BEFORE THE EMPLOYEE RELATIONS COMMISSION
COUNTY OF LOS ANGELES

In the Matter of UNION OF AMERICAN PHYSICIANS AND DENTISTS, Charging Party, and LOS ANGELES COUNTY CHIEF ADMINISTRATIVE OFFICE, Respondent.	**HEARING OFFICER'S REPORT** **UFC 23.17**
UNION OF AMERICAN PHYSICIANS AND DENTISTS, Charging Party, and LOS ANGELES COUNTY DEPARTMENT OF HEALTH SERVICES, Respondent.	**UFC 23.19 (CONSOLIDATED)**

Hearing Officer: Fredric R. Horowitz, Esq.

Appearances:

Charging Party: Lawrence Rosenzweig, Esq.
Professional Corporation

Respondents: Daniel C. Cassidy, Esq.
Liebert Cassidy Whitmore

Hearings Held: March 18, 2002 and April 9, 2002,
Los Angeles, California

Submitted to Hearing Officer: June 6, 2002

STATEMENT OF THE CASE

On November 2, 2000 [UX 1] and October 19, 2001 [UX 2], the Charging Party, Union of American Physicians and Dentist ("UAPD"), filed the instant Charges against Respondents, Los Angeles County Chief Administrative Office ("CAO") and Department of Health Services ("DHS"), respectively, alleging violations of §§12(a)(1) and (3) of the Los Angeles County Employee Relations Ordinance ("ERO"). On February 28, 2002, Respondents answered by denying the charges and asserting defenses of unclean hands and bad faith conduct during negotiations [RX 1]. The Charges were referred by the Los Angeles County Employee Relations Commission ("ERCOM") for proceedings before a Hearing Officer in accordance with the Rules and Regulations adopted by those commissions and then consolidated for hearing before the undersigned.

The parties were afforded a full opportunity to call and cross-examine witnesses under oath, introduce documents, and present argument at the hearings. A transcript of the proceedings was prepared. Serial written closing arguments were filed by the parties, and the cases were deemed submitted upon receipt of the Reply Brief from UAPD. No useful purpose is served in summarizing all of the testimony, exhibits, and arguments in this proceeding, all of which has been carefully reviewed and considered. Rather, only those matters deemed necessary in resolving the Charges at issue are discussed herein.

MATTERS AT ISSUE

UFC 23.17 and 23.19 present the following issues to be decided in this proceeding:

1. Whether the County violated §§12(a)(1) and (3) of the ERO as alleged in the charges filed November 2, 2000 and October 19, 2001?

2. If so, what should be the remedy?

SUMMARY OF RELEVANT EVIDENCE

UFC 23.17

In 1985 the County first implemented comprehensive cafeteria-style benefit plans under Internal Revenue Code §125. These plans allow employees to make pre-tax salary contributions towards the cost of providing a choice of benefits to be selected by each employee. Employees under these plans are also able to trade certain benefits in varying degrees for taxable cash. Flex, the County's first cafeteria plan, was open only to the non-represented employees. In 1989, a second cafeteria plan, Choices, was developed by the County for bargaining unit members of unions belonging to the Coalition of County Unions. In 1991 or 1992, a third cafeteria plan, Options, was implemented for employees represented by SEIU Local 660. Meanwhile, in January 1991, the County offered Mega-Flex, an option to Flex, to non-represented County employees. On July 2, 1993, CAO Harry Hufford explained that MegaFlex was intended in large part to address "a powerful need to recruit and retain physicians, attorneys, management

staff, and other highly skilled individuals who now make-up the Mega-Flex ranks." [UX 9].

On June 27, 1999, UAPD became the certified representative of a stipulated bargaining unit (No. 324) of previously non-represented non-supervisory physicians and physician specialists in several Classifications employed by various County departments [RX 2]. At the time, MegaFlex/Flex was a popular benefit plan among physicians who are some of the highest paid employees in the County. The Union thus sought to retain this benefit plan for members of the new bargaining unit in the initial Memorandum of Understanding ("MOU"). The County, however, took the position MegaFlex/Flex was designed only for non-represented County employees, so it would be necessary to move the physicians to Choices, the cafeteria plan adopted for members of bargaining units represented by the Coalition.

On November 15, 1999, the County and UAPD commenced negotiations for the new MOU [RX 3]. The parties conducted 18 bargaining sessions through August 23, 2000 followed by six sessions in mediation from September 13, 2000 through November 1, 2000 [RX 29]. The Union made a variety of proposals in the course of negotiations to allow physicians to remain in MegaFlex/Flex. The County, however, remained steadfast in its position to remove the newly represented physicians employees from MegaFlex/Flex and include them in Choices. The County justified its position for essentially administrative reasons even though the plans were said to be equivalent in cost to the County and value to the employees [UX 9]. The Union, however, argued the County's intransigence at the bargaining table on these benefits was illegal.

During these negotiations, Supervisor Zev Yaroslavsky asked County Counsel the following question:

> Can a County union negotiate coverage for its members under the County of Los Angeles Flexible Benefit Plan [RX 18]?

On March 22, 2000, County Counsel replied as follows [Id.]:

> We believe that coverage for union members under the Flexible Benefit Plan can be negotiated, and the Board of Supervisors may designate such employees as eligible for coverage.
>
> The County's Flexible Benefit Plan consists of two different cafeteria benefit plans commonly referred to as Flex and MegaFlex, which also have non-pensionable versions. It has been County policy since the creation of these plans to offer them only to unrepresented County employees.
>
> By contrast, the County's represented employees receive benefits that are periodically negotiated with the employee unions, and are set out in the Fringe Benefits Memoranda of Understanding between the County and SEIU Local 660, and between the County and The Coalition of County Unions. Specific cafeteria benefit plans have been negotiated for represented employees with those two large groups of unions.
>
> The County's policy of offering coverage under the Flexible Benefit Plan to unrepresented employees is codified in the Plan itself. For example, for the Flex Plan Los Angeles County Code sections 5.27.020 K and L. Definitions, provide as follows:
>
> > K. "Eligible Employee" means a full-time permanent employee of the County who was not in an Excluded Bargaining Unit and who is designated by the Board as eligible to participate in the Plan . . . .
> >
> > L. "Excluded Bargaining Unit" means an employee representation unit, unless the representative of such unit and the County agree that the employees in such unit shall be covered hereunder.
>
> The provisions of the MegaFlex Plan, and of the non-pensionable Flex and MegaFlex Plans contain

identical in qualifying provisions.

> In summary, to date there have been two requirements for employee coverage under the Flexible Benefit Plan: 1) that the employees be unrepresented; and two) that the employees' classification be designated by the Board as eligible. However, the Plan specifically provides that the County may negotiate coverage under the Plan with employee unions. If that occurs, designation by the Board would make those represented employees eligible for coverage under the Flexible Benefit Plan.

On November 2, 2000, the parties filed a Notice of Impasse [RX 29], and their joint request for a fact finder to be appointed was approved by ERCOM on November 27, 2000 [RX 26]. UAPD and the County had reached tentative agreement on 31 Articles in the course of negotiations, so the seven remaining Articles, including benefit plans, were referred to fact finding [RX 28].

Meanwhile, on November 2, 1990, UAPD filed the instant Charge with ERCOM (UFC 23.17) alleging the County's position was illegal:

> The bargaining position of the County that eligibility for benefit plans is conditioned solely on the represented or non-represented status of its employees is a violation of its duty to bargain in good faith with the UAPD over benefits [UX 1].

It is to be here noted as of July 26, 2000, 463 physicians in the bargaining unit were in MegaFlex, 189 were in Flex, and 187 were not in permanent positions and thus had no cafeteria plan benefits [UX 3]. The County allowed these physicians to remain with MegaFlex/Flex pending the outcome of the collective bargaining process for the initial MOU.

On May 26, 2001, Fact Finder Michael Prihar issued Findings and Recommendations on the seven open issues based on evidence presented March 29 and 30, 2001 and the post-hearing briefs in proceedings con-

ducted pursuant to the ERO [UX 14]. The Fact Finder found the Union's position on benefits to be the more persuasive on the merits and recommended that physicians be allowed to retain their eligibility for MegaFlex/Flex benefits in the new MOU [UX 14]. On June 20, 2001, the County notified the Commission it refused to accept the Fact Finder's recommendations on benefits [UX 15]. On June 22, 2001, the County advised the Union of the intent to implement its last, best, and final offer [RX 19]. After further negotiations between the County and UAPD failed to produce an agreement, the Board of Supervisors voted on August 7, 2001 to implement the County's last, best, and final offer for Unit 324 [RX 30].

Effective January 1, 2002, Choices replaced MegaFlex/Flex as the cafeteria plan for the physicians and physician specialists in the UAPD represented bargaining unit.

UFC 23.19

On August 15, 2001, Chief Physician Lionel A. Cone, M.D., at Olive View Medical Center, circulated a memo to the six pediatricians he supervised as follows [UX 4]:

> SUBJECT: Petition to Hold Another Vote on Whether to Decide if Physicians should Continue to be Represented by the Union of American Physicians and Dentists (UAPD)
>
> Please review the attached petition. If you agree that physicians should no longer be represented by the UAPD then please sign the attached form and forward to the next person.
>
> When everyone has had an opportunity to review/sign this form then please send it to Maureen Sims, M.D., Department of Pediatrics, Olive View Medical Center.

The attached petition stated as follows:

> I am a physician employed by the County of Los Angeles and do not want to continue to be represented by the physician's union (Union of American Physicians and Dentists). I request that another election be held to determine whether physicians should be represented by the union.

Dr. Gary Posner testified he and the other pediatricians supervised by Dr. Cone were the only doctors to receive the memo. Dr. Posner told Dr. Cone the memo was very inappropriate. It is noted Dr. Sims also held a supervisory position with the County and was not a member of the bargaining unit.

The parties stipulated Olive View Medical Director William Loos, M.D., if called to testify, would state that prior to August 15, 2001 he told Dr. Cone that management was to remain neutral in matters concerning UAPD. It was further stipulated Dr. Loos would state that upon learning of the August 15, 2001 memo he instructed Dr. Cone to cease and desist from such actions and Dr. Cone replied that he believed the letter was neutral and was distributed only to his five or six subordinate physicians.

UAPD Regional Director Joe Bader testified a decertification petition was filed with the Commission on or about October 1, 2001 which was pending as of the hearings herein. Bader explained "Save the Benefits" and restore MegaFlex/Flex for physicians was the primary issue for those responsible for the campaign to decertify the Union.

On October 19, 2001, UAPD filed the instant Charge with ERCOM (UFC 23.19) alleging as follows [UX 2]:

> By circulating the enclosed letter [from Dr. Cone] and decertification petition among their subordinates using county stationary, on county time and through county mail, and encouraging them to sign

it, Los Angeles County management has violated section 12 a (1) and (3) of the Employee Relations Ordinance, and interfered with the efforts of the UAPD to represent physicians in bargaining unit 324. Further, it constitutes another in a series of unfair labor practices and violations of the ordinance (See UFC 23.17).

POSITIONS OF THE PARTIES

The Union contends the County has violated the ERO as alleged in UFC 23.17 and 23.19. In UFC 23.17, UAPD argues County Code §§5.27.020 K and L. violate Government Code §§3502, 3506 and 3507 by making an impermissible distinction in benefit plans based on represented status as employees. Alternately, the Union maintains the County bargained in bad faith with a rigid, inflexible position on benefits. It is said County policy required automatic imposition of Choices, this policy has nothing to do with cost, and the County's inflexibility constituted unlawful bad faith bargaining. In UFC 23.19, UAPD asserts the letter by Dr. Cone violated the ERO by interfering with the right of employees to choose their own representative. For remedy, the Union seeks a restoration of the status quo.

In turn, the County denies any violation of the ERO in these cases. In UFC 23.17, the County maintains the issue of whether to enroll physicians in Choices or MegaFlex/Flex was always a negotiable matter. The County denies any bad faith bargaining on this issue, particularly when viewed against the course of the negotiations as a whole. It is said management's strong position on moving physician to Choices was based on sound business and administrative considerations. In UFC 23.19, the County asserts the letter of Dr. Cone was facially

neutral and even if not had no adverse impact on the bargaining unit. For these and other reasons, the County urges the Charges be dismissed.

OPINION

UFC 23.17

§§12(a)(1) and (3) of the ERO provide it shall be an unfair employee relations practice for the County to interfere with, restrain, or coerce employees in the exercise of their rights under the under the ordinance or to refuse to negotiate with the recognized union on negotiable matters. UAPD contends the County has unlawfully conditioned eligibility for its benefit plans solely on the represented or non-represented status of its employees. This action, according to the Union, violated the County's duty to bargain in good faith under the Meyers-Milias-Brown Act as well as the ERO. For its part, the County denies having refused to bargain over the eligibility of physicians for MegaFlex/Flex and Choices or having bargained in bad faith over the issue. A review of all the evidence and argument in this proceeding supports the position of the County. It follows the Charge should be dismissed.

In *Placentia Fire Fighters, Local 2147 v. City of Placentia*, 57 Cal.App.3d 9, 126 (1976), the court said, "good faith is a subjective attitude and requires a genuine desire to reach an agreement." The totality of the bargaining history must be considered to determine if a serious attempt to resolve differences and reach a common ground is made. *Id.* The duty of good faith, however, does not require a party

to make any particular concessions or yield to any specific demand. *See, e.g., United States Gypsum Co. v. NLRB*, 484 F.2d 108 (CA 8, 1973), denying enforcement to 200 NLRB 1098 (1972). Absent evidence of dilatory tactics or an attempt to undermine efforts to reach an overall agreement, lawful hard bargaining rather than an unlawful unyielding of position may be inferred from the totality of the circumstances. *See* Hardin, *The Developing Labor Law (3rd Ed. 1992)* at 624 and the cases cited therein.

The evidence in this proceeding demonstrates both the County and the Union bargained in earnest to reach an agreement. The parties conducted 18 bargaining sessions from November 15, 1999 through August 23, 2000 followed by six sessions in mediation from September 13, 2000 through November 1, 2000 [RX 29]. The record reflects tentative agreements ("TA") were reached steadily throughout that process. Of the 37 Articles in the newly proposed MOU, 30 Articles were TA'd prior to the hearings in Fact Finding and only five Articles remained open thereafter [RX 28]. There is no evidence of any delays or dilatory tactics by the County in the course of these negotiations other than the allegation by UAPD of unlawful intransigence by management on the issue of benefits.

There is no dispute the County remained steadfast in its proposal for the physicians now represented by UAPD to be moved to Choices. According to UAPD Regional Director Bader, the Union made alternate proposals in order to reach a compromise, including grandfathering existing employees in MegaFlex/Flex, retain MegaFlex/Flex with minor changes, or permit the County to "buy out" the value of MegaFlex/Flex

with other pay and benefits. Management rejected all these proposals, insisting that eligibility for MegaFlex/Flex would no longer be possible for physicians once they were in a bargaining unit. From this record, it is clear the County exhibited no flexibility in its proposal to replace MegaFlex/Flex with Choices for the members of this bargaining unit.

The Union has failed, however, to establish the intransigence by management on this issue violated the ERO or state law. Contrary to the claim of the Union, the provisions in County Code §§5.27.020 K. and L. do not prevent the County from extending eligibility for MegaFlex/Flex to represented employees. Paragraph L. specifically provides represented employees may be deemed eligible should "the representative of such unit and the County agree that the employees in such unit shall be covered hereunder" [JX 1]. On March 22, 2000, County Counsel issued an opinion letter which concluded "that coverage for union members under the Flexible Benefit Plan can be negotiated, and the Board of Supervisors may designate such employees as eligible for coverage" [RX 18]. There is no evidence in this proceeding the County's negotiators at the bargaining table asserted that eligibility for MegaFlex/Flex was not negotiable. Because the County was not precluded from extending coverage under MegaFlex/Flex to the newly represented physicians, there is no basis for finding County Code §§5.27.020 K. and L. violates the ERO or Government Code §§3502, 3506 and 3507 by making an impermissible distinction based on represented status as employees.

It is recognized the County's stated reasons for insisting on the removal of represented employees from MegaFlex/Flex, principally ease of administration and avoiding fragmentation of the risk pool, were not deemed persuasive by Fact Finder Prihar. Consistent with the experience related by several physicians in this proceeding, Fact Finder Prihar found the conversion to Choices, "without a doubt, would decrease in actual take home for a lot of the doctors who are now participating in MegaFlex" [UX 14 at p. 4]. Fact Finder Prihar said additional reasons for allowing physicians to keep MegaFlex/Flex were found in CAO Hufford's 1993 explanation of the benefits such as increased productivity, lower costs, and improved employee satisfaction, as well as an important and powerful tool to recruit and retain physicians [UX 9 and 14 at p. 4]. Thus, Fact Finder Prihar recommended the adoption of this benefit package in the new MOU [UX 14].

Yet the mere fact UAPD, the physicians affected, and Fact Finder did not agree with the wisdom or necessity of management's abject refusal to extend eligibility for MegaFlex/Flex to represented employees does not automatically render the position of the County to be *illegal*. As discussed above, there is no requirement in the ERO or Meyers-Milias-Brown for a party to be forced to make a concession or yield to any particular demand so long as the overall course of bargaining is conducted in good faith. In this instance, the Union has failed to show the County engaged in any dilatory tactics or unreasonable refusal to reach an overall agreement on the initial MOU other than not accede to the proposals of UAPD on the issue of benefits. For this reason, it cannot be found the County's rigid, inflexible

approach to the eligibility of the physicians for benefit plans at the bargaining table was unlawful or in bad faith. The remedy for the perceived inequity in benefit plans thus lies squarely in the process of collective bargaining. It follows UFC 23.17 should be dismissed.

UFC 23.19

§12(a)(1) of the ERO provides it shall be an unfair employee relations practice for the County to interfere with, restrain, or coerce employees in the exercise of their rights under the under the ordinance. On August 15, 2001, Chief Physician Cone sent five or six subordinate pediatricians a memo with a petition seeking a vote to determine whether UAPD should continue as the representative of the bargaining unit [UX 4]. Contrary to the claim of the County, this memo can reasonably be viewed as direct interference by management with the right of employees choose their representative.

On the other hand, there is no evidence in this proceeding of any adverse impact on the physicians as a result of this memo. Dr. Cone had been instructed by Olive View Medical Director Loos to remain neutral in matters concerning UAPD. When Dr. Loos learned of the memo, he instructed Dr. Cone to refrain from taking any further actions in this regard. There were approximately 800 members of this bargaining unit, and none of the other doctors in the bargaining unit viewed the memo from Dr. Cone. Indeed, there was no showing the views or votes of the five or six pediatricians who received the memo were influenced as a result. Under these circumstances, the claim by the County the memo did not cause any harm and any violation was thereby

de minimis is established by the evidence. In light of the prompt corrective action taken by Dr. Loos and lack of evidence of any adverse impact on the doctors' exercise of their rights, a violation of the ERO has not been established. UFC 23.19 should therefore be dismissed.

FINDINGS AND CONCLUSIONS

1. The County did not violate §§12(a)(1) and (3) of the ERO as alleged in the charges filed November 2, 2000 and October 19, 2001

2. The Charges are dismissed.

RECOMMENDATION

It is respectfully recommended the Los Angeles County Employee Relations Commission adopt the Findings and Conclusions herein.

DATED: August 22, 2002

Respectfully submitted,

FREDRIC R. HOROWITZ,
Hearing Officer