to a neutral party for verification, such as the State Mediation and Conciliation Service . . . .

[7] Employer/Employee Relations section 2003(D) defines "Commission" as "Civil Service Commission-Board of Review of the County of Ventura."

On October 31, 2006, Nicoll responded to UAPD by denying its request for recognition as the Clinic physicians which UAPD sought to represent were not employees of the County. Nicoll further explained:

> As we previously explained to you, the County does not employ any employees in the facilities listed in your letter. The County's Health Care Agency contracts with a number of contractors to operate clinics within the geographic area of the County, including some or all of those listed in your letter. The physicians working in those clinics are the employees or subcontractors of the clinic operator, not the County. Because the persons you seek to represent are employees of subcontractors of the clinic at which they work, your request for recognition should be directed to the operators of those clinics. Accordingly, the County denies your request for recognition.

On November 8, 2006, Bader replied to Nicoll and stated that UAPD believed that:

> [T]he control exercised by the County over the salaries, benefits and working conditions of the Physicians working at these clinics, makes it, and not the clinic operators, the legal employer.
>
> In accordance with Section 2009 of the Personnel Rules and Regulations of Ventura County, the UAPD appeals your decision denying recognition to the UAPD as the exclusive representative of all regularly employed full and part-time primary care physician providers working at the various clinics contracted with the Ventura County Healthcare Agency, . . .

On December 8, 2006, Nicoll responded to Bader's appeal by writing:

> We have reviewed your letter of November 8, 2006. It is the County's position that the unit for whom you are seeking recognition consists of individuals and jobs that are not County [e]mployees or positions.[8] As such[,] they are not covered by the

[8] Employer/Employee Relations section 2003(U) defines "Public Employee and Employee" as:

> Public Employee and Employee – means any person employed by the County excepting those persons elected by popular vote or appointed to office by the Governor of this State.

> Personnel Policies and Regulations, nor are they under the jurisdiction of the Civil Service Commission.
>
> We therefore respectfully reject the request to have the matter referred to the Commission.

After receiving the rejection letter from Nicoll, UAPD filed the instant unfair practice charge on December 13, 2006.

New Operation Agreements between VCMC and Clinic Corporations

In May 2007, VCMC and its Clinic Corporations entered into new agreements for the operations of the Clinics. The purpose of the changes in the new agreement was to remove the sections of the prior agreements upon which the unfair practice charge was filed. The ALJ ruled that the new agreements would only be admitted to show that subsequent to the petition for recognition, the agreements had changed. The specific changes to the agreement and whether they changed the labor relations landscape of whether VCMC was the employer of the physicians employed at the Clinics was irrelevant as the new agreements did not reflect the status of the employment relationship at the time the petition for recognition was filed with the County.

ISSUES

1. Is the County a joint employer, along with the Clinic Corporations, of the Clinic physicians?

2. Did the County violate its local employer-employee relations rules by refusing to process UAPD's appeal of its determination to deny recognition to the Civil Service Commission?

County Personnel Rules and Regulations section 243 defines "Position" as:

> Position: An aggregation of tasks and responsibilities requiring the services of one individual.

CONCLUSIONS OF LAW

The existence of an employer-employee relationship set forth in the MMBA is defined by the Act itself and by the case law interpreting the Act. A "public agency" and "public employee" are defined by the MMBA section 3501(c) and (d) as:

> (c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.
>
> (d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state. (Emphasis added.)

UAPD contends that the County is a "joint employer" of the Clinic physicians. PERB has adopted the following test to determine joint employer status:

> "[W]here two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment -- they constitute 'joint employers.'" (United Public Employees v. Public Employment Relations Board (1989) 213 Cal.App.3d 1119, 1128, citing to NLRB v. Browning-Ferris Industries, Etc. (3rd Cir. 1982) 691 F.2d 1117, 1124 (Browning-Ferris).)

Additionally, Browning-Ferris held that: "[A] finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be' - - independent legal entities that have merely 'historically chosen to handle jointly . . . important aspects of their

employer-employee relationship." (Browning-Ferris, p. 1122.) The entire record must be examined in light of the statutory language and the Board is not bound by contract language in determining the level of control over the employee. (Ventura County Community College District (2003) PERB Decision No. 1547, p. 21). Service Employees International Union v. County of Los Angeles (1990) 225 Cal.App.3d 761, 769 further defined the employment relationship as:

> An employee is an individual who performs services subject to the right of the employer to control both what shall be done and how it shall be done and an employer is a person for whom an individual performs services as an employee. [Citations.] The essential characteristic of employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed. [Citations]. (Emphasis added.)

For the most part, the non-disciplinary day-to-day activities of patient care were under the control of the Medical Directors. They were responsible for ensuring that the physicians complied with the regulations/standards of the Medical Staff Bylaws and the licensing and accrediting agencies. Both the Medical Directors and Ambulatory Care exercised authority to discipline/terminate Clinic physicians and in that way Ambulatory Care exercised significant control over patient care. By screening Clinic physicians during the hiring process, Ambulatory Care was also able to exercise significant control over the delivery of patient care aspect of the Clinics. Lastly, Ambulatory Care exercised significant control over the Clinic physicians in the delivery of patient care by setting forth a performance requirement of a minimum number of patient visits to be completed in a half-day shift.

Other than the day-to-day medical care oversight and the terms and conditions of employment of the Clinic physicians related to that oversight, VCMC/Ambulatory Care exercised significant control over the other terms and conditions of the Clinic physicians'

employment. Ambulatory Care's control over a number of non-patient care areas such as the Clinic's budget (prepared jointly and subject to approval of Ambulatory Care), the individual Clinic physician's employment agreement (subject to approval of Ambulatory Care), the revenues, the fees to be charged Clinic patients, and the restriction on the use of the facilities and equipment made it more than a significant player in the control of the Clinic physicians' terms and conditions of employment regarding non-patient care. Each of these areas restricted the autonomy of the Clinic Corporations to act independently and have its own control over non-patient care terms and conditions of employment of the Clinic physicians and the "bottom line" of the Clinic Corporation. The control of these areas also impacted any monetary compensation that a Medical Director could offer a Clinic Physician.

Even with Ambulatory Care's general fiscal control over the Clinic Corporations, Ambulatory Care also had specific control over the salaries of the Clinic physicians. Not only was a Medical Director restricted from paying a Clinic physician above the prevailing wage without Ambulatory Care approval, but the individual physician employment agreements for the Clinic physician must be approved by Ambulatory Care. It is no surprise that some of the physicians started dealing directly with Dr. Gonzales over issues such as specialty pay (deliveries and caesarean sections), student loan payback, and time base reduction.

Lastly, Ambulatory Care exercised significant control over the Clinic physicians in those ancillary terms of employment such as educational opportunities as well as prescribing a guideline for dress and grooming.

Based on Ambulatory Care's significant control over the subject matters described above, it is concluded that it is a joint employer of the Clinic physicians. As Ambulatory Care was a joint employer of the Clinic physicians, it had a duty to process the petition for recognition under its local employer-employee relations rules and therefore unreasonably

withheld recognizing UAPD for purposes of processing a petition for recognition in violation of MMBA section 3507(c), constituting an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(g). The County's conduct also constitutes a derivative violation of interfering with the public employees' rights to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations which violated MMBA section 3502 and 3506 and constituted an unfair practice under MMBA section 3509(b) and PERB Regulation 32603(a). It is not found that the County violated MMBA section 3507.1(c). It was premature to determine whether the County should have granted UAPD exclusive or majority jurisdiction as UAPD never got that far in the process, and the issue is beyond the factual scope of the complaint.

Refusal to Process UAPD's Appeal to County Civil Service Commission

It is uncontested that Nicoll refused to process UAPD's November 8, 2006 appeal of the County's denial of recognition to UAPD as exclusive representative of the Clinic physicians to the County Civil Service Commission. The County refused this request as it contended the employees/positions in question were not County employees and therefore did not fall under the jurisdiction of the County Civil Service Commission.

A plain reading of the language of Employer/Employee Relations Section 2009(H) through (K) indicates that the only issue that can be appealed to the County Civil Service Commission is the unit determination itself, and not whether the County denied recognition of UAPD as the exclusive representative of the Clinic physicians. As the unit determination had not yet been made, the County did not violate its own local employer-employee relations rules when it refused to process UAPD's appeal to the County Civil Service Commission.

REMEDY

Government Code section 3541.5(c), incorporated within MMBA sections 3509(a) and (b),[9] authorizes PERB:

> to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

As a remedy for non-recognition, UAPD requests that PERB order the creation of a bargaining unit and either order recognition for that bargaining unit or order that a representational election be conducted for that bargaining unit. The County argues that its new agreements executed in May 2007 change the employment relationships with the Clinic physicians and therefore affect the remedy which UAPD requests.

The denial of the petition for recognition came approximately five months before the changes in the contract. During that window period, the recognition process could have been completed. Because the violation of non-recognition occurred first, it is only logical that the remedy to that violation should be completed before a new employment relationship is considered. On the other hand, the remedy should not go further than making the UAPD whole.

It is therefore appropriate to order the County to take the following affirmative action. Within 30 workdays following the service of a final decision in this case, the County is

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[9] Section 3509(a) provides that the powers and duties of PERB described in Government Code section 3541.3 shall also apply to the MMBA, and shall include the authority of subdivisions (b) and (c). Section 3509(b) describes the unfair practice jurisdiction of PERB. Government Code section 3541.3(i) empowers PERB to investigate unfair practice charges, and to take any action and make determinations as PERB deems necessary to effectuate the policies of this chapter.

directed to process UAPD's request for recognition in accordance with its local Employer/Employee Relations rules (section 2008 and 2009) and the MMBA.

It is not appropriate to direct the County to recognize UAPD and conduct an election as these remedies are premature. The establishment of a bargaining unit was not litigated or set forth in the complaint, and an appropriate unit has not been decided by the County's own local rules. Under the legislative scheme set forth in the MMBA and PERB Regulations, recognition, elections and unit determinations are to be resolved according to reasonable rules adopted by the public agency (MMBA sections 3507(a)(3) and (4), and 3507.1(a)). Challenges to local rules may be pursued later as an unfair practice charge (MMBA section 3509(b) and PERB Regulations 32602 and 32603(g)) in that the County allegedly violated its own rule or the rule itself was violative of the MMBA.

It is also appropriate that the County be ordered to post a notice incorporating the terms of the order at all locations in the County where notices to public employees are customarily posted for employees represented by employee organizations as well as the Clinics. Posting such a notice, signed by the authorized agent of the County, will provide employees with notice that the County has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purposes of the MMBA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union High School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the County violated the MMBA when it refused to process UAPD's petition for recognition. By this conduct, the County violated MMBA sections 3507(c),

3509(b), and PERB Regulation 32603(g), and interfered with employee rights in violation of MMBA sections 3502, 3506 and PERB Regulation 32603(a). All other allegations are dismissed.

Pursuant to section 3509(a) and (b) of the Government Code, it is hereby ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to process UAPD's petition for recognition according to its local employer-employee relations rules.

2. Interfering with the Clinic physicians' right to participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within thirty (30) workdays from service of the final decision, process the request for recognition by UAPD according to the County's Employer/Employee Relations Rules.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UAPD.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Shawn Cloughesy
Administrative Law Judge