

**BEFORE THE EMPLOYEE RELATIONS COMMISSION  
OF THE COUNTY OF LOS ANGELES**

In the matter of )

**Service Employees International  
Union, Local 721** )

Charging Party, )

vs. )

**Department of Health Services,** )  
Respondent. )

**CASE NO.  
U.F.C. 07-09**

**DECISION**

On March 31, 2009 the charging party, Service Employees International Union, Local 721 ("Local 721") filed an Unfair Practice Charge against Department of Health Services ("the Department"). The Commission granted a hearing, and the matter was referred to a hearing before Hearing Officer ("HO") Thomas S. Kerrigan.

A hearing was held on June 16, and August 13, 2009. Both parties were afforded full opportunity to present relevant evidence, examine and cross-examine witnesses, and offer argument. At the conclusion of the hearing, both parties filed written briefs with the Hearing Officer. A verbatim transcript of the proceedings was provided to the Hearing Officer for his consideration in preparing his report to the Commission. After taking the matter under submission the HO issued his Report and Recommendation ("Report") and filed it with the Commission.

The HO recommended that the Commission find that the Department did not commit any violations of the Employee Relations Ordinance of Los Angeles County, No. 9646, by refusing to bargain before implementing new competency testing procedures for nurses who work at Los Angeles County hospitals, and other health care facilities managed and operated by the Department.

In reaching this recommendation, the HO applied the three part test set forth in *Claremont Police Officers Association v. City of Claremont* (2006) 30 Cal. 4<sup>th</sup> 623. In applying the first part of the test, the HO found that the implementation of the new competency procedures had a significant effect on the wages, hours and working conditions of members of the bargaining unit. Then, applying the second part of the test the HO found that the decision to implement the new testing procedures involved a decision by the Department of how it would conduct care giving in the future by aggregating greater accountability, and control over the competence and quality of its

nursing staff, therefore, the decision was an exercise of management discretion of the largest proportions. Accordingly, he then concluded that the decision to implement new testing procedures was a fundamental management and policy decision.

The HO then turned to the third part of the test, the balancing of the parties' respective interests, which is then required to be addressed by Claremont, because of his two previous findings on the first two parts of the test. In applying the third step in the test, the balancing of the parties' interests, the HO balanced the parties' respective interests, and found 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. Accordingly, he concluded that the county was not required to bargain over the new competency testing procedures themselves.

The HO then addressed the portion of the new competency testing procedure, which ultimately required automatic termination for those nurses who were unable to pass the testing procedures. The HO found that the new automatic termination portion must be considered separable from the other provisions of the new testing policy. He noted that the new termination policy removed termination discretion from management. He then conducted a balancing of the parties' interests in the automatic termination portion of the new procedure and found that the interests of Local 721 outweighed the Department's interest in the automatic termination procedure. Accordingly, the HO then recommended that the Commission find that the Department violated the Ordinance by unilaterally adopting an automatic termination procedure without first bargaining with Local 721.

The Department timely filed Exceptions to the HO's Report. The Charging Party timely filed its Response to Exceptions to the HO's Report.

On July 27, 2009 both parties, through their respective representatives presented oral argument to the full Commission. On July 27, 2009, after hearing argument of the parties, the Commission remanded the matter to the HO for re-consideration of his factual finding that the Department had implemented an automatic termination procedure. The HO was further instructed to reconsider his Report and Recommendation, if necessary, in light of his re-examination of this factual issue.

On July 13, 2010 the HO filed his Amended Findings of Fact, Conclusions of Law and Recommended Order.

In his Amended Report and Recommendation, the HO noted that the evidentiary record was somewhat vague on the issue of whether the automatic termination procedure had actually been implemented, but observed that based on his re-examination of the record, and upon candor on this issue by the parties in the Exceptions and the Reply thereto, it was not necessary to hear further testimony. He then found that the Department had never actually implemented an automatic termination procedure, but had made such a proposal. Accordingly, he reversed the portion of his previous Report that recommended that the Department had violated the Ordinance by unilaterally

implementing the automatic termination procedure. In his Amended Report, the HO simply adopted and re-issued his previous decision, except he reversed his previous finding that the Department had actually implemented the proposed automatic termination provision. In his Amended Report, in view of his reversal of his factual finding thereon, he recommended that the Department did not violate the Ordinance as the Department never actually implemented its proposed automatic termination procedure.

In the Amended Report the HO recommended that the Commission find that the Department did not violate the Ordinance by unilaterally implementing new competency testing procedures for nurses who work at Los Angeles County hospitals and other health care facilities managed and operated by the Department. He further recommended that the Unfair Charge be dismissed in its entirety.

The Charging Party timely filed its Exceptions to the Hearing Officer's Amended Findings and Recommendation. The Department timely filed its Opposition to Charging Party's Exceptions to the Hearing Officer's Revised Report. The Commission then heard oral argument from the parties on the Exceptions, and Reply thereto.

The Commission having considered all the filings in this matter, the Hearing Officer's Amended Findings and Recommendation, and the oral argument of the parties, issues the following orders.

### **ORDERS**

IT IS HEREBY ORDERED that the Hearing Officer's Amended Findings of Fact, Conclusions of Law, and Recommended Order is adopted in its entirety.

IT IS HEREBY ORDERED that Respondent Department of Health Services, did not did commit any violations of the Employee Relations Ordinance of Los Angeles County, No. 9646, as alleged in the Unfair Practice Charge.

IT IS FURTHER ORDERED that the Unfair Practices Charge filed herein by Charging Party be dismissed in its entirety.

Dated at Los Angeles, California: August 22, 2011.

A handwritten signature in black ink, appearing to read 'R. Douglas Collins', is written over a horizontal line.

R. Douglas Collins, Chair

## PROOF OF SERVICE

I, Rose Henderson declare under penalty of perjury as follows:

On August 23, 2011, I personally served the DECISION in the matter of UFC 07-09, 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:

Donna R. Evans, Esq.  
Liebert Cassidy Whitmore  
6033 W. Century Boulevard  
Suite 500  
Los Angeles, CA 90045

Robert Hunt  
SEIU Local 721  
309 S. Raymond Avenue  
Pasadena, CA 91105

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.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on Aug 23, 2011 at Los Angeles, California.

  
Rose Henderson