LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION

In the Matter of UNION OF AMERICAN PHYSICIANS AND DENTISTS, Charging Party, vs. PHILIP F. STONE, DEPUTY DIRECTOR OF PERSONNEL EMPLOYEE RELATIONS LOS ANGELES COUNTY, Respondant	UFC 23.1 HEARING OFFICER REPORT AND RECOMMENDATIONS

I. BACKGROUND

The facts and procedural history of this case are inseparable. On February 2, 1979 the Union of American Physicians petitioned (Petition No. 143) the Employee Relations Commission of Los Angeles County for a unit determination. After finding that there was sufficient interest, the Commission held a Unit Determination Hearing on April 16, 1979 and May 4, 1979, at which both the County of Los Angeles and the Union of American Physicians appeared and had an opportunity to be heard.

On July 27, 1979, the Commission handed down a Decision and Order creating a bargaining unit, entitled "Supervisory Psychiatrists, Department of Mental Health," comprised of members of two employment classifications: Chief Physician I

and Physician Specialist. Chief Physician I is a County classification of psychiatrists who have supervisory duties. The Physician Specialist classification included some physicians with supervisory responsibilities--those receiving "unit credit," a sub-classification for physicians in charge of a unit or program--and some physicians with no supervisory responsibilities. The record is not clear as to how many physicians there were in each classification.

The County requested a reconsideration of this decision on August 17. The Commission responded by affirming its Decision and Order on August 30. A secret ballot election was conducted on November 11, and the members of the bargaining unit elected the Union of American Physicians and Dentists as their exclusive representative.

On October 31, 1979--following the unit determination, but prior to the certification election--the County created a new employment classification of Senior Physician which included former members of the Physician Specialist category who had supervisory responsibility--those physicians formerly designated as receiving unit credit--thus limiting the classification of Physician Specialist to those who did not have supervisory responsibility. However, there was evidence that Physician Specialists still had some supervisory responsibility after the reclassification (TR p. 35, l. 20-24).

The Commission certified this election on November 28 and accreted the members of the classification of Senior Physician into the bargaining unit on August 18, 1980.

The record does not disclose any meetings, negotiations, or bargaining between the County and the Union of American Physicians and Dentists as the representative of this unit on the normal subjects of collective bargaining since this Union was certified as the exclusive representative. On July 1, 1980, the Union submitted proposals for bargaining to the County which were answered by a letter from Mr. Phillip Stone, Deputy Director of Personnel, Employee Relations, County of Los Angeles, dated July 11, 1980 (JX 3). Mr. Stone stated that it was "inappropriate to engage in bargaining" because the bargaining unit was not appropriate.

II. PRESENT PROCEDURAL POSITION

On August 4, 1980, the Union of American Physicians and Dentists filed an unfair practice charge against the County which responded on September 16. A hearing was set for October 31, 1980.

At the hearing, counsel for the County moved to dismiss the charge on the grounds that the bargaining unit was inappropriate. Counsel for the Union objected to the presentation of evidence on the grounds that this issue had been heard by the Commission and resolved by the Commission in the Unit Determination Order. The hearing officer reserved judgment on the motion to dismiss and proceeded to hear the Union case on the unfair practice charge. Following the Union presentation, the County was allowed to present the testimony of its one witness to prove

the threshold facts of its motion: that the classification of Senior Physician had been created removing supervisory responsibility from the Physician Specialists. The Union objected to this evidence on grounds that it had not had notice of the motion prior to the hearing, and because of this surprise, it was not ready to present rebuttal evidence on this point. The Union renewed its objection as to the permissability of a motion to dismiss on the ground of inappropriate bargaining unit.

Cognizant that a ruling on the appropriateness of the County's motion was a proper subject of briefs by counsel[1] and that, if the Union's objection as to surprise and inability to present evidence was sustained[2] a new hearing date would have to be scheduled, counsel for both sides and the hearing officer entered the following agreement: counsel would submit written briefs on the issue of the inappropriateness of the bargaining unit as a basis for a motion to dismiss or as an affirmative defense and on the issue of the failure to bargain. If the hearing officer determined that the issue of the appropriate bargaining unit was a proper one for the hearing, he would then reschedule a hearing date for the Union to present rebuttal

---

[1]Counsel for the County submitted a trial memorandum in support of the motion. Counsel for the Union had had not opportunity to reply in writing.

[2]Subsequent evaluation of the threshold documents of this case shows that the Union was placed on notice of the issue of appropriateness of the bargaining unit in the County's answer.

evidence. If the hearing officer determined the issue was not proper or that the County had presented insufficient evidence to support the motion, the hearing officer would proceed to determine the issue of refusal to bargain.

III. ISSUES

While the parties did not submit an agreed statement of issues, the hearing officer and the parties agreed to the following issues in the course of the hearing (TR p. 26).

A. When the Commission has issued a Decision and Order establishing a particular bargaining unit, may the issue of the appropriateness of the bargaining unit be relitigated in the unfair practice hearing as a basis for a motion to dismiss or an affirmative defense?

B. If the above issue is resolved in the affirmative, was the bargaining unit appropriate?

C. Did the County refuse to bargain with the Union of Physicians and Dentists, the exclusive representative for the Supervisory Psychiatrists?

IV. POSITIONS OF THE PARTIES

A. The County

The Commission's unit determination is in violation of the Employee Relations Ordinance Section 8(c) which forbids the unit from including supervisory and non-supervisory employees in the same unit unless they are in the same classification. When the supervisory physicians were removed from the classification Physician Specialist, the unit was in violation of the Ordinance.

Since the Ordinance contains no method of decertification or judicial review, the only means to get a change in the unit determination is through the vehicle of the unfair practice procedures. The Commission should follow the precedent of the National Labor Relations Board and review the appropriateness of the unit as a basis for a motion to dismiss the unfair practice charge or an an affirmative defense to the charge.

B. The Union

Absent an extraordinary change in circumstances, fraud, or new evidence that was previously unavailable, the County should not be able to relitigate the issue of appropriateness of the bargaining unit. Such a rehearing would be an unnecessary duplication of effort an would further delay the reaching of an agreement. The Commission knew the facts of the present case when it determined the original unit and when it accreted the new classification into the unit.

V. DISCUSSION AND CONCLUSIONS

A. Motion to Dismiss

It is impossible to say that the issue of the appropriateness of the bargaining unit is never relevant to an unfair practice charge. Even the brief of the Union acknowledges that where there is "newly discovered or previously unavailable evidence or the existence of special circumstance," it may be possible to relitigate the issue of appropriateness.

The County claims that there is a changed circumstance in the present case: the reclassification of Physician Specialists

who have supervisory positions to a new title of Senior Physician. The County argues that it has thus removed the Commission's reasons for including non-supervisory and supervisory employees in the same bargaining unit. Since the supervisory and non-supervisory employees are no longer in the same job classification, they should not be in the same bargaining unit.

This change of classification is not sufficient justification to reopen the issue of appropriateness. The issue was fully litigated for two days before the Commission. The County requested a reconsideration of the decision at a time when it knew it was already considering changing the classification. The Commission knew of the change when it accreted the new classification into the bargaining unit.

Moreover, even if the County's reclassification is viewed as a new circumstance, it is a change brought about by the County itself. It is impossible to say that the change was in response to the unit determination; however, the County admits that consideration of the change began after the Unit Determination Hearing had begun, and that the change was made after the Commission's formal decision was rendered. (See County brief p.2). The changed circumstances which allow a party to relitigate the appropriateness of a bargaining unit at an unfair practices proceeding do not include changes brought about by the party seeking the relitigation, especially when the change may have been in response to the Commission's hearing and decision. Any other rule would allow the Commission's decision to be undermined at the will of the losing party.

The County argues that this issue should be decided here as a matter of decertification. The absence of any specific provision of the Employee Relation Ordinance or of the Rules and Regulations of the Employee Relation Commission indicate that these bodies do not wish to have extensive review of the certification order. The County in this hearing seems to argue that the lack of decertification was an oversight which the hearing officer should correct. Such a correction is not appropriate absent the special consideration mentioned above.

The same rationale discussed above applies to the issue of judicial review; however, some additional discussion is needed. The County cites AFL v NLRB, 308 U.S. 401 which established that under the National Labor Relations Act (NLRA) the proper method of seeking judicial review of a Certification Decision was through the unfair practice procedure which apply to a refusal to bargain in good faith. Although precedent governing the NLRB is strong, pursuasive authority, it should not be applied in the present case to justify the hearing officer reviewing the final determination of the Commission.

Unlike the NLRA, the County Employee Relations Ordinance grants a very narrow right of judicial review. Section 10 (f) of the NLRA, upon which AFL v NLRB is based, states that "Any person aggrieved by a final order of the Board . . . may obtain review of such order in any circuit court of appeals . . . ." Under the Employee Relations Ordinance, the County is precluded from seeking judicial review. The Ordinance states that

a Commission Order requiring the County to take action to remedy an unfair practice "shall be binding on the County." The only recourse to the courts is granted to the party aggrieved by the County's failure to implement a Commission Order (Section 12 (e) (1)). The County has limited its own scope of judicial review.

Nevertheless, even under the limited review granted by the Ordinance, the County still may get its day in court if the charging party is required to seek mandamus to enforce a bargaining order of the Commission. This possibility does not require this forum to decide the issue of the appropriatness of the bargaining unit; the County has been allowed to establish its record.

Absent a more specific mandate from the Board of Supervisors or the Employee Relation Commission as to the County's right to judicial review and the role of this forum, there is no basis to believe that this forum may review the final unit determination of the Commission. The motion to dismiss is denied.

B. Merits of the Motion to Dismiss

Because of the conclusion above, it is unnecessary to reach the issue of whether the bargaining unit certified by the Commission is appropriate.

C. Merits of the Unfair Practice Charge

There was no evidence of meetings or negotations between the parties on normal subjects of collective bargaining. The

letter of July 11, 1980, from Phillip Stone, Deputy Director of Personnel, to Fred Duscha, Coordinator of the Union of American Physicians and Dentists, and the other joint exhibits establish that the County has refused to bargain with the Union of American Physicians and Dentists for the bargaining unit designated Supervisory Psychiatrists, Department of Mental Health. The County did not seek to rebut this evidence nor did the County brief this issue. The refusal to bargain was not stipulated, however, the County made little attempt to contest this fact, although the County had ample opportunity to do so.

VI. RECOMMENDED FINAL ORDER

Charge UFC 23.1 is hereby sustained. The County of Los Angeles has refused to negotiate with the Union of American Physicians and Dentists as the certified representative of the Supervisory Psychiatrists, Department of Mental Health.

The County is therefore ordered to meet and begin negotiation with the Union of American Physicians and Dentists within thirty days from the date this order becomes final and to continue negotiations until an agreement or impasse as defined by the Employee Relations Ordinance is reached.

Respectfully submitted

February 2, 1981

H. Anthony Miller
Hearing Officer