STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COMMUNITY HEALTH CENTER OF
BRANCH COUNTY,
Respondent-Public Employer,

Case No. C98 D-97

-and-

MICHAEL CONNOLLY and RANDY ROTH,
Individual Charging Parties.
_____/

APPEARANCES:

Dykema Gossett, PLLC, by John A. Entenman, Esq., for Respondent

Law, Weathers, and Richardson, John H. Gretzinger, Esq., for Charging Parties

DECISION AND ORDER

On November 12, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

Dykema Gossett, PLLC, by John A. Entenman, Esq., for the Respondent

Law, Weathers, and Richardson, by John H. Gretzinger, Esq., for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Section 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210, MSA 17.455(10), this case was heard at Lansing, Michigan on November 9 & 10, and December 21, 22, & 23, 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 March 8, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on May 5, 1998, by Coldwater Anesthesia Associates (CAA). The charge was later amended to substitute the names of two individuals, Michael Connolly and Randy Roth, as individual Charging Parties. The charge was filed against Connolly and Roth's former employer, Community Health Center of Branch County (CHC). Connolly and Roth are certified registered nurse anaesthetists (CRNAs). The charge, as amended, alleges that on or about April 29, 1998, the Respondent terminated their employment because they engaged in activities protected by PERA. These activities include requesting (as CAA) that the hospital voluntarily recognize them as the collective bargaining agent for a unit of CRNAs on December 10, 1996, and filing a petition for representation election with this Commission on March 2, 1997 in Case No. R97 C-63. Charging

Parties also allege that they engaged in concerted protected activity under the Act when they jointly complained to Respondent about violations of hospital and insurance billing rules by the medical doctor anesthesiologists (MDAs) with whom they worked. Respondent denies that its decision to terminate Charging Parties and contract out their work was caused in whole or in part by activities protected by the Act.

Facts:

Background

CHC is an acute care hospital owned by Branch County and located in Coldwater, Michigan. It is overseen by the Branch County Board of Commissioners, and managed by a separate nine member board of trustees. CHC has 130 beds and approximately 500 employees, including bargaining units of registered nurses and licensed practical nurses.

Charging Party Connolly was first hired by Respondent on September 10, 1979, as one of four CRNAs then employed by CHC. CRNAs are qualified to directly administer anesthesia under the medical direction of a medical doctor (MD), osteopathic doctor, or dentist. At CHC, an MDA must be present in the operating area at all times when CRNAs are providing anesthesia services. The MDAs at CHC are physicians in private practice with staff privileges at the hospital; at no time during the events involved in this proceeding did CHC employ any MDA.

On October 23, 1991, CHC laid off all three CRNAs it employed at that time because it was losing money on their services. The CRNAs, however, continued to work for CHC as contractors. The three CRNAs, including Connolly, formed a professional corporation, CAA, and began to bill Medicaid, Medicare, Blue Cross and other insurance carriers separately for their services. CAA's billing was handled by the hospital, which received CAA's reimbursement payments. In January 1992, Charging Party Randy Roth became part of CAA. Roth had been previously employed by the hospital as a CRNA, but had quit about two years earlier.

The CRNAs' earnings as part of CAA were substantially higher than their salaries had been. At least initially, this arrangement was satisfactory to the hospital. In late 1994 or early 1995, however, serious disputes arose between the CRNAs and the MDAs over billing practices. The first dispute was over billing for "single room" cases. A "single room" case is an operation taking place when no other surgeries are being performed. In 1995, the practice at CHC was that in "single room" cases a CRNA would provide the necessary anesthesia services, but both the CRNA and the MDA whose presence was required would submit bills. This was contrary to Medicaid regulations, which stated that in "single room" cases Medicaid would pay only the party that had personally performed the service; Medicaid would not pay for "medical direction." The MDAs represented in their Medicaid billings that they had personally performed the anesthesia services. As a result, Medicaid paid the MDAs and denied the CRNAs' requests for payment. The CRNAs complained to Medicaid, asserting that the MDA billings contained false representations. The CRNAs also complained to the CHC administration about this practice.

In 1995 it was also the practice at CHC to have one MDA supervise three operating rooms. The MDAs billed Blue Cross for all three rooms, and these bills had been paid by Blue Cross even though Blue Cross regulations prohibited an MDA from billing for supervising more than two operating rooms at a time. The CRNAs brought this situation to Blue Cross' attention. The CRNAs also complained about this practice to the CHC administration.

In July 1995, CHC's chief of staff called a special meeting of the medical staff to discuss the CRNAs' accusations. An MDA, Dr. Wadley, admitted violating Medicaid and Blue Cross billing regulations, although he stated that he believed these regulations were stupid. After a series of heated exchanges, the medical staff told the MDAs that they had to comply with all applicable billing regulations.

After this meeting the MDAs began administering more anesthesia themselves. The MDAs started administering all anesthesia in one of the four operating rooms. The MDAs also, whenever feasible, administered anesthesia in the other operating rooms if a patient had private insurance (which paid at a higher rate), and left cases reimbursed by Medicaid(which paid the least) to the CRNAs. The CRNAs complained to the hospital administration about these practices, and the hospital warned the MDAs that if this continued they could lose their hospital privileges. However, the hospital never actually attempted to take away the MDAs' hospital privileges, at this time or at any time thereafter.

Events in 1996 - Charging Parties Attempt to Form a Bargaining Unit

In November 1995, CHC hired a new chief financial officer (CFO), Randy DeGroot. DeGroot discovered that the hospital had lost approximately $77,000 on CRNA services during the calendar year 1995. This loss resulted from monies that had been paid to CAA for billings for which the hospital had not been reimbursed. In April 1996, the Board of Trustees put out a request for proposals for a single contractor to take over all anesthesia service at the hospital. The hospital's medical staff and the Board's finance committee asked the CRNAs and MDAs to develop a joint proposal, but they were unable to come to an agreement. Both CAA and Branch County Anesthesia Associates (BCAA), a professional corporation which included all three MDAs then practicing at CHC, eventually submitted separate proposals.

The hospital was not satisfied with any of the proposals it received. On August 8, 1996, the Board's finance committee accepted the recommendation of CHC's Chief Operating Officer (CEO), Douglas Rahn, that CHC contract with BCAA for medical supervision only, and that the hospital offer all three CRNAs employment with the hospital. The record indicates that this decision was made in part because the hospital staff valued the services of the CRNAs and feared that BCAA might not hire them if BCAA were given full control.

The CRNAs were very unhappy with the hospital's decision. In August 1996, the CRNAs held meetings with the hospital to discuss the terms of their future employment. According to the Charging Parties, Jan Stratton, then the chief nursing officer, promised during these discussions that they would receive a year's worth of banked vacation time, in addition to personal time off (PTO), which they could begin using immediately upon becoming employees. During these discussions, the

CRNAs were told by Rahn and Stratton that they were to fill out complaint forms, or "variances," when they noted a violation of billing regulations by the MDAs. On August 28, 1996, Stratton sent the CRNAs a letter summarizing the terms of the hospital's offer of employment. The CRNAs signed the letter, accepting employment. The letter described the CRNAs' vacation benefits as follows:

> Vacation benefits will be according to years of service at the hospital, namely: 5-10 years continuous employment - - 18 days; more than 10 years continuous employment - - 24 days. You will be given credit for continuous years of service at CHC, in terms of the amount of vacation time available to you. In addition, eight days of PTO time will be provided at the time of your hire. Waiting periods for vacation and PTO time will be waived.

The CRNAs became employees of CHC effective November 1, 1996. Almost immediately, the CRNAs began to file variances. The hospital's file of the variances filed by the CRNAs between November 1996 and March 1998 is approximately two inches thick. The principal complaints contained in the variances were: (1) the MDAs were taking cases where the patients had private insurance for themselves, even if this delayed the beginning of an operation; (2) the MDAs and/or surgeons were assigning the CRNAs to perform anesthesia in "single room" Medicaid or Medicare cases, in violation of hospital policy, while the MDAs billed as if they had administered the anesthesia themselves; (3) the MDAs were improperly billing for cases where they had not provided the level of supervision required for them to properly bill them as medically supervised. A very small number of the variances included complaints about working conditions, e.g., insufficient breaks, called in when unnecessary.

On December 10, 1996, the CRNAs sent the hospital a letter formally requesting that CAA be recognized as the collective bargaining representative for a unit consisting of the three CRNAs. The hospital received this letter on December 12. The hospital, by letter from its attorney dated December 16, declined the request for recognition. The letter stated that the hospital did not believe that a unit consisting only of CRNAs was appropriate.

On December 16, 1996, the CRNAs met with Stratton and Rahn to discuss the respective responsibilities of the CRNAs and MDAs under the new arrangement. The CRNAs were handed a document at this meeting. According to the document, one of the responsibilities of the MDAs, was to "determine the CRNAs' schedules, maximizing their hours." Certain practices which had been in effect while the CRNAs were contractors were altered at this time. Most significant to the CRNAs was a requirement that all three CRNAs report to work every weekday unless informed otherwise by the MDA, even if no surgery was scheduled for the third operating room. Under the previous practice, two CRNAs reported if there was no surgery scheduled for the third room, with the third CRNA on call. Either at this meeting or at some time shortly thereafter, the CRNAs were informed that all "single room" Medicaid cases would be performed by the MDAs. Also at about this time the hospital decreased the rate at which it had been billing for CRNA services

On December 17, 1996, the CRNAs received their third paychecks as employees of the hospital. The CRNAs' first two pay stubs had shown them with a balance of a year's worth of

accrued vacation time, in addition to eight days of PTO. On their December 17 check stubs, however, this vacation time had been removed, leaving only the hours which had accrued since November 1. The CRNAs complained first to Stratton and then to Rahn, without success. They were told that the human resources department had made a mistake in initially crediting them with this vacation time. The record indicates that DeGroot noticed these hours while reviewing the monthly financial report for November. DeGroot checked with Stratton, was told that she had not agreed to give the CRNAs accrued vacation time, and then brought the "mistake" to the attention of the director of human resources. The record shows that the paperwork to remove this vacation time was completed by a payroll clerk on December 12, the same day that, according to hospital records, the hospital received CAA's letter requesting recognition.

Events of 1997 - CAA Files a Petition for Representation Election

On March 2, 1997, CAA filed a representation petition with this Commission. (Case No. R97 C-63). CHC objected to the proposed unit of CRNAs as inappropriate. A hearing date was set but was postponed numerous times due to the illness of CAA's attorney.

The record indicates that through the calendar year 1997, Dr. Lawrence Woodhams had a series of conversations with Connolly about the CRNAs' efforts to unionize.[1] These conversations took place either in the operating room or in the adjoining locker room. Woodhams admitted that he told Connolly that he believed that the petition was an inappropriate reaction to the efforts of the hospital administration to protect them, and that the other members of the Board of Trustees agreed with him.[2] Based on the demeanor of the witnesses, I credit Connolly's testimony that Woodhams spoke angrily about the CRNAs' efforts to organize. I also credit Connolly's testimony that Woodhams also said, "we don't need that here," and that Woodhams repeatedly told him to drop the unionization effort.

On March 18, 1997, DeGroot submitted a report to the Board's finance committee assessing the financial impact of employing the CRNAs for the months November 1996 through February 1997. DeGroot pointed out that while he had projected the change in their status to have a "budgeted positive impact" of $8,456 for this period, in fact there had been a "negative net income effect" of $16,819. DeGroot noted that this contrasted with a projected annual loss of $77,629 were the CRNAs to remain contractors, and also that the hospital had reduced its charges for CRNA services

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[1] Dr.Woodhams is a podiatrist who frequently performs surgery at CHC. Woodhams has been a member of CHC's Board of Trustees since about 1994. In addition, Woodhams was a member of the Board's finance committee prior to April 1996, and again from February 1997 until January 1998.

[2] Hal Creal, president of the CHC Board of Trustees at the time the petition was filed, testified that he was disappointed by the request for recognition, and admitted that he thought the CRNAs efforts to organize were "an unfair reaction to the Board's efforts to be fair" to them. Creal also confirmed that other Board members felt the same way.

by $3,126 a month. However, DeGroot concluded that the primary problem was underutilization of the CRNAs. He noted that the administration had met with the MDAs in February to address "productivity" issues.

On this same date, Stratton sent the CRNAs a memo regarding scheduling. Prior to this memo, the CRNAs had left the hospital after their last regularly scheduled surgery was over, usually shortly after 3:00 p.m. One CRNA remained on call for emergencies. The memo stated that one CRNA was to remain at the hospital each week day until 6:00 p.m., even if no surgeries were taking place, unless and until the MDA released him to leave. On May 19, 1997, Stratton sent another memo instructing the MDAs to "keep the CRNAs at the hospital as long as possible." The memo explained that CRNAs were being sent home on days the surgical schedule was light. As a result, "add-on" surgeries which could have been performed that day were postponed to the following day because no CRNA was available. Sometime afterward, Stratton notified the CRNAs and MDAs that one CRNA was to remain at the hospital each weekday until 8:00 p.m.

Sometime during the summer of 1997, one of the CRNAs resigned. The hospital had to use temporary CRNAs, increasing the hospital's costs. In September 1997, Stratton prepared a report on the CRNAs' "last case start times," i. e., the times they started their last case for the day, for the period July 15 through September 16, 1997.

Events of 1998 - The Petition is Withdrawn and Charging Parties are Terminated

In January 1998, Woodhams had a conversation with both Connolly and Roth in the locker room. Woodhams testified that Connolly approached him. Again, based on the demeanor of the witnesses, I credit Connolly's and Roth's testimony that Woodhams initiated the conversation. I also credit their testimony that Woodhams said that the hospital was now willing to consider their return to contractor status and that the administration couldn't discuss this with them until the CRNAs withdrew their representation petition. Connolly told Woodhams that he would withdraw the petition. Shortly afterward, Woodhams reported this conversation to Rahn. Rahn asked him to get confirmation from Connolly, and Woodhams brought Connolly to meet with Rahn. Rahn told Connolly that the Board of Trustees could "consider alternatives" if the petition were withdrawn, and Connolly confirmed his intent to withdraw the petition. On January 30, 1998, CAA sent a letter to this Commission withdrawing the pending representation petition.

Meanwhile, on January 27, 1998, the MDAs sent a letter to Rahn asking the hospital to again consider contracting with them as the exclusive provider of anesthesia services. This letter stated:

> We still have a department that has no central focus of authority, resulting in two parties constantly vying for control. Our main point here is that this situation will continue until a hard and apolitical decision is made to make only one party the complete authority. A political decision trying to make the least inflammatory decision will only prolong this issue, and we will continue to discuss variations of this issue indefinitely.

During this same period DeGroot was reviewing the financial statements for the calendar year 1997. DeGroot reported to Rahn that the hospital had lost approximately $97,115 on anesthesia services for that period. In February 1998, Rahn prepared for the Board of Trustees a written analysis of the anesthesia department's problems. Rahn listed these problems as follows: (1) the hospital was losing money on CRNA services; (2) the MDAs and CRNAs had difficulty working together; (3) one of the three CRNA positions had become vacant and the hospital was using expensive temporary help; (4) the MDAs' wanted to hire a fourth CRNA to help them cover the pain clinic as well as the operating room; (5) there were not enough MDAs in the operating room during peak times, and BCAA had indicated that they did not want to hire another MDA for their practice. Rahn's report listed the pros and cons of seven options, including allowing the MDAs to hire two CRNAs while keeping Charging Parties employees of the hospital, returning all the CRNAs to the status of independent contractors, and contracting with the MDAs to provide full anesthesia services. Rahn estimated the monetary savings in making the CRNAs independent contractors to be the same as the savings in contracting with the MDAs. However, he noted that this option wouldn't "solve relationship problems," that it "kept the hospital in the middle" and that it "reduces MDAs incentives and financial gain."

Sometime after Rahn's presentation of his report, the Board's executive committee decided to attempt to negotiate an exclusive contract with BCAA. An agreement was reached. BCAA signed the contract on April 13, 1998. On Friday, April 24, the Board's finance committee voted to recommend to the full Board that it approve the contract. On Monday, April 27, the Board approved the contract and acted to terminate the employment of the CRNAs. That same day, CAA filed a second representation petition with the Commission.[3] On April 29, the CRNAs were notified by letter that their employment would be terminated effective June 1, 1998.

The instant unfair labor practice was filed on May 14, 1998. Shortly after their termination by the hospital, Connolly and Roth accepted BCAA's offer of employment. The terms of that employment were less favorable than those provided by Respondent. At the time of the hearings in this case, Connolly and Roth continued to provide anesthesia services at CHC as employees of BCAA.

Discussion and Conclusions of Law:

Charging Parties allege that their June 1, 1998 terminations constituted retaliation for their union activities, in violation of Section 10(1)(a) and (c) of PERA, and their concerted protected activities, i.e., filing complaints in the form of variances, in violation of Section 10(1)(a) of the Act.

The elements of prima facie case of unlawful discrimination under Section 10(1)(a) or (c) of

[3] This petition is Case No. R98 D-54. The parties agreed to hold this petition in abeyance pending resolution of this charge.

PERA are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Thereafter, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action(s) would have taken place even in the absence of protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw,* 1997 MERC Lab Op 414,419. See also *MESPA v Evart Public Schools,* 125 Mich App 71 (1983).

Charging Parties engaged in union activity when they, as CAA, made a request for voluntary recognition in December 1996, and when they filed a petition for a representation election in March 1997. Respondent argues that there was no union activity because the March 1997 representation petition was withdrawn in January 1998, and not refiled until after Respondent had decided to contract with BCAA. However, the fact that the first petition was withdrawn is irrelevant, since Charging Parties allege that their termination was retaliation against them for that petition. In any case, they could refile their petition at any time. The record also establishes that the hospital administration and its Board of Trustees knew about the request for voluntary recognition and the March 1997 petition at the time the decision was made to terminate Charging Parties' employment.

Charging Parties also allege that their filing of variances was protected activity. Except for a few insignificant exceptions, these variances did not contain complaints about working conditions. Rather, they document numerous incidents in which the MDAs allegedly violated insurance billing regulations or hospital policy. Charging Parties assert that this activity was protected because in filing these variances they acted out of concern for their personal liability and/or their job security. Charging Parties assert that if they had not documented variances between the hospital's billings for their services and BCAA's billings, they could have been implicated in billing fraud. They also claim that they had an economic interest in insuring that BCAA performed the supervision for which BCAA had agreed in its contract with the hospital, because otherwise the hospital might decide to get out of the anesthesia business by contracting with BCAA or other anesthesiologists, resulting in the CRNAs losing their jobs. Finally, the Charging Parties argue that they were attempting to protect their jobs by noting instances where they were forced to perform anesthesia in "single room" Medicaid cases, in violation of hospital policy.

Charging Parties cite *Arrow Electric Co., Inc. v NLRB,* 155 F3rd 762 (6th Cir., 1998), in which the Court affirmed the NLRB's finding that an employee walkout to protest their supervisor's "rude, belligerent, and overbearing behavior" was protected because the supervisor's conduct "directly impacted the employees' jobs and their ability to perform them." Charging Parties also cite *Squier Distributing v Teamsters Local 7,* 801 F2d 238 (6th Cir, 1986), in which the Court affirmed a finding by the NLRB that employees' actions in giving affidavits to law enforcement authorities stating that the employer's vice president had embezzled funds from the employer was protected activity. The Court in that case agreed with the NLRB that the employees' overriding concern in that case was for their job security, and not for the managerial efficacy of the vice president's decisions, since the employees had previously discussed their fear for their jobs if the company failed financially or if the vice president lost the liquor license which allowed the company to operate. The Court in

Squier distinguished this situation from cases in which employees who accused their employers of mismanagement of public funds or policies relating to patient care had been held not to have engaged in activity protected by the NLRA. In those cases, the Court said, "the concern exhibited by the employees was not for the retention of their jobs but for other laudable, but unprotected, goals." 801 F2d at 241.

I find no evidence in this record that Charging Parties, as employees of CHC, could have been held personally liable for billing fraud, and no indication that fear of being implicated in billing fraud motivated them to file the variances. There is also no evidence in the record that the CRNAs filed variances with the hospital to prevent CHC from deciding to contract out its anesthesia services, or because they feared discipline by the hospital for complying with physician directives which violated hospital policy. By reporting possible billing fraud and violations of hospital policy by the MDAs to the hospital administration, Charging Parties acted in the best interests of the public and of the hospital itself. I find, however, that Charging Parties were not acting out of concern for their job security or any other term or condition of employment. I conclude that Charging Parties did not engage in protected concerted activity by filing the variances. However, even if this activity was protected, there is no evidence that CHC was angered by the variances or that the filing of variances was in any way connected to Charging Parties' termination.

As indicated above, I find that Charging Parties demonstrated that they engaged in union activity and that the Respondent had knowledge of that activity. I also find that Charging Parties met their burden of showing union animus. The fact that members of the Board of Trustees expressed "disappointment" upon learning that Charging Parties were attempting to organize is not sufficient to establish union animus. However, the record indicates that throughout 1997 Dr. Woodhams, a Board member, made persistent, angry, attempts to persuade Connolly to drop his efforts to unionize. I also find that in January 1998 Dr. Woodhams and CHC CEO Rahn lured Charging Parties into dropping their representation petition by suggesting that if they did so they could once again become independent contractors, when the hospital had no serious intention of resuming that arrangement with them. I conclude that this action, coupled with Dr. Woodhams' earlier conduct, establishes union animus on the part of Respondent in this case.

However, union activity, employer knowledge of that activity, and evidence of union animus are not sufficient to establish even a prima facie case of unlawful discharge. There must also be suspicious timing or other evidence to indicate that the discharge was linked to the union activity. In this case, Charging Parties attempt to show this link by evidence that they were treated differently by CHC after they made their request for voluntary recognition. Charging Parties point out that soon after they made their request for recognition in December 1996, they learned that the hospital had removed accrued vacation leave from their accounts. Charging Parties also point to the fact that the CRNAs' hours of work were also increased in the same month as their request for recognition. According to Charging Parties, a report prepared by the hospital in September 1997 on the "last case start times" of the CRNAs was part of this same pattern of retaliation. Charging Parties also point to Rahn's insistence in January 1998 that Charging Parties withdraw their petition before the hospital would even consider contracting with them, and his reference to "union consequences" in his February 1998 analysis, as an indication that the Board of Trustees had Charging Parties' union

activities at the forefront of their minds at the time the Board made the decision to terminate them. Finally, Charging Parties point out that while in August 1996 the hospital had sought to protect their employment, by March 1998 Charging Parties were not even given the opportunity to submit a bid for the anesthesia contract. All of these events, Charging Parties contend, demonstrate that after they requested voluntary recognition Respondent changed its attitude toward them, culminating in its final decision to terminate their employment.

I am not persuaded by Charging Parties' arguments. First, it is not clear whether Stratton ever promised Charging Parties that they would receive banked vacation time upon becoming employees in 1996; the letter setting out their terms of employment which Charging Parties signed does not state that they would. Secondly, the record indicates that Respondent's human resources department completed the paperwork to remove the vacation time on the same day that Respondent received Charging Parties' letter requesting recognition. It is unlikely that Respondent could have reacted so quickly. The facts as detailed above also indicate that after the CRNAs became hospital employees in 1996, the hospital administration tried to maximize the CRNAs' billable hours, and thus the hospital's compensation for their services, without jeopardizing the hospital's relationship with the MDAs. These somewhat contradictory objectives explain the administration's decisions to increase the number of hours the CRNAs spent at the hospital, as well as the "last case start time" report. Rahn's January 1998 conversation with the Charging Parties about withdrawing their petition is discussed above. I do not find this conversation sufficient by itself to support a conclusion that Charging Parties's union activity was a motivating factor in the Board's decision to terminate them. In Rahn's February 1998 report, he lists "may exacerbate union issues" as one of four arguments against one of the seven options he discusses - that of keeping the Charging Parties as employees of the hospital, but eliminating their on-call, and allowing the MDAs to hire two additional CRNAs. Whatever Rahn meant, there is nothing to indicate that this one argument played any significant part in the Board's decision to contract with BCAA. I conclude that Charging Parties have not shown a causal connection between their union activity and their termination. Therefore, they have not established that their union activity was even a motivating factor in their termination.

This conclusion is sufficient to support a recommendation that the charge be dismissed. I conclude, however, that even if Charging Parties' protected activities are found to be a motivating factor in their termination, they would have been terminated even in the absence of this activity. That is, the record establishes other, predominating, causes for their termination. It is clear that during 1997 the hospital lost money on CRNA services. Charging Parties devoted considerable effort to explaining what steps the hospital could have taken to avoid losing this money. However, I am not persuaded that Respondent avoided taking these steps for the sole purpose of ensuring that it would lose money, and thereby justify Charging Parties' termination. Moreover, Charging Parties and the MDAs clearly did not get along. Which side was in the right is not relevant here. As noted above, the record indicates that one of Respondent's objectives was protecting its relationship with the MDAs. By contracting with BCAA, Respondent removed itself from the middle of the CRNA/MDA dispute, reduced its own operating costs, and transferred to BCAA(by the terms of their contract) responsibility for adequate staffing and for complying with insurance billing regulations.

In conclusion, I find that Charging Parties were not engaged in activity protected by the Act

when they complained to the hospital administration about the MDAs' billing practices and violations of hospital policy. I also find that Charging Parties did not meet their burden of establishing that their union activity was a motivating factor in their termination. Finally, I conclude that even if Charging Parties' protected activity was a factor in the decision to terminate their employment, the record establishes that they would have been terminated even in the absence of this activity. For these reasons, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____