

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

In the Matter of:

MEADOW BROOK MEDICAL CARE FACILITY,
Respondent-Public Employer,

Case No. C98 C-46

-and-

TEAMSTERS STATE, COUNTY & MUNICIPAL
WORKERS, LOCAL 214,
Charging Party-Labor Organization.

APPEARANCES:

Nantz, Litowich, Smith & Girard, by Steven K. Girard, Esq., for Respondent

Law Offices of Robert W. White, by Robert W. White, Esq., for Charging Party

DECISION AND ORDER

On March 27, 2000, Administrative Law Judge Roy L. Roulhac issued his 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Date: _____

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For Respondent:

Nantz, Litowich, Smith & Girard
By Steven K. Girard, Esq.

For Charging Party:

Law Offices of Robert W. White
By Robert W. White, Esq.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) *et seq.*, this case was adjudicated by Administrative Law Judge Roy L. Roulhac. The proceedings were based upon an unfair labor practice charge filed on March 11, 1998, by Teamsters State, County & Municipal Workers, Local 214, against Meadow Brook Medical Care Facility. The parties filed a Factual Stipulation and briefs on June 10 and August 2, 1999, respectively. Pursuant to Section 16(b) of PERA, my conclusions of law and recommended order are set forth below:

The Charge:

The Union alleges that the Employer violated Sections 10(1) (a), (c), and (e) of PERA by "...refusing to negotiate about a mandatory subject of negotiation, unilaterally declaring the Facility to be a non-smoking workplace." The Employer filed an answer denying the allegations set forth in the charge on March 20, 1999.

Factual Stipulation:

1. The Employer, Meadow Brook Medical Care Facility ("Facility"), is a 100-bed skilled nursing facility created to care for the elderly and infirm of Antrim County. The Facility is located in the city of Bellaire, Michigan, and pursuant to the provisions of the Social Welfare Act, MCLA §400.1 *et seq.*, is

governed by a three-member Family Independence Agency board.

2. Since June 1991, the Facility's non-professional employees have been represented for collective bargaining purposes by Teamsters State, County and Municipal Workers, Local 214 ("Local 214"). The parties' first collective bargaining agreement was effective from October 11, 1992, through October 11, 1995.

3. At all relevant times, David Schulz has served as the Facility's Human Resource Manager and Sheryl Langdon has been Local 214's business representative.

4. On March 11, 1992, the Facility unilaterally promulgated and published a smoking policy for employees. This policy permitted smoking in two areas - one inside the Facility and one outside.

5. After a lengthy fact-finding process, the parties entered into a successor agreement effective from October 11, 1997, through October 11, 1999. In the new collective bargaining agreement, which contains provisions for binding and final arbitration of grievances, the parties revised Section 16.2 to refer to the smoking policy. Section 16.2 reads:

Section 16.2. Facility Rules and Regulations: The Facility reserves the right to establish from time to time reasonable rules and regulations which it shall deem proper to govern the conduct of the Facility's employees, including by way of illustration and not by way of limitation, operational procedures, and work rules and regulations. The Facility also reserves the right to establish changes and modifications from time to time regarding such rules, regulations and general personnel policies and procedures.

Any changes or modifications which may be established by the Facility . . . in existing safety rules and regulations, general personnel policies and procedures and work rules and regulations and under which employees may be subject to possible disciplinary action shall be publicized by the Facility either through posting on the bulletin board or through some other method of publication or notification and such changes shall not be effective for at least five (5) days . . . this five (5) day period . . . shall not apply to changes or modifications which must be immediately effective due to requirements of federal and/or state law or due to safety or health considerations. . .

Non-Smoking Policy: The Facility has an established smoking policy prohibiting smoking except in certain designated areas on Facility premises.

6. On February 15, 1998, a fire broke out at the Facility. It is believed by the City of Bellaire fire chief ("fire chief") that the fire was caused by a resident who left smoking materials in a coat in his room. Although the fire itself was confined to that resident's room, substantial smoke and water damage occurred elsewhere in the Facility.

7. The next day, the fire chief sent a letter to administrator Judy Petroff stating that pursuant to his authority under "Act 207", he was issuing an order designating all of the premises as "a non-smoking facility." On the same day, Petroff posted a notice to employees communicating the fire chief's order to all employees and revised the smoking policy to ban all indoor smoking and restrict outdoor smoking to designated areas. The notice and revised smoking policy was also faxed to Local 214's business

representative, Langdon.

8. On February 20, 1998, Langdon faxed and mailed a letter to Schulz questioning the fire chief's authority to issue his order. She sent another letter to him on February 26, 1998, which informed him of the Local's position and requested the February 16, 1998, notice be rescinded.

9. On March 3, 1998, Schulz sent a letter to Langdon denying her request to rescind the notice. On March 9, 1998, the fire chief rescinded his order, but referenced a motion of the Antrim County Board of Commissioners dated July 8, 1993, which prohibited smoking in all County-owned buildings effective September 1, 1993.

10. In a March 26, 1998, letter to Local 214, Schultz wrote:

In reviewing your correspondence . . . , you state that if it is the Facility's [wish to continue] to pursue non-smoking status, the Employer should request that the parties commence negotiations on the matter. Given the fire chief's February 16, 1998 order, negotiations on the issue appear to be a futile exercise. Additionally, inasmuch as the parties have already bargained on the subject, it is not clear why the parties would need to meet again.

However, the Facility is willing to meet to discuss this matter with you. Perhaps the parties can reach an accommodation that will satisfy everyone. You must understand that this policy revision was implemented after a fire and for the safety of our residents. Thus, what will be an issue in negotiations will be a balancing of the inconvenience to those employees who have to smoke outside versus the health and safety of our residents.

Please contact me at your earliest convenience if you wish to meet and discuss further. (Emphasis added.)

Local 214 did not respond to the letter.

Conclusions of Law:

The Union claims that smoking policies are mandatory subjects of bargaining and as such, the Employer had no right to unilaterally alter a working condition without notice and bargaining. Among other relief, the Union seeks a cease and desist order and reinstatement of the employees' smoking lounge and the previous smoking policy. The Employer agrees that smoking policies impact terms and conditions of employment and is, therefore, a mandatory bargaining subject. It, however, asserts three defenses. First, it offers that since the matter is expressly covered by the parties' agreement, the Union has already exercised its bargaining right and the dispute should be resolved through the grievance procedure. Second, the Employer notes the Union knowingly and voluntarily waived its right to bargain over the smoking policy; and third, the Union never responded to the Employer's offer to bargain. I agree.

In *Houghton Lake Community Schools*, 1997 MERC Lab Op 42, the Commission reiterated its rule that when a matter is "covered by" a collective bargaining agreement, the union has already exercised

its bargaining rights and any dispute involving the terms of the agreement should be left to the contract's grievance-arbitration procedures. *Port Huron Ed Ass'n v Port Huron School Dist.*, 452 Mich 309, 319-322 (1996); *St Clair County Road Comm'n*, 1992 MERC Lab Op 533; *Flint Board of Education*, 1998 MERC Lab Op 570, 574. Here, Section 16.2 of the parties' agreement expressly covers smoking in the workplace and grants the Employer the right to unilaterally modify or change existing policies. The agreement also contains a procedure for final and binding arbitration. Thus, no PERA issues exist. Even if the smoking policy were not covered by the agreement, the Union failed to make a bargaining demand. In its March 26, 1998, letter to the Union, the Employer offered to meet and bargain with the Union. The Union, however, did not respond to the bargaining offer.

Based on the above discussion, I find the Employer did not violate its bargaining obligation. I recommend that the Commission issue the order set forth below:

Order

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Roy L. Roulhac
Administrative Law Judge

Dated: _____