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

In the Matter of:

HURLEY MEDICAL CENTER,
Public Employer-Respondent,

MERC Case No. C18 H-084-B

-and-

REGISTERED NURSES AND REGISTERED PHARMACISTS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, Geoffrey S. Wagner and Anthony K. Chubb, for Respondent

Miller Cohen, PLC, by Richard Mack, for Charging Party

## DECISION AND ORDER

On September 5, 2019 Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it 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 as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: OCT 15 2019

[1] MOAHR Hearing Docket No. 18-017790

**STATE OF MICHIGAN**
**MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**
**EMPLOYMENT RELATIONS COMMISSION**



In the Matter of:

HURLEY MEDICAL CENTER,
Respondent-Public Employer,

-and-

Case No. C18 H-084-B
Docket No. 18-017790-MERC

REGISTERED NURSES AND REGISTERED PHARMACISTS ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, Geoffrey S. Wagner and Anthony K. Chubb, for the Public Employer

Miller Cohen, PLC, by Richard Mack, for the Labor Organization

## DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Registered Nurses and Registered Pharmacists Association (RNRPA) against Hurley Medical Center. 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 case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), formerly the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed on or before January 14, 2019, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural Background:

Charging Party represents a bargaining unit consisting of employees of Hurley Medical Center in the classifications of graduate nurse, general duty nurse, charge nurse, assistant nurse manager, graduate pharmacists and all registered staff pharmacists. On September 4, 2018, the Union filed an unfair labor practice charge which included two counts. The first count alleged that Respondent violated PERA by making a unilateral change in nurse-patient staffing ratios. In the second count, Charging Party asserted that the Employer violated the Act by threatening to discipline a bargaining unit member, later

identified by the Union as Jill Folts, for engaging in protected concerted activity. The charge was assigned Case No. C18 H-084; Docket No. 18-017790-MERC and scheduled for hearing on October 25, 2018.

On October 12, 2018, the Union filed an amended unfair labor practice charge which added a third count alleging that Respondent had unlawfully imposed a new policy requiring bargaining unit members to get vaccinated for the flu. The parties subsequently agreed to bifurcate the allegations into separate cases. The first count (nurse-staffing ratios) was re-docketed as Case No. C18 H-084-A and placed in adjourned without date status pending the issuance of a grievance arbitration decision. The newest count (flu vaccinations) was re-assigned Case No. C18 H-084-C and adjourned in order to give the parties the opportunity to reach a settlement of the dispute. The instant charge (threat to discipline unit member) was re-docketed as Case No. C18 H-084-B and heard before the undersigned in Detroit, Michigan on October 25, 2018.

Findings of Fact:

## I. Background

The most recent collective bargaining agreement between the Charging Party RNRPA and Respondent Hurley Medical Center expired on June 30, 2016. Article 10 of the agreement, Maintenance of Discipline, provides that any disciplinary action issued to a member of the bargaining unit "will be presented and discussed with the member directly by a non-bargaining unit member of the management staff." The contract further provides that discipline "will be of a corrective nature, rather than punitive, and it will be progressive; however, flagrant violation of rules or professional conduct may merit immediate discharge or suspension."

In addition to the disciplinary provisions contained within the parties' collective bargaining agreement, Respondent maintains a "zero tolerance" harassment policy, Standard Practice (SP) 2877, which prohibits "any form of sexual or other unlawful harassment, including bullying." The policy, which the Medical Center issued on or about November 21, 2013, defines harassment as "a pattern of intentional behavior that includes, but is not limited to, threats, assaults, violent acts, bullying (including humiliation, ridicule and/or isolation) or the creation of an offensive or hostile environment." An individual's "intentional behavior" must do one of the following in order to violate the policy: (1) place a workplace member in reasonable fear of harm to his/her person or damage to his/her property; (2) have the effect of substantially interfering with the work performance, opportunities, or benefits of a workplace member; (3) have the effect of substantially disrupting or interfering with the operation of the medical center; or (4) have the effect of creating an offensive or hostile environment in the workplace." The policy states that all complaints "will be thoroughly investigated" and that all "officers, executives, managers, and supervisors are responsible for ensuring a work environment" free from harassment.

## II. August 9, 2018, Incident

Typically, there is a non-productive charge nurse (NPCN) employed on each floor of the Medical Center. The NPCN is not assigned any patients; rather, he or she assists the other nurses by performing various tasks, including patient admissions and discharges, bed assignments and moving furniture. Sometime during the summer of 2018, the pediatric unit lost its NPCN. At a staff meeting on August 8, 2018, Kelly Hippensteel, a registered nurse assigned to pediatrics and a member of Charging Party's bargaining unit, raised the issue of who would be taking over the duties of the pediatric NPCN. In response, supervisor Heather Rayburn, the pediatric and pediatric intensive care unit nurse manager, stated that some of the NPCN's duties could be picked up by Becky Lauckner, a certified health unit coordinator (HUC). Lauckner is a non-clinical employee, meaning that she does not have the training or certification required to perform medical procedures. At the hearing in this matter, Rayburn testified that she also told the pediatric nurses that another ancillary staff member, Sherise Williams, would be able to provide assistance to the registered nurses. Neither Lauckner nor Williams are members of the RNRPA bargaining unit.

Jill Folts is an assistant nurse manager in the pediatric unit and is Lauckner's immediate supervisor. She is also an RNRPA representative. On August 9, 2018, Folts and Hippensteel had a discussion at the nurses' station about the previous day's staff meeting which Folts had been unable to attend. At the time, Lauckner was standing on the other side of the counter in earshot of the two registered nurses. When the subject of staffing came up, Hippensteel expressed concern to Folts about having Lauckner take over some of the duties previously performed by the NPRC. While discussing the matter, Hippensteel turned to Lauckner and told her to "stay in your scope of practice." Hippensteel testified that she made the statement in a non-threatening, conversational tone and that Lauckner did not seem intimidated by the comment. Similarly, Folts testified that Hippensteel spoke "kind of [in] fun and joking" and that she was smiling when she made the remark. According to Folts, Lauckner "kind of smiled and half-laughed" in response to Hippensteel's comment. Immediately thereafter, Folts told Hippensteel that if someone outside of the bargaining unit starts to perform the duties of the NPCN, she would have to file a grievance. Folts then walked over to one of the computer desks at the nurses' station and called human resources to request copies of various job descriptions, including the job description for the HUC position. Folts testified that she requested the documents because she thought they might be useful if she had to file a grievance. At no point during the incident did Folts make any statements directly to Lauckner.

Later that day, Rayburn received an email from Lauckner requesting a meeting to "discuss some issues." Rayburn testified that when she arrived at the nurses' station, Lauckner immediately approached her and followed her into the nurse manager's office.[1] According to Rayburn, Lauckner was "tearful, distraught, very upset, visibly upset." Rayburn testified that Lauckner told her that she felt she was being attacked by Folts and Hippensteel

[1] Lauckner was not called to testify in this matter. At the hearing, Charging Party objected to Rayburn testifying about her meeting with Lauckner, asserting that such testimony constituted inadmissible hearsay. I overruled the objection and allowed Rayburn to testify, not for the truth of the matter asserted, but for the purpose of explaining Rayburn's motives for initiating an investigation.

and that she was confused about what she may have been doing which might be considered outside the "scope of her job." According to Rayburn, Lauckner did not reference Folts' threat to file a grievance, but she did mention the fact that Folts had requested a job description for the HUC position. Rayburn testified that she spent a lot of time trying to calm Lauckner down and that she offered additional job breaks to Lauckner who, at the time, was pregnant. After reviewing the allegations made by Lauckner, Rayburn called a representative down from human resources and initiated an investigation into the conduct of both Folts and Hippensteel.

As part of the investigation, Rayburn prepared a written Notice of Investigation against Folts. The document, which was introduced into the record as Exhibit 7, does not contain any factual allegations pertaining to Folts but rather merely asserts that Folts was alleged to have violated the following Hurley Medical Center Conduct Rules: Employee Conduct Rule (ECR) 26 – Threatening, intimidating, coercing or interfering with other employees or supervisors at any time on Medical Center premises; ECR 27 – Discourteous or rude behavior towards anyone at any time on Medical Center premises. Use of obscene and/or profane language or personally insulting behavior towards anyone, and any time, on Medical Center premises; ECR 28 – the making of false or malicious statements concerning any Medical Center employee, any member of the Medical Staff, or the Medical Center relating to the services or activities of the Medical Center; Standard Practice 0387 – safe workplace policy; and SP 2877 – sexual and other unlawful harassment (including bullying).[2] The Notice of Investigation concludes with a warning that "Discipline may result from the investigation, including suspension or termination."

Charging Party was notified about the investigation and assigned RNRPA representative Beth Jaworski to assist Folts with respect to the charges and investigation. Jaworski accompanied Folts to an investigatory interview in Rayburn's office on August 9, 2018, the same day as the incident. Rayburn began the meeting by reading aloud the allegations set forth in the Notice of Investigation and advising Folts that, pursuant to SP 0011, the Medical Center's non-retaliation policy, Folts was prohibited from taking any action against the employee who lodged the complaint. Rayburn told Folts that Lauckner had come into her office crying and claiming that she had been ganged up on by Folts and Hippensteel. Rayburn then asked Folts a series of questions regarding the incident. There is no dispute that one of the questions asked by Rayburn pertained to Folts' attempt to procure a copy of Lauckner's job description. At hearing, Rayburn testified that she raised the issue because she felt that Folts, as assistant nurse manager, should have already known what duties Lauckner should be performing without requiring a copy of the job description. Although Folts, Jaworski and Rayburn all agree that the subject of Folts' threat to file a grievance came up during the investigatory meeting, there was conflicting testimony at hearing regarding who first raised the issue.

Both Folts and Jaworski testified that Rayburn asked Folts directly whether she had threatened to file a grievance during her conversation with Hippensteel at the nurses' station. According to Folts, Rayburn's tone became "very threatening" when the issue of the Union

[2] Although Exhibit 7 indicates that the investigation of Folts was premised on an alleged violation of each of the above policies or rules, SP 2877 was the only policy or rule introduced into the record in this matter.

filing a grievance was raised and that she felt that Rayburn implied through her tone and demeanor that Folts had no right to take such action. Jaworski testified that Rayburn was not threatening but that her tenor when asking about the grievance was one of "inquisitive concern." Following the meeting, Jaworski produced a typewritten summary of what had occurred between Rayburn and Folts. That document, which was submitted into evidence as Exhibit 3, indicates that it was Rayburn who raised the grievance issue. In her summary, Jaworski wrote that Rayburn "asked Ms. Folts if she told the HUC she would write a grievance."

Rayburn testified that because Lauckner never told her that Folts had threatened to file a grievance, she could not possibly have been the one to raise the issue during the August 9, 2018, investigatory interview. According to Rayburn, it was Folts who first brought up the subject of filing a grievance in response to a question about the conversation at the nurses' station. In support of this contention, Rayburn produced her own notes from the investigatory meeting which she reduced to writing shortly after that discussion had concluded. The document, which Respondent introduced into evidence as Exhibit 2, indicates that Rayburn asked Folts whether she and another nurse had told Lauckner to stay in her own scope of practice. According to Rayburn's notes, Folts responded, "No (smiling) I told her if she were to do a nursing thing I (Jill) would write a grievance." Rayburn testified that she responded to that exchange by asking Folts, "[S]o you would say you're going to write a grievance," to which Folts answered, "Yes."

Rayburn testified that later in the day on August 9, 2018, following the conclusion of the investigatory interview, she reached the conclusion that no further action should be taken regarding Lauckner's allegations against Folts and Hippensteel because it was a "he said/she said" situation. At some point thereafter, Rayburn prepared a written summary of her findings. In the document, which was introduced into evidence by Respondent as Exhibit 7, Rayburn references the complaint made against Folts and Hippensteel by Lauckner, as well as an additional allegation of harassment made against Folts by another employee of the Medical Center.[3] In addition, Rayburn notes in the summary that Folts and another registered nurse had expressed concerns about Lauckner's own conduct and demeanor. Rayburn concluded the summary by writing, "I looked into the allegations against Ms. Lauckner and quickly found some foundation to them. At this point it was obvious that there were integrity concerns regarding Ms. Lauckner and there were not any witnesses to support the allegations Ms. Lauckner made against Ms. Folts. I did not proceed with any further investigation regarding Ms. Folts as it relates to Ms. Lauckner's accusations."

Although Rayburn quickly determined that no discipline should be issued against Folts arising from the August 9, 2018, incident, it is undisputed that she did not apprise Folts of her decision or the fact that the investigation had been concluded. In fact, Folts did not learn of the results of the investigation until the date of the hearing in this matter. When asked why she did not inform Folts that the investigation had concluded without the issuance of any discipline, Rayburn testified that she had been made aware by Folts that Lauckner was

[3] In her written summary of the investigation, Rayburn described the substance of the complaint which Lauckner had lodged against Folts and Hippensteel. Rayburn asserted that Lauckner told her that Folts and Hippensteel had instructed her to "stay in her scope of practice" and that they repeatedly told Lauckner she was doing "too good of a job."

having issues in her personal life and that, as a result, she spent time "really focusing on those other things that [Folts] had brought up." Rayburn also testified that pursuant to some unidentified policy, she had thirty days from the date the investigation was initiated in which to determine whether discipline was warranted and, since more than thirty days had passed since the Notice of Investigation was issued to Folts, she considered the matter concluded. At hearing, Rayburn could not recall any other instance in which she had notified the subject of an investigation that the matter had been closed in a situation in which no discipline was issued.

Discussion and Conclusions of Law:

Charging Party argues that Respondent violated Sections 10(1)(a) by initiating a Notice of Investigation and threatening to discipline Folts for discussing the filing of a grievance and requesting job descriptions.[4] Respondent asserts that the charge must be dismissed because the investigation into Folts' conduct was required by the terms of its unlawful harassment policy.

Under Section 9 of PERA, public employees have the legal right to "organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice." Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed to public employees under Section 9 of the Act, including the right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." The test of whether Section 10(1)(a) of PERA has been violated does not turn on the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions objectively tend to interfere with the free exercise of protected employee rights. Thus, conduct which is inherently destructive of employee rights granted by Section 9 of PERA may violate Section 10(1)(a) irrespective of the Employer's motivation. *Huron Valley Sch*, 26 MPER 16 (2012); *Macomb Academy*, 25 MPER 56 (2012). The existence of an adverse employment action is not necessary to establish an independent violation of Section 10(1)(a). *Detroit Pub Sch*, 31 MPER 37 (2018) (no exceptions).

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[4] The initial charge cited Sections 10(1)(a)(c) and (e) of PERA. Neither at hearing nor in its post-hearing brief has Charging Party explained how Respondent's conduct in this matter constituted a Section 10(1)(e) violation. With respect to Section 10(1)(c), the only argument set forth by the Union is its claim that management treated Folts differently than another employee, specifically Lauckner. Charging Party raised the disparate treatment allegation for the first time towards the conclusion of the hearing during Respondent's case-in-chief. I held that I would not allow the Union to present evidence regarding disparate treatment because that allegation was not raised in the unfair labor practice charge, despite the fact that the Union was clearly aware of the basis for that claim when it brought the charge. Any challenge to that determination should be properly directed to the Commission on exception, rather than as an argument to the undersigned in the context of a post-hearing brief.

This is the same test utilized in cases arising under Section 8(a)(1) of the National Labor Relations Act (NLRA), a provision which is essentially identical to Section 10(1)(a) of PERA.[5] The Supreme Court has held that some conduct is "so inherently destructive of employee interests" that it may be deemed proscribed without the need for proof of an underlying improper motive. *NLRB v Great Dane Trailers, Inc*, 388 US 26 (1967). "That is, some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" *Id*, quoting *NLRB v Erie Resistor Corp*, 373 US 221 (1963). Among the conduct which has been identified as being inherently destructive for purposes of the NLRA are actions by the employer which distinguish amongst its employees based upon their participation, or lack thereof, in protected concerted activity. *NLRB v Centra, Inc*, 954 F2d 366 (CA 6, 1993); *Portland Willamette Co v NLRB*, 534 F2d 1331 (CA 9, 1976). See also *Hahner, Foreman & Harness, Inc*, 343 NLRB 1413, 1425 fn 8 (2004) (proof of unlawful motivation not required when employee is disciplined for conduct that is part of the res gestae of protected concerted activities); *Carry Companies of Illinois v NLRB*, 30 F3d 922 (CA 7, 1994); *Mediplex of Danbury*, 314 NLRB 470; *Cooper-Jarrett*, 260 NLRB 1123 (1982); *American Freightways Co*, 124 NLRB 146 (1959).

In the instant case, there is no question that Folts was engaged in protected concerted activity at the time of the incident from which the investigation arose. On August 9, 2018, Folts, a Union representative, was discussing staffing issues with Hippensteel, a fellow nurse and a member of Charging Party's bargaining unit. Upon learning from Hippensteel that Rayburn was planning to assign bargaining unit job duties to Lauckner, a non-unit employee who lacks the training and certification required to perform medical procedures, Folts indicated her intention to file a grievance over the staffing issue. She also contacted human resources and requested copies of job descriptions to assist her in the grievance process. It is well established that PERA protects the rights of employees to discuss grievances and other complaints for the purpose of mutual aid or protection. *Reeths-Puffer Sch Dist*, 391 Mich 253, 265 (1974). Having determined that Folts' conduct at the nurses' station was activity protected by Section 9 of PERA, the next issue to consider is whether her behavior was so egregious as to cause her to lose protection under the Act.

The Commission has long recognized that in the course of collective bargaining and grievance administration, tempers may become heated and harsh words may be exchanged. *City of Riverview*, 2001 MERC Lab Op 354. See also *Benzie County Central Sch*, 1984 MERC Lab Op 838; *Reese Pub Sch*, 1967 MERC Lab Op 489. While there are limits as to what conduct is to be tolerated during the course of protected activity, discipline for offensive behavior occurring in this context should be permitted in only the most extreme of cases. *City of Detroit (Water & Sewerage Dep't)*, 1988 MERC Lab Op 1039, 1046. Rude or insulting remarks, obstreperous comments, and other forms of rough language are protected under PERA when made in the course of protected concerted activity, even where the employee could be legitimately disciplined had such conduct occurred as part of the everyday working relationship between the employer and its employees. *Genesee County Sheriff's Dep't*, 18 MPER 4 (2005); *Baldwin Comm Sch*, 1986 MERC Lab Op 513.

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[5] In construing PERA, both the Commission and the courts are guided by the construction placed on analogous provisions of the NLRA. *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n*, 458 Mich 540 (1988); *Rockwell v Crestwood Sch Dist*, 393 Mich 616 (1975).

An employee engaged in protected activity may lawfully be disciplined, or threatened with discipline, only when his or her behavior is so flagrant or extreme as to render that individual unfit for future service. *Isabella County Sheriff's Dept*, 1978 MERC Lab Op 689, 174 (no exceptions); *Unionville-Sebewaing Area Sch*, 1981 MERC Lab Op 932, 934. In determining whether an employee's concerted protected activity loses the protection of the Act, the Commission considers the context in which the actions take place, including where they occur and, in the case of offensive remarks, whether they are made spontaneously in the course of a grievance discussion. *Baldwin Comm Sch, supra* at 520. A history of similar intimidation or insubordination by the employee militates against finding the conduct protected. *Baldwin Comm Sch, supra* at 520; *Univ of Mich*, 2000 MERC Lab Op 192, 195 (no exceptions). Also relevant is whether the employee was merely responding to heated remarks or insults by the employer or others. *Baldwin Comm Sch.*

Although the conversation between Folts and Hippensteel took place at the nurses' station, I do not believe that Folts' conduct should be given the lesser protection afforded to "shop floor" discussions. There is no evidence in the record that either Folts or Hippensteel made any statements which could reasonably be construed as rude or offensive. Neither Folts nor Hippensteel threatened Lauckner with violence or otherwise acted in an abusive, hostile or aggressive manner towards her, nor did either employee use any form of rough language. In fact, Folts did not make any statements directly to Lauckner. Rather, the testimony establishes that the investigation into Folts' conduct arose from Lauckner's subjective feeling of being bullied or harassed and based solely upon what was clearly a rather benign conversation between a Union representative and another bargaining unit member about issues of concern to the RNRPA. To the extent that the "stay in your lane" comment could reasonably be interpreted as harassment or bullying, that statement was made by Hippensteel, not Folts. Under such circumstances, I conclude that Folts did not engage in conduct causing her to lose the protection of PERA when she discussed staffing issues with Hippensteel on August 9, 2018, and, therefore, that Respondent violated the Act by subjecting Folts to an investigation for misconduct arising out of such activity.

In arguing that the charge should be dismissed, Respondent does not specifically dispute that Folts was exercising her Section 9 rights at the time of her discussion with Hippensteel, nor does the Employer argue that Folts engaged in conduct which would cause her to forfeit the protections of the Act. Rather, the Employer asserts that it cannot be found to have unlawfully interfered with, restrained or coerced Folts in the exercise of her Section 9 rights because the investigation was initiated in response to a legitimate complaint made by another employee and was conducted in conformance with its policy prohibiting workplace harassment and bullying.[6] Although the Commission has not yet directly addressed this issue, the National Labor Relations Board (NLRB) has held that an employer's legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and

[6] In its post-hearing brief, Respondent argues that an investigation is required for "any claims of hostile work environment or harassment, whether large or small." However, there is no testimony in the record to this effect. In fact, the quote upon which Respondent relies in support of this assertion is a statement made by the Medical Center's attorney during his opening statement at the hearing in this matter.

possible discipline on the basis of the subjective reactions of others to their protected activity. *Consolidated Diesel Co*, 332 NLRB 1019, 1020 (2000), enf'd 263 F3d 345 (CA 4 2001).

In *Consolidated Diesel*, the employer maintained a harassment policy applicable to "[a]ny unwelcome action, intended or not, which is considered offensive to the receiver or a third-party." Pursuant to that policy, harassment charges were to be investigated first by a supervisor who then was to report the results of the investigation to the employee relations manager. The manager was then required to decide whether the charges should be heard by the performance management process committee which had disciplinary authority. Harassment charges were filed against two employees, both of whom had gotten into confrontations with coworkers while distributing union flyers on the employer's premises. The respondent subjected both employees to the second stage of its investigatory process, despite the fact that the employer's initial investigation established that the two employees were engaged in protected activities at the time of the incidents giving rise to the charges. The Board held that although the investigation and disposition of the charges was entirely consistent with the harassment policy, the conduct complained of was not of a nature that would remove it from the protection of the NLRA and the complaints upon which the investigation was based "manifested a purely subjective notion of harassment." In so holding, the Board noted that it was not the employer's initial investigation which was unlawful, but rather it was the respondent's continuation of its investigation after the initial investigation disclosed that the employees were engaged in protected activity which constituted a violation of Section 8(A)(1).

In enforcing the Board's decision in *Consolidated Diesel*, the Court of Appeals for the Fourth Circuit agreed with the NLRB that where harassment charges relate to conduct protected by Section 7 of the NLRA, an employer may not apply such policy in a manner which is inconsistent with controlling law. The Court stated:

> Where it is clear that employees are engaging in activity protected by the Act, no "substantial and legitimate business justification" exists for continuing to subject them to coercive proceedings on the basis of wholly subjective charges of harassment.
>
> Were we to conclude otherwise, the statutory guarantee would be eviscerated. There would be nothing left of Section 7 rights if every time employees exercised them in a way that was somehow offensive to someone, they were subject to coercive proceedings with the potential for expulsion.
>
> * * *
>
> We emphatically do not hold that every purported exercise of Section 7 rights immunizes an employee from disciplinary measures. If an employer is confronted with evidence of employee misconduct that could objectively be considered harassment, then the Act does not prevent the employer from investigating the matter further and taking necessary disciplinary action. [The two employees here] however, did nothing more than talk up the union with fellow employees. Neither man acted in an abusive, threatening, or intimidating manner. Yet both men were subjected to the Company's

> [disciplinary] procedure for exercising core Section 7 rights, merely because [other employees] "felt" offended by them. Such a wholly subjective notion of harassment is unknown to the Act. [263 F3d at 354-355 (citation omitted).]

See also *Romer Industries*, 362 NLRB 828 (2015) (management cannot lawfully punish employee for noncoercively talking to coworker about a grievance even if it upset that coworker and even if the employer insisted on defining that conduct as bullying or harassment); *Hispanics United Buffalo, Inc*, 359 NLRB 37 (2012) (respondent unlawfully applied its harassment policy by discharging employees based solely on a coworker's subjective claim that she felt offended by Facebook comments made in response to criticisms of their job performance); *Blue Chip Casino*, 341 NLRB 548, 555 (2004) (employee's conduct remained protected despite the fact that coworkers were subjectively annoyed; the standard for assessing whether conduct remains protected under the Act is an objective standard).

As noted, the Employer did not call Lauckner to testify in this matter. The only evidence concerning what occurred at the nurses' station on August 9, 2018, came from the testimony of Folts and Hippensteel, as well as Rayburn's recollection of Lauckner's statements and demeanor immediately following the incident. Rayburn testified that when Lauckner came to speak with her, she was visibly upset and that she conveyed her belief that she had been bullied by the two registered nurses. With respect to the details of the incident, however, Lauckner's complaint, as described at hearing by Rayburn, was merely that Hippensteel had told her to stay within the scope of her job duties and that Folts had referenced filing a grievance over the performance of the NPCN tasks. There is no suggestion in the record that Lauckner told Rayburn that either Folts or Hippensteel used profanity or demeaning language, employed an aggressive or menacing tone, created an offensive or hostile workplace environment or even raised their voices during the incident. Thus, Rayburn had no objective basis for believing that Folts had engaged in any violation of Respondent's rules or policies.

While it may have been reasonable and appropriate for Rayburn to attempt to get more information by interviewing Folts, she should have immediately terminated the investigation upon learning that Folts had been engaged in protected concerted activity at the time of the incident. Compare *DTE Energy Co*, 202 LRRM 1343 (NLRB Div of Judges 2015) (no violation where respondent halted the investigatory interview after the first hint that the conduct was related to union activity). Absent any evidence that Rayburn was confronted with an objectively valid harassment complaint, the continuation of the investigation, which carried with it the possibility of discipline, would reasonably tend to interfere with the free exercise of Folts' protected rights. Respondent then compounded the error by failing to inform Folts of Rayburn's determination that no further investigation was warranted and that no discipline would result. Notably, Rayburn made that determination in early August, yet Folts did not learn that the investigation had concluded until the date of the hearing in this matter, at least two months later. Keeping Folts in the dark for such a lengthy period would reasonably tend to chill her protected conduct. For these reasons, I conclude that Respondent's actions in connection with its investigation of Folts constituted a violation of Section 10(1)(a) of PERA.

In reaching such a conclusion, I do not mean to suggest that a public employer is prohibited from investigating an employee for harassment, bullying or other misconduct merely because that employee may have been engaged in protected concerted activity at the time of the incident. The initiation and continuation of such an investigation is proper under PERA where the employer is confronted with evidence of serious misconduct that could objectively be considered harassment or other behavior violative of legitimate employee rules or policies. See e.g. my recent decision in *Eastern Michigan Univ*, 33 MPER ___, issued August 5, 2019 (no exceptions), in which I held that the respondent did not violate the Act by interviewing an employee regarding allegations that she had berated a coworker in an incident which the coworker had described as "dangerous," "explosive" and representing a "possible physical threat." However, where an employee is engaged in protected concerted activity, he or she may not lawfully be threatened with discipline based solely on a coworker's subjective feelings of harassment.

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

Respondent Hurley Medical Center, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 9 of the Act by investigating and threatening them for conduct arising from their protected concerted activities.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. If it has not already done so, remove from its files any documentation maintained as a result of the investigation of Jill Folts and notify Charging Party in writing that this has been done and that such documentation will not be used against Folts in any way.

   b. Post the attached notice on Respondent's premises in places where notices to employees are customarily posted for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: September 5, 2019

## NOTICE TO ALL EMPLOYEES

HURLEY MEDICAL CENTER, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the order of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, we hereby notify our employees that:

**WE WILL** cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 9 of PERA by investigating and threatening them for conduct arising from their protected concerted activities.

**WE WILL** remove from our files any documentation maintained as a result of the investigation of Jill Folts and notify Charging Party in writing that this has been done and that such documentation will not be used against Folts in any way.

**WE ACKNOWLEDGE THAT** all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of PERA.

HURLEY MEDICAL CENTER

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.