STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURON COUNTY MEDICAL CARE FACILITY,
Employer

Case No.R97 G-113
-and- (Objections to Election)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 79,
Petitioner
_____/

APPEARANCES:

For the Employer: Nantz, Litowich, Smith & Girard, by Steven K. Girard, Esq.

For the Petitioner: Yasmin J. Abdul-Karim, Esq., Senior Staff Attorney

DECISION AND ORDER ON OBJECTIONS TO ELECTION

Pursuant to Section 12 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.212, MSA 17.455(12), and Commission Rule 49, R 423.449, this case was heard at Bad Axe, Michigan on August 19, 1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. The subject of the hearing was written objections filed to the conduct of an election conducted by this Commission on June 4, 1998. The objections were timely filed on June 10, 1998, by the Employer, Huron County Medical Care Facility. Based on the record made at the hearing and briefs filed by both parties on October 15, 1998, the Commission finds as follows:

The Petition, Election and Objections:

The petition was filed on July 14, 1997 by Service Employees International Union, Local 79. Petitioner sought to represent a bargaining unit consisting of all nonsupervisory registered nurses and licensed practical nurses employed by the Huron County Medical Care Facility, excluding the director and assistant director of nurses and all other employees. A hearing was held on this petition on October 1, 1997, and on March 24, 1998, we issued a Decision and Direction of Election. See *Huron County Medical Care Facility,* 1998 MERC Lab Op 137. We directed an election in the following unit:

> All full-time and regular part-time registered nurses, licensed practical nurses, and graduate nurses employed by the Huron County Medical Care Facility, including the MDS coordinator, the assistant MDS coordinator, and the restorative nurse; but excluding all supervisory employees, including the administrator, the director of nursing, the assistant director of nursing, and the RN floor supervisors; casual employees; clerical employees; and all other employees.

The Decision and Direction of Election stated that relief nurses could vote by challenged ballot.

An election was conducted on the Employer's premises on June 4, 1998. At the close of this election a tally of ballots was provided to the parties. This tally indicated that there were eight votes cast for the Petitioner and five against, with no challenged ballots.

On June 10, 1998, the Employer filed timely objections to the election. The objections read as follows:

> (1) On the morning of the election, Henry Acevedo and Maryann Woods entered the property of the Employer and began to electioneer in the cafeteria adjacent to the voting room. Mr. Acevedo and Ms. Woods also entered onto the employee smoking area to urge employees to vote for the union and to discuss the election.
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> (2) During the time period Mr. Acevedo and Ms. Woods were on the Employer's premises, they criticized the Facility and its Administrator to the voters for holding a regularly scheduled nurses meeting and falsely indicated to employees that (1) the Employer had scheduled the nurses meeting so that eligible voters would not be able to vote and (2) the Employer had told nurses not to vote.
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> (3) By their conduct in entering onto the Facility's premises, electioneering near the polling area and falsely indicating to employees that the Employer was trying to interfere with their rights to vote, the Union itself has interfered with employee rights guaranteed by Section 9 of the Michigan Public Employment Relations Act, MCLA §423.201 et seq., and has effectively eliminated any basis for maintaining laboratory conditions mandated by the Commission for the conduct of representation elections under its jurisdiction.
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> (4) Also, while electioneering in the cafeteria, Mr. Acevedo also falsely advised registered nurse supervisors that they were eligible to vote in the election, even though the Commission had previously ruled these employees to be supervisors ineligible for inclusion in the unit.
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> (5) During the morning voting session, one RN supervisor attempted to vote. Her vote was challenged by the Employer's observer and was segregated in a separate envelope.

(6) During the afternoon voting session, five RN supervisors attempted to vote. Their votes were also challenged by the Employer's observer and segregated in separate envelopes.

(7) At the end of the voting period, the votes were tallied. The results were eight votes for the Union, five votes against the Union, and six challenged ballots. Although the challenged ballots were sufficient to affect the outcome of the election, they do not appear on the official tally of ballots. The Employer's observer was not consulted regarding the disposition of these challenges nor was the Employer's Administrator or any other representative of the Employer. Thus, the tally of ballot does not accurately reflect the election results.

Facts:

The June 4, 1998 election was held in a break room on the first floor of the Employer's premises. The polls were open from 7:00 a.m. to 7:30 a.m. and again from 2:45 p.m. to 3:30 p.m. Both the Employer and the Petitioner had observers present during both polling periods.

Henry Acevedo is Petitioner's director of its nursing home division. On the morning of the election Acevedo entered the premises at about 6:30 a.m. through the Employer's front door and lobby. Acevedo went with some employees directly to the break room, where he met and talked with the Commission's election agent. The Employer does not allege that Acevedo engaged in any improper conduct at this time. Acevedo left the building just prior to the opening of the polls.

Three voters voted during the morning polling session. One of these voters, whose name was not on the voting eligibility list, was challenged by the Employer's observer on the grounds that the voter was a RN supervisor. RN supervisors were found in the Commission's previous decision to be excluded from the unit as supervisors. The voter was permitted to vote. However, her ballot was put into an envelope with her name on it in accord with the Commission's usual procedure.

Acevedo returned to the building just after 7:30 a.m., going directly to the break room. The Commission's election agent said to Acevedo that the turnout had been low, that the election agent wanted to know what the problem was, and that he (the election agent) understood that there was a meeting for the nurses called by the Employer taking place at the same time. The election agent did not tell Acevedo how he had learned about the meeting, and the record does not indicate how this occurred. Acevedo told the election agent that he didn't know anything about the meeting but that he would look into it.

Acevedo immediately went to the reception desk in the lobby and asked to speak to Ruth MacAlpine, the facility's administrator. MacAlpine was in a nurse's meeting. She left the meeting and came to meet Acevedo in the lobby. Acevedo asked MacAlpine why she had scheduled meetings on the day of the election since she knew the election was going to be held that day. Either in this conversation or before, Acevedo learned that a nurse's meeting was also scheduled for the afternoon

polling period. According to MacAlpine, Acevedo was visibly upset; Acevedo admitted that he was not smiling at the time. MacAlpine responded that nurses' meetings were always held on the first Thursday of every month. MacAlpine also said that the meetings were not mandatory. According to MacAlpine, Acevedo asked if MacAlpine was asking nurses to come to the meetings and forego voting, and MacAlpine replied that this was not true. There was no testimony that any eligible voter overheard their conversation in the lobby. MacAlpine then took Acevedo into a conference room. In this room were three or four people. The only person Acevedo recognized was the director of nurses. MacAlpine asked the people in the room to confirm that nurses' meetings were normally held the first Thursday of every month and that they were not mandatory, and they did so. After saying he was going to check further into the matter, Acevedo left the room.

Acevedo then went back to the break room. About 10 minutes later he returned to the lobby and asked to speak to MacAlpine again. MacAlpine came to the lobby. Acevedo apologized for his earlier remarks. He said that he had not had all of the facts at the first meeting, but that he had looked into it, and that it was his understanding that the meetings were not mandatory. Acevedo told MacAlpine that he would be back later. At approximately 7:50 a.m., Acevedo left the building.

Acevedo returned to the facility shortly before 11:00 a.m. He was accompanied by Marianne Woods, a Petitioner business representative. Woods is assigned to the unit of the Employer's service employees currently represented by Petitioner. Acevedo and Woods stopped at the reception desk in the lobby. MacAlpine admitted that she was told that they had come into the building. Acevedo and Woods went directly to the employees' cafeteria. The cafeteria is next door to the break room, and there is a smoking area outside. According to Acevedo, this was not the first time he had come into the facility and talked to employees in the cafeteria during their lunch breaks. On this occasion Acevedo spoke mostly to members of the service employees' unit, and to only one or two nurses. Acevedo asked one nurse, an LPN, if she had voted yet. The LPN said she had not voted yet and had not attended the morning nurses' meeting. According to the LPN, Acevedo told her that he was concerned that the meeting in the morning had been scheduled on purpose to "tell us not to vote." The LPN also testified that Acevedo said that he "was concerned that (MacAlpine) was telling employees not to vote." According to the LPN, Acevedo also told her he had talked to MacAlpine earlier in the day, and that she had assured him that these nurses' meetings were regularly scheduled meetings that were held every month at the same time, and had nothing to do with the election. The LPN admitted that Acevedo did not suggest that MacAlpine had lied to him. The LPN testified that she told Acevedo that these meetings had been going on for the two years she had worked for the Employer. Acevedo did not recall telling the LPN that he believed the meetings had been scheduled deliberately to prevent employees from voting. According to Acevedo, he did say that at first he had thought that it was mandatory to attend the meetings, but that he had talked to MacAlpine and that she had assured him that these were regularly scheduled meetings that were not mandatory. According to Acevedo, he also told the LPN that he wanted to make sure that everyone was clear on the fact that it was not mandatory for the nurses to attend the meeting.

While in the cafeteria, Acevedo asked another nurse, a RN supervisor, if she was voting. She replied that she understood that RNs could not vote. Acevedo told her that they could. He also said

to her, in an irritated tone, that there were other meetings scheduled that day and that these meetings were going to interfere with the voting later in the afternoon. There was no evidence that Acevedo knew that this nurse was a RN supervisor. Acevedo left the building between 12:00 and 12:30 p.m.

Woods' purpose in coming to the facility was to discuss with employees in the service unit matters relating to the current contract negotiations for this unit. Woods spoke with a number of employees from the service unit in the cafeteria and in the outside smoking area adjacent to the cafeteria. She did not discuss the election with anyone, and spoke to only one employee who was an eligible voter. This employee, an LPN, came to her and asked her a question about insurance, which Woods briefly answered. Woods left the building at the same time as Acevedo.

During the afternoon polling session five voters whose names were not on the voting eligibility list came to vote. All five were challenged by the Employer's observer on the basis that they were RN supervisors. The ballots of these voters were put in challenged ballot envelopes with the voters' names on them, in accord with the Commission's usual procedure. After the polls had closed, Acevedo and Woods returned to the facility and came to the break room. No representative of the Employer, other than its observer, came to watch the counting of ballots. The election agent asked Acevedo what he wanted done with the challenged ballots. Acevedo told the election agent that he didn't want to use them. The election agent then set the challenged ballots aside. The Employer's observer was not consulted regarding the disposition of the challenged ballots. The election agent counted the unchallenged ballots. As indicated above, eight votes were cast for the Petitioner and five against. The election agent prepared an official tally of ballots. The tally stated that there were no challenged or spoiled ballots. This tally was signed by Acevedo and by the Employer's observer. The election agent then gave them both copies of the tally.

Some testimony was presented at the hearing regarding the nurses' meetings scheduled for the day of the election. The record indicated that these meetings are for all professional nurses, RNs and LPNs. They are typically scheduled on the first Tuesday of every month, although if this is a holiday the meeting will be scheduled for another day. The morning meeting begins at about 7:10 a.m., and the afternoon meeting at about 2:15. The meetings last about an hour. Although employees are not disciplined for failing to attend a meeting, they are encouraged to attend if they are working that day and their workload permits it. The Employer keeps track of who attends by having employees sign in.

Discussion and Conclusions of Law:

In *General Shoe Corp.*, 77 NLRB 124, 21 LRRM 1337 (1948), *enf'd* 192 F2d 504, 29 LRRM 2112 (6th Cir, 1951), the National Labor Relations Board (NLRB) first enunciated its "laboratory standards" rule for the conduct of elections conducted by it under the National Labor Relations Act (NLRA), 29 U.S.C. §151, et seq. The Board held that an election should be set aside if conduct occurred which created an atmosphere calculated to prevent a free and untrammeled choice

by the employees, even if that conduct did not constitute an unfair labor practice. The NLRB said:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault, or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. 77 NLRB at 127.

The Labor Mediation Board, this Commission's predecessor, adopted the "laboratory standards" rule in *Ojibway Motor Hotel*, 1966 MERC Lab Op 17, and *North Detroit General Hospital*, 1967 MERC Lab Op 79. Furthermore, as we first held in *City of Detroit*, 1971 MERC Lab Op 892, in an objection proceeding the burden is upon the objecting party to show that the election was not fairly conducted, and not upon the Commission to show that it was.

In its first objection, the Employer asserts that on the day of the election Petitioner agents Acevedo and Woods engaged in electioneering in the cafeteria and smoking area next to the voting room. The record establishes that neither Acevedo nor Woods were in the cafeteria, any location close to the voting place, or even on the Employer's premises during the period when the polls were open. Acevedo was admittedly in the Employer's cafeteria and smoking area between the hours of approximately 11:00 a.m. and 12:30 p.m. During this time he spoke to voters and urged them to vote. Acevedo had no protected right to be on the Employer's premises during this period. However, the Employer, who knew he was there, did not ask him to leave. Even if Acevedo did in fact engage in "electioneering" during this period, his doing so did not interfere with the election.

In its second objection, the Employer alleges that while Acevedo and Woods were on the Employer's premises they criticized the Employer and its Administrator for holding a regularly scheduled nurses' meeting. It also alleges that Acevedo and Woods falsely indicated to employees that (1) the Employer had scheduled the nurses meeting so that eligible voters would not be able and vote; and (2) the Employer had told nurses not to vote.

The record indicates that Acevedo criticized MacAlpine for scheduling these nurses' meetings in the conversation that took place between them in the lobby shortly after the polls first closed at 7:30 a.m. However, the record does not establish that any eligible voter overheard this conversation. The Employer asserts that while Acevedo was in the cafeteria during the lunch hour he made false statements regarding the Employer to eligible voters. Specifically, the Employer alleges that Acevedo falsely accused the Employer of deliberately scheduling nurses' meetings to prevent eligible voters from voting. The Employer cites *Quick Service Transportation*, 1982 MERC Lab Op 342. In that case, the Commission set aside an election based on accusations made by an employee against the Employer at a union meeting which occurred three days before the election. The employee accused the Employer's manager of embezzling funds that the Employer had allocated for wage increases.

We find that the record does not support the Employer's allegation that Acevedo falsely accused the Employer of deliberately scheduling meetings to prevent employees from voting. Only one eligible voter, the LPN, testified that Acevedo spoke to her about the scheduling of these meetings. When Acevedo heard from the election agent that meetings to be attended by eligible voters had been scheduled for the same times as the polling periods, he was naturally concerned that voters would be discouraged from voting by these meetings. Even though these meetings were not strictly mandatory, it would have been preferable either to have scheduled the election for a date on which there were no meetings scheduled or to have rescheduled the meetings. We credit the LPN's testimony that Acevedo mentioned to her that he was concerned that the meetings had been scheduled on purpose to keep the nurses from voting. However, the LPN also testified that Acevedo also told her that MacAlpine had assured him that the meetings were regularly scheduled meetings and were not mandatory. That is, rather than accusing the Employer of wrongdoing, Acevedo told the LPN that he had been concerned when he heard about the meetings, but that his concerns had been satisfied. Moreover, even if Acevedo's remarks are interpreted as an accusation, this case is clearly distinguishable from *Quick Service Transportation.* In that case, the Commission said that it was probable that at least some of the employees at the meeting would have believed the accusations, and that they were of such a serious nature that they were certain to create an atmosphere of mistrust. In this case, the LPN clearly did not believe that the meetings had been purposely scheduled to interfere with the election. In fact, she told Acevedo that these were meetings that had been regularly held as long as she had worked for the Employer. Finally, we note that *Quick Service Transportation* was decided before *City of Dearborn*, 1983 MERC Lab Op 128. In *Dearborn*, we held that we would no longer probe into the truth or falsity of campaign statements. We stated in that case that we would not set elections aside on the basis of campaign statements, unless these statements involved threats, or a promise of benefits, or the voters had been presented with forged documents.

The record also does not support the Employer's claim that Woods engaged in any "electioneering" on the Employer's premises on the day of the election. The record indicates that Woods was at the facility for purposes unrelated to the election, spoke to only one eligible voter, and that only after the voter had asked her a question.

The Employer also asserts in its objections that Acevedo interfered with the election by falsely advising RN supervisors that they were eligible to vote. The Employer alleges that by advising RN supervisors that they could vote when they were clearly ineligible under our direction of election, Acevedo "created an atmosphere of distrust among employees with the Employer."
According to the Employer, by sending these nurses to vote when he knew their votes would be challenged by the Employer, Acevedo deliberately created a suspicion in the minds of voters in line to vote that the Employer was attempting to disenfranchise them. We find no merit in this argument. First, the record establishes only that Acevedo told one RN she could vote. The record does not establish that Acevedo knew this individual personally or knew that she was a RN supervisor. Secondly, we note that the posted notices of election clearly indicated that RN supervisors were excluded from the proposed unit. We do not agree with the Employer's claim that the voters in this case were so unsophisticated that they could not understand the challenged ballot process.

We conclude that Acevedo's conduct on the day of the election did not interfere with the employees' exercise of their right of free choice.

The Employer also asserts that the election should be set aside because the challenged ballots, which were determinative of the results of the election, were omitted from the official tally of ballots. The Employer notes that Commission Rule 46, R 423.446 states, "A person challenged as an ineligible voter shall be permitted to vote in secret, and the election agent shall set aside the ballot, with appropriate markings. If it is determined by the commission or its election agent that the challenged ballot, or ballots, is determinative of the result, the commission shall determine the merits of any challenged ballot and decide whether or not the person is an eligible voter." The Employer argues that absent the express agreement of both parties, only the Commission had the authority to determine whether the challenged voters were eligible.

The six ballots were challenged by the Employer's election observer and our election agent on the ground that they were not on the Employer's eligibility list supplied by it for the voting at the election, and on the ground that the voters were all RN floor supervisors who had been already found in a litigated decision to be ineligible to vote. Both the Employer's election observer and our election agent signed the challenged ballot envelopes at the time of the challenge. When the Employer's observer signed these challenges, she was agreeing on the Employer's behalf that the six challengees were ineligible to vote. Thus, at the count of the ballots after the election it was only necessary for the election agent to obtain the consent of the Petitioner-Union in order to sustain the challenges and exclude them from the count and the tally of ballots. This was done in the proper manner by our election agent when he obtained the agreement of the Union representatives that the six challenged voters were ineligible to vote in the election. Thus, before the count of the ballots in this case both parties, through their duly authorized and chosen agents, had agreed in writing that the six ballots should not be counted. Such ballots are considered by this Commission to be resolved and are not, and were not, included in the tally of ballots.

Contrary to the contention of the Employer in its objections, the tally of ballots accurately reflected the election results, as it would have been improper for our election agent to include the six resolved challenges in the tally. No other stipulation or agreement was required to resolve the challenges other than the agreement of the observers or agents of the parties, which was obtained in this case. Our Rule 46(2), R423.446(2), relative to the Commission determining the merits of challenged ballots, clearly applies only to unresolved challenged ballots that are decisive of the outcome of the election. *Huron Motor Inn*, 1966 MERC Lab Op 568, 588; *Holland Board of Public Works*, 1966 MERC Lab Op 563, 564. Our decision in *City of Sterling Heights*, 1986 MERC Lab Op 807, 810, cited by the Employer, is not applicable to this case. In *Sterling Heights*, the election agent improperly opened and counted four challenged ballots of persons not on the employer's eligibility list without obtaining the unambiguous agreement of the city. In the instant case, the Employer had not included the six challenged voters on its eligibility list, and its own observer and the election agent properly challenged their ballots. Once the Petitioner agreed as to the count on the ineligibility of the six voters, the six challenged ballots were resolved and had no bearing on the election or its results. Therefore, such ballots need not properly be included in the tally of ballots,

and this objection is overruled. Accordingly, based on all of the above, we enter the following order dismissing the objections in this matter:

Order

In accord with the discussion and conclusions of law set forth above, we find the objections filed by the Employer to the election conducted on June 4, 1998 to be without merit. We direct that a certification of representative be issued forthwith naming the Service Employees International Union, Local 79 as the bargaining agent for the following group of employees:

> All full-time and regular part-time registered nurses, licensed practical nurses, and graduate nurses employed by the Huron County Medical Care Facility, including the MDS coordinator, the assistant MDS coordinator, and the restorative nurse; but excluding all supervisory employees, including the administrator, the director of nursing, the assistant director of nursing, and the RN floor supervisors; casual employees; clerical employees; and all other employees.[1]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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C. Barry Ott, Commission Member

Dated: _____

[1]Commissioner Bishop did not participate in this decision.