STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

IOSCO COUNTY MEDICAL CARE FACILITY,
Respondent-Public Employer,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES,
Charging Party-Labor Organization in Case No. C97 L-271,
Petitioner in Case No. R97 I-142.
_____/

APPEARANCES:

Masud, Gilbert and Patterson, P.C., by Gary D. Patterson, Esq., for the Public Employer

Leamon Hood, Area Director, for the Labor Organization

DECISION AND ORDER

On January 29, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above captioned cases, finding that Respondent Iosco County Medical Care Facility (IMCF) interfered with a representation election in violation of Section 10(1) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1); MSA 17.455(10)(1). In addition, the ALJ found that the Employer violated Section 10(1)(a) and (c) of PERA by discharging employee Kristine Thomas because of her union activity. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA, MCL 423.216; MSA 17.455(16). The Employer filed timely exceptions on March 1, 1999. The American Federation of State, County and Municipal Employees (AFSCME) did not file a brief in support of the ALJ's Decision and Recommended Order.

Having carefully reviewed the entire record, including the transcripts, exhibits and briefs, we conclude that the ALJ erred in finding that the circumstances surrounding the election did not allow the employees to exercise a free and fair choice in deciding whether to be represented by AFSCME. Therefore, we dismiss the Union's objections to the conduct of the election and direct that an appropriate certification of the results of the election issue. Because the ALJ expressly rested her decision concerning the discharge of Thomas upon her finding that the Employer unlawfully interfered with the conduct of the election, we dismiss the unfair labor practice charge as well.

I.

As set forth more fully in the attached Decision and Recommended Order, the Iosco County Medical Care Facility is a public skilled care nursing home with 64 residents. On September 24, 1997, AFSCME filed a petition with the Commission seeking to represent all full-time and regular part-time service and maintenance employees of the facility. Included in the petition were employees of the facility's laundry, housekeeping, dietary and maintenance departments, activity aides and certified nursing assistants. A consent election agreement was entered into between the parties on or about October 16, 1997. Throughout the preelection period, the Employer conducted a vigorous campaign against the Union, which included the hiring of a professional consultant to assist the facility in persuading its employees to vote against AFSCME. During the weeks preceding the election, IMCF administrator Thomas Meyer conducted a series of mandatory meetings with employees during which he discussed various topics relating to unions and collective bargaining, showed videos, and answered questions about what might occur if AFSCME were to win the election. The Employer also distributed numerous written handouts to its employees in the form of "Q & A"s and "Election Facts" in an attempt to persuade its employees to vote against the Union.

When the election was held on November 13, 1997, AFSCME lost by a 41-25 vote. The Union filed timely objections alleging that the nursing facility engaged in conduct which interfered with a free and impartial election. AFSCME also filed an unfair labor practice charge which asserted that employee Kristine Thomas was unlawfully discharged by the Employer because of her union activities. Thereafter, the ALJ issued a complaint and notice of hearing consolidating the objections and the unfair labor practice charge. Hearings were conducted on March 17, 1998, and March 31, 1998, following which the ALJ issued a decision and order recommending that this Commission direct a second election to determine whether employees wish to be represented by AFSCME. The ALJ also recommended that we order the Employer to offer Thomas unconditional reinstatement to her former, or a substantially equivalent, position, and to make her whole for all wages and benefits lost as a result of the unlawful discharge.

II.

Before reviewing the ALJ's conclusions and recommendations, we wish to briefly address two procedural issues which were not raised by the Employer in its exceptions, but are worthy of comment at this time. The objections, as originally filed by AFSCME, contained the following assertion:

> The employer and its agents engaged in prohibited conduct which interfered with the employees right to an election free of intimidation. The employer's conduct included coercing, restraining and threatening employees if they organized a union.
>
> We believe the employer's conduct to be so egregious that the atmosphere for a reasonably fair election is impossible and that an order to bargain should be issued.

It is our opinion that the ALJ should have dismissed these generalized objections sua sponte for failing to comply with Rule 49(1) of the General Rules and Regulations of the Employment Relations Commission, R423.449, which requires that objections contain "a statement of facts upon which the objections are based and the reasons for the objections." See *Lansing General Hosp*, 1972 MERC Lab Op 257, 262; *Oakland Community College*, 1970 MERC Lab Op 1021, 1026 n 1. Rather than dismissing the case on this basis, the ALJ allowed AFSCME to file a bill of particulars clarifying the scope of its objections. The ALJ then compounded this error by allowing the Union to introduce evidence regarding various threats allegedly made by the Employer which were beyond the scope of even the bill of particulars. In Objection No. 6, the Union alleged that Respondent threatened employees with "loss of employment if the union should call them out on strike." At the hearing, however, AFSCME presented testimony regarding alleged threats to close the facility and lay off employees if the Union were to be elected. It is well-established that objections may not be amended or expanded upon following expiration of the five-day period for the filing of such objections. See *Greenfield Doughnuts*, 1976 MERC Lab Op 399, 402 n 3; *Evangelical Deaconess Hosp*, 1971 MERC Lab Op 17, 19-20. We consider these matters today only because they were fully litigated at the hearing without objection from the Employer.

III.

With regard to representation elections conducted by this Commission, we have adopted the National Labor Relations Board's "laboratory conditions" standard. *Huron Co Medical Care Facility*, 1998 MERC Lab Op 670, 677. See also *Ojibway Motor Hotel*, 1966 MERC Lab Op 17; *North Detroit General Hospital*, 1967 MERC Lab Op 79. Under this standard, it is our duty to provide an atmosphere in which an election can be conducted under "conditions as nearly ideal as possible" so that the uninhibited desires of the employees in the proposed bargaining unit may be determined. *Huron Co Medical Care Facility*, *supra*, quoting *General Shoe Corp*, 77 NLRB 124, 127; LRRM 1337 (1948), enf'd 192 F2d 504, 29 LRRM 2112 (CA 6 1951). In assessing whether the laboratory conditions necessary for a fair and impartial election have been destroyed, we will not probe into the truth or falsity of preelection statements, nor will we set aside an election on the basis of misleading campaign remarks. *Saginaw County Mental Health*, 1996 MERC Lab Op 488, 490. We will, however, protect against campaign conduct such as threats, promises or the like, which interfere with employee free choice. *Id.* See also *City of Dearborn*, 1983 MERC Lab Op 121. The burden of proof is on the party filing the objections, and there is no burden on the Commission to show that the election was fairly conducted. *Huron Co Medical Care Facility*, *supra* at 677; *City of Detroit*, 1971 MERC Lab Op 892.

In recommending that this Commission set aside the election, the ALJ found that the Employer had violated Section 10(1) of PERA by threatening to withhold or delay wage increases if AFSCME were elected, and by promising to give its employees wage increases if they rejected the Union as their collective bargaining representative. The ALJ also concluded that the Employer had unlawfully interfered with the election by telling its employees that it would be futile for them to select AFSCME as their collective bargaining representative, and by threatening to close the facility if the Union were elected. Contrary to the ALJ, we find that Respondent's conduct, viewed as a

whole, did not violate PERA.

A. Wage Increase

In past years, the state legislature has made available to nursing facilities a certain amount of money which may be passed on to employees in the form of a wage increase or used to fund new fringe benefits. This is commonly referred to as a "wage pass-through." The amount of money made available to nursing facilities via the pass-through program has varied over time. In order to receive the pass-through money, the facility must submit an application to the Medical Services Administration. A nursing facility can chose to take all, part of, or none of the approved funds. If accepted, the pass-through is added to the facility's per diem Medicaid rate. The record indicates that Respondent has always chosen to accept at least part of the available funds. In October of 1997, the legislature approved a wage pass-through for 1998 of $.50 per hour for each employee, including $.05 for FICA. The application process for the 1998 pass-through was scheduled to begin in January of that year.

The decision regarding whether to accept the 1988 wage pass-through was to be made by the Employer's governing body, the Iosco County Family Independence Agency (FIA). At the time Respondent learned of the union organizing campaign, the board had not yet made a decision regarding whether to accept the pass-through money. During the mandatory meetings with employees, Meyer stated that it was unlikely they would receive the pass-through if the Union was voted in because the FIA would wait to bargain over the issue. In addition, a handout dated October 27, 1997, provided:

> Q9: If the Union is voted in, will we get our annual raise January 1, 1998?
>
> A9: No. In all likelihood, the FIA board would wait for contract negotiations with the union. It would not make sense to give an annual raise only to have the union demand an additional amount. Remember, Ray Schonschack told us that it took several years before the County EMS got a contract that included a pay raise.
>
> * * *
>
> Q15: Is there a wage pass thru [sic] this year? If the union gets in, will we receive the wage pass thru [sic]?
>
> A15: The State of Michigan has approved a wage pass-though again this year. Participation in the plan is voluntary. Because of that, it is impossible to guess how the FIA Board would view the pass-through if the union wins the election. You could get the pass-through, but, then again, you might not get the pass-through.

In another Q & A handout, dated November 7, 1997, the Employer indicated that current wages or benefits "are frozen until a contract is agreed to," and that all "pay practices, benefits and

terms and conditions of employment are *at risk* during negotiations." (Emphasis in original.) Finally, in a handout dated November 12, 1997, Meyer made the following statement in response to a question from an employee:

> Your raise has nothing to do with saving the FIA Board money. The FIA Board is and will continue to be committed to offering competitive wages and better than average benefits for employee and family.
>
> Remember, that IMCF is a non-profit organization so our resources go for providing top quality resident care and for competitive wages and benefits. The county gets nothing back if we have a surplus (like a profit in a private company).
>
> Currently there is wage pass-through money available. The Legislature approved it recently. If the union wins, the Board will probably not be able to implement the pass-through because all pay practices, benefits, and terms and conditions of employment are frozen. So, you probably would not receive a raise until the contract is agreed to.

The ALJ found that Respondent's preelection statements communicated a clear message to the employees that acceptance of the wage pass-through was contingent on their defeat of the Union in the upcoming election. In reaching this conclusion, the ALJ placed considerable emphasis on the fact that the Employer could provide no reasonable justification for turning down the wage pass-through. We disagree. At the hearing, Meyer testified that the Employer could actually lose funding if its costs were to rise in comparison with other facilities in the area. Meyer stated:

> The current method of funding is a "rebasing" of our cost. They annually do audits and every two years we are rebased, and so they capture the cost of whatever wage increase we were to give, up until you reach the 80th percentile in our class. If you exceed that, then they will not give you anymore [sic] and you begin to lose money. So we have to be very careful that we don't exceed that 80th percentile.
>
> Our facility runs, we're running about the 79th percentile right now. So we're right, teetering on that edge where if we were to go over it we would – we would lose money.

Meyer also explained that the IMCF costs are currently $35 a day higher per Medicaid resident than both of its nearest competitors, and that the Employer might eventually be required to bring its costs in line with comparable facilities. In any event, we conclude that Respondent's rationale for declining to accept some or all of the pass-through money is not directly relevant to the question of whether the Employer's preelection statements regarding this issue warrant setting aside the election. Rather, the pivotal issue here is whether the Employer had established a pattern of wage increases consistent enough to amount to a settled practice which the facility had a legal duty to continue.

During the pendency of a representation petition, an employer is obligated to maintain the

status quo with regard to existing terms and conditions of employment until a collective bargaining agreement is reached. *NLRB v Katz*, 369 US 736; 50 LRRM 2177 (1962). The withholding of a wage increase prior to a representation election will constitute an unfair labor practice in violation of Section 10(1) of PERA unless the increase is discretionary as to time or amount. See e.g. *Twp of Harrison,* 1982 MERC Lab Op 1105; *Washtenaw County,* 1979 MERC Lab Op 113; *Perry Distributors, Inc*, 1972 MERC Lab Op 462, 465; *Branch County Road Comm*, 1969 MERC Lab Op 247, 251. By the same token, an employer may not unilaterally grant a wage increase following certification of the bargaining agent without violating its bargaining obligation, unless the increase is in the nature of an automatic or predetermined step increase. *Id.* See also *Detroit Public Library*, 1997 MERC Lab Op 689 (no exceptions); *Munson Medical Center,* 1971 MERC Lab Op 932; *Munson Medical Center,* 1971 MERC Lab Op 1092. This is true even where there is a history of annual wage increases. *Mid-Michigan Comm College*, 1988 MERC Lab Op 472*; Goodman Holding Co*, 276 NLRB 935; 120 LRRM 1134 (1985); *Anaconda Ericcson Inc*, 261 NLRB 831; 110 LRRM 1134 (1982). Pursuant to these principles, statements by the employer referring to the withholding of wages or benefits will not be grounds for setting aside an election where the increase is in the nature of a discretionary benefit which the employer would be free to grant unilaterally following certification of the bargaining representative. See e.g. *Gerkin Co,* 279 NLRB 1012; 122 LRRM 1205 (1986); *Southwire Co*, 282 NLRB 916 124 LRRM 1257 (1987).

Contrary to the ALJ, we find that the wage increase in the instant case did not constitute an existing term or condition of employment which the Employer was obligated to continue. The pass-through is entirely dependent on approval by the legislature, and the Union introduced no evidence to establish that such funds have been made available to nursing care facilities consistently each and every year. More importantly, facilities like IMCF are free to accept all or part of the funds which are made available, or to reject the pass-through money outright. Even if some or all of the pass-through money is accepted, the Employer is under no obligation to apply it toward a wage increase. Instead, the money may be used to pay for fringe benefits. Although Meyer testified that Respondent has never declined to accept a pass-through in its entirety, he indicated that the amount accepted by the Employer has varied over the years, as has the amount of money made available by the legislature to support the program. On these facts, we conclude that the wage increase was too indefinite as to both timing and amount to constitute an existing term or condition of employment. Therefore, Respondent would have been obligated to negotiate any wage or benefit increase with the Union had it won the election, and the Employer's statements regarding the wage pass-through properly conveyed this message. Viewing these remarks as a whole, as we are obligated to do, *Detroit Bd of Ed*, 1980 MERC Lab Op 49, 73, we do not believe that the Employer in any way conditioned the wage increase upon defeat of the Union. These statements, as well as the Employer's comment that wages and benefits would remain frozen during the potentially long period of negotiations, merely constitute legitimate predictions regarding the possible consequences of unionization. See e.g. *Flexsteel Industries*, 311 NLRB 257; 144 LRRM 1203 (1993); *Mantrose-Haeuser Co*, 306 NLRB 377; 139 LRRM 1249 (1992). Accordingly, we conclude that the Union has failed to establish a violation of PERA on this basis.

B. Refusal to Bargain

At one of the preelection meetings, Meyer discussed the collective bargaining process with IMCF employees. Although there was conflicting testimony regarding exactly what was said at this meeting, the ALJ credited the testimony of Jackie Schraeder, chair of the union's organizing committee, who recalled that Meyer crossed his arms over his chest and indicated that everything would be put on the bargaining table, and that he could "just say no" if he disagreed with any of the Union's proposals.

Respondent also made reference to its bargaining obligations in campaign literature made available to IMCF employees prior to the election. For example, the "Election Facts" handouts contained the following statements:

> The state and similar federal law "*requires and [sic] employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party*."
>
> What this means that is that the only obligation the employer has is to *meet and confer*. **The employer is not required to agree to any proposal (demand) made by the union**. The employer may simply say: "**No thanks**."
>
> * * *
>
> At the bargaining table, management is only required to discuss and consider the union "demands." It is perfectly legal for the Facility to say NO to any proposal or demand. The law does not require the employer to agree to anything if it is not in the best interest of the Medical Care Facility.
>
> The law defines collective bargaining very specifically: The employer is required to "meet and confer" in good faith with the union and discuss wages, benefits, and other terms and conditions of employment. The law does not say "agree" to any proposal, just meet and confer.
>
> The employer is not even required to make a counter proposal to the union's demand. The Employer may simply say . . . "NO thanks!" (Citation omitted; italics and emphasis in original.)

Similarly, Meyer attempted to explain the realities of collective bargaining in various "Q & A" handouts which were distributed to employees prior to the election:

> Q14: If the union is voted in (Hopefully it won't) can management put a "no strike" clause in the contract?
>
> A14: I am not sure if a "no strike" would be necessary if AFSCME gets in, but we

> would try to get one included. Michigan state law prohibits public employees from striking. The Iosco County Medical Care Facility is a public employer. Therefore, employees here are prohibited from walking out on strike.
>
> Most of the time the only weapon the union can use is its right to call employees out on strike. This is withholding the services of the workers to get the employer to give in. But since public employees are prevented from striking, what is the real power of the union coming into our Medical Care Facility? What can the union hold over the head of the FIA Board? Why would employees want to pay an organization to represent them when the organization has no bargaining power?

The ALJ held that these remarks constituted a threat by the Employer that it would not bargain in good faith if the Union were to win the election. We disagree. Statements by an employer which imply that joining a union would be futile may warrant setting aside an election. *Bellevue Community Schools*, 1987 MERC Lab Op 535, 544. See also *Riverside Manufacturing Industries*, 185 NLRB 218, 75 LRRM 1082 (1970). However, an election will not be set aside on this basis unless the employer has created the impression in the minds of its employees that it would not bargain in good faith with the union even if it were selected. See *American Greetings Corp*, 146 NLRB 1440 n 4; 56 LRRM 1064 (1964). In the instant case, we find that the remarks at issue are an accurate statement of the law. Section 15 of PERA provides, in pertinent part:

> (1) A public employer shall bargain collectively with the representatives of its employees. . . . Except as otherwise provided in this section, for the purposes of this section, *to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement . . . *but this obligation does not compel either party to agree to a proposal or require the making of a concession*. [Emphasis supplied.]

In its campaign literature, the IMCF indicated to its employees that it had a legal duty to bargain in good faith, and that it was required to meet and confer with the Union with respect to wages, hours, and other terms and conditions of employment. Furthermore, Meyer emphasized that he was "committed" to negotiating in good faith with AFSCME. In this way, the campaign literature distributed by the Employer essentially mirrors the language contained within Section 15 of PERA. Statements by Respondent indicating that it could simply say "no" or "no thanks" to Union demands are also consistent with the statute, and this Commission has held that it is not objectionable to remind employees that benefits do not come automatically from joining a union, but must be bargained. *Bellevue Community Schools*, *supra* at 543-544. See also *Fern Terrace Lodge*, 297 NLRB 8; 132 LRRM 1294 (1989); *Clark Equipment Co*, 278 NLRB 498, 499-500; 121 LRRM 1258 (1986). To the extent that Meyer may have put his hands across his chest when discussing the Employer's bargaining obligation, we fail to see how this behavior conveyed a message to employees that Respondent would not bargain in good faith. At the most, we interpret such conduct as implying

that Meyer intended to be a tough negotiator who would vigorously protect the Employer's interests. Finally, we do not agree that the election should be set aside on the basis of Meyer's assertion that the Union had "no bargaining power." Although this remark was not an accurate characterization of the relationship between the public employer and the labor organization representing its employees, we view it as mere campaign propaganda which could not reasonably be construed to contain a threat. This is particularly true given the fact that the Employer repeatedly acknowledged its duty to bargain in good faith if the Union were selected. See *Litton Mellonics Systems Division*, 258 NLRB 623, 636; 108 LRRM 1212, enforced 738 F3d 447; 117 LRRM 2688 (CA 9 1984). We conclude that the statements which form the basis for this objection, considered as a whole, did not interfere with the conduct of a free and fair election.

C. Plant Closure and Layoffs

At a mandatory meeting prior to the election, Meyer was questioned regarding whether the IMCF might close if the Union were to win the election. He responded by asking those in attendance at the meeting whether the facility was a mandatory service. When no one responded, Meyer asked the employees whether the county was obligated to run the court house and sheriff's department. Once again, the employees remained silent. Meyer then asked whether the county was required to maintain a nursing care facility. Upon received no response to this question, Meyer explained that, unlike some other services, a nursing care facility is not a mandatory service.

The Employer also made reference to a possible loss of job security in a "Q & A" handout dated November 7, 1997. In response to a question concerning the order in which employees would be discharged in the event the facility were forced to downsize, Respondent made the following statement:

> There are several questions to answer.
>
> First, I do not think that down-sizing would be implemented simply because of the union. A staff reduction would only occur because of financial reasons and would generally be at the direction of the FIA Board. Because of the costs associated with a union, we could eventually be forced to reduce staff primarily because we are overstaffed compared to our competition. Where we now have 4 aides they have 2 doing the same work.
>
> In the 30+ years we have been in business, we've never had a layoff. It would be a shame if one would be required. If a reduction in force was required before a contract was agreed to, the layoffs would probably be made based on seniority in the department. So the last hired would be the first to go.

An employer is free to make a prediction as to how it will be affected by unionization. However, the prediction must be carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond its control. *NLRB v Gissel*

Packing Co, 395 US 575, 618; 71 LRRM 2481 (1969); *Michigan State University*, 1976 MERC Lab Op 317. Admittedly, we are somewhat troubled by Meyer's soliloquy at the mandatory meeting. Although Meyer did not explicitly state that the facility would close in the event of a union victory, his rather cryptic remarks were, at the very least, ill-advised. Nevertheless, preelection statements must be read as a whole and in the context of all other literature issued by both parties. See *Detroit Bd of Ed*, *supra*. In the "Q & A" handout, Respondent expressly stated that it did not anticipate having to reduce staff if the Union were selected as bargaining representative. In commenting on the whether layoffs might be necessary in the future, the Employer linked any possible loss of job security to factors outside of its control – union pressure to increase wages and market conditions. See e.g. *Crown Cork & Seal*, 36 F3d 1130; 147 LRRM 2449 (DC Cir 1994); *Somerset Welding & Steel, Inc, v NLRB*, 987 F2d 777; 142 LRRM 2356 (DC Cir 1993). In light of these written statements downplaying the likelihood of a reduction in staff, we do not believe that Meyer's isolated and essentially ambiguous remarks at the meeting warrant setting aside the election.

IV.

Lastly, the Employer argues that the ALJ erred in finding that it discharged employee Kristine Thomas on the basis of her union activity. Where it is alleged that a decision is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the employer's decision to terminate the employee. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982). The elements of a prima facie case of discrimination under Sections 10(1)(a) or (c) of PERA include: (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Once the prima facie case is established, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct. The ultimate burden of proving discrimination, however, remains with the employee. See *Evart, supra* ; *Grand Rapids Fire Dep't*, 1998 MERC Lab Op 703, 706. In the instant case, the ALJ held that anti-union animus could be inferred from the "unlawful threats" made by the Employer prior to the election. As noted previously, we disagree with the ALJ's determination that the statements in question violated PERA. Finding no other evidence on the record which would suggest that the Employer harbored anti-union animus or hostility, we dismiss Objection 3 and the unfair labor charge upon which that objection was based.

For the reasons set forth above, we conclude that the Union's objections to the conduct of the election and the unfair labor practice charge are without merit and should be dismissed.

ORDER

Pursuant to Section 13 of PERA, the objections to conduct affecting the results of the election and unfair labor practice charge are hereby dismissed. We direct that an appropriate certification of the results of the election be issued and attached to this order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

IOSCO COUNTY MEDICAL CARE FACILITY,
Public Employer and Respondent

Case Nos. C97 L-271 &
R97 I-142

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),
Petitioner and Charging Party
_____/

APPEARANCES:

For the Public Employer: Masud, Gilbert, and Patterson, P.C., by Gary D. Patterson

For the Petitioner: Leamon Hood, Area Director

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This proceeding involves the consolidation of objections filed to an election held in Case No. R97 I-142 with a related unfair labor practice charge, Case No. C97 L-271. Pursuant to Sections 10, 12, and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, 423.212 & 423.216, MSA 17.455(10), 17.455(12) & 17.455(16), hearings were conducted at Tawas, Michigan on March 17, 1998 and at Lansing, Michigan, on March 31, 1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before June 15, 1998, I make the following findings of fact, conclusions of law, and recommended order.

The Petition, Election, and Objections:

The petition for representation election in Case No. R97 I-142 was filed on September 24, 1997, by the American Federation of State, County and Municipal Employees (the Union). The petition sought to represent all full-time and regular part-time service and maintenance employees of the Iosco County Medical Care Facility (the Employer), a skilled care nursing facility. Included in the petition were employees of the Employer's laundry, housekeeping, dietary, and maintenance departments, activity aides, and certified nursing assistants. An election was conducted on November

13, 1997, pursuant to a consent election agreement entered into on about October 16, 1997. Twenty-five votes were cast for the union, and 41 against, with no challenged ballots.

The Union mailed its objections to the election to the Commission on November 19, 1997, and also delivered them by fax on November 20. The signed original mailed on November 19 was received by the Commission on November 21.[1] The objections, as originally filed, read as follows:

> The employer and its agents engaged in prohibited conduct which interfered with the employees right to an election free of intimidation. The employer's conduct included coercing, restraining and threatening employees if they organized a Union.
>
> We believe the employer's conduct to be so egregious that the atmosphere for a reasonably fair election is impossible and that an order to bargain should be issued.

On November 26, the Employer filed a motion for a bill of particulars asking for a more specific statement of the conduct alleged to form the basis for setting aside the election. The Employer requested that the objections be dismissed if the Union failed to respond to the motion. The Employer did not, however, request that the objections be dismissed because they did not contain a statement of facts supporting the objections as required by Commission Rule 49(1). On November 26, I directed the Union to respond to the Employer's motion.[2] The Union filed the following response on December 15, 1997.

> During the weeks and days prior to and leading up to the election, as mentioned above, the employer through its agents Thomas D. Meyer, Administrator; Attorney Gary Patterson; and consultant Tom Rouskee engaged in the following:
>
> 1. On or about October 16, 1997, Thomas D. Meyer communicated in a letter addressed to "Dear Fellow Employees, the administration will be providing all employees with facts to make an informed decision" and expressed his opinion that "a union is not in the best interest of employees." He ended his letter by threatening to end their "open door policy."
>
> 2. On or about October 20, 1997, the Iosco County Family Independence Agency Board in a letter address to: "all employees" stated that "we do not believe that a union would be in the best interest of employees" and urged all employees to consider the facts and vote no.

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[1] Objections mailed within the five day period as set out in Commission Rule 49(1), R 423.449, are timely if received within three days after the last date for filing. *Harrison C.S.*, 1976 MERC Lab Op 602.

[2] See, e.g. *COOR I.S.D.*, 1984 MERC Lab Op 51.

3. On or about October 21, 1997, Thomas D. Meyer, Administrator and Jan Henderson, D.O.N. discharged Kristine A. Thomas on a thinly disguised and transparent reasoning [sic] that was actually and obviously designed to shield the real reason for the discharge which was their knowledge that Kristine A. Thomas was playing an active role in organizing and forming a union.

4. The employer distributed several flyers to employees with misleading and false information designed to instill fear that if they were to vote for the union, they would lose benefits and a real possibility that the union negotiators would take away the employees' right to choose what items would be negotiated, and which ones would be given up such as health insurance in order to gain dues check off and union recognition.

5. The employer violated its own policies by distributing its anti-union literature and leaflets in resident care areas.

6. The employer held mandatory captive audience meetings with employees and threatened the employees with a loss of benefits, pay and employment if the union should "call them out on strike."

7. The employer held captive audience meetings where they showed video tapes of other employees on strike and the aftermath of a strike and traumatize [sic] employees who had lost a job, homes, and dignity.

The Unfair Labor Practice Charge

The charge in Case No. R97 I-142 was filed by the Union on December 22, 1997. The charge alleged that employee Kristine Thomas was unlawfully discharged by the Employer on October 21, 1997, because of her activities on behalf of the Union. The Employer asserted that Thomas was discharged because she falsified her employment application.

On January 6, 1998, I issued a complaint and notice of hearing consolidating the objections and unfair labor practice charges and setting a hearing date.

Background Facts:

The Employer is a public skilled care nursing home with 64 residents. Its governing body is the Iosco County Family Independence Agency Board. As noted above, on September 24, 1997, the Union filed a petition for an election among the Employer's employees. The showing of interest filed with the petition indicates that at that time the Union had the support of a substantial majority of the 72 employees who, according to the Employer, constituted the proposed bargaining unit. The

Employer subsequently hired a professional consultant to assist it in persuading its employees not to vote for the Union. On October 20, the FIA Board sent the employees a letter stating that it did not believe a union was in the best interests of resident care, of employees, or of the facility. Over the next three weeks, the Employer conducted a series of informational meetings designed to persuade the employees not to vote for the Union. There were four different presentations. Each covered different topics related to unions and collective bargaining. Each of the four presentations was given three times, at different hours so that all employees could attend, so that there were actually 12 meetings held. All eligible voters were required to attend one of each of the four presentations.[3] Thomas Meyer, the Employer's administrator, conducted the meetings. At each meeting, Meyer talked about the Union and answered questions about what would or might occur if the employees elected the Union as their bargaining representative. At three of the presentations the Employer showed videos. At some of the meetings, supervisors and other individuals also talked to employees about bad experiences they personally had with unions at places they had previously worked. During the same period that the meetings were being held, the Employer also distributed 16 written handouts to its employees. Six were titled "Q &As," and contained questions about the Union submitted by employees at the Employer's request, and the Employer's answers. The rest were titled "Election Facts." The subheadings of these 10 documents were "Typical AFSCME Contract Clauses," 'Union Dues," "Union Rules," "Union Finances," "The Risks of Collective Bargaining," "Strikes," "The Process of Negotiations," "The Voting Process," "Election Day Reminders," and "Vote No!"

Objection No. 1

On October 16, 1997, Meyer sent a letter to employees suggesting that they use the locked employee suggestion box located in the Employer's activities room to submit questions about the union's election claims, the election, or the Employer. The letter stated that a secretary would unlock the box and type up the questions, and that no one from management would see the originals. The concluding paragraph of the letter stated:

> I encourage all employees to submit questions and use the new suggestions and questions process. You may also ask me or any of the member of administration any questions you may have. Currently, we still have an "open door policy."

The Union did not argue Objection No. 1 in its post-hearing brief. I find that the last sentence of Meyer's October 16 letter did not constitute a threat to deprive employees of an existing benefit if the Union were elected.

Objections Nos. 2 and 3

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[3] Meetings held by the Employer within 24 hours of the election are per se grounds for setting aside the election if attendance at these meetings is mandatory. *Rose Manufacturing Co.*, 1972 MERC Lab Op 167, adopting the rule of *Peerless Plywood*, 107 NLRB 427, 33 LRRM 1151 (1953). However, none of the meetings in this case were held within 24 hours of the election.

The Union did not argue Objection No. 2 in its brief. I find nothing objectionable in the statement cited. The allegations in Objection No. 3 are the same as those in the unfair labor practice charge, and are discussed below.

Objection No. 4

This objection apparently alleges that the Employer's handouts contained misleading and/or false information, i.e., assertions that if the Union were elected employees would lose benefits, particularly health insurance, during the process of negotiations. The record indicates that the Employer did suggest, both in its handouts and at meetings, that the Union would be likely to negotiate away the employees' existing benefits in exchange for dues check off and union security clauses. The Commission has held that, in the absence of fraud, it will not set aside elections on the basis of misrepresentations of fact where these misrepresentations do not contain unlawful threats or promises of benefits. *City of Dearborn*, 1983 MERC Lab Op 121. The Union did not argue in its brief that the election should be set aside, or that a bargaining order should be issued, based on misrepresentations. However, the Union did argue, both at the hearing and in its brief, that the election should be set aside because of threats made both at the mandatory employee meetings and in the Employer's handouts. These allegations will be discussed under Objection No. 6 below.

Objection No. 5

The evidence for this objection is contained in the Employer's "Q & A" handout dated November 1, 1997:

> Q17: Why can anti-union propaganda be distributed and discussed in resident care areas while pro-union propaganda cannot?
>
> A17: We did some checking after this question came in. We found out that there were a couple of instances when residents were present when the handouts were distributed. Handouts will henceforth not be distributed in resident rooms or in the dining room. Distribution will be made in a way that does not interfere with residents.
>
> Regarding union literature, the law is that it can only be in employee areas like the staff dining room, the employee breakroom, the report room or the smoking areas outside.

The Union did not argue this objection in its post-hearing brief. I conclude that this objection is without merit.

Objection No. 6.

Alleged Threats to Withhold Wage Increases

The Union alleges that the Employer threatened to withhold the employees' "wage pass through" if the Union was elected. Each year nursing facilities like the Employer can opt to receive a certain amount of Medicaid money, as determined by the state legislature, to be passed on directly to employees in the form of wage or benefit increases at the beginning of the calendar year. This is commonly referred to as a "wage pass through." A nursing facility can opt to take all, part, or none of the approved pass through. If accepted, the funds can only be used for wage or benefit increases. If a facility believes it is already paying a competitive wage for its labor market, it might opt to reject the pass through. This was the only explanation in the record for why a nursing facility might reject the wage pass through. Meyer testified that "the Employer "generally opts to accept at least part of the wage pass through."

In 1997 Meyer was the legislative chair for the County Medical Care Facilities Council, and a member of the legislative committee for the Health Care Association of Michigan. Meyer was actively involved in the efforts by these organizations to get the state legislature to approve a $3.00 wage pass through over three years. Meyer explained that the organizations he represented hoped to improve benefits and wages for all employees, cut down on turnover, and thereby improve the quality of care. Around the end of October 1997, the legislature approved a pass through for January 1998 of $.50 per hour, including $.05 for FICA.

Eight employees testified to remarks made by Meyer with respect to whether employees would receive the wage pass through in January 1998 if the Union won the election. The eight Union witnesses testified as follows. Neal Henderson testified that Meyer said that "there was not going to be any wage pass through until after the union activities were all over with." Henderson also testified that Meyer said he "was going to withhold the wage pass through until after the union was voted out or after negotiations." According to June Greve, Meyer said that "he didn't have to pay us our pay increase of $.50 across the board." Rowana Leach recalled Meyer saying that "we may not get our pay raises in January." Steve Pickett testified that Meyer said that if the Employer had to go in and negotiate the employees might not even receive the wage pass through. According to Barbara Lafayette, Meyer said that employees "would not receive the wage pass through if the union got into the building." Susan Anderson recalled Meyer saying that both the wage pass through and hospitalization insurance would be "placed in bargaining." She also said that she knew that the employees would not receive wage increases in January if the Union came in because of what she read in the Employer's handouts. Nelda Floss testified that although she could not recall exactly what Meyer said, his remarks led her to fear that she would not get the wage pass through if the Union was elected. Jackie Schraeder, the chair of the Union's organizing committee, testified that Meyer said that if the Union came in, the employees would not, in all likelihood, get the wage pass through in January. According to Schraeder, Meyer said that it would make no sense for the Employer's Board to approve giving employees the pass through, when the Employer would in all likelihood give another raise when bargaining with the Union.

According to Meyer, he said at the meetings that if the Union was voted in, the employees would not likely get the pass through because the Board would wait to bargain.

An employee handout entitled "Q &A's," dated October 27, contained the following:

Q9: If the Union is voted in, will we get our annual raise January 1, 1998?

A9.: No. In all likelihood, the FIA board would wait for contract negotiations with the union. It would not make sense to give an annual raise only to have the union demand an additional amount. Remember, Ray Schonschack told us that it took several years before the County EMS got a contract that included a pay increase.[4]
. . .

Q15: Is there a wage pass thru [sic] this year? If the union gets in, will we receive the wage pass thru?

A15: The State of Michigan has approved a wage pass-through again this year. Participation in this plan is voluntary. Because of that, it is impossible to guess how the FIA Board would view the pass-through if the union wins the election. You could get the pass-through, but, then again, you might not get the pass-through.

The handout dated November 7 included the following:

Q49: People say that if the union comes in, the Facility can't take away or change my current wage and benefits I am now getting. Is that true?

A49: Current wages or benefits may not be changed *during the period that the union and the Facility would be engaged in negotiations.* All the pay practices, benefits, and terms and conditions of employment are frozen until a contract is agreed to.

During negotiations, however, all these pay practices, benefits and terms and conditions of employment are *at risk* because they are all subject to the "give and take" of the negotiations. Wages and benefits are "mandatory subjects of bargaining." What you have now is not necessarily what you could end up with. The final contract would contain what you would end up with.

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[4] According to the Union's brief, this answer had a second paragraph that read as follows:

There is no way to predict how long it could take to reach an agreement if the union wins the election. But, no matter how long it could take, employees who would not be in the bargaining unit would probably receive a raise in January like everyone got this past year.

The copy of this handout admitted into the record as Jt. Ex. 1b does not contain this statement. However, Question 9 and its answer appear at the bottom of page one of the handout, and the next page of the exhibit is page three. It is possible, therefore, that the above paragraph appears on a page that was inadvertently omitted from the document admitted into the record.

> Not only is what you have now at risk, another problem with the negotiation process is the time it could take to get a contract. Our labor attorney is negotiating a *first-time contract* with this union for another client; *he has been in negotiations for over 18 months with AFSCME*. (All italics and quotation marks in original)

Of the Union witnesses, only Henderson's testimony differs significantly from what Meyer claims he said at the meeting, or what the Employer said in its handouts. Henderson claims that Meyer said that the employees would not get the wage pass through "until the union was voted out." Except for Henderson's, the recollections of all the Union witnesses, including Schraeder, the head of the union organizing committee, were consistent with Meyer's testimony that he told employees that if the Union got in the Employer would not give the pass through in January, but would wait to bargain, and the statement in the November 7 handout that current wages and benefits could not be changed while the Union and the Employer were engaged in negotiations. Since no other witness testified similarly to Henderson, and since Henderson did not demonstrate specific recall of the meeting or context in which these alleged threats were made, I do not credit his testimony on this point. For reasons discussed below, however, I conclude that the Employer made statements about the wage pass through which warrant setting the election aside. I base this conclusion on Meyer's own version of what he said at the meetings, and on statements contained in the Employer's handouts.

After a labor organization has been certified as the exclusive bargaining representative for its employees, an employer has the obligation to refrain from making unilateral changes in existing terms and conditions of employment. If an employer has an established practice of giving wage increases at a certain time, this will constitute a term and condition of employment. In *Marquette General Hospital, Inc.*, 1974 MERC Lab Op 351, a Commission administrative law judge concluded that an employer violated its duty to bargain by refusing to give an employee a wage increase after the union was elected. The employer had a pay plan that provided that employees would receive a pay increase after working a certain number of hours. The employer argued that after the election all wage increases "were solely a matter for negotiations." The administrative law judge held, however, found a violation. He noted that an employer cannot unilaterally deny to employees benefits that otherwise would have accrued to them because a majority of the employees have selected a bargaining agent.

PERA does not prohibit a public employer from expressing its views concerning a union or unions during the course of an organizational campaign. *Local 79, SEIU v Lapeer County General Hospital*, 111 Mich App 441,447 (1981). However, promises of benefit if a union is rejected, or threats to withhold benefits because of the union's presence, constitute unlawful coercion and not a lawful expression of opinion. It is unlawful for an employer, during the course of an election campaign, to tell employees that if the union is selected they will not be eligible for wage increases they would otherwise have received. For example, in *Frank's Nursery and Crafts*, 297 NLRB 781, 133 LRRM 1266 (1990), the employer had a practice of awarding merit increases to eligible employees each January. In an meeting held during an election campaign, an employee asked the employer if he would receive a merit increase if the union was elected. The employer replied that all wages would be frozen between the union's election and the time a contract was negotiated. The

NLRB's administrative law judge found that this was an unlawful threat. He noted that the employer's merit review program was an existing term of employment, and that if the union won the election the employer couldn't unilaterally change its merit review program or any other term or condition of employment. He also noted that in its response to the employee's question the employer did not make a prediction concerning the outcome of negotiations, or indicate that the matter might be subject to negotiation with the union. Rather, the employer made clear that if the union won the election the employer would unilaterally, and unlawfully, freeze wages and deprive employees of any opportunity to receive merit increases. The National Labor Relations Board (NLRB) adopted the findings of its administrative law judge, and a new election was directed.

The Employer here did not concede that it had a regular practice of giving its employees the annual wage pass through approved by the legislature, although it conceded that it "generally" gave them at least part of it. The Employer did not, however, provide a business reason for not accepting the money, or for withholding the employees' wage increases. In fact, the record established that Meyer, in connection with professional organizations to which he belonged, had been actively involved in lobbying for a much larger pass through than the one the legislature approved for 1998. Nor did Employer give employees a reason, other than the election of the Union, that they would not get the increase in January 1998. Rather, in its "Q & A" dated October 27, the Employer said that the employees would not get the pass through in January 1998 if the Union were elected, because the Union would then demand an additional amount. By this statement, and Meyer's statement at the meetings, the Employer clearly conveyed that if the Union were elected, it would not give the employees a wage increase until it reached a contract with the Union. Moreover, the Employer repeatedly suggested in the October 27 handout that it would take a very long time to reach that contract. Also, a promise by an employer that employees will receive raises after the election if the employees vote the way the employer wants them to is grounds for setting aside an election. *Branch Co. Road Commission*, 1969 MERC Lab Op 247 (Employer promised that employees would receive COLA payments after the election if they rejected the petitioner and retained an association as their bargaining agent); *NLRB v Arrow Molded Plastics, Inc.*, 653 F2d 280 (6th Cir., 1981), 107 LRRM 3332 (promise of wage increase expressly contingent on union's defeat). Here the Employer did not even suggest that the employees might not get the pass through in January 1998 even if they rejected the Union. That is, the Employer told employees that they would not get a wage increase in January 1998 if they selected the Union, while effectively promising them the increase if they rejected Union representation. I find this combined threat and promise of benefits to be grounds for setting aside the election.

In the October 27 "Q& A" document, the Employer replied to a question about whether the employees would receive the pass through if the Union were elected as follows, " Participation in the plan is voluntary . . . it is impossible to guess how the FIA Board would view the pass-through if the union wins the election. You might get the pass-through, but, then again, you might not get the pass-through." By voting against accepting the pass through, the Employer would be cutting itself off from a source of funds for a wage increase. Where a statement can be reasonably construed to contain a promise or a threat, it is not a defense that the statement was equivocally phrased. *National Music Camp*, 1967 MERC Lab Op 320; *Dykhouse Pickle Co.*, 1971 MERC Lab Op 440. I conclude

that this was an implied threat to retaliate against the employees for selecting the union by rejecting the source of funds for their wage increase.

Alleged Threats to Take Away Employee Benefits

The Union asserts that the Employer threatened that if the Union were elected, the employees would lose their existing fringe benefits, in particular their health insurance benefits. Employees in the proposed bargaining unit receive individual and family Blue Cross benefits from the Employer. The record established that the effect of the Union's election on the employees' continued receipt of health insurance benefits was a significant issue to the voters.

Eight employees testified to remarks made by Meyers at the employee meetings about health care benefits. According to Henderson, Meyer said that "the union would negotiate away part of the employees' Blue Cross benefits." Greve testified that Meyer said that 'just because the union came in, he did not have to agree with them, he could change benefits if he wanted to, he could take them away." However, on cross-examination, Greve admitted that Meyer always referred to what might happen at the bargaining table, and that he did not say that the Employer would simply take away the employees' existing benefits. Leach recalled Meyer saying that the employees could lose their insurance if the Union was elected. She also testified that Meyer said that "if the union got in there would be a lot of changes around here. That if it went into negotiating with the union at the bargaining table, things would be delayed and we would lose benefits and stuff." Pickett testified that Meyer said that employees could lose benefits in the process of negotiations. Pickett also remembered Meyer saying that "he would take a pie and cut it in half and we'd lose so much insurance because of the union." Schraeder testified that Meyer said that there was only so much money in the pie, and part of the money would go toward hiring a legal representative to bargain. Lafayette recalled Meyer telling employees that their insurance would be "thrown out on the table to bargain with." Neither Floss nor Kimberly Swartzentruber could recall what Meyer actually said, but both testified that something that Meyer said at one of the employee meetings caused them to be seriously concerned about losing their health insurance benefits if the Union was elected.

According to Meyer, he showed employees a "pie graph" showing the facility's sources of revenue. He explained that almost all the facility's revenues came from Medicaid and Medicare, and that the facility had no way to increase revenues beyond the annual increases granted by the state and the federal governments. According to Meyer, he also told employees that whenever a union enters a work place, there are costs associated with that, and asked the employees to ask the Union where the money to pay these costs would come from. Meyer said that when asked what would happen to the employees' health benefits if the Union was voted in, he told employees that everything would become part of the collective bargaining process. Employees might end up with more, they might end up with less, but most assuredly they would end up with something different than they had today. He also said that he could not predict what the outcome of negotiations would be. Jane Henderson, the Employer's Director of Nurses, recalled Meyer saying that pay and benefits would be up for negotiations, and that they could be more, could be less, or could sit at the same level.

The Commission uses an objective standard to evaluate the coercive effect of employer statements. *William A. VanNorman, d/b/a Sight and Sound T.V.*, 1976 MERC Lab Op 739,743. The standard is whether a reasonable employee would interpret the statements as threats, not whether the employees in fact felt threatened. See also, *Black Angus(Clinton)*, 1974 MERC Lab Op 29.

In *Lapeer County General Hospital*, 1980 MERC Lab Op 534, *aff'd* 111 Mich App 441 (1981), the Commission found that an employer's statement that a union may "trade off" existing employee benefits in exchange for agency shop and dues check off clauses was not a threat warranting a new election. In *Ripley Shoe Products*, 171 NLRB No. 153, 68 LRRM 1282 (1968), the National Labor Relations Board (NLRB), found the following to be a statement of fact, and not objectionable, "If the union get into this plant, the law requires us to bargain, but it makes no guarantees. That means the door is thrown wide open on everything - your wages and all your benefits. You could get more; you could get the same - or you could get less, but there no law that we have to agree to a single particular demand made by the union."

I find nothing in the testimony to support the Union's claim that the Employer threatened to take away the employees' existing health benefits unilaterally, or that the Employer threatened to refuse to bargain over health benefits if the Union won the election. I conclude that this objection is without merit.

Alleged Threat to Refuse to Bargain

According to the Union, Meyer implicitly threatened that the Employer would not bargain in good faith, and that therefore it would be futile for the employees to vote for the Union.

Four Union witnesses recalled remarks by Meyer about the Employer's willingness to bargain in good faith. Henderson testified that Meyer said that if the union was voted in, he (Meyer) would be part of the negotiating team, and he would simply say no. According to Henderson, Meyer folded his arms over his chest to illustrate his point. Schraeder testified that Meyer crossed his arms over his chest when he said that everything would be put on the bargaining table, and that if he decided that he did not want to give the Union something, he could just say no. Greve recalled Meyer saying that he did not have to agree with the Union. According to Roberts, Meyer said that even if the union got in, the employees shouldn't think that they would get a raise or anything because he would fight against it, and it wouldn't matter what the Union bargained for.

According to Meyer, he said that if there was something the union presented at the bargaining table, it would be perfectly okay, if it was not in the best interest of the facility, to just say no to that particular issue - not to the entire process, but to that particular issue.

This issue was also addressed in several of the Employer's "Election Facts" handouts. . . .

The state and similar federal law "requires and [sic] employer and the representative

of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party.

What this means that is that the only obligation the employer has is to ***meet and confer***. The employer is not required to any proposal (demand) made by the union. The employer may simply say: "No thanks."

. . .

At the bargaining table, management is only required to discuss and consider the union "demands." It is perfectly legal for the Facility to say NO to any proposal or demand. The law does not require the employer to agree to anything if it is not in the best interest of the Medical Care Facility.

The law defines collective bargaining very specifically: The employer is required to "meet and confer" in good faith with the union and discuss wages, benefits, and other terms and conditions of employment. The law does not say "agree" to any proposal, just meet and confer.

The employer is not even required to make a counter proposal to the union's demand. The Employer may simply say . . . NO Thanks!"(Italics and emphasis in the original)

Also, the Employer "Q & A" handout dated October 24 contained the following:

Q14: If the union is voted in (Hopefully it won't) can management put a "no strike"clause in the contract?

A14: I am not sure if a "no strike" would be necessary if AFSCME gets in, but we would try to get one included. Michigan state law prohibits public employees from striking. The Iosco County Medical Care Facility is a public employer. Therefore, employees here are prohibited from walking out on strike.

Most of the time the only weapon the union can use is its right to call employees out on strike. This is withholding the services of the workers to get the employer to give in. But since public employees are prevented from striking, what is the real power of the union coming into our Medical Care Facility? What can the union hold over the head of the FIA Board? Why would employees want to pay an organization to represent them when the organization has no bargaining power?

I conclude that Schraeder's version of Meyer's remarks is the most credible. Schraeder, who as noted above was the head of the union's organizing committee, was the Union witness who demonstrated the most knowledge of the collective bargaining process. Moreover, her testimony that Meyers used the gesture of folding his arms over his chest was supported by Henderson. I conclude that when Henderson testified that Meyer said he would "simply" say no to the Union's

demands, and when Roberts testified that "it wouldn't matter what the Union bargained for," they were recalling their own interpretations of Meyer's message, and not what Meyer actually said. I also do not credit Meyer on this point. Meyer's version of his remark is carefully phrased - more carefully phrased than the statements contained in the Employer's handouts, and too carefully phrased to be credible.

An employer's statement that selecting a union would be futile because the employer would refuse to bargain is an unlawful threat. See *Overnite Transportation Co.*, 296 NLRB 669, 671, 132 LRRM 1176 (1989); *Metropolitan Life Insurance Co.*, 142 NLRB 929, 53 LRRM 1187 (1963); *The Trane Co.*, 137 NLRB 1506, 50 LRRM 1434 (1962). It is clear, however, that an employer may lawfully inform employees that the employer has no obligation to agree in negotiations to any particular proposal made by the union. See *Ripley Shoe Products, supra.* The NLRB's position is that it will not set aside an election because of employer statements allegedly emphasizing the futility of selecting a bargaining representative unless the employer has stated, either expressly, or by clear implication, that it would not bargain in good faith with a union even if were selected by the employees. *American Greetings Corp.* 146 NLRB 1440, fn.4, 56 LRRM 1064 (1964).

I conclude that the Employer threatened employees that it would not bargain in good faith if the Union were selected. First, the Employer stated in its "Election Facts" handout and at the employee meetings that it was not required by law to agree to any proposal of the Union, but could simply say "No," or "No Thanks." These statements, by themselves, do not imply that the Employer would refuse to bargain in good faith. However, the Employer also (1) stated that the Employer's only obligation was to "meet and confer" (not bargain) with the Union; (2) indicated that the Employer had no obligation to make a counterproposal to the Union's demands; (3) failed to clarify the implications of these remarks by indicating to employees that it would bargain in good faith with the Union. Moreover, in its October 24 "Q & A" handout the Employer stated that because public employees are not allowed to strike the Union, "has no bargaining power." Employer statements should not be viewed in isolation, but must be interpreted in the context of the entirely of the Employer's conduct during the organizational campaign. *Black Angus, supra.* I conclude that when read in context, the Employer's statements cited above conveyed the threat that it would not bargain in good faith with the Union if it were to be elected. Accordingly, I find these statements to constitute additional grounds for setting aside the election.

Alleged Threats to Close

The Union asserts that the Employer implicitly threatened to close the facility if the Union were elected. [5] According to Lafayette, at one of the earlier meetings Meyer said that if the Union

[5] Objection No. 6 states that the Employer threatened employees with "loss of employment if the union should call them out on strike." However, the Union presented testimony at the hearing regarding other alleged threats to the employees' continued employment. The Employer raised no objection to this testimony. For this reason, I have considered these other alleged threats as within the scope of the objections.

was elected, he would close the place down and the employees would all be out of employment. According to Lafayette, Meyer was "upset" when he made these remarks. Lafayette also testified that at a later meeting Meyer said that "if the union comes in we will close the doors and everybody will be out of work." Lafayette testified that Meyer did not link the closure of the facility to the negotiating process, and that his statements at the meeting were different from the statements made in the Employer's handouts. Lafayette was the only witness who recalled hearing these threats or anything resembling them. Both Kimberly Gough and Schraeder recalled Meyer saying only that the county needed a police station and a fire department, but did not need a medical care facility.[6]

According to Meyer, someone asked him at a meeting whether the facility might be closed. He answered by asking them if the facility was a mandatory service, but no one responded. He then asked if the court house was mandatory, and if the sheriff's department was mandatory, with the same results. He asked them if the county was required to maintain a nursing care facility. Again, no one responded. He then explained to employees that, unlike some other services, a nursing care facility was not a mandatory service. According to Meyer, this was all that he said about the possibility of the facility's closing.

On this point, I credit Meyer's testimony. The testimony of Gough and Schraeder is essentially the same as Meyer's. The only witness whose testimony on this point differed significantly was Lafayette. Because there were 12 meetings, and Lafayette did not indicate at which meeting Meyer made the remarks she attributes to him, it is possible that Lafayette heard this statement at a meeting which was not attended by any of the other witnesses. However, the lengthy record in this case does not contain any other example of Meyer making such a bald threat. I find it unlikely that Meyer would have statements such as the ones Lafayette attributes to him.

The "Q & A" handout dated November 7 contained the following:

> Q47: On the last Election Facts paper (yellow copy), it stated we had better than average staffing ratios. If the union was voted in and the Facility decided to down-size because of collective bargaining - who would go first?
>
> A47: There are several questions to answer.
>
> First, I do not think that down-sizing would be implemented simply because of the union. A staff reduction would only occur because of financial reasons and would generally be at the direction of the FIA Board. Because of the costs associated with a union, we could eventually be forced to reduce staff primarily because we are overstaffed compared to our competition. Where we now have 4 aides they have 2

[6] Rowana Leach also testified that Meyer said that if the Union got in the Employer could outsource the kitchen, dietary, or housekeeping functions. However, she admitted on cross-examination that what Meyer had actually said was that the Union might agree to a contract clause which would allow the Employer to do this.

doing the same work.

> In the 30+ years we have been in business, we've never had a layoff. It would be a shame if one would be required. If a reduction in force was required before a contract was agreed to, the layoffs would probably be made based on seniority in the department. So the last hired would be the first one let go.

Whether an employer has unlawfully threatened to cease operations or close the plant if the union is selected is an issue which has arisen again and again under the National Labor Relations Act (NLRA), 29 U.S.C. §151 et seq. In *NLRB v Gissel Packing Co.*, 395 US 575 (1969), 71 LRRM 2481, the Supreme Court set out the general guidelines for determining whether a particular statement about plant closure constitutes an unlawful threat. The Court held that an employer is free to communicate to his employees any of his general views about unionism, or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefits. He may even make predictions as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction may be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control, or to convey a management decision already arrived at to close the plant in the case of unionization.. . . If there is any implication that an employer may take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation. In *Bangor Twp. Bd of Ed*, 1984 MERC Lab Op 272, the Commission adopted this standard. It found in that case that the employer lawfully made a reasonable prediction, based on economic facts which were available and open to discussion with the union, that a large number of layoffs would be required if the union did not accept the employer's demand for concessions.

In this case Meyer admittedly responded to an employee's question about whether the facility might close if the Union were elected with what amounted to a statement that the Employer was the only county function which the county was not required by law to maintain. There is no indication that he accompanied this statement with assurances that the Employer would not close unless forced to do so by Union demands or other economic circumstances out of the Employer control. However, in the Employer's November 7 "Q & A" handout, quoted above, the Employer clearly stated that it would not downsize the facility unless forced to do so. Despite the statement in the handout, I conclude that, under the standards set out above, and considering the circumstances in which it was made, Meyer's statement that the county was not required to maintain a nursing facility was a threat to close the facility if the Union were to be elected. Unlike the statement in the "Q & A" handout, Meyer's remark was a spontaneous response to an employee question. Employees could reasonably have interpreted this remark to be a better indicator of the Employer's true intentions.

Objection No. 7

There was no testimony regarding the specific content of the videotapes shown at the

meetings, except that they showed strikes and portrayed the Union in a negative light. The Union did not argue this objection in its brief. References to strikes at other locations, including violence and public disorder, are not necessarily objectionable. *Lapeer County General Hospital*, 1974 MERC Lab Op 488. I find no merit to thisobjection.

The Discharge of Kristine Thomas- Objection No. 3

Kristine Thomas began working for the Employer as a nursing assistant on September 16, 1997, approximately one week before the Union filed its representation petition. Thomas was not among the 24 employees named by the Union as constituting its organizing committee in a letter to the Employer dated September 30. However, Thomas was an active union supporter who wore a union shirt to work. She also told her nurse supervisor, Gale (no last name given) that she supported the Union.

The Employer's employment application includes the question, "Have you ever been convicted of a crime?" It also states, "Conviction of a criminal offense will not necessarily preclude your employment." When filling out this application prior to her hire, Thomas answered "no" to this question. According to Thomas, she answered this way because she thought the question referred only to felonies. Sometime after Thomas began work the Employer requested a copy of her criminal history record from the State Police. The record indicates that the Employer routinely requests this information on new employees. Thomas' record showed that Thomas had pled guilty to two misdemeanors, both relating to bad checks. The Employer received Thomas' criminal record on October 9. The report was placed on the desk of Director of Nursing Henderson. Due to her absence to attend a conference, Henderson did not see the report until Monday, October 13. When she saw it, she immediately took it to Meyer. On October 21, Thomas was told that she was fired her for lying on her job application.

The Employer's employee handbook states that an employee can be discharged for "dishonesty, including but not limited to, falsification, misuse of, or omissions from any Medical Facility forms, records, report, including employment applications, time report, and medical information." The record indicated that once, in 1996, the Employer decided not to fire an employee after discovering he had lied on his job application about a misdemeanor conviction. The Employer asserted that since 1996 its policy has been that any employee who provides false information on their employment application will be discharged. In support of its contention that it had such a policy, the Employer provided the records of four employees discharged in 1996 and in 1997 before the beginning of the Union organizing drive. All four of these employees had felony convictions: one pled guilty to retail fraud , another was convicted of mail theft, a third had a drug conviction, and the fourth had an extensive record. The first two of these employees had stated on their employment applications that they had no convictions, while the other two had left the question unanswered. The discharge statements of two of these employees - one who made a false statement on her application and one who left the space blank - stated that their terminations were due to their criminal histories. The discharge statement of a third employee stated that her termination was due to falsification of her employment application; this employee had answered the conviction question falsely. The

discharge statement of the fourth employee stated that her termination was due both to the Employer's being made aware of her felony conviction and to the falsification of her employment application; this employee had left blank the criminal history question on the application. All four of these employees were terminated on the day or within a few days of the date the Employer learned of their criminal records.

The elements of prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) union animus or hostility to the employee's protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discrimination action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. If a charging party succeeds in making its prima facie case, the burden shifts to the employer to show that the same action would have been taken for lawful reasons even in the absence of protected activity. *Michigan Education Support Assn. v Evart Public Schools*, 125 Mich App 72, 74 (1983).

Although Thomas was not one of the principal union supporters, the record indicates that she wore union buttons on the job to show her support. The Employer argues that Charging Party failed to establish that it knew of Charging Party's activity at the time of her discharge. Meyer testified that he did not know that Thomas was a union supporter or even who she was until Henderson, the Director of Nursing, brought him the information about her criminal record. However, Meyer and Henderson together made the decision to terminate Thomas, so Meyer clearly knew who she was when he terminated her. Thomas testified that she openly made known her union support by wearing buttons and by telling her supervisor she supported the Union. I do not credit Meyer's testimony that he was unaware of Thomas' pro-union views at the time he discharged her. I also find that the unlawful threats made by the Employer in this case, as discussed under Objection No. 6 above, are sufficient to establish union animus. Finally, although the timing of her discharge was linked to the date the Employer received her criminal record, Thomas was nevertheless discharged during the most crucial part of the union organization campaign, between the consent election agreement and the election. I conclude that a prima facie case of unlawful discharge has been established on this record.

There is no question that Thomas falsified her employment application. The Union argues, however, that Thomas received disparate treatment when she was allegedly discharged for this offense. It asserts that the Employer had no consistent policy of terminating employees for making false statements on their applications. Secondly, it asserts that while the Employer has consistently terminated employees with extensive criminal records and/or felony convictions, the Employer did not fire employees for lying on job applications regarding misdemeanor convictions. As indicated above, the Employer's handbook states that an employee can be discharged for any misstatement on his application, but the Employer admitted that it did not consistently apply this policy before 1996. The personnel documents presented by the Employer to demonstrate that since 1996 it has fired all employees who have lied on their applications do not support its claim. First, only two of these discharged employees had, in fact, lied about their convictions on their applications. Secondly, all four had felony, not misdemeanor, convictions. Finally, as discussed above, in giving its reasons for discharge the Employer did not consistently distinguish between the offense of falsifying the

application and the fact of having a criminal conviction. I also note that the Employer presented no evidence that prior to Thomas it had ever terminated an employee for falsely stating on his application that he did not have a misdemeanor conviction. I find that the record does not establish that when it terminated Thomas, the Employer had a policy of terminating all employees who had falsified their applications. Further support for this finding is found in the fact that while the four employees discussed above were terminated almost immediately after the Employer discovered their criminal history, Meyer and Henderson waited over a week before discharging Thomas. This delay suggests that they were uncertain about what to do about Thomas' case. For reasons set forth above, I conclude that Thomas would not have been discharged for lying about her misdemeanor convictions on her employment application in the absence of her expressions of support for the Union.

Summary of Conclusions, and Remedy

For reasons discussed above, I find no merit to the Union's Objections Nos. 1,2,4,5, & 7. With respect to matters covered under Objection No. 6, I conclude that the Employer interfered with the election by threatening to withhold and/or delay wage increases if the Union were elected, and by promising to give them these wage increases at the expected time if they rejected the Union as their bargaining representative. I also conclude that the Employer interfered with the election by implying that it would be futile for employees to select the Union because the Employer would not bargain in good faith. In addition, I find that the Employer interfered with the election by threatening to close the facility if the Union were elected. I find no merit to the Union's claim that the Employer threatened to take away employee benefits. Finally, I find that the Employer interfered with the election and violated Section 10(1)(a) and (c) of PERA by discharging Kristine Thomas because of her support for the Union.

The Union asks that the election held on November 13 be overturned. It also asks that a bargaining order be issued, based on its majority showing of interest at the time of the filing of the petition, because the Employer's conduct has been such that no free and fair election could be held. The Commission, however, has expressed its reservations about the use of cards alone to determine the bargaining agent. *Nick's Fine Foods*, 1968 MERC Lab Op 307. See also *Staszuk's Able Van Lines*, 1972 MERC Lab Op 936; *Branch Co. Road Comm.*, 1969 MERC Lab Op 247. In fact, I have been unable to find any case in which the Commission has issued a bargaining order without an election having been held. I therefore reject the Union's request. Because of the seriousness of the Employer's conduct in this case, however, I find that the Employer should be required to post the attached notice to employees for 30 days prior to the date the second election is conducted. I recommend that the Commission issue the following order, including a direction of a second election.

Recommended Order

It is hereby ordered that Iosco County Medical Care Facility, its officers and agents, shall:

1. Cease and desist from discharging or otherwise discriminating against their

employees because of their union activities or other activities protected by Section 9 of the Public Employment Relations Act.

2. Offer Kristine Thomas unconditional reinstatement to her former or substantially equivalent position without prejudice to any rights or privileges she previously enjoyed, and make her whole for all wages and benefits lost as a result of her unlawful discharge on October 21, 1997, less interim earnings but including interest at the statutory rate, compounded quarterly.

3. Post the attached notice to employees in conspicuous places on the Employer's premises, including all places where notices to employees are customarily posted, for a period of 30 consecutive days.

The election held on November 13, 1997 is hereby set aside. After the attached notice has been posted for the period set forth above, a second election shall be held in the bargaining unit set forth in the parties original consent election agreement.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission , the **Iosco County Medical Care Facility** has been found 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 cease and desist from discharging or otherwise discriminating against employees because of their union activities or other activities protected by Section 9 of the Public Employment Relations Act.

WE WILL offer Kristine Thomas unconditional reinstatement to her former or substantially equivalent position without prejudice to any rights or privileges she previously enjoyed, and make her whole for all wages and benefits lost as a result of her unlawful discharge on October 21, 1997, less interim earnings but including interest at the statutory rate, compounded quarterly.

WE WILL NOT threaten to withhold and/or delay wage increases to our employees if they select a union as their bargaining representative.

WE WILL NOT promise our employees that they will receive wage increases if they reject a union as their bargaining representative.

WE WILL NOT threaten to refuse to bargain in good faith with the duly elected bargaining representative of our employees, and therefore imply that it would be futile for employees to vote for that union.

WE WILL NOT threaten to close our facility because the employees have selected a union to represent them.

IOSCO COUNTY MEDICAL CARE FACILITY

By: _____

Dated:_____

(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 or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Michigan Plaza Building, 14th Floor, Detroit, Michigan 48226. Telephone: (313) 256-3540)