

civil service commission

BOARD OF REVIEW AND APPEALS



Commissioners
Don Becker
Alyse M. Lazar
J. William Little
Haywood Merricks III
James Vandenberg

**MINUTES
REGULAR BUSINESS MEETING
THURSDAY, APRIL 28, 2011
9:30 a.m.
LOWER PLAZA ASSEMBLY ROOM**

- I. **CALL TO ORDER** – Chair Vandenberg called the meeting to order at 9:30 a.m.
- II. **ROLL CALL** - Commissioners present: Chair Vandenberg, Vice-Chair Merricks, and Commissioners Becker, Little and Lazar. Staff present: Cheryl Shaw, Commission Assistant, Robert Orellana, Law Advisor and Jim Dembowski (IR).
- III. **PLEDGE OF ALLEGIANCE**
- IV. **MINUTES FOR APPROVAL** – The minutes of the Regular Business Meeting of February 24, 2011, were approved on motion by Vice-Chair Merricks, seconded by Commissioner Lazar. The minutes of the Special Meeting of April 12, 2011, were approved on motion by Commissioner Becker, seconded by Commissioner Lazar.
- V. **PUBLIC COMMENTS** – None.
- VI. **OLD BUSINESS** – None.
- VII. **NEW BUSINESS** – Discuss request from County Executive Office that Commission streamline its procedures for its review of proposed Memoranda of Understanding or Agreement pursuant to Section 103 of the County's Personnel Rules and Regulations.

Chair Vandenberg stated that at the special meeting held earlier in the month Mr. Nicoll made a verbal suggestion to the Commission regarding changing the procedure for conducting Section 103 reviews by the Commission. The Commission had requested and is awaiting a written request regarding the details of the proposed change. Mr. Dembowski apologized for not having supplied the written documents as requested indicating his office has been extremely busy. Chair Vandenberg stated that since this issue was not time sensitive it could be held over. Upon motion made by Commissioner Little, seconded by Vice-Chair Merricks, the matter will be tabled until receipt of the written documents for placement on the Commission's next regular business meeting agenda.

VIII. REQUEST FOR HEARING –

- A. Dr. Sherilynn Wheaton, Case Number 11-98-23-03, Suspension without Pay
West Ventura Medical Clinic
- B. Dr. Steven Barr, Case Number 11-98-02-04, Suspension without Pay
West Ventura Medical Clinic
- C. Dr. Linda England, Case Number 11-98-05-05, Suspension without Pay
West Ventura Medical Clinic
- D. Dr. Rebecca Wade, Case Number 11-98-23-06, Termination of Employment
West Ventura Medical Clinic
- E. Dr. Dana Jennings, Case Number 11-98-10-07, Termination of Employment
West Ventura Medical Clinic

Chair Vandenberg acknowledged receipt of the above referenced requests for hearing and stated his desire for the Commission to consider all appeals jointly for purposes of evaluating their sufficiency. Appearing for all petitioners was attorney Lawrence Rosenzweig with attorney Michael Lavenant present for the West Ventura Medical Clinic (“Clinic”) and Dr. Ramsey Ulrich, the Clinic’s director.

Mr. Rosenzweig agreed with the Chair that there was commonality with regard to the appeals for all five disciplined physicians at this stage of the proceedings. He stated that, in 2009, PERB (the California Public Employment Relations Board) held that the County is a joint employer, with the Clinic, of the petitioners, that the County did not appeal PERB’s decision in that regard, and that the County eventually recognized the petitioners’ union, the Union of American Physicians and Dentists (“Physicians Union”) which Mr. Rosenzweig also represents. He further indicated that the PERB decision is the only ruling which holds that the County is a joint employer of the physicians and that the County still contends they are not a joint employer. In response to a question from the Commission, Mr. Rosenzweig stated that there is no Memorandum of Agreement between the County and the Physicians Union because the County “walked away from the bargaining table” which action the Physicians Union has since challenged as an unfair labor practice.

Commissioner Little inquired about the scope of this joint employer relationship and whether both the County and the Clinic are required to concur on disciplinary actions. Mr. Rosenzweig stated that they are jointly responsible and if the County disagrees with action taken by the Clinic, then the County is required to take some action. Mr. Rosenzweig stated that whether the County did anything in regard to these disciplined physicians is unknown but is a factual question to be determined at a hearing. Mr. Rosenzweig did not specifically address Vice-Chair Merricks’ inquiry about funding of the Clinics, but did state that every doctor who is staffed at the Clinics also has privileges at the County hospital.

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Commissioner Becker stated that the issue of recognition of a union is a completely different issue than that currently before the Commission, that is, whether the County is a joint employer for purposes of imposing discipline. Commissioner Becker stated that the prior PERB decision also did not determine what the County's obligations are with regard to collective bargaining. Commissioner Becker indicated that he also thought that the issue of responsibility for disciplinary decisions was factual in nature and that the Commission would need more information to decide if the County was an employer for purposes of reviewing disciplinary actions taken by the Clinic. Mr. Rosenzweig suggested that the issue may be resolved by some sort of preliminary hearing in the future.

Commissioner Lazar inquired about the existence of any other documents, including contracts between the County and the Clinic, on which the petitioners' base their argument that the Commission has jurisdiction over their appeals. Mr. Rosenzweig stated contract documents were presented during the PERB hearings but that there has been no ruling regarding any new or different contracts which now exist. He did not reference any contractual terms that might govern the County's review of disciplinary decisions taken by the Clinic.

Chair Vandenberg asked Mr. Dembowski about the County's position with respect to the disciplinary actions. Mr. Dembowski deferred to the Clinic's attorney, Mr. Lavenant. Chair Vandenberg noted that a letter from attorney Lavenant had been received by the Commission late yesterday afternoon and was distributed this morning to the Commissioners and asked for additional comments from Mr. Lavenant.

Mr. Lavenant stated that the prior PERB decision was being cited inappropriately by the petitioners. In his view, the 2009 decision regarding the joint employer relationship between the County and the Clinic only addresses whether the County had to process the Physician Union's petition for recognition, which the County has done. He stated the 2009 PERB decision states nothing else about whether these physicians are permanent employees or whether the County has to pay their compensation. In his view, the 2009 PERB decision is just a snapshot of what existed between the County and various clinics at that time, and that, the prior contracts have been changed. In his view, the various clinics now operate as private employers and alone determine their employees' rates of pay, benefits and working conditions. Mr. Lavenant argued that PERB has no jurisdiction over the clinics which are private employers. In any case event, Mr. Lavenant concluded even if everything the petitioners contend is true, the physicians would not be considered permanent employees of the County and the Commission, therefore, lacks jurisdiction to grant their requests for hearings or any relief from disciplinary actions.

In response to Chair Vandenberg's question about hiring decisions, Mr. Lavenant indicated that the employment contracts are signed only by the director of the Clinic and the physician, and that the County is not a party to those contracts. In response to Commissioner Lazar's additional inquiry, Mr. Lavenant indicated he does not know if the

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Clinic's budget, which is used to pay the physicians, must be approved by the County. In response to a question from Vice-Chair Merricks, Mr. Lavenant indicated that the contract between the County and the clinics had been changed since the PERB decision but that he is unsure what changes were made, if any, with regard to the contracts between these physicians and the Clinic.

Commissioner Becker volunteered that the 2009 PERB decision states that the County was able to control some discipline in certain instances by the use of "cause letters." He expressed that at this point the Commission needed to conduct a hearing to obtain evidence and information in order to make an informed decision. Mr. Lavenant indicated that interpretation of the contracts would be a legal argument and not a factual one. He also reiterated that even assuming the argument made by petitioners is true, the physicians could not be considered permanent County employees and that Ordinance section 1347-9 specifically excludes physicians and dentists from the County's classified service list.

Law Advisor Robert Orellana reminded the Commission that under the Civil service System Ordinance section 1352-3, the Commission's task at this time is to consider the petitions for legal sufficiency. Mr. Orellana read the section aloud and concluded that factual grounds for an appeal need to be set forth in the petitions in order for the Commission to determine whether all parties are subject to the Commission's jurisdiction. If the Commission cannot grant any effective relief, for example because it lacks jurisdiction over the Clinic, then further hearings would be futile. Mr. Orellana advised that the sufficiency of the petitions needs to be decided based on what is contained within the four corners of the petitions themselves. If the Commission decides the petitions are not sufficient, then the only course of action for the Commission is to dismiss them subject to petitioners' having a right to file amended petitions within 10-days following denial thereof, pursuant to the terms of section 1352-3. Mr. Rosenzweig argued that the petitions incorporated the entirety of the 2009 PERB decision.

Chair Vandenberg asked if there was a consensus among members regarding the sufficiency of the petitions. He expressed his view that the petitions did not state sufficient facts to grant relief. Vice-Chair Merricks and Commissioner Becker also agreed that the petitions lacked sufficient facts. Commissioner Becker indicated that the petitioners should be given some guidance as to what should be included in any amended petitions.

Commissioner Lazar stated that incorporation by reference of the PERB decision did not make the petitions sufficient and that it was not the Commission's job to instruct the petitioners on what to include in their petitions. She added that the petitioners have had the benefit of hearing the Commissioners' responses and discussion today. Commissioner Little expressed concern over enforcement of any Commission decision due to the lack of any jurisdictional relationship between the Commission and the local medical clinics. He felt a further hearing or briefing was warranted on that issue.

Upon motion made by Chair Vandenberg, seconded by Commissioner Lazar, the Commission voted unanimously to dismiss the petitions for insufficiency and to grant petitioners 10 days leave to amend. The Commission added that any amended petitions are due filed on or before May 9, 2011, and if timely received, will be placed on the Commission's regular business meeting agenda for May 26, 2011.

IX. REQUEST FOR INVESTIGATION – None.

X. INFORMATIONAL – None.

XI. COMMISSION/STAFF COMMENTS –

A. Presentation of fiscal year 2011/2012 CSC Budget.

Staff presented the Commission's Preliminary Budget for fiscal year 2011/2012, which is set at \$145,000. Commissioner Little stated that according to the latest budget figures, it appears the Commission will have significantly under spent their budget. In response to a question from Commissioner Lazar about potential budget cuts, Cheryl Shaw indicated that there had been no indication from the fiscal department that the Commission's budget for next fiscal year would be less than \$145,000.

B. Presentation of draft letter to the Board of Supervisors regarding the Commission's activities for the third fiscal quarter.

Staff presented the Commission with a draft quarterly report to the Board of Supervisors regarding the Commission's activities for the first fiscal quarter of 2011. Upon motion made by Commissioner Little, seconded by Commissioner Lazar, the Chair was directed to sign the letter to be forwarded to the Board of Supervisors.

Additional Comments:

Commissioner Becker indicated that he thinks that the Commission should have the opportunity to be part of the process in determining facts relative to deciding the sufficiency of a petition for recognition of a bargaining unit and suggested the Commission should consider recommending a change to the rules regarding that process. Chair Vandenberg expressed that there was still a PERB decision pending and expressed concern over establishing new ground for employee groups and uncertainty that this is part of the Commission's mission. Commissioner Becker clarified that he was not speaking to the issue of employee discipline but that the Commission should have the power to hear appeals regarding unit recognition rather than the proposed union going directly to PERB.

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Mr. Dembowski confirmed that under Article 20 in the County's Personnel Rules and Regulations, the Commission does have this power and that the Physicians Union could have availed itself of this Article's provisions after the CEO's office rejected its petition for recognition but that it chose to proceed instead directly to PERB. Mr. Dembowski reminded the Commission that after the County processed the petition and made a recommendation to the Commission that the petition be denied as deficient on its face, the Commission made an unprecedented decision allowing the Physicians Union to belatedly perfect what the CEO's office determined was an untimely petition for recognition on newly submitted voting cards. The County then recognized the Physicians Union bargaining unit and sat down and had discussions. In response to an inquiry from Commissioner Becker, Mr. Dembowski stated that he is not aware whether there was any argument in front of PERB or the Administrative Law Judge during the recent hearings that the Physicians Union had failed to exhaust its administrative remedy of appealing to the Commission.

Chair Vandenberg inquired generally as to the process that the Commission would follow if it were to recommend changes of the Personnel Rules and Regulations. Mr. Orellana indicated that, depending on the nature of any such recommendation, it may have to proceed to all the unions for bargaining. He stated that the Board of Supervisors can approve changes by resolution for unrepresented employees but not for unions. He also indicated that there is nothing which prevents the Commission from making recommendations for change at any time. The Board can then act upon it or simply receive and file a recommendation without action.

Commissioner Becker expressed concern that the Physicians Union should have appealed to the Commission rather than PERB in order to exhaust its administrative remedies. Mr. Dembowski confirmed that there is an unfair labor practice charge pending before PERB but he was unsure whether that issue has been addressed and did not know when PERB would issue its decision. Commissioner Little expressed concern that despite the PERB decision, it appears that the joint employer relationship is still somewhat undefined and that the Commission is unable to address the issue. Mr. Orellana indicated that the Commission could be heard if an organization sought to go before PERB rather than the Commission, and if the County was willing to provide notice of such an action to the Commission, the Commission could direct its staff to file an amicus brief or direct a letter to PERB with the Commission's comments, if desired.

Mr. Dembowski indicated that the petitioners still have the burden to establish that they are employees of the County subject to the Civil Service protection of the Ordinance and Personnel Rules and Regulations. He stated that the County is not in any way accepting that the disciplined physicians are employees or that they had any idea what Dr. Ulrich was doing with respect to any discipline of the Clinic employees. Commissioner Becker indicated that the County should state a position on the issue and not just sit back and do nothing.

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In light of the extended discussion, on advice of counsel, the Chair directed staff to provide a copy of the audio tape of the entire meeting to counsel for both the petitioners and for the clinic.

XII. ADJOURNMENT – The meeting was adjourned at 10:49 a.m.