**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,<br><br>Charging Party,<br><br>v.<br><br>EL CAMINO HOSPITAL DISTRICT,<br><br>Respondent. | Case No. SF-CE-309-M<br><br>PERB Decision No. 2033-M<br><br>May 29, 2009 |

Appearances: Weinberg, Roger and Rosenfield by Vincent A. Harrington, Jr., Attorney, for Service Employees International Union, Local 715; Howard Rice Nemerovski Canady Falk & Rabkin, by David J. Reis, Attorney, for El Camino Hospital District.

Before McKeag, Neuwald and Wesley, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the El Camino Hospital District (District) of a proposed decision by an administrative law judge (ALJ). The charge alleged that the El Camino Hospital (Hospital), an entity closely affiliated with the District, violated the Meyers-Milias-Brown Act (MMBA or Act)[1] when it refused to participate in an agency shop election pursuant to the statutory provisions of the MMBA on the ground that the Hospital is not a "public agency" within the meaning of the Act. Service Employees International Union, Local 715 (SEIU) alleged that this conduct constituted a violation of MMBA sections 3502.5,

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

subdivision (b), 3506 and 3509, subdivision (b) of the MMBA and PERB Regulation 32603, subdivisions (a) and (g).[2]

We have reviewed the entire record and conclude the Hospital is a public agency, subject to the provisions of the MMBA. In the alternative, we conclude the District and the Hospital are a single employer for collective bargaining purposes. Accordingly, for the reasons set forth below, we find the Hospital, like the District, is subject to the provisions of the MMBA and, therefore, violated the MMBA when it refused to participate in an agency shop election.[3]

## FINDINGS OF FACT

The District is a public agency within the meaning of MMBA section 3501, subdivision (c). SEIU is an employee organization within the meaning of Section 3501, subdivision (a).

### A. Background

California's Local Health Care District Law (Health & Saf. Code, § 32000 et seq.) authorizes the establishment of governmental agencies dedicated to furnishing hospital services in areas where hospital facilities are lacking. The governing board of a hospital district is initially appointed by the county board of supervisors in the county in which the district is located; thereafter, the board members are subject to popular election. (See Health &

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] The District requested oral argument in this matter. The Board has historically denied requests for oral argument when an adequate record has been prepared, the parties submitted comprehensive briefs, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles* (*Valadez, et al.*) (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) These criteria are met in this case. Therefore, the District's request for oral argument is hereby denied.

Saf. Code, § 32100.) In this case, the District's governing board consists of five elected members.

The District was established in 1957 by approval of a ballot measure and comprises an area in Santa Clara County encompassing Mountain View, Los Altos, Los Altos Hills, as well as portions of Sunnyvale, Cupertino and Palo Alto. In 1961, the District established the Hospital in Mountain View. The Hospital has operated successfully from its inception.

The 1990s marked a period of change in the provision of health care services throughout the country. One of the significant changes during this time was the emergence of managed care plans which achieve cost containment through various measures including case management, utilization review, and capitation of insurance reimbursements.

**B. Privatization of the Hospital**

According to the District's own history, "The El Camino Story," the District's governing board concluded in the early 1990s that it could only survive the changing climate in health care services by "privatizing" itself. In 1992, the board voted to transfer all Hospital-related assets to a newly created non-profit public benefit corporation (an Internal Revenue Service "501(c)(3)" corporation). The transfer included the hospital building, improvements, fixtures and other related assets to the corporation.

The Hospital's articles of incorporation state that it was organized under the California Nonprofit Public Benefit Corporation Law "for charitable purposes." One of its specific purposes is to operate acute care hospitals in Mountain View, Cupertino, Los Altos, Los Altos Hills, or Sunnyvale, establish medical clinics, and provide health care services to meet community needs.

The District, on the other hand, retained title to the land on which the Hospital was situated and entered into a ground lease with the newly created corporation. One of the recitals of the ground lease states:

> Tenant [the Hospital] is a nonprofit public benefit corporation that is organized and operated for the purpose of providing *integrated health care services,* including hospital services, to its communities. Tenant conducts its operations independently of Landlord [the District], and serves its own charitable purposes independently of Landlord's governmental purposes.

(Italics added.)

The purpose of the arrangement was to establish an "integrated delivery system" by partnering with community physician groups. Under this concept, the Hospital would take on a wider scope of services in order to become more of a full-service operation and remain competitive in the market.

So far as the record indicates, the Hospital was the principal ongoing health care facility operated by the District and, after the transfer, the District ceased operation of Hospital services. Coincidently, the vote by the District governing board to transfer its assets was taken shortly before legislation took effect on January 1, 1993, requiring that such asset transfers by hospital districts only take place after public notice and a vote of the electorate.

The governing board of the integrated delivery system, known as Camino Healthcare, included "community" members as well as members from the District's governing board. A short time later, a newly formed local physicians' group, known as Camino Medical Group, entered into contractual agreements with Camino Healthcare. Within a very short time, however, the integrated delivery system's plan to absorb the private physicians into Camino Healthcare encountered financial difficulties. In addition to these financial issues, a local

physician voiced complaints about declining quality of care at the Hospital and raised issues regarding reduced Hospital staffing in nursing and housekeeping.

### C. Return of the Hospital to District Control

In the meantime, the California Attorney General's office contacted the District's governing board to discuss possible conflict-of-interest law violations in connection with the 1992 transfer of assets and the extremely favorable terms granted to Camino Healthcare. The District filed suit against Camino Healthcare seeking to void the transfer-of-assets transaction. In so doing, the District sought to "regain public control" of the Hospital. Soon thereafter, the Camino Medical Group severed its relationship with Camino Healthcare.

The litigation led to a settlement in December 1996. Pursuant to this settlement, the "private board" of the Hospital agreed to resign from Camino Healthcare, leaving the District as the "sole member" of the corporation. This act "allow[ed] El Camino Hospital and its assets to be returned to public control." The settlement was finalized on December 31, 1996, when the District's governing board appointed three new members to fill the vacancies resulting from resignations of the Camino Healthcare board's community members. Two of these appointees were themselves District governing board members.

In 1998, the Hospital returned to operating under its original name (i.e., El Camino Hospital), but remained legally constituted as a 501(c)(3) corporation. The change was described as stating "more clear[ly] that the hospital no longer operates under the policies of the past," while operations of the hospital itself did not undergo change.

### D. Composition of the Hospital Board

The Hospital's corporate bylaws state:

> The Corporation shall have one voting Member: El Camino Hospital District, a political subdivision of the State of California

(the "Member"). The Corporation shall have no other voting members.

The Hospital board consists of six board members. The District board, as the only voting member of the Hospital corporation, has appointed its own board to serve in five of these six Hospital board seats. The remaining seat is held by the Hospital's chief executive officer (CEO) as an "ex officio director."

The Hospital's CEO is hired by, and serves at the pleasure of, the Hospital board. In one instance, the same person, Richard Warren, served as CEO of both the District and the Hospital. At the time of this dispute, Marla Gularte served as both the Hospital's interim CEO and the Hospital's chief financial officer.

From the District's standpoint, it scrupulously honors the legal line demarcating the two entities. The District governing board meets at different times from the Hospital board. As a matter of practice, however, the District governing board meets on the same day and in the same place as the Hospital governing board. The Hospital board meets more frequently on a monthly basis. The District governing board meets regularly on a quarterly basis. The District board keeps its own minutes and issues separate meeting notices. The District board members continue to be elected by ballot in Santa Clara County. (Health & Saf. Code, § 32100.5.)[4]

**E. The District's Relationship with the Hospital**

The District board does not propose or approve the Hospital's budget. The District has a separate budget. As a matter of protocol, however, both budgets are approved on the same day. Additionally, the District has the power to tax and exercise eminent domain, but the Hospital does not.

[4] The District asserts that there is no legal requirement that the Hospital board members be the same as the District board members. While this may be true, the "sole shareholder" provision and right of removal ultimately make this point moot.

The Hospital owns the Hospital building and all the assets associated with it. The District owns the land on which the Hospital is located and receives rent amounting to approximately $70,000 annually. The Hospital's articles of incorporation have a reversionary clause requiring return of all of its assets to the District in the event of dissolution. In 1999, Senate Bill No. 719 was adopted, imposing transfer-of-assets restrictions on the Hospital, which mirror those applying to hospital districts. If the Hospital intends to transfer 50 percent or more of its assets, it must secure approval from the voters of the District. (Health & Saf. Code, § 32121.7.) The District must also approve "all initial Board members" of any entity to which any assets are transferred, and any assets transferred must be returned to the District upon termination of the transfer agreement.

Currently, the District is responsible for providing between $2 million and $2.5 million in funds annually to the Hospital. These funds are dedicated for capital expenditures only. From its tax base, the District generates a total of $6 million to $7 million annually. After remitting the capital funds to the Hospital, the District retains and invests the balance of those funds. The District recently prevailed in a parcel tax measure that will result in $148 million for capital improvements to the Hospital.

The Hospital's total annual operating expenses are approximately $300 million. The bulk of the Hospital's revenues come from third-party payer sources (e.g., managed care health insurance plans and government health care financing) and directly-paid patient fees.

**F. The Hospital's Labor Relations**

In 2000, SEIU prevailed in a consent representation election. The unit includes professional, licensed, technical, and maintenance employees, which currently numbers between 950 and 1000 bargaining unit members. In 2000, SEIU successfully negotiated its

first memorandum of understanding (MOU) with the Hospital. That contract, as well as two successor agreements negotiated with SEIU, were ratified by the Hospital board, not the District board.

The District is not involved in the day-to-day management of hospital personnel. The Hospital has its own human resources division which administers the collective bargaining agreement with SEIU and the other recognized unions. The director of the human resources division takes the lead in negotiating all collective bargaining agreements. The District has no authority to dictate wages, hours or other terms and conditions of employment for employees of the Hospital. Employees of the Hospital have no employment relationship with the District. The Hospital's CEO retains ultimate authority over personnel decisions, including hiring and termination and serves at the pleasure of the Hospital board.

In 2003, SEIU filed unfair labor practice charges with the National Relations Labor Board (NRLB) against the Hospital. On September 30, 2003, the regional director of Region 32 issued a decision refusing to issue a complaint on the following basis:

> The investigation of these charges disclosed that the Employer is owned and operated by the El Camino Hospital District, a local community hospital district. The investigation further disclosed that the operations of the Employer are governed by the El Camino Hospital District Board, a five member publicly elected board of directors. In such circumstances, I find that the Employer is exempt for the Board's jurisdiction as a political subdivision under the second prong of *NLRB v. Natural Gas Utilities District of Hawkins County*, 402 U.S. 600 (1971).

On January 20, 2004, after receiving further argument by the Hospital, the NLRB gave SEIU notice of its intent to rely on evidence that "the El Camino Hospital District, through the District Board, had the authority to appoint the members of the El Camino Healthcare Board and that the members of the El Camino Healthcare Board serve 'at the pleasure' of the

El Camino Hospital District board." In one of the documents relied upon by the NLRB in its investigation, the author explains that despite this exercise of control, the Hospital board's existence is still needed:

> for two key reasons: immediacy and legal settlement requirements. Most fundamentally, the Settlement Agreement that was reached to return El Camino to public control required the continued existence of Camino Healthcare. [F]urthermore, with numerous legal, licensing and accreditation requirements to be met, it was critical that an appropriate structure be in place to move forward with operational and professional issues. To transition the existing 501(c)(3) governance structure back to the District structure would take considerably longer and cost a great deal at a time of intense competitive pressures. The District Governing Body determined that El Camino Hospital would benefit the most by leaving the existing Camino Healthcare structure in place and operating under the Brown Act, *with public oversight by the elected District Board.*

(Emphasis added.)

G. Agency Shop Proposal

On April 19, 2005, SEIU and the Hospital commenced negotiations on a successor MOU to the one expiring on June 30, 2005. SEIU submitted a proposal to amend the organizational security article to require payment of agency fees in order to supplement the existing maintenance of membership provisions.

In its proposal, dated April 19, 2005, SEIU sought to change the organizational security article in the following ways. First the title of the section dealing with union security payments would be retitled from "Maintenance of Union Membership" to "Agency Shop." Subsection A would be retained:

> Every bargaining unit employee will have the choice of whether or not to become a member of the Union. However, every

> employee who becomes a member of the Union after the date of this Agreement shall maintain his or her membership in the Union for the duration of this Agreement.

Subsection B established the agency shop provisions which would require employees upon hire, and as a condition of continuing employment to: (1) "[j]oin and maintain membership in the Union;" (2) "[c]hoose not to join the Union and pay an agency fee equivalent to the costs the Union incurs for collective bargaining, contract enforcement and grievance processing;" or (3) allow, on the basis of religious objection to union security provisions, for deduction of the fair share amount for donation to a charity. An additional provision calls for defaulting the employee to an agency fee, if he/she fails to choose option (1) or (3). Lastly, the section retains the language allowing opting out of membership during a seven-day-window period preceding the expiration of the contract, and adds language that such withdrawing members will be treated as agency fee payers.

The Hospital refused to agree to changes in the existing language. Sensing little prospect of movement on the matter, SEIU withdrew its proposal on June 28, 2005. Withdrawal of the proposal, together with the presentation of a comprehensive settlement offer, led the way to the conclusion of the negotiations. SEIU simultaneously informed its membership of its intent to seek an agency shop election pursuant to the petition/election procedure in the MMBA. Petitions were circulated, SEIU obtained the required proof-of-support, and that proof-of-support was presented to the State Mediation and Conciliation Service. When the State Mediation and Conciliation Service presented the Hospital with SEIU's demand for an election, the Hospital refused to enter into such an election. The instant unfair practice charge followed.

## ISSUES

1. Is the Hospital a public agency within the meaning of Section 3501, subdivision (c) so as to come under jurisdiction of the MMBA?
2. Is the Hospital a public agency under the MMBA by virtue of the single employer or joint employer doctrines?
3. If the Hospital is a public agency, was it entitled to refuse participation in the agency fee election because SEIU failed to first rescind the contractual maintenance of membership provisions?

## DISCUSSION

PERB is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering public employees. PERB only has jurisdiction over public employees and does not have any authority over collective bargaining laws covering employees of private companies. (*City of Santa Clarita* (2006) PERB Decision No. 1865.) Under the MMBA, a "public employee" is defined in Section 3501, subdivision (d) as any person employed by any "public agency." A "public agency" is defined in Section 3501, subdivision (c) as:

> [E]very governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not.

The District was established in 1957 by approval of a ballot measure pursuant to California's Local Health Care District Law. The District's governing board consists of five

elected members. Clearly, the District is a public agency subject to the MMBA. The question in this case, however, is whether the Hospital is a public agency under the MMBA.[5]

**A. The Roseville Community Hospital Case**

In *Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400 (*Roseville*), the court considered whether a hospital was a public agency subject to MMBA. In that case, the City of Roseville built a hospital. Shortly after completing construction, the city entered into an agreement to operate the hospital with a non-profit hospital corporation called "Roseville District Hospital."

The union in *Roseville* argued that the hospital was a public agency because the City owned the premises and facilities of the hospital and because the hospital was constructed with funds raised by municipal election. In further support of its argument, the union noted: (1) the lease agreement between the city and the hospital referred to the operation of the hospital as a municipal affair; (2) the hospital paid monthly rent to the city; (3) the parties included statements in their operational agreement that the city reserved the right to terminate the contract and take over operation of the hospital in the event of a breach of contract; and (4) that the city required quarterly and annual reports from the hospital. (*Roseville* at pp. 404-405.)

The hospital, on the other hand, argued that it was not a public agency because it had never been a hospital district. Instead, the hospital claimed it had been a non-profit

[5] In its appeal, the District claims the complaint should be dismissed because the Hospital is not named as a respondent in the charge. Such a defect could have easily been cured had the District raised the defense at an earlier point in the proceedings. The District, however, did not clearly raise such a defense. (See *East Side Union High School District* (2004) PERB Decision No. 1713.) Moreover, at the conclusion of the hearing, SEIU made a motion to amend the complaint to specifically add to paragraph two of the complaint, "Respondent acts by and through its joint employer and/or alter ego, El Camino Hospital." The ALJ granted the motion. Accordingly, we find no due-process, notice defect evident from these proceedings and, therefore, find no merit in this defense.

corporation from its inception, and that it was governed by a separate board of directors who had sole authority to operate the hospital and manage its employees. To further support its argument, the hospital noted that it paid the city monthly rent, it was governed by an independent board of directors, and it exercised complete responsibility for the administration, operation and maintenance of the hospital. (*Roseville* at p. 405.)

Looking to the express language of Section 3501, the court determined that in order to be a public employer subject to the MMBA, the hospital would have to be a "public corporation," "quasi-public corporation" or a "public service corporation."

The court found that in order to be a public corporation the entity must be "formed for political and governmental purposes and vested with political and governmental powers." (*Roseville* at p. 407.) With regard to quasi-public corporations and public service corporations, the court found that the entity "must have the characteristics of a 'public agency' within the purposes for which the [MMBA] was enacted, that is, to compel the governing bodies of public agencies to meet and confer in good faith regarding conditions of employment with representatives of recognized employee organizations." (*Roseville* at pp. 407-408.)

Examining the MMBA, the court concluded that the purpose of the statute was to establish organizational/representational rights for employees "who are without the traditional means of enforcing their demands by collective bargaining and striking, thus providing an alternative which would discourage strikes and yet serve the public employees' interests." (*Roseville* at p. 408.) According to the court:

> Viewed in this light we believe the phrases 'quasi-public corporation' and 'public service corporation' must refer only to entities which are specifically designated as such by the statutes under which they are organized and under which they operate. . . . There is no claim here that the Roseville Community Hospital is not subject to ordinary collective bargaining procedures and other

> concerted activities of the type generally approved by law. (*Ibid.*)

The court concluded that the hospital, although it was involved to a certain extent with the city, did not come within the definition of "public agency" as used in Section 3501 of the MMBA.

**B. The *Roseville* Case was Based on an Erroneous Interpretation of the Law**

It is noteworthy that the court's discussion regarding employees without the "traditional means of enforcing their demands" by collective bargaining and striking was based on its premise that "in the absence of specific legislative authorization it is doubtful that public employees have the right to strike." (*Roseville* at p. 408.) Based in large part on this premise, the court narrowly defined the terms "quasi-public corporation" and "public service corporation."

However, subsequent to the issuance of *Roseville*, the California Supreme Court ruled that strikes by public employees are not unlawful unless it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public. (*County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*).) Thus, the fundamental premise upon which the court in *Roseville* based its decision was altered by the Supreme Court in *County Sanitation.* Accordingly, it is unclear whether the court's rigid interpretation of MMBA section 3501 survived the issuance of *County Sanitation.*

**C. The *Roseville* Case is Distinguishable**

Assuming the rule in *Roseville* is still good law, the facts in the instant case are markedly different from the facts in *Roseville*. As indicated above, the Hospital was privatized in 1992. The District board of directors voted to transfer all Hospital-related assets to a newly

created non-profit public benefit corporation (an Internal Revenue Service "501(c)(3)" corporation). The asset transfer to the Hospital corporation included the hospital building, improvements, fixtures, etc. The District retained title to the land on which the Hospital was situated and entered into a ground lease with the newly created corporation. So far as the record indicates, prior to the transfer, the Hospital was the principal ongoing health care facility operated by the District. After the transfer, however, the Hospital was operated independently by the newly created corporate board.

Under this operational model, the relationship between the District and the Hospital was substantially similar to the relationship between the city and the hospital in the *Roseville* case. In both instances, the hospitals were operated by independent boards. Moreover, these boards were granted relative autonomy by contract and exercised complete responsibility for the administration, operation and maintenance of their respective institutions.

These similarities changed, however, in December of 1996, when litigation led to a settlement whereby the "private board" of the Hospital agreed to resign from Camino Healthcare, leaving the District as the "sole member" of the Hospital corporation. This act "allow[ed] El Camino Hospital and its assets to be returned to public control." The settlement was finalized on December 31, 1996, when the District's governing board appointed three new members to fill the vacancies resulting from resignations of the Camino Healthcare board's community members. Two of these appointees were themselves District governing board members. The third appointee was the Hospital's CEO who served at the pleasure of the Hospital board.

As indicated above, the purpose of the lawsuit was to "regain public control" of the Hospital. By ousting the independent board, obtaining control of the Hospital's assets and

establishing itself as the sole voting member of the Hospital corporation, the District was successful in regaining public control of the Hospital. Moreover, in light of the fact that the five elected members of the District board continue to serve as five of the six Hospital board members, it is clear that the District board continues to maintain public control of the Hospital. We find this distinction to the significant.

In *Roseville*, the appellant argued that the hospital should be deemed a public agency based on *Evans v. Newton* (1966) 382 U.S. 296 (*Evans*). In *Evans*, a parcel of land was devised to the City of Macon to be used as a park for white people only. The Supreme Court ruled that the public character of the park required it to be treated as a public institution and, therefore, subject to the prohibitions of the Fourteenth Amendment.

The court in *Roseville* distinguished *Evans* on three grounds. First, the court noted that *Evans* involved a civil rights case decided on Fourteenth Amendment grounds. Next, the court noted there was nothing in the record to suggest the transaction between the city and the hospital was a sham to avoid its legal responsibilities. Last, unlike the City of Macon and its park, the court noted that the city was not "actively involved in the operation of the hospital."

Based on the last two factors, it is clear the court in *Roseville* ascribed great significance to the operational independence of the hospital as it related to the city. In the instant case, however, this operational independence is lacking. Indeed, the District took extraordinary measures via litigation to regain public control of the Hospital and continues to exert control of the Hospital as the only voting member of the Hospital corporation. In so doing, the District board members, by virtue of their self-appointment to the Hospital board, are ultimately responsible for the operation of the Hospital. Under these circumstances, we

conclude the *Roseville* case is distinguishable and, therefore, does not dictate the outcome of this case.

### D. The Political Subdivision Exemption under the National Labor Relations Act (NLRA)

The NLRB's jurisdiction expressly excludes "any State or political subdivision thereof." (29 U.S.C. § 152(2).) In 1971, the U.S. Supreme Court developed a test to determine whether an employer is a political subdivision and, therefore, excluded from NLRB jurisdiction. (*NLRB v. Natural Gas Utility District* (1971) 402 U.S. 600 (*Hawkins*).) Acknowledging that the NLRA did not define the term "political subdivision," and that the NLRA's legislative history failed to help define the term, the Supreme Court relied on the premise that the exemption was intended to exclude federal, state and municipal governments from the NLRB's jurisdiction. Consequently, the Supreme Court concluded that an entity is a political subdivision if it is either: (1) created directly by the state, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general electorate. (*Ibid.*)

The test under *Hawkins* was applied by the Board in *Options For Youth-Victor Valley, Inc.* (2004) PERB Decision No. 1701 (*Options for Youth-Victor Valley, Inc.*). In that case, the regional director applied the *Hawkins* test to determine that a charter school, *Options for Youth-Victor Valley, Inc.*, was a political subdivision under both the first and the second prongs of the *Hawkins* test. The Board adopted the proposed decision and held the school was a public employer subject to the provisions of the Educational Employment Relations Act (EERA).[6]

[6] EERA is codified at Government Code section 3540 et seq.

Applying *Hawkins* to the present case, the District is the sole voting member of the Hospital corporation. The members of the District board -- who are publicly elected officials -- have appointed themselves as five-sixths of the Hospital board. Acting in their capacity as members of the Hospital board, these members employ the Hospital's CEO who, by virtue of that employment, is the sixth Hospital board member. Further, these members, acting in their capacity as Hospital board members may terminate the CEO's employment upon 30 days written notice. Thus, the members of the Hospital board are "responsible to public officials" because five-sixths of the Hospital board are public officials. Moreover, they are also responsible to the "general electorate" because five-sixths of the Hospital board are elected by voters in the District.

For these reasons, we find the Hospital meets the second prong of the *Hawkins* test and is therefore, a public entity subject to the provisions of the MMBA.[7]

**E. The Hospital is Subject to the MMBA by Virtue of the Single Employer Doctrine**

Assuming, arguendo, the Hospital is not properly characterized as a public entity pursuant to the *Roseville* decision, the Hospital may nonetheless be subject to the MMBA pursuant to the "single employer" or "joint employer" doctrines.

A single employer status exists where two nominally separate entities are actually part of a single integrated enterprise so that there is, in reality, only a single employer. (*Public*

[7] As indicated above, the NLRB similarly concluded the Hospital was a political subdivision pursuant to the second prong of the *Hawkins* test. However, decisions by the NLRB are not binding on the Board. In *Fresno Unified School District* (1979) PERB Decision No. 82, the Board, quoting the hearing officer, explained, "[t]here is nothing in the EERA which expresses a legislative intent that the jurisdiction of the [Board] should extend up to the boundaries of NLRB jurisdiction." Still, both the Board and the California courts have long held that NLRB decisions may be used for guidance when interpreting similar issues. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

*Transportation Services Corporation* (2004) PERB Decision No. 1637-M (*Public Transportation*).) The Board looked to the following four factors to determine the existence of a single employer relationship: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. (*Public Transportation*; *Trustees of the California State University* (2006) PERB Decision No. 1839-H; *NLRB v. Browning-Ferris Industries* (1982) 691 F.2d 1117, 1124 (*Browning-Ferris*).) It has been ruled that while no single factor is controlling and all need not be present (*Ibid.;*; *NLRB v. O'Neill* (9th Cir. 1992) 965 F.2d 1522, 1529), the first three ordinarily are more critical than the fourth. (*Public Transportation.*)

1. The District and the Hospital are Functionally Integrated

The first element of the single employer test requires a charging party to demonstrate the entities in question are functionally integrated. Here, the District claims there is no interrelationship between it and the Hospital because, among other things, the Hospital's managers and supervisors control the day-to-day operations of the Hospital, the Hospital owns the supplies and equipment in the Hospital, and the District provides a relatively small amount of money to the Hospital for capital improvements. We disagree.

The Hospital owes its existence to the District, and the District has a significant interest in the continued viability of the Hospital. Indeed, the District resumed control of the Hospital to strengthen the Hospital's financial condition. The District owns the land upon which the Hospital is situated, receives rent from Hospital for the Hospital building and possesses a reversionary interest in the Hospital's corporate assets.

In addition, as a result of the lawsuit, the District is now the sole voting member of the Hospital corporation. Moreover, the District board members have appointed themselves as

five-sixths of the Hospital board. Therefore, even if the Hospital technically owns its equipment, and even if its staff performs the day-to-day operations, the Hospital's independence is illusory. Under these circumstances, the District has clearly assumed control of the Hospital and is, therefore, ultimately responsible for the administration of the Hospital. Accordingly, we conclude the first element of the single employer test is satisfied.

2. The District Controls the Hospital's Labor Relations

To establish the second element of the single employer test, the charging party must demonstrate centralized control of labor relations. The District argues that there is no centralized control of labor relations because it is not involved in the day-to-day management of hospital personnel. Instead, the District argues that the Hospital has its own human resources division which administers the collective bargaining agreement with SEIU and the other recognized unions.

As indicated above, however, the District deliberately sought to regain public control of the Hospital. As part of that control, the District is the sole voting member of the Hospital corporation and the District's board members have appointed themselves as five-sixths of the Hospital board. In this capacity, the District board members have taken direct control of the Hospital. Relative to this discussion, the District board members, in their capacity as Hospital board members, were responsible for ratifying the first three MOUs between SEIU and the Hospital. Thus, the District, through its board members, has direct control over this aspect of the Hospital's labor relations.

The District also argues that there is no centralized control of labor relations because the director of the human resources division takes the lead in negotiating all collective

bargaining agreements. In addition, the District alleges it has no authority to dictate wages, hours or other terms and conditions of employment for employees of the Hospital.

However, the District, through its board members, has assumed the responsibility of ratifying the MOUs between SEIU and the Hospital. Thus, although the director of the human resources division may perform the actual negotiations, the director lacks the authority to approve an agreement. That authority lies with the Hospital board, and since the District has assumed control of the Hospital, the authority lies with the District. Thus, the District has clearly assumed the authority to dictate wages, hours or other terms and conditions of employment for employees of the Hospital. Accordingly, we conclude the second element of the single employer test is satisfied.

3. The District and the Hospital Share Common Management

To establish the third element of the single employer test, the charging party must demonstrate the entities in question share common management. As discussed above, the District is the sole voting member of the Hospital corporation and has assumed control of the operation of the Hospital. The sixth member of the Hospital board is the CEO. Although the CEO retains ultimate authority over personnel decisions, including hiring and termination, the CEO serves at the pleasure of the Hospital board, and, therefore, at the pleasure of the District board. Accordingly, we conclude the third element of the single employer test is satisfied.

4. The District and the Hospital Share Common Ownership

The last element of the single employer test requires the charging party to demonstrate common ownership between entities in question. Presently, the District owns the land upon which the Hospital is located and receives rent in the amount of approximately $70,000 per year. The Hospital, on the other hand, owns the hospital building and all the assets associated

with it. However, the Hospital's articles of incorporation have a reversionary clause requiring return of all of the corporation's assets to the District in the event of dissolution. In 1999, Senate Bill No. 719, an act of special legislation, was adopted, imposing transfer-of-assets restrictions on the Hospital which mirror those applying to hospital districts. Moreover, if the Hospital intends to transfer 50 percent or more of its assets, it must secure approval from the voters of the District. (Health & Saf. Code, § 32121.7.) The District must also approve "all initial Board members" of any entity to which any assets are transferred and any assets transferred must be returned to the District upon termination of the transfer agreement.

Under these circumstances, we find the District and the Hospital share common ownership. Accordingly, we conclude the fourth element of the single employer test is satisfied. Because all four elements have been satisfied, we find the District and the Hospital are properly characterized as a single employer. We, therefore, conclude the Hospital, like the District, is subject to the MMBA.

**F. The Joint Employer Doctrine does not Apply in this Case**

In addition to the single employer doctrine, the Board also recognizes the joint employer doctrine. A "joint employer" situation arises "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (*San Jose/Evergreen Community College District* (2007) PERB Decision No. 1928 (*San Jose/Evergreen*); *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1128, quoting *Browning-Ferris*; *The Regents of the University of California* (1999) PERB Order No. Ad-293-H.) As explained by the Board in *San Jose/Evergreen*, a joint employer theory does not depend upon the existence of a single

integrated enterprise; instead, it assumes the enterprises are independent legal entities that historically have chosen to jointly address important aspects of their employer-employee relationship. Consequently, these cases focus on the level of control exerted over the employees by the enterprises in question.

As discussed above, the District has assumed control of the Hospital. Thus, the instant case does not involve a situation in which the District and the Hospital share or co-determine matters governing essential terms and conditions of employment. Rather, this case involves the existence of a single integrated enterprise. Under these circumstances, we find the joint employer doctrine does not apply in this instance.

**G. Failure to Remove Maintenance of Membership Provisions**

The District contends that even if the Hospital is bound by the provisions of the MMBA, it was excused from participating in the agency fee election because the existing maintenance of membership provision in the expiring MOU is inconsistent with the proposed agency fee arrangement. It bases this argument on a California Attorney General opinion (86 Ops. Att. Gen. 169 (2003)), which opines that the voting mechanism may be used to change a contract's organizational security provision only if the existing provision is first removed from the MOU by negotiation.[8]

In that case, the union sought to have an election during the term of the agreement. The existing "service fee" was equal to the regular union membership dues. The analysis concludes that the election procedure is intended only for those situations where negotiations fail to produce an agency fee arrangement and thus the election may not be held during the

[8] It should be noted that opinions of the Attorney General, although persuasive are not binding on the Board. It is also noteworthy that the Attorney General is not charged with interpreting the MMBA in the first instance. That job rests soundly with the Board. (*City of Monterey* (2005) PERB Decision No. 1766-M.)

term of the agreement if there is an existing agency fee provision that conflicts with the existing one. Based on this case, the District asserts that SEIU was required to have the maintenance of membership provisions removed by an election.

The Attorney General begins by explaining that removal of an agency fee provision is by negotiation between the union and the employer. The very end of the opinion adds that an existing provision may be rescinded by election. This statement, however, merely restates the law. (MMBA § 3502.5, subd. (d).) Nothing in the opinion suggests that the union must initiate such an election. Rather, the opinion states the obvious. Namely, that if a provision has been eliminated by vote, there is no impediment to a new election initiated by the union during the term of the existing MOU (other than the statutory waiting period). Because we find no authority supporting a requirement that the union is required to initiate an election for rescission, we find the District's argument lacks merit.

In addition, the maintenance of membership provision in the existing MOU and the proposed agency fee provision are two materially different provisions. The current maintenance of membership provision provides: "Every bargaining unit employee will have the choice of whether or not to become a member of the Union. However, every employee who becomes a member of the Union after the date of this Agreement shall maintain his or her membership in the Union for the duration of this Agreement." An "agency shop," on the other hand is defined in Section 3502.5, subdivision (a) is:

> an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.

The maintenance of membership provision merely gave bargaining unit members the choice of becoming a union member and imposed an obligation upon them to remain members during their employment. Based on our review of MMBA section 3502.5, we find the maintenance of membership provision in the MOU is not an agency fee provision, and therefore, not subject to Section 3502.5.

Last, we find these two provisions are not incompatible. The proposed agency fee provision would apply only to non-members. On the other hand, the current members participating in the automatic dues deductions pursuant to the maintenance of membership provisions had their opportunity during the window period of the expiring MOU to withdraw their membership, or have it continued for the term of the new agreement. Thus, the agency fee provisions would only serve to supplement the fees being directed to SEIU by now covering employees who decline union membership. Therefore, we find the maintenance of membership fee provision and the proposed agency fee provision are not mutually incompatible. Consequently, SEIU need not rescind the maintenance of membership provisions before seeking an agency fee election.

Based on the foregoing, we find that the District and Hospital unlawfully denied SEIU its right to invoke the agency fee election procedure pursuant to MMBA section 3505.2(b).

**H. Remedy**

Pursuant to MMBA section 3509, subdivision (a), the PERB under EERA section 3541.3, subdivision (i) is empowered to:

> . . . take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

As discussed above, we find the District and Hospital violated MMBA section 3502.5, subdivision (b) by refusing to participate with SEIU in an agency fee election. Accordingly, it is appropriate to order the employer(s) to cease and desist from its unlawful conduct and participate in the election process as demanded by SEIU. (*Antelope Valley Community College District* (1979) PERB Decision No. 97; *Rio Hondo Community College District* (1983) PERB Decision No. 292; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.)

In addition to the forgoing remedies, the proposed decision included the following:

> In the event the agency fee provision is approved through election, make SEIU whole by remitting an amount equivalent to the fees SEIU otherwise would have collected had the election not been delayed, together with interest at the legal rate of seven percent.

Based on our review of this matter, we find such a remedy is, at best, speculative and unwarranted. (*State of California, California Department of Transportation, and Governor's Office of Employee Relations* (1981) PERB Decision No. 159b-S) We, therefore, do not find a monetary award appropriate under the facts of this case.

## CONCLUSION

Because the members of the Hospital board are responsible to both "public officials" and the "general electorate," we find the Hospital is properly characterized as a public agency and, therefore, subject to MMBA. Further, even if the Hospital is not properly characterized as a public agency, we find the District and the Hospital are single employers and, therefore, conclude the Hospital's violations of the MMBA may be imputed to the District. Based on these findings, we conclude both the District and the Hospital violated the MMBA when SEIU

was unlawfully denied its right to invoke the agency fee election procedure pursuant to Section 3505.2, subdivision (b).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the El Camino Hospital District (District), acting by and through the El Camino Hospital (Hospital), violated the Meyers-Milias-Brown Act (MMBA) by refusing to participate in an agency fee election pursuant to the provisions of the MMBA, Government Code section 3502.5, subdivision (b). By this conduct, the District and Hospital also interfered with the right of employees to participate in the activities of an employee organization of their own choosing, in violation of MMBA section 3506 and PERB Regulation 32603, subdivision (a).

Pursuant to section 3509, subdivision (a) of the MMBA, it hereby is ORDERED that the District and Hospital, their respective governing boards and their representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to participate in an agency fee election pursuant to the provisions of MMBA section 3502.5, subdivision (b).

2. By said conduct, interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Participate in an agency fee election pursuant to the provisions of the MMBA section 3502.5, subdivision (b), upon demand by the Service Employees International Union, Local 715 (SEIU).

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations in the District and Hospital, where notices to employees customarily are placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District and/or Hospital, indicating that the District and Hospital will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on SEIU Local 715.

It is further Ordered that all other allegations in Case No. SF-CE-309-M are hereby DISMISSED.

Members Neuwald and Wesley joined in this Decision.

APPENDIX

**NOTICE TO EMPLOYEES**
**POSTED BY ORDER OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**
**An Agency of the State of California**

After a hearing in Unfair Practice Case No. SF-CE-309-M, *Service Employees International Union, Local 715 v. El Camino Hospital District*, in which the parties had the right to participate, it has been found that the El Camino Hospital District and the El Camino Hospital (Hospital) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3506, 3502.5, subdivision (b), and PERB Regulation 32603, subdivision (a) (Cal. Code Regs., tit. 8, sec. 31001 et seq.), when they refused to participate with the Service Employees International Union, Local 715 (SEIU) in an agency fee election pursuant to the provisions of MMBA section 3502.5, subdivision (b). This conduct also interfered with the right of Hospital employees to participate in the activities of an employee organization of their own choosing in violation of MMBA section 3506.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to participate in an agency fee election pursuant to the provisions of MMBA section 3502.5, subdivision (b).

2. By said conduct, interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

Participate in an agency fee election pursuant to the provisions of MMBA section 3502.5, subdivision (b), upon demand by SEIU.

Dated: _____

EL CAMINO HOSPITAL DISTRICT AND
EL CAMINO HOSPITAL

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.