

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Public Employer-Respondent.

MERC Case No. C17 I-077

-and-

UNIVERSITY OF MICHIGAN HOUSE OFFICERS
ASSOCIATION,
Labor Organization-Charging Party.

_____ /

APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by David J. Mason, for Respondent

Soldon Law Firm, LLC, by Kyle A. McCoy, for Charging Party

DECISION AND ORDER

On December 6, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order¹ in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it/they cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by either of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Issued: February 15, 2019

¹ MAHS Hearing Docket No. 17-020201

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Public Employer-Respondent.

-and-

Case No. C17 I-077
Docket Number. 17-020201-MERC

UNIVERSITY OF MICHIGAN HOUSE OFFICERS
ASSOCIATION,
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APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by David J. Mason
for the Respondent

Soldon Law Firm, LLC, by Kyle A. McCoy for the Charging Party

ERRATA

The Decision and Recommended Order issued in the above matter on December 6, 2018,
is corrected as follows:

1. All references to Dr. J. Sybil Bierman shall instead be read as Dr. J. Sybil Biermann.
2. All references to Robin Tartar shall instead be read as Robin Tarter.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Date: January 15, 2019

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION**

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
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-and-

Case No. C17 I-077
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UNIVERSITY OF MICHIGAN HOUSE OFFICERS
ASSOCIATION,
Labor Organization-Charging Party.

APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by David J. Mason for the Respondent

Soldon Law Firm, LLC, by Kyle A. McCoy for the Charging Party

**DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE**

On September 19, 2017, the University of Michigan House Officers Association (Charging Party or Association) filed the present unfair labor practice charge against the University of Michigan Health System (Respondent or University). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (Commission).

Unfair Labor Practice Charge and Procedural History:

The Association's charge alleges that the University violated Section 10(1)(a) of PERA when, on June 19, 2017, the University's Associate Dean for Graduate Medical Education, J. Sybil Bierman, interrupted a presentation being given by an Association representative to new unit members, and told them that regardless of their membership status with the Association, they would receive all the benefits of the parties' collective bargaining agreement.

On December 27, 2017, the University filed a motion for summary disposition arguing that the Charging Party failed to present any allegations that could give rise to a Section 10(1)(a) violation.

Charging Party timely filed its response to the University's motion on January 8, 2018. In an interim order dated January 18, 2018, I denied the University's motion and proceeded to set the matter for hearing.

The parties appeared before the undersigned on March 19, 2018, in Detroit, Michigan. Based upon the entire record, including the transcript of the March 19, 2018, hearing, the exhibits admitted into the record and the parties' post hearing briefs, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

General Background²

The UMHS is an organization underneath the umbrella of the University of Michigan and includes the University's Medical School, its various hospitals, medical centers, and clinics, its Faculty Group Practice, and other departments and entities. The UMHS's department of Graduate Medical Education (GME) operates, oversees, manages, and handles the Medical School's residency program. Residents are recently graduated medical doctors who have been accepted to the University's residency program. The purpose of the residency program is to provide proper training and education to allow Residents to eventually become independent practicing doctors. All participants in the residency program are members of the Association's bargaining unit and are called House Officers.

Sitting at the top of the GME is Dr. J. Sybil Bierman, the department's Director and Associate Dean. According to Bierman her role is to oversee the GME training program and to prepare the Residents for independent practice. Bierman is also the University's designated institutional officer for the American Council of Graduate Medical Education (ACGME), the national accrediting body which oversees the University's residency program.

The Association experiences quite a bit of bargaining unit turnover because, as Residents complete their residency programs, they either leave to practice independently or move on to advanced training programs. At the time of hearing, the Association employed Robin Tartar as its Executive Director, a position she had held for at least six years. Tartar is neither a doctor nor is she employed by the University.

The parties are both signatories to a collective bargaining agreement effective from July 1, 2017, through June 30, 2020. Article XXXIV, entitled Orientation for House Officers, provides in the relevant part the following:

The Employer will provide an orientation for new House Officers at the beginning of employment. A representative of the House Officers Association will be provided the opportunity to make a presentation.

² The following factual background describing the structure of the UMHS and its residency program is summarized from both the record as developed in the present matter and also from a recent Decision and Recommended Order involving these same parties that dealt with both an unfair labor practice charge and unit clarification petition. See *University of Michigan Health System*, 31 MPER 46 (2018) (no exceptions).

Tartar has presented on behalf of the Association at the orientation each of the last six years. Bierman testified that the orientation typically includes information that incoming Residents are required to know prior to starting the program and includes 15 or 20 different presenters that each cover short amounts of material.

June 2017 Orientation

The orientation that is the center of the present dispute occurred on June 19, 2017. It was held in the auditorium at the University's Towsley Center which is located on the Ann Arbor medical campus. Approximately 200 incoming House Officers were in attendance. The auditorium has built-in seating and includes a raised stage of approximately three feet with a podium. The parties each agreed that the Association's allotted time for their presentation in the orientation was fifteen (15) minutes.

Bierman started out the morning with an introduction and was followed by various other presenters. Terri Schork, a University administrative assistant who, as part of her duties, works on the new-hire orientation, testified that at the point in the orientation where the Association was set to set present, the entire orientation was behind schedule by about five (5) minutes.

At some point during the Association's presentation – the parties' witnesses each testified as to the events in slightly varying fashion as will be discussed below – Tartar was at the podium when Bierman interrupted the presentation and made comments. Following Bierman's comments, several members of the Association and Tartar responded after which Bierman again spoke. Following this exchange, Charging Party's presentation concluded.

Association President Michael Clery testified that during the portion of the presentation in which Tartar was speaking about the parties' new contract, which had yet to be ratified, he and other Association members were passing out membership forms to the audience when Bierman began walking from stage left near the back of the auditorium towards the stage. Clery claims that once Bierman reached the area near the stage, she stopped in the center in front Tartar who was on the raised stage and said something to the effect that those present "did not need to join the Union in order to gain all the benefits of the contract." According to Clery, after Bierman spoke, another Association member, Elias Taxakis, spoke up and said "yes, but you don't want to be a freeloader," after which someone else from the Association stated the correct term was "free-rider" and not "freeloader." At this point, Clery claimed that Bierman again stated that "you do not need to join to gain the benefits of that contract." Clery also stated that following Bierman's second statement, Tartar stated "you don't want your picture up on the wall of shame." Clery indicated that he took Tartar's comment as a joke and that he heard laughter following the comment. Clery also claimed that the Association does not have a "wall of shame."

Association Secretary Joel Castellanos also testified that Bierman spoke while standing on the floor in front of the center stage where Tartar was standing. Castellanos agreed that Bierman began speaking while membership forms were being passed out to the House Officers in attendance at the orientation and that she said something like "you don't have to join the Union to get the benefits." Castellanos echoed Clery's testimony regarding the back and forth regarding "free-loader", "freerider", and Bierman's repeat of her earlier statement. Castellanos further claimed that laughter followed Tartar's statement regarding the "wall of shame." He too denied that the Association has a "wall of shame."

Tartar testified that she had been discussing joining the Association and was encouraging the incoming House Officers to join so that they could vote on the upcoming ratification of the parties' contract when Bierman, who had been standing stage left, approached the stage. According to Tartar it was not until Bierman was standing on the ground in front of the stage but to Tartar's left that the GME Director first spoke. Similar to the other Association witnesses, Tartar claims that Bierman stated that "you don't need to sign up and be a member of the Union to get the benefits of the contract." Tartar's recitation of what followed was similar to that testified to by both Clery and Castellanos; she also denied that the Charging Party had a "wall of shame."

Bierman testified that it was not until Tartar asked if there were any questions that she spoke. According to Bierman, there were at least three questions asked by audience members, one of which involved a cell phone stipend.³ Bierman claims that following a question from the audience regarding the stipend, Tartar indicated that there would be a form that would have to be filled out in order to receive the benefit. It was around this time that, according to Bierman, Association membership forms were being handed out. The GME Director further claimed that she had been sitting in the audience near the front of the auditorium where she heard some confusion from incoming House Officers on whether the form being handed out was for the cell phone stipend. Bierman stated that because of what she overheard, she stood and said something to the effect of "you can have the cell phone stipend whether or not you join the Union." According to the GME Director, she did not make this statement directly in front of Tartar but rather while standing slightly stage left of the podium on the auditorium's floor. Bierman claims that Tartar corroborated that statement and then went on to talk about voting as benefit of membership. Bierman recalled the comment regarding being a "freeloader" and the "wall of shame" but did not recall that "freeloader" was later clarified to "free-rider." Bierman did not appear to claim during her testimony that she made a second statement following the "wall of shame" remarks. Bierman also claimed that at the point that she made her comments, the Association's presentation had gone over the allotted fifteen-minute limit.

Schork's testimony supported the account given by Bierman. Schork claimed that Tartar asked whether there were any questions and after someone in the audience asked a question regarding the cell phone stipend, Tartar "then explained that there would be an SPG."⁴ According to Schork it was not until then that Bierman spoke. Schork's recollection of Bierman's comments was that the Director said something to the effect of "the papers you have in front of you are not for the cell phone stipend but are for signing up to be a member of the [Association], which you don't have to have to get the cell phone stipend." Schork's testimony placed Bierman stage left of Tartar on the ground. Schork also stated that while she could not be sure whether the Association had run out of time, she "would've assumed so because of the distraction with handing out materials."

Neither Clery nor Castellanos, during their respective testimony, mentioned that Bierman's comments were made in response to, or following, any question regarding the cell phone stipend. Moreover, only Clery recalled during testimony that Tartar spoke about the cell phone stipend. Clery did not recall however whether Tartar's comments regarding the cell phone stipend included any discussion about a form. Furthermore, neither of the Association officers testified that there had been

³ Article XXXVII of the parties' contract, entitled Cellular Phone Stipend, provides the terms and conditions by which House Officers can receive a fifty dollar (\$50.00) monthly stipend to be used towards the Officer's cell phone bill.

⁴ While the parties stipulated that "SPG" stands for "Standard Practice Guide" there was no testimony regarding how an SPG would be connected and/or related to the cell phone stipend. Moreover, Article XXXVII of the parties' contract does not mention "SPG" or "Standard Practice guide."

any questions following Tartar's presentation. Clery specifically testified that he did not believe there had been time at the end of the presentation for there to have been a question period, while Castellanos testified that Tartar "gave her [contact] information and said if you had any questions to contact us." Tartar could not recall being asked any questions regarding the cell phone stipend. Neither of the Association officers, or Tartar herself, testified that they had received any indication that their presentation had run longer than its allotted time.

Each of the five witnesses appeared credible in their testimony as to the sequence of events that occurred during the June 2017 orientation presentation, despite significant differences in their respective recollections. Focusing first on what facts the witnesses seemed to agree on, I note that, where testimony was provided in relation to Bierman's starting position before her comments, those that testified, claimed she came from somewhere stage left of Tartar to stand on the floor in front of the raised stage.⁵ Moreover, their appeared to be consensus from the witnesses that following Bierman's initial comments, someone did make the "freeloader" comment and that Tartar did at some point mention the "wall of shame." The most relevant factual disagreements between the two sides are over the content of Bierman's statements, whether they focused on the cell phone stipend, or were more general statements regarding union membership. Moreover, the dispute also includes the timing of those statements, whether the statements were made in response to questions or rather were simply made while Tartar was speaking, and whether membership forms were being handed out. It is the opinion of the undersigned that it is more likely than not that, given the similar witness testimony regarding the "freeloader" comments, Bierman's initial comment was of the nature described by Clery, Castellanos, and Tartar, and was devoid of any spoken reference to the stipend.⁶ It seems wholly unlikely that a comment referencing the eligibility of a cell phone stipend would have prompted the "freerider" comment. Additionally, given that all but Bierman testified that the GME Director made a second statement, I find it more likely than not that the second comment occurred and that it too was devoid of any spoken reference to the stipend. Again, it seems unlikely that this second comment, if focused on the cell phone stipend as opposed to a statement regarding union membership, would have caused Tartar to make her "wall of shame" comment.

Discussion:

Section 10(1)(a) of PERA prohibits employers from interfering with, restraining, or coercing employees in the exercise of rights protected under the Act. In determining whether a public employer's statement constitutes a violation of Section 10(1)(a), both the content of the employer's statement and the surrounding circumstances must be examined. *New Buffalo Bd of Ed*, 2001 MERC Lab Op 47; *New Haven Cmty Sch*, 1990 MERC Lab Op 167, 179. Moreover, it is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer's motive for the proscribed conduct or the employee's subjective reactions thereto. *City of Greenville*, 2001 MERC Lab Op 55, 58. Rather the test is whether a reasonable employee would be coerced. *Id* at 56.

As established in the preceding section, I have concluded that Bierman made two comments to the effect that Residents do not need to join the Association in order to get the benefits of the

⁵ I find it irrelevant whether Bierman came to stand directly in front of Tartar or slightly stage left of the speaker as Bierman nonetheless was standing at the front of the auditorium before the entire orientation audience.

⁶ My finding to the content of Bierman's comment notwithstanding, I do think it wholly possible that Bierman's intention may have been to address what she saw as a perceived confusion regarding the forms being passed out and comments she claims to have heard from certain unidentified audience members.

contract. There is no question that Bierman's statements were factually true in nature. As such those comments, standing alone, could not be cause for the undersigned to find a violation of 10(1)(a) of the Act. However, Bierman did not make the statements in a vacuum. Rather those statements must be examined in conjunction with the "surrounding circumstances." *New Buffalo*, supra. To that point, the Association argues that such circumstances should include consideration given to (1) time; (2) location; (3) speaker; (4) audience; and (5) interruption. Addressing the timing issue, the factual disputes aside as to when during the presentation the comments were made or whether the Association's allotted time had expired notwithstanding, it is clear from the record that Bierman made her comments while Tartar was still standing on the stage and while memberships forms were being passed out. As to the location of comments, the Association notes that the orientation took place in an enclosed space in a University building located on the University's campus. Identifying the speaker, Charging Party argues that Bierman is a distinguished faculty member as well as the new House Officers' "most important manager/supervisor" because she is the GME's Director and Associate Dean as well as the designated ACGME institutional officer. According to the Association, the audience were individuals being introduced to the contract and the Association's status as their bargaining agent. Lastly, the Association claims that the comments interrupted Tartar's presentation and were "designed for maximum effect... because it showed superiority over the Union."

As stated above, it is my opinion that Bierman's comments, standing alone, would not rise to the level of a Section 10(1)(a) violation. Furthermore, had Bierman waited until the Association's presentation had concluded, such that Tartar and the Association officers were no longer the focus of the audiences' attention, I would similarly not find a violation of Section 10(1)(a). However, given that the comments were made by the Director and Associate Dean of the GME during the Association's presentation when membership forms were being handed out, I find that a reasonable House Officer would have perceived those comments as an attempt to coerce them to refrain from joining the Association for fear that such an action was against the wishes of Bierman.

I have considered all other arguments as set forth by the parties and conclude that such does not require a change in the conclusion. As such and in accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Respondent University of Michigan Health System, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing members of the bargaining unit represented by the University of Michigan House Officers Association in the exercise of rights protected by Section 9 of PERA.
2. Ensure that all members of the bargaining unit represented by the University of Michigan House Officers Association, are free to engage in lawful concerted

activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

3. Post the attached notice for a period of thirty (30) consecutive days, to employees in conspicuous places on Respondent's premises, including, but not limited to, all places where notices to employees represented by the University of Michigan House Officers Association, are normally posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Date: December 6, 2018

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION**, THE COMMISSION HAS FOUND THE **UNIVERSITY OF MICHIGAN HEALTH SYSTEM** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL ensure that all members of the bargaining unit represented by the University of Michigan House Officers Association are free to engage in lawful concerted activity, through representatives of their own choice, for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT interfere with, restrain, or coerce members of the bargaining unit represented by the University of Michigan House Officers Association in the exercise of rights guaranteed and protected by Section 9 of PERA.

UNIVERSITY OF MICHIGAN HEALTH SYSTEM

By: _____

Title: _____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.