

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

In the Matter of:

REGISTERED NURSES AND REGISTERED PHARMACISTS
OF HURLEY HOSPITAL,
Labor Organization-Respondent,

Case No. CU02 A-003

-and-

LISA LINDSAY, JEFFREY REICHARDT, RYAN LAPEER,
And CAROLINE McGRAW,
Individual Charging Parties.

APPEARANCES:

Scheff & Washington, by George Washington, Esq., for the Respondent

Lisa Lindsay, Jeffrey Reichardt, and Ryan Lapeer, in pro per

DECISION AND ORDER

On October 31, 2002, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan, on April 29, 2002, by Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the record, including the charge, transcript of the hearing and exhibits admitted at the hearing, I make the following findings of fact and conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

On January 29, 2002, Lisa Lindsay, Jeff Reichardt, Ryan Lapeer, and Caroline McGraw¹, registered nurses employed by Hurley Medical Center (the Hospital), filed this charge against their collective

¹ McGraw did not appear at the hearing.

bargaining agent, the Registered Nurses and Registered Pharmacists of Hurley Medical Center. Charging Parties allege that the Union violated its duty of fair representation in conducting a contract ratification election in September 2001. Lindsay, Reichardt and Lapeer also allege that the Union caused the Hospital to discipline them because they complained about the Union's handling of this election.

Facts:

The September 17, 2001 Election

Respondent represents a bargaining unit of approximately 815 registered nurses and pharmacists employed by the Hurley Medical Center. Respondent and the Hospital began negotiating a new collective bargaining agreement in the spring of 2001. In July 2001, Respondent and the Hospital reached a tentative agreement that was rejected by Respondent's membership. Respondent then held a second election at which members were asked only if they wanted to vote separately on a controversial proposal to reduce the number of personal days in exchange for increased pension benefits. The membership indicated that they did want to vote separately on this proposal. Accordingly, in late August or early September 2001, Respondent scheduled a third election. Respondent's election committee selected a date for the third election, September 17, picked the location as a room in the main Hospital building, and set the hours of the election as 7:30 a.m. to 5:00 p.m.

Respondent's Constitution and Bylaws require it to notify members of contract ratification elections both by mail and by posting on Respondent's bulletin board, and to schedule elections so that all members may have the opportunity to attend and vote. The bylaws require that in elections for officers, notices must be mailed and posted at least 15 calendar days prior to the election, but there is no minimum posting period for contract ratification elections.

Between September 6 and 8, 2001, Denise Paliani, Respondent's bargaining/grievance chair, posted election notices on bulletin boards throughout the Hospital. These notices, although handwritten, were prepared on Respondent's stationary. She also faxed notices to 18 locations where members of the unit work. These included facilities away from the main Hospital's building and areas of the Hospital open only to authorized personnel. Paliani's notices stated that the election would be held between 7:30 a.m. and 5:00 p.m. Sometime between the time the election committee selected the election date and the date Paliani posted notices of the election, however, the *Flint Journal* published an article quoting Respondent President Charlotte Novak as stating that the election would be held between 7:00 a.m. and 7:30 p.m. Reichardt testified that he saw a notice in the Hospital stating that the hours of the election were 7:00 a.m. to 7:30 p.m.

Contrary to previous practice, Respondent did not mail postcards to members announcing the September 17 election and did not notify members how to vote by absentee ballot.

The election was held as scheduled on September 17. In previous contract ratification elections, a member of the election committee physically took a ballot box to the Hospital's offsite dialysis clinic and to another offsite clinic, North Park, because the nurses working at these sites are generally not able to leave

during the day. This was not done on September 17. At 5:00 p.m., the election committee closed the polls and began counting the ballots. At least three unit members showed up to vote after the polls closed. About 50% of the membership voted in the election, a slightly higher percentage than usual for Respondent's unit. The contract was approved by about 60 votes, while the proposal to exchange personal days for increased pension benefits was defeated by about 13 votes. On September 18, Novak sent the Hospital a letter notifying them that the contract had been ratified.

On September 21, approximately 250 members of the bargaining unit submitted a petition to the Respondent asking for a recount of the ballots, an explanation of why polls were closed at 5:00 p.m. when "voting hours were published as well as verbally stated," as 7:00 a.m. to 7:30 p.m., and an explanation of why absentee ballots were not issued.

On October 9, Respondent held a meeting in an auditorium at the Hospital to discuss the members' complaints. About 135 members of the bargaining unit attended the meeting. Novak, Paliani, and Vice President Jeff Morse, were at the meeting, along with members of the election committee. The meeting lasted about two and one-half hours. During the meeting the sealed ballot boxes were brought into the auditorium and the election committee recounted the ballots in front of the membership. Several members of the unit criticized the actions of the election committee and executive board. Charging Parties Reichardt, Lindsay, and Lapeer were among the most vocal critics. Discussion on both sides was very heated. Reichardt made a motion to rerun the election. Novak did not allow a vote on the motion. She told the members that she didn't believe that a new vote could be held because Respondent had already told the Hospital that Respondent had accepted the contract.

On October 16, a group of members, including Lindsay, Lapeer, Reichardt and McGraw, lodged a complaint with Respondent's internal appeals committee regarding the conduct of the election. The appeals committee issued a written decision on November 30. It found that the bylaws had not been completely followed and also recommended that certain changes be made to the bylaws. The appeals committee stated, however, that it did not have the power to decide whether another election should be held.

Disciplinary Actions Following the October 9 Meeting

Jeff Reichardt is a registered nurse (RN) in surgical services. Reichardt was on duty during the afternoon of October 9. Reichardt testified that he told the charge nurse in his area that he was leaving to go to the union meeting. As noted above, Reichardt made a motion at the meeting to hold another ratification election. While Reichardt was addressing the membership on this issue, he noticed Paliani leaving the auditorium. Charging Party Lindsay testified that Paliani went to a pay phone in an alcove at the side of the auditorium and made a call. She also testified that she saw Morse leave the auditorium and make a phone call. Paliani and Morse admitted that they left the meeting for short periods, but denied making any phone calls while the meeting was taking place. Between five and ten minutes after Reichardt finished addressing the meeting, a secretary from surgical services came into the auditorium and told him that the administrator of surgical services wanted to see him. On his way back to the surgical area, Reichardt encountered his immediate supervisor, a nurse manager, who said that the administrator had received a couple of phone calls and then had begun looking for him. Reichardt subsequently received a formal verbal

written warning for leaving his work area without approval. Respondent filed a grievance over this discipline which, at the time of the hearing, was scheduled for arbitration.

Lisa Lindsay is an RN in an emergency room. On October 18, Lindsay wrote a memo addressed to all RNs about filing the complaint with the appeals committee and other matters relating to the election. In the memo she told employees to call her in the emergency room if they wanted a copy of the bylaws. The following day, Lindsay sent seven copies of this memo to different areas of the Hospital through the Hospital's vacuum tube message system. The tube system is used to transmit lab reports and patient charts and for other hospital business. Employees also send personal items through the tube system, even though this is against formal policy. On October 25, Lindsay received a memo from her supervisor indicating that she was under investigation because of the October 18 memo. She was told that the investigation might result in discipline. A few days later, Respondent President Novak came to Lindsay's work area and asked to see her. The two women spoke for about ten minutes in a waiting area. According to Lindsay, Novak essentially admitted giving the Hospital a copy of the memo, through Respondent's attorney. On November 9, Lindsay received a written verbal reprimand for writing the memo while on duty, improperly using Hospital property to distribute the memo, and distracting others from their jobs.

Respondent filed a grievance over Lindsay's reprimand. In its third step answer dated December 14, 2001, the Hospital replied that even if the tube system had been used by other employees for personal business, the Hospital was required to address Lindsay's improper use of the tube system after her improper use was reported to it. Thereafter, in a pre-arbitration meeting, the Hospital offered to settle the grievance by agreeing to remove the reprimand from Lindsay's file after six months. Respondent's executive board believed that this was a reasonable settlement, and decided not to proceed to arbitration on the grievance. Lindsay appealed the executive board's decision to Respondent's internal appeals committee. The appeals committee denied her request on January 15, 2002.

Ryan Lapeer is an RN in the emergency room. Sometime in early 2000, Lapeer had his tongue pierced and began wearing a tongue ring. The Hospital has a jewelry code that prohibits the wearing of bracelets and necklaces, and limits employees to one ring. The jewelry code does not mention tongue rings. In the late spring of 2001, and again in the early summer, Lapeer was told by his nurse manager not to wear the tongue ring. After the second warning, Lapeer began wearing a plastic plug to work. On November 2, 2001, Lapeer came to work wearing his tongue ring. At the beginning of his shift, Lapeer had a short meeting with Paliani about a grievance unrelated to his tongue ring. Shortly after Paliani left, Lapeer's supervisor came to him and told him to take his tongue ring out. Lapeer agreed. Later Lapeer asked his supervisor who had "turned him in." His supervisor said, "You know who you saw." According to Lapeer, before his supervisor approached him he saw only two other employees, Paliani and an employee who denied reporting him. Lapeer admitted that he had also seen patients. On November 5, Lapeer received a written verbal warning for wearing the tongue ring. Lapeer did not file a grievance over this action.

Discussion and Conclusions of Law:

A union owes its members a duty of fair representation under Section 10(3)(a)(i) of PERA. The union's duty consists of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651,679(1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. See *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; (1967). In *Goolsby*, at 682, the Court gave examples of "arbitrary" conduct by a union:

The conduct prohibited by the duty of fair representation includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence.

Section 10(3)(a)(i) contains a proviso protecting the right of a union to prescribe its own rules with respect to the acquisition or retention of membership. The Commission has consistently interpreted this proviso as limiting a union's duty of fair representation to actions having an effect on employment. *Service Employees International Union*, 2002 MERC Lab Op ____ (Case Nos. CU01 C-12 through CU01 C-19, decided April 16, 2002); *Service Employees International Union, Local 586*, 1986 MERC Lab Op 149; *AFSCME Local 1585*, 1981 MERC Lab Op 160. The Commission has held that a union decision to conduct or not to conduct a contract ratification election among its members is a purely internal union matter. *City of Lansing*, 1987 MERC Lab Op 701. However, the Commission has also held that if a union chooses to hold a ratification election, its manner of conducting the election is subject to its duty of fair representation because the approval or rejection of a contract affects employees' terms and condition of employment. The Commission has found a union guilty of violating its duty of fair representation with respect to a contract ratification election in only two cases, *Wayne Co Community College*, 1976 MERC Lab Op 347, and *SEIU, Local 586, supra*.

In *Wayne Co Community College*, the union's bylaws provided that the votes of part-time faculty could not count for more than 20% of the votes cast in a contract ratification election. The union adopted a "weighted" voting system under which votes cast by part-time faculty members were not counted as full votes. That is, in an election in which 111 full-time and 121 part-time members voted, the number of votes cast by part-time faculty was calculated to be 30. The Commission noted that full-time employees presumably had a greater vested interest in the contract, since the part-timers usually also held full-time jobs elsewhere. It emphasized that it was not holding that the union was required to treat part-time employees exactly the same as full-time employees. The Commission also found that at the time the bylaw was originally passed, the union had attempted in good faith to balance the rights of full-time and part-time employees. The Commission noted, however, that as the ratio of part-time to full-time employees increased, the disparity between the votes cast and votes counted by part-time employees also increased. The Commission held that the union violated its duty of fair representation by continuing to follow the bylaw, because, by the time the charge was filed, the disparity was so great that the union's continued enforcement of the bylaw constituted arbitrary conduct.

In *SEIU Local 586*, the Commission found that the Union violated its duty of fair representation when it refused to allow three employees to vote in a contract ratification election on the grounds that the union's records did not list them as members of the union. The union's constitution restricted the right to vote in contract ratification elections to members of the union in good standing. However, the union had not enforced this provision for many years, no regular check was done of individual membership status, and the union did not notify or give employees an opportunity before the election to confirm that they were listed on the union's records as members in good standing. The union also refused to look at old membership cards the employees produced at the polls to show that they were, in fact, members. The Commission held that taken as a whole the Union's conduct was irrational or unreasonable, and constituted "inept conduct undertaken with little care or indifference to the interests of the employee."

In the instant case, Respondent failed to comply with the requirement of its bylaws that it notify members of the contract ratification election by mail. It did not, as it had in previous contract ratification elections, provide instructions on how to file an absentee ballot or take ballot boxes to satellite locations. Respondent provided no explanation for these lapses. However, there is no evidence that Respondent deliberately neglected to take these steps in order to affect the outcome of the election, or that it otherwise acted in bad faith. Moreover, unlike the union bylaw in *Wayne Co Community College*, or the union's conduct in *SEIU*, there was no showing here that any of Respondent's actions disenfranchised any voter or directly prevented any employee from voting. The record indicates that some voters appeared to vote after the polls were closed. However, Respondent was not directly responsible for the fact that these voters apparently chose to rely on information published in a newspaper article. Respondent posted notices of its September 17 contract ratification election. I conclude that Respondent's failure to take certain additional steps to ensure that its members knew about the election or could vote was not gross negligence, irrational or "unreasoned" conduct, or "inept conduct undertaken with indifference to the interests of its members." For these reasons, I conclude that Respondent did not violate its duty of fair representation by its conduct in connection with its September 17, 2001 contract ratification election.

I also find that Reichardt, Lindsay and Lapeer failed to prove that Respondent's officers or agent caused them to be disciplined by the Hospital. Even if I were to credit Lindsay's testimony that Paliani and Morse made phone calls shortly before Reichardt was ordered back to his work station, there is no evidence on this record that Paliani, Morse, or any other union representative was responsible for reporting Reichardt's absence from the surgical unit to his administrator on October 9. Similarly, there is no evidence that Paliani told Lapeer's supervisor that he was wearing his tongue ring on the morning of November 2; either Lapeer's coworker or a patient's parent could have made that report. Lindsay's allegation is that Novak caused her to be disciplined for misuse of the tube system because of Lindsay's complaints about the election. However, even if Novak gave a copy of Lindsay's memo to Respondent's attorney, the record does not establish that Novak intended or expected Lindsay to be disciplined for the memo's contents or for her use of the tube system.

In accord with the findings of fact, discussion, and conclusions of law above, I find that Respondent did not violate its duty of fair representation under Section 10(3) (a) (i) by its actions in connection with the contract ratification vote held on September 17, 2001. I also find that Charging Parties failed to demonstrate that Respondent's agents violated either Section 10(3) (a) (i) or Section 10(3)(b) by causing

them to be disciplined by the Hospital because of their complaints about Respondent's conduct of the election. I therefore recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____