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LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

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EMPLOYEE RELATIONS
COMMISSION
COUNTY OF LOS ANGELES

In the Matter of)

GUILD FOR PROFESSIONAL PHARMACISTS,)

Charging Party,)

vs.)

COUNTY OF LOS ANGELES, DEPARTMENT
OF HEALTH SERVICES,)

Respondent)

UFC No. 029-12

APPEARANCES

For the Charging Party: Michael Posner
Posner and Rosen, LLP
3600 Wilshire Blvd., Ste. 1800
Los Angeles, CA 90010

For the County: Maurice Cooper
Chief Executive Office,
Benefits, Compensation Policy and Employee Relations
774-A Hall of Administration
Los Angeles, CA 90012

INTRODUCTION

This proceeding is based on a charge filed with the Los Angeles County Employee Relations Commission ("ERCOM") on October 26, 2012, by the Guild for Professional Pharmacists (the "Guild") against the Los Angeles County Department of Health Services (the "County" or "DHS"). The Guild claims that the County violated Section

12(a)(I)(3)¹ of the Employee Relations Ordinance (“ERO”) by refusing to negotiate in good faith with the Guild with regard to its demand that pharmacists study and pass the Department’s Pharmacy Competency Examination as a condition of employment. (Jt. Exh. 1.)

Hearings on the matter were conducted on June 27, 2014, and August 25, 2014. The matter was taken under submission on October 22, 2014, after receipt of the parties’ briefs and the transcripts from the hearing.

PROCEDURAL HISTORY OF UFC NO. 029-12

The original charge in this case was filed by the Guild on October 26, 2012. It stated:

Within the past 90 days the employer refuses to negotiate in good faith with the undersigned Guild for Professional Pharmacists, that represents pharmacists. The Department demands that as a condition of employment, pharmacists study and pass the Department’s Pharmacy Competency Examination. Pharmacists are already licensed by the State and have completed their CLE requirements mandated by the State. The additional materials provided by the Department to pharmacists to study and master, [sic] is voluminous for which that are not compensated and have to study at home.

The County denied the charge. (Jt. Exh. 2.)

STATEMENT OF THE FACTS

Background Regarding the Competency Examination

¹ Presumably, the Guild meant to allege a violation of County Code § 5.04.240, subdivision A(3).

Claudia Myles is the Executive Director of the Guild for Professional Pharmacists. (T. 23.²) Sometime around 2005, representatives of the Guild met with Amy Gutierrez, the DHS Chief Pharmacy Officer and Director of Pharmacy Services, about developing a pharmacist assessment evaluation. This was done in response to allegations of employee incompetence at Martin Luther King Hospital and related to pharmacists working at that hospital. (T. 67-68, 130.) Patients had died at the hospital and malpractice suits had been filed against the County. (T. 161.) These allegations were publicized in the Los Angeles Times and were the subject of a regulatory review by the Joint Commission on Accreditation of Healthcare Organizations. (T. 161.)

At a meeting on September 9, 2008, the Los Angeles County Board of Supervisors took action to implement an Auditor-Controller's report on the lack of competence of the staff at Martin Luther King Hospital and to "evaluate competencies of the staff [at MLK] using an approach that is consistent with the best practices for such testing." (T. 257-58; County Exh. 7.)

Then, sometime in 2009, representatives of the Guild met with representatives of the DHS to discuss competency testing of pharmacists which was being mandated by the Board of Supervisors in response to the closing of Martin Luther King Hospital and the problems that had arisen there. (T. 68, 125, 127, 133.) At that meeting, the Department

² Page references are to the transcripts of the hearing produced by Joyce Silverman.

provided the Guild with a handout containing an overview of the exam that the pharmacists would be required to take. (County Exh. 5.)

The Guild did not demand to bargain when it learned that the Board was going to mandate the assessment of pharmacists. (T. 31, 70.) According to Myles, “the Guild approved the idea of a competency assessment.” (T. 69.) According to Gutierrez, Guild President Vogel indicated that the members were glad the Board had taken this action. (T. 135, 137.)

The parties did not introduce into evidence the original version of the Board’s policy. Instead, the record includes DHS issued Policy No. 780.200, effective June 1, 2011, which implemented the Board’s mandate and which the parties have treated as the governing document.

Relevant portions of that document include:

POLICY:

All DHS workforce members . . . must participate in the Department’s ongoing competency assessment and skills validation process.

. . . .

GUIDELINES

1. All workforce members . . . must complete and pass initial and annual core competencies, skills validation, and specialty competencies, as applicable.

2. Competency assessments are ongoing and mandatory.

. . . .

7. Employees will be given two (2) opportunities each (core and/or specialty) to pass competency assessment. Failure to pass assessment will result in the following actions:

a. Initial – remediation shall be offered ot employees.

b. 2nd attempt – referral to the DHS HR Performance Management which may result in suspension, reduction of position to a previously

held item, or discharge in accordance with Civil Service Rules.

....
12. County workforce members who fail the competency assessment will receive a letter of failure . . . with consequences of an additional testing failure. A second failure will be referred to DHS HR Performance Management for corrective action, up to and including discharge.

(Jt. Exh. 3.)

The Guild did not make a demand to bargain in 2010. (T. 71.) However, in September of 2010, the Guild sent a letter to the Board of Supervisors which suggested an alternative to the competency exam which could be incorporated into the parties' Memorandum of Understanding ("MOU"). (County Exh. 1.) The letter expressed the Guild's concern that the exam which had been implemented was causing stress on the members and was not cost efficient. As an alternative, the Guild suggested monthly updates on pharmacy related topics.

Tim Pescatello, an Employee Relations representative from DHS, testified that he attended a meeting with Guild representatives at the end of the summer in 2010, regarding problems with the competency exam. (T. 262.) According to Pescatello, the Guild representatives expressed concerns with regard to the large amount of material to be mastered, the formatting of the exam, the difficult nature of the material being tested, the content of the material, and the amount of time it took to study for the exam. (T. 260.³)

³ However, minutes later, Pescatello contradicted that testimony when he stated that no one from the Guild expressed concerns regarding adequate studying time. (T.

According to a February 2012 follow up letter from Vogel, the Board referred the matter to the DHS and the DHS ignored the complaints and made a threatening phone call indicating that the Guild's communication with the Board was inappropriate. (County Exh. 1.) However, the record contains an October 26, 2010 letter signed by DHS HR Administrator Ann Marinovich (but written by Gutierrez) which addressed each of the concerns raised by the Guild's letter to the Board. (T. 141; County Exh. 2.) The Guild never provided a written response to that letter. (T. 77, 142.)

The Guild did not make a demand in 2011 that the County bargain over this policy. (T. 71, 80.) However, Myles testified that Guild members continued to be unhappy with the policy requiring them to pass the competency exam. They complained about anxiety, angst, fear, and raised questions as to why, as state licenced professionals who have a state mandated continuing education requirement, they needed to take such an exam. (T. 30.⁴) According to Myles, no similar competency exam is required of County employed physicians or dentists. (T. 27.)

The County allowed Guild members two hours of paid "outside activity time" per year. Members were allowed to use this two-hour period in order to study for the competency exam. According to Myles, some members requested compensation for the additional studying time actually required in order to prepare for the exam. That request

263.)

⁴ Pharmacists must complete 30 hours of continuing education every two years. (T. 203.)

was denied. (T. 91-93.) The Guild never made a claim for overtime on behalf of its members. (T. 94.)

For the first administration of the exam, study materials were not distributed to members until a few days prior to the exam. (T. 31-32.) A similar problem existed the second year the exam was given. There were also delays in the creation of the exam. (T. 32.) Eventually, through the efforts of a Joint Labor/Management Committee, there was an agreement to distribute the study materials by the end of July for an exam that would be administered in October. That would give Guild members approximately 60 days in which to prepare for the exam. (T. 32.)

The study materials for the 2012 exam were introduced into evidence and consist of almost 300 pages of technical material. (Jt. Exh. 6.) Myles testified that she could not have prepared for an examination based on those materials in the two hours of outside activity time allotted by the Department. (T. 33.) Guild members told her that they spent 25-50 hours a week studying the materials, giving up weekends, vacation time, and family time. (T. 33-34.)

Guild members also complained about the coverage of the exam. For example, pharmacists whose duties were devoted almost exclusively to the treatment of cancer patients were being required to be familiar with anti-cholesterol agents which they never prescribed in their practice. (T. 35.) Other pharmacists questioned the need to be tested on drugs only prescribed on an outpatient basis when their practice was limited to the care

of hospital patients. (T. 35.) Another pharmacist complained that some study materials were devoted to diagnosing patients with hypoglycemic and hyperglycemic crises. According to that pharmacist, those materials would only be needed by endocrinologists who treated those patients, not by pharmacists filling such prescriptions. (T. 36.)

In January of 2012, Guild President Vogel sent a letter to all members which informed the members that the Guild was going to oppose the continuation of the competency exam and was going to again communicate its opposition of the exam to the Board of Supervisors. (County Exh. 1.) According to Myles, the letter was designed to reflect Guild members' continuing frustration with the exam and the Board's failure to respond to the concerns of Guild members. (T. 114.)

Bargaining History Regarding the Competency Examination

As indicated, the Guild did not demand that the County bargain over the competency exam in either 2009, 2010, or 2011. In 2011, the Guild agreed to extend their MOU for one year. (T. 119-20.)

Claudia Myles, Guild President Robin Borden, and the Executive Director Ralph Vogel represented the Guild during bargaining in 2012. (T. 25, 39.) Vogel was the chief negotiator; Myles took notes. (T. 25-26.) Five other Guild members were also on the negotiating committee. (Guild Exh. 1.) Don Washington and Maurice Cooper represented the County. (T. 39.)

Myles testified that the parties met on September 9, 2012 just prior to the

expiration of the existing MOU. (T. 38; Guild Exh. 1.) The County had wanted to extend the MOU for one year. Guild members were frustrated with the prior wage freeze, the fact they were being paid well below market value for their services, and the annual need to demonstrate competence with the Department's competency exam. (T. 38-39.)

Prior to that meeting, the Guild had submitted a proposal that salaries be raised to the level paid by Kaiser Southern California to its pharmacists. The other proposal was the elimination of the competency exam. (T. 40; Guild Exh. 1.)

Myles testified that when the Guild discussed the competency exam, Washington suggested that Guild representatives meet with Dr. Katz of the DHS and Gutierrez. (T. 41.) However, when he was asked if the exam could be eliminated, Washington said "no." (T. 41-42; Guild Exh. 1.)

Guild representatives voiced their frustration regarding the exam. Guild member Dave Mayeda asked how it was that physicians, optometrists, and dentists were able to avoid having to take a competency exam. (T. 42.) Vogel stated that the exam was "Mickey Mouse" and jeopardized jobs. (T. 43.)

The parties met again on September 26, 2012. During that session, the Guild presented a proposal which called for a wage adjustment and the elimination of the competency exam. (T. 44-45; Jt. Exh. 7; Guild Exh. 2.) The County responded by rejecting the proposal and indicating there would be no wage increases. (T. 46.)

According to Myles, during that session, Cooper indicated that the County

believed the competency exam was not a mandatory subject of bargaining. (T. 46; Guild Exh. 2.) In fact, at the beginning of the instant hearing, the parties stipulated that during the course of negotiations for the 2012 MOU, the County took the position that the subject matter of the competency examination was only a permissive subject of bargaining. (T. 21.)

Cooper also believed that the County had the right to assess the competency of its employees. (T. 48-49.) Pescatello testified that the County reiterated at each session that "the issue of competency testing was a foregone conclusion." (T. 268.)

The County representatives also indicated that the competency exam was mandated by the Board of Supervisors and the requirement could not be eliminated without the approval of the Board of Supervisors. (T. 46-47.) Gutierrez, who was at the session, indicated that the DHS was open to suggested improvements in the exam. (T. 47, 185.) She also indicated that she was unaware that the pharmacists had any complaints regarding the exam. (T. 47.) Cooper also indicated that there was currently no "mechanism" for having that kind of discussion. (T. 47.)

The Guild also asked why pharmacists working for the Sheriff's Department were exempt from taking a competency exam. Gutierrez responded that she was not responsible for the Sheriff's Department. (T. 48.)

The parties also discussed what action the Department would take if a pharmacist failed the examination. Gutierrez indicated that if a pharmacist failed one section, he or

she could retake that portion in a week. In the interim, that person's ability to continue to work would be at the discretion of the Department. (T. 49.) She also indicated her belief that taking a competency exam was not a "condition of employment" since new employees were not required to take the exam prior to being employed. (T. 50.)

The County also suggested that the Guild agree to a one year extension and come back to the bargaining table in a year. Vogel indicated that would not be acceptable to the membership of the Guild. (T. 51.)

The comparison with physicians was also raised during this session. Gutierrez indicated that physicians have an internal peer review process that assessed competence. Pharmacists do not have a similar process. (T. 52, 199-200.⁵) In addition, Cooper once again indicated that the County did not believe that the issue of competency was relevant to the negotiations. (T. 54.)

Gutierrez testified that as a result of the concerns expressed by the Guild at that session, the County proposed the creation of a Joint Labor/Management Committee to discuss ways in which the competency assessment process might be improved. (T. 187; County Exh. 6.) The specific proposal was for a committee that would meet "up to four times annually." (T. 230; Jt. Exh. 10.) The proposal also provided that the ultimate decision on any matter would be management's and that nothing resulting from the

⁵ However, Gutierrez testified that she does not know the details of the physicians' review process. (T. 201-02.)

committee would be subject to grievance and arbitration. (T. 232-33.)

The parties met again on October 3, 2012. (T. 55; Guild Exh. 3.) At that session, Vogel asked why the County had not provided information he had requested regarding the exam failure rate. (T. 56.) The parties also again discussed what would happen if a pharmacist failed the exam. (T. 57.) Cooper once again indicated that the County was not going to bargain over the competency exam. Instead, Cooper indicated that proposed modifications could be submitted to the Department through the previously discussed Joint Labor/Management Committee. He reiterated the County's position that the subject of a competency exam was a permissive subject of bargaining. (T. 58-59.)

The parties met again on November 29, 2012. (T. 59; U-4.) During that session, the County presented the Guild with a written settlement offer which included the creation of the Joint Labor/Management Committee. (T. 195; Jt. Exh. 10.) The Union did not present a counter offer. (T. 195.)

During that bargaining session, the parties again discussed the competency exam with the Guild suggesting a name change. This was rejected by the County. (Guild Exh. 4.) During that session, the County presented its last best final offer which was rejected by the Guild. (Guild Exh. 4.) Thereafter, an impasse was declared. (T. 60-61.)

Additional Evidence

The class specifications for three pharmacist titles were introduced into evidence. (Jt. Exh. 5.) None indicated the need to pass a DHS assessment.

No pharmacists failed the 2009, 2010, or 2011 exams. Nor were any pharmacists disciplined with regard to their performance on these exams. (T. 78, 145-46.)

The Department and Guild representatives did create a Joint Labor/Management Committee which did engage in discussions during 2013. Part of those discussions addressed concerns raised by the Guild regarding the competency exam. (T. 273-74.)

Myles acknowledged that some improvements in the examination process did result from meetings of the Joint Labor/Management Committee. (T. 100, 102; County Exh. 3 and County Exh. 4.) However, Myles testified that this was not a substitute for bargaining. The Joint Labor/Management Committee meetings were “very one-sided.” (T. 279.) For example, with regard to the timely receipt of the study materials, the Guild had to rely on the good faith of the Department. If the parties had bargained, the Guild might have been able to negotiate a firm date. (T. 281-82.)

THE PARTIES’ POSITIONS

The positions advocated in the briefs will be presented here in a summary fashion and will not recite all of the specific factual information or legal authority referenced in support of each side’s position. Notwithstanding any brevity, all arguments and authority presented in the parties’ respective briefs have been read and given careful consideration.

The Guild’s Position

The Guild argues that the subject of the competency exam is a mandatory subject of bargaining and not merely a permissive subject. The difference is critical because the

Guild possessed the legal right to engage in a work stoppage over a mandatory subject of bargaining. The fact the County may have engaged in some discussions regarding the exam during bargaining sessions is irrelevant.

The Guild argues that eventual creation of a Joint Labor/Management Committee which allowed the Guild a forum to discuss the competency exam and make changes is also irrelevant. The Guild had no power during these discussions and no enforcement mechanism for either obtaining concessions or holding the County to concessions it had made. According to the Guild, under the County's position, there was no collective bargaining, only "collective begging."

The Guild argues that as a matter of law, the competency exam was mandatory subject of bargaining because it related to the terms and conditions of employment. Case law establishes that when an employer establishes work rules which can have an impact on an employee's continued employment, those rules are mandatory subjects of bargaining irrespective of the employer's reasons for adopting the rules.

The Guild argues that it did not waive its right to bargain over the competency exam when it failed to demand to bargain when the exam was first imposed on DHS pharmacists. A waiver must be clear and unmistakable either by express or implied conduct. Nothing in the history of the exam indicates that the Guild expressly agreed to the County imposing the requirement. To the contrary, the Guild raised objections to the exam and its administration starting soon after its mandate by the Board. According to

the Guild, even acquiescence during prior bargaining will not waive the right to bargain over changes.

The Guild argues that the Department's failure to discipline any employee for not passing the exam does not take the exam out of the realm of a mandatory subject of bargaining. The critical question is whether a member could have been disciplined, not whether a member complied with the requirement to pass the exam, thus avoiding discipline.

As a remedy, the Guild requests a finding that the County committed an unfair labor practice and that it be awarded compensation in the amount of 50 hours of overtime for each Guild member who studied in order to pass the exam.

The County's Position

The County first argues that under the California Supreme Court's decision in *Claremont Police Officer's Association v. City of Claremont* (2006) 39 Cal.4th 623, and the balancing test it created, the County is not obligated to bargain over the competency exam because it is a fundamental management decision. Under the first part of that balancing test, there was no adverse effect on pharmacists wages, hours, or working conditions. Under part two of the test, it is clear that the Board made a fundamental management decision as a result of the healthcare crisis which arose out of the problems at MLK hospital. Under part three of the test, the public policy considerations outweigh and right the Guild claims to engage in collective bargaining.

The County further argues that the Guild's position is contrary to ERCOM's decision in UFC 07-09 in which ERCOM held that the County did not violate the ERO when it implemented testing procedures for nurses at County hospitals and healthcare facilities.

The County also argues that the Guild waived its right to have the County bargain when it failed to object to the exam in 2009, 2010, or 2011. For like reasons, the Guild's claim is barred by the equitable defense of laches.

The County also argues that the Guild's position cannot be sustained since it is based entirely on hearsay.

The County argues that there is no basis for the Guild's claim to compensation for study time put in by each member. The Guild never requested overtime and there is no evidence to support the claim.

The County also argues that the Guild's belief that pharmacists' state mandated continuing education requirements are an adequate substitute for an exam is unfounded. The annual assessments are targeted and allow the Department to see if the pharmacists can prove their competence.

Finally, the County argues that it did engage in good faith bargaining. Issues regarding the competency exam were fully discussed during the bargaining sessions. In addition, the County proposed and the Guild did accept the creation of a Joint Labor/Management Committee which later met and discussed and responded to many of

the Guild's concerns about the exam.

DISCUSSION

Was the Competency Exam a Mandatory Subject of Bargaining?

Section 5.04.090.B of the ERO defines the scope of negotiations to include “wages, hours, and other terms and conditions of employment.” Although the County’s ERO and the National Labor Relations Act (“NLRA”) are not identical, the “wages, hours, and other conditions and terms of employment” language in the ERO undoubtedly was modeled on § 9(a) of NLRA which provides that a certified union shall represent employees “for the purpose of bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.” It is well-established that where there is similar language, it is appropriate to look at federal labor precedent. (*Anderson v. Los Angeles County Employee Relations Commission* (1991) 229 Cal.App.3d 817, 827.)

There seems to be little doubt that the decision to conduct a competency exam has an impact on the hours of work required by pharmacists in order to keep their positions and that yearly passage of this exam has become a condition of continued employment. The fact that no employee has yet been disciplined does not alter that fact. Guild employees are professionals and one would expect that they would do what was needed in order to provide appropriate patient care and to avoid discipline.

Thus, the difficult question in this case is not the interpretation of Section 5.04.090.B. Under the federal precedent cited by the Guild, the imposition of a

competency exam which requires uncompensated study time and the risk of discipline would clearly be a mandatory subject of bargaining. Instead, the question is whether the Board's decision is outside the scope of bargaining under the "fundamental policy exception" as construed by the California Supreme Court in *Claremont Police Officers Association*, *supra*, 39 Cal.4th 623.

In *Claremont*, the Court dealt with the tension between a public employer's obligation to bargain over the terms and conditions of employment and the exclusion from that duty to bargaining when a public employer makes "fundamental managerial or policy decisions." Recognizing that the management rights provision and the duty to bargain obligations are somewhat vague and so potentially overlapping that either rule could swallow the other, the Court articulated a three part test:

First, we ask whether the management action has "a significant and adverse impact on wages, hours, or working conditions of the bargaining unit employees." If not, there is no duty to meet and confer. Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then . . . the meet-and-confer requirement applies. Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on wages, hours, or working conditions of the employees—we apply a balancing test. The action "is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." In balancing the interests to determine whether parties must meet and confer over a certain matter . . . , a court may also consider whether the "transactional cost of the bargaining process outweighs its value."

(*Claremont*, *supra*, 39 Cal.4th at p. 638, citations omitted.)

In *Claremont*, the issue in question was the police department's decision to require officers to fill out a vehicle stop data form in order for the department to determine whether officers were engaging in racial profiling. Because the Court determined that completion of the stop data form did not have a significant and adverse impact on the officers' working conditions, the Court concluded that the City did not have to meet and confer with the union. As a result, the Court did not need to engage in the rest of the balancing process.

As with many multi-factor balancing tests, stating the test is much easier than applying it, especially when the Court which established the test did not have occasion to apply some of the critical parts of the test. However, I am not writing on a clean slate. Guidance has been provided by a recent ERCOM decision on facts which are substantially similar to those before me.

In UFC 07-09, Service Employees International Union, Local 721 filed an unfair practice charge against the DHS alleging that the ERO was violated when the DHS refused to bargain before imposing new competency testing procedures for nurses working at County hospitals and healthcare facilities.⁶

Initially, the Hearing Officer found that the implementation of the new competency procedures had a "significant effect on wages, hours and working conditions

⁶ The record does not contain the reports issued by Hearing Officer Thomas S. Kerrigan. References to his reports are based on a copy of the ERCOM decision in UFC 07-09 attached to the County's Brief.

of bargaining unit members.” He then applied the second part of the *Claremont* test and concluded that the new testing procedures involved a discretionary decision by the Department regarding how care would be given and how it would control competence by nurses providing that care. Applying the third part of the test, the Hearing Officer concluded that “the Department’s interest in providing high quality and safe health services to the public were paramount to Local 721’s right to collective bargaining.” As a result, he found that the County was not required to bargain over the new competency testing procedures.

It appears that the Hearing Officer then did a separate analysis on what was described as a portion of the Department’s policy which required automatic termination for any nurse who could not pass the new test. According to the Hearing Officer, this part of the new policy was “separable” from the other provisions. When the Hearing Officer applied the third part of the *Claremont* test, he concluded that Local 721’s interests outweighed the Department’s interest in having an automatic termination procedure.

The Department filed an exception to that part of the Hearing Officer’s report and ERCOM remanded the matter to the Hearing Officer for reconsideration of his factual finding that the Department “had” implemented an automatic termination procedure. After reviewing the record and the parties’ briefs, the Hearing Officer issued a new report which concluded that the Department had never implemented an automatic termination procedure. As a result, the Hearing Officer reversed his prior determination that the

Department had violated the ERO by unilaterally implementing an automatic termination procedure.

After receiving the Hearing Officer's amended report, ERCOM adopted the report, and dismissed the case after finding that the DHS had not violated the ERO as alleged.

It is certainly possible that the specifics of the test and testing procedures imposed on the nurses in UFC 07-09 are factually distinguishable in some meaningful way from testing procedures imposed on Guild members. However, nothing in the record presented to me alleges or supports, the existence of critical differences. As a result, I am not sure how I have the ability to distinguish these two situations and reach a different conclusion.

In both the instant case and in UFC 07-09, the DHS, in order to ensure that medical professionals treating patients were competent, unilaterally imposed competency tests. In both cases, in order to ensure that healthcare professionals took the testing seriously, there were potential employment consequences for failing the test. In UFC 07-09, it was something less than automatic termination. Here, while the record shows potential disciplinary consequences, no pharmacists have failed the test and none have been disciplined. To the contrary, the record also shows that the Department wants to work with pharmacists in order to have them pass the test and is trying to avoid the need to discipline any pharmacist who is having trouble with the exam.

Like the Hearing Officer in UFC 07-09, I find that the implementation of the competency exam did have a significant impact on the wages, hours, and working

conditions of Guild members. Like the Hearing Officer in UFC 07-09, I find that this impact arose from the Department's implementation of a fundamental managerial policy decision. Finally, like the Hearing Officer in UFC 07-09, I find that the Department's need to make this decision outweighs the benefit to employer-employee relations of bargaining about the action in question. As a result, under *Claremont*, the County did not have to bargain over the competency exam.

For these reasons, I need not address any of the other issues raised by the parties, such as the question of whether the Guild, by its actions, might have waived its right to demand bargaining.

FINDINGS OF FACT

1. Prior to 2009, the Board of Supervisors became concerned about the quality of medical care being from to patients at County hospitals and healthcare facilities.
2. As a result, starting in 2009, members of the Guild for Professional Pharmacists working for the DHS have been required to take and pass a competency exam.
3. In order to pass this exam, Guild members were required to spend up to 50 hours of uncompensated time studying the pre-exam materials provided by the Department.
4. According to DHS Policy No. 780.200, which governs the examination requirement, pharmacists are given two chances to pass the exam. If a pharmacist fails a second time, he or she may be subject to discipline, which might include suspension, a reduction, or discharge.

5. To date, no pharmacist has suffered any disciplinary consequences by reason of failing the competency exam.
6. Since the time the exam was mandated, the Guild and individual pharmacists have made complaints and expressed concerns about the exam. These include the stress caused, the time needed to study, the lack of compensation for the time needed to study, the relevancy of some of the study materials, the timely provision of study materials, and questions about whether competence of pharmacists could be ensured by other methods.
7. Until bargaining commenced in 2012, the Guild never demanded that the County bargain over the exam. The Guild did, however, communicate with senior DHS staff and the Board of Supervisors regarding their concerns about the examination requirement.
8. In 2012, the Guild demanded to bargain over the exam. The County refused, contending the subject of the exam was a permissive subject of bargaining.
9. Notwithstanding the County's position, it did engage in discussions about the exam and the examination process during bargaining sessions in 2012.
10. One suggestion made during bargaining by the County was the creation of a Joint Labor/Management Committee to discuss exam related problems. This committee was created and has met and provided a forum for discussing ways to change the exam process in response to legitimate concerns expressed by the Guild.
11. The decision to require Guild pharmacists to take a competency exam, and to have passage of that exam enforced by what appears to be a system of progressive discipline,

has a significant and adverse impact on the wages, hours, and working conditions of the Guild members.

12. This adverse effect arises from the implementation of a fundamental managerial policy decision.

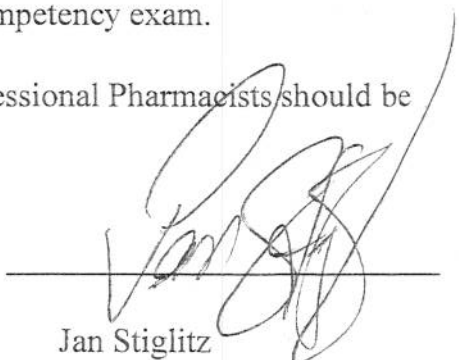
13. The County's need for unencumbered decisionmaking in managing its operations and ensuring quality patient care outweighs the benefit to employer-employee relations of bargaining about the decision to impose a competency test on Guild members.

CONCLUSIONS OF LAW

1. The Department of Health Services did not commit any violation of the Employee Relations Ordinance when it failed to bargain over the competency exam.

2. The Unfair Practice Charge filed by the Guild for Professional Pharmacists should be dismissed.

Dated: November 3, 2014



Jan Stiglitz
Hearing Officer

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is 500 W. Temple Street, 374 Hall of Administration, Los Angeles, CA 90012.

On November 18, 2014, I personally served the HEARING OFFICER'S REPORT in the matter of UFC 029-12 on the parties listed below by placing a true copy thereof in a sealed envelope for collection and mailing in the Los Angeles County Kenneth Hahn Hall of Administration Mail Room addressed as follows:

Michael Posner
Posner and Rosen, LLP
3600 Wilshire Blvd. Suite 1800
Los Angeles, CA 90010

Maurice Cooper
CEO Employee Relations
500 W. Temple St., Suite 774-A
Los Angeles, CA 90012

It is the practice of said mail room to place such correspondence with postage thereon fully prepaid in the United States Postal Service the same day they are received in the mail room.

Executed on November 18, 2014 at Los Angeles, California

I declare under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.


Rose Henderson