STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION,
(BRANCH INTERMEDIATE SCHOOL DISTRICT),
Respondent-Labor Organization,

Case No. CU98 L-64

-and-

ROBERT P. HUNTER,
Charging Party.
_____/

APPEARANCES:

White, Przybylowicz, Schneider & Baird, P.C., by Douglas V. Wilcox, Esq., for Respondent

Robert P. Hunter, Esq., for Charging Party

DECISION AND ORDER

On January 27, 2000, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above matter finding that Respondent Michigan Education Association (hereafter "MEA") did not violate Section 10(3)(a)(i) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint. The Decision and Recommended Order was served upon the parties in accordance with Section 16(b) of PERA. On March 21, 2000, Charging Party Robert P. Hunter filed timely exceptions to the Decision and Recommended Order of the ALJ. The MEA filed a brief in support of the ALJ's decision on April 14, 2000.

In this case, we are again asked to consider the appropriateness of the MEA's conduct in connection with the filing of a decertification petition by Charging Party. The facts of this case were accurately set forth in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Briefly, this dispute arose after a group of employees who were dissatisfied with the MEA formed a committee to explore the possibility of decertifying the Union as bargaining representative of a unit of Branch Intermediate School District employees. Attorney Hunter was contacted by the committee to assist in the decertification effort. On October 15, 1998, Hunter filed a petition for decertification with this Commission. Pursuant to an agreement between the MEA and the Branch

Intermediate School District, a consent election was scheduled on December 8, 1998. On that day, a majority of employees voted in favor of retaining the MEA as bargaining representative.

Following the election, Hunter filed unfair labor practice charges alleging that the MEA violated Section 10(3)(a)(i) of PERA by spying on meetings sponsored by the committee, interrogating members of the bargaining unit, and impliedly promising to confer benefits upon employees in exchange for abandoning the decertification campaign. Some of the conduct described in the unfair labor practice charge was also asserted as constituting objections to the conduct of the election. These objections were dismissed in a Decision and Order issued by this Commission on January 19, 2000. See *Branch County Int School Dist*, 2000 MERC Lab Op ___ (Case No. R98 J-128). Thereafter, the ALJ issued the Decision and Recommended Order at issue here. In finding no PERA violation, the ALJ held that the conduct of a labor organization with respect to its treatment of employees should be evaluated differently than that of an employer. Because a union does not have the same power to affect employment status as an employer, the ALJ concluded that union surveillance is unlawful only if accompanied by threats to employees or other coercion. Finding that the MEA acted peacefully in its efforts to solicit employee support, the ALJ recommended dismissal of the charges.

Charging Party now takes exception to the ALJ's determination that Respondent's preelection conduct did not violate Section 10(3)(a)(i) of PERA. Once again, Hunter relies primarily on Commission decisions concerning employer conduct as controlling precedent. Hunter argues that surveillance by an employer has been found unlawful because of its tendency to intimidate, and that surveillance by a labor organization should be evaluated in a like manner. We disagree. In recognition of the considerable power which an employer has over tenure of employment, wages and working conditions, this Commission evaluates the actions of employers and unions differently. See e.g. *Branch County Int School Dist*, *supra*; *Saginaw County Mental Health*, 1996 MERC Lab Op 488, 490-491; *Grandvue Medical Care Facility*, 1989 MERC Lab Op 104, 106; *City of Dearborn*, 1983 MERC Lab Op 121. In applying different standards to certain types of employer and union conduct, the National Labor Relations Board (hereafter "NLRB") similarly recognizes the greater coercive power wielded by employers. For example, the NLRB has drawn a distinction between employer and union promises of benefit during election campaigns. See e.g. *The Smith Co*, 192 NLRB 1098, 1101; 78 LRRM 1266 (1971) (union's campaign promises not objectionable because employees are aware that these promises are contingent upon factors beyond union's control). The NLRB also treats union and employer conduct differently with respect to preelection polling and visits to the homes of employees for the purpose of campaigning. See cases cited in *Randell Warehouse of Arizona, Inc*, 328 NLRB No. 153; 161 LRRM 1265 (1999).

With regard to allegations of surveillance in particular, NLRB cases involving photographing or videotaping of employees are instructive. Unlawful photographing of employees has been characterized as a form of surveillance. See Patrick Hardin, *The Developing Labor Law*, 129 (3rd Ed 1992), and cases cited therein at 129-130. The NLRB has generally held that photographing or videotaping by an employer, absent proper justification, is presumptively coercive. See e.g. *National Steel and Shipbuilding Co*, 324 NLRB 449; 157 LRRM 1010 (1997); *Dilling Mechanical*

Contractors, Inc, 318 NLRB 1140; 152 LRRM 1165 (1995), enf'd 107 F3d 521; 154 LRRM 2552 (CA 7, 1997); *Casa Miguel Inc*, 320 NLRB 534, 538; 153 LRRM 1280 (1995); *F.W. Woolworth Co*, 310 NLRB 1197; 143 LRRM 1187 (1993). By contrast, where union photographing is the basis for an unfair labor practice charge or objection to election, the NLRB typically utilizes what can best be described as a "totality of the circumstances" approach. See *Randell Warehouse of Arizona, Inc*, *supra*, in which the NLRB overruled *Pepsi-Cola Bottling Co*, 289 NLRB 736; 128 LRRM 1275 (1988) (*Pepsi-Cola* held that absent any legitimate explanation from union, videotaping of employees as they left plant during organizational drive constitutes objectionable conduct). See also *Local Joint Executive Board of Las Vegas (Casino Royale, Inc)*, 323 NLRB 148, 161; 156 LRRM 1013 (1997); *UAW, Local 695 (T B Wood's Sons Co)*, 311 NLRB 1328, 1336; 145 LRRM 1157 (1993); *Interstate Cigar*, 256 NLRB 496, 500-501; 107 LRRM 1271 (1981). Thus, there is no merit to Hunter's contention that it is inequitable for this Commission to evaluate the conduct of employers and unions differently.

We express no opinion as to the propriety of the ALJ's determination that Section 10(3)(a)(i) of PERA prohibits only union tactics involving threats of reprisal or physical violence. We need not address that issue since the record in this case, including the transcript and exhibits submitted by the parties, contains no evidence to suggest that Respondent's conduct would in any way tend to restrain or coerce employees in the exercise of their rights guaranteed under Section 9 of PERA. With respect to the October 13 and December 7 meetings, there is no indication that Respondents actions on those dates impeded or discouraged employees from participating freely in the upcoming decertification election, or that they instilled a fear of retribution. Although Hunter uses terms like "invasion" and "infiltration" to describe Respondent's conduct on the dates in question, there is not even a hint of any threat of economic reprisal, intimidation or actual physical violence by Respondent. Nor is there any evidence that the MEA representatives made threatening or abusive statements at the meetings which could reasonably cause a fear of future reprisals by the Union. To the contrary, the record establishes that they were merely attempting to carry out their permissible objective of retaining majority support, and that they did so in a manner which was entirely peaceful, professional and nonthreatening.

The remaining allegations and assertions set forth in Charging Party's brief are frivolous at best. Hunter's arguments concerning alleged promises of benefits and threats to engage in future unlawful conduct are particularly dubious. We fail to see how this conduct could reasonably be interpreted as anything more than a legitimate effort by the MEA to provide information to the school district's employees and protect its organizational interests. As for Charging Party's contention that the MEA unlawfully demeaned the decertification effort when one of its representatives, upon leaving the October 13, 1998, gathering, stated, "Well, that sure was a short meeting," this argument is so plainly lacking in substance and merit that no serious discussion is warranted.

ORDER

For all of the above reasons, the unfair labor practice charges in this case are hereby dismissed

in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

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Harry Bishop, Commission Member

_____

C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BRANCH INTERMEDIATE SCHOOL DISTRICT,
Public Employer

-and-

MICHIGAN EDUCATION ASSOCIATION, Case No. CU98 L-64
Respondent-Labor Organization

-and-

ROBERT P. HUNTER,
Charging Party
_____/

APPEARANCES:

Douglas V. Wilcox, Esq., White, Przybylowicz, Schneider & Baird, P.C., for the Respondent

Robert P. Hunter, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan, on December 8, 1998, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on December 15, 1998, and amended on February 19, 1999, by Robert P. Hunter, alleging that the Michigan Education Association had violated Section 10 of PERA.[1] Based upon the record, including briefs filed by the parties on or before June 23, 1999, the undersigned

[1]The conduct described in the charge filed on December 15 was also asserted as constituting objections to the election held by the Commission in Case No. R98 J-128. These cases were consolidated for hearing but were separated for decision after the charges were amended. On January 19, 2000, the Commission issued its decision and order dismissing the objections. *Branch County Int School Dist*, 2000 MERC Lab Op ___.

makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charges:

> The charge filed on December 15, 1998, alleges the following:
>
> That on December 7, 1998, David Crim and Sue Burt, agents and employees of the Michigan Education Association (MEA), restrained and coerced and interfered with the concerted activities of Branch ISD employees by spying on and/or surveilling them attending or attempting to attend an employee meeting held at the Quality Inn of Coldwater, Michigan.
>
> That on October 13, 1998, Sue Burt, an agent and employee of the Michigan Education Association, restrained, coerced, and interfered with the concerted protected activities of Branch ISD employees by spying or and/or surveilling them attending an employee meeting held in Coldwater, Michigan.

The amended charges filed on February 19, 1999, state the following:

> That on or about October 26, 1998, in Bronson, Michigan, Sue Burt, MEA Uniserv Director, in cooperation with local Branch ISD MEA local officers, did restrain, coerce and interfere with the protected concerted activities of Branch ISD employees in violation of PERA Section 10(3)(a)(i) by promising or impliedly promising them enhanced wages, benefits, and terms and conditions of employment if they agreed to continue their support for the MEA by rejecting or abandoning their decertification efforts.
>
> That on or about January 20, 1999, David W. Crim, an agent of and organizer for the MEA did, in writing, restrain or coerce Branch ISD employees in violation of PERA Section 10(3)(a)(i) by impliedly threatening future acts of MEA spying on or surveilling employees who engage in protected concerted activities by attending employee only meetings.

Preliminary Matters*:*

On December 29, 1998, Respondent MEA filed a Motion to Dismiss the unfair labor practice charge and/or objections on the basis that, as an individual, Hunter lacked standing to assert claims under PERA. The Motion to Dismiss was denied by the undersigned by letter of January 13, 1999. Section 16 of PERA does not place restrictions on who may file an unfair labor practice charge. Rule 1(4) of the Commission General Rules and Regulations (R423.401) defines a charging party as "a person, or duly authorized agent thereof, who files a charge alleging an unfair labor practice under LMA or PERA." The Commission has imposed a restriction in only one type of charge: the Commission has not allowed individuals to file refusal to bargain charges under Section 10(1)(e) because the obligation to bargain under PERA runs between the employer and the exclusive bargaining representative. *Kent County Ed Assoc*, 1994 MERC Lab Op 110, 115. As the agent of employees involved in the decertification effort, I find that Hunter had standing to file a charge.

Facts:

The Michigan Education Association (MEA) represents a bargaining unit of the following Branch Intermediate School District employees:

> All pre-school and head start teachers, teacher assistants (aide/paraprofessionals), bus monitors, custodial/maintenance, housekeepers, secretarial/clerical, bus drivers, food service, health coordinator/school nurse, parent involvement/social services coordinator.

The last contract between the parties covered the period of July 1, 1994 to June 30, 1998.

In the fall of 1998, certain employees who were dissatisfied with MEA representation formed the Committee against the MEA and began to explore decertification. Sheryl Loss was the leader of this group. She made telephone calls, sent out flyers, and contacted attorney Robert P. Hunter for assistance.

October 13, 1998 Meeting

A meeting was scheduled for October 13, 1998 at 4:30 p.m.by the Committee against the MEA. A flyer distributed prior to the meeting stated the following:

> *Are you aware that your union dues are about to be raised?
> *Are you aware that a very high percent of your union dues is being used for political activity?
> *Are you aware that it is your legal right NOT to pay the portion of your dues that go to fund union political activity?

> *Are you aware that you can resign from the union & request a refund?
> We have been communicating with Robert P. Hunter, nationally recognized labor law expert and former member of the National Labor Relations Board. He is currently the director of labor policy for the Mackinac Center for Public Policy. If you are NOT happy with the MEA and want to know more you may attend the meeting on Tuesday, October 13th, at 4:30. Meeting place is Coldwater American Legion on Main Street. Much more info has been given to you so if you want to know more please take the time to read all of the handouts before the meeting. We only have an hour and this will help save time.

The meeting location was subsequently changed to the Township Hall. Loss arrived at the hall at 4:30 p.m. to set up. She posted a sign-in sheet at the door. Approximately 30 employees attended the meeting, including Union President Tammy Sylvester. Since Sylvester had only served as president for a short time, she invited MEA Uniserv Director Sue Burt to the meeting to answer employee questions. Burt arrived at the meeting at 5:00 p.m. with two representatives from MEA's coordinating council; another representative arrived a short time later. When the meeting started they were asked to identify themselves. They did so and indicated that they were from the MEA. At that point they were told that it was a closed meeting and were asked to leave. Before she left, Burt indicated that she was their representative, that she had been invited to the meeting by employees and that she had come to listen to employee concerns. As they left, one of the representatives stated "well, that sure was a short meeting" and laughed.

Since negotiations were scheduled for later that evening, Burt waited in her car in the parking lot for members of the bargaining team who were at the meeting. When the bargaining team members joined her, Burt asked what had happened in the meeting and what questions were asked by employees.

On October 15, 1998, a decertification petition covering employees in the bargaining unit was filed with the Commission by Robert P. Hunter in Case No. R98 J-128.

<u>October 26 Meeting:</u>

The MEA scheduled an informal meeting for 5:00 p.m. on October 26 at its office in Bronson to give an update on the petition and answer questions. Approximately 12 employees attended the meeting. Burt and President Sylvester led the discussion. After several questions had been asked about bargaining, Sylvester asked Burt if she could let them know what was being discussed in negotiations. With Burt's approval, they discussed in general terms the progress that had been made in bargaining in the seven or eight sessions that had been held. For example, they talked about seeking protection for part-time employees, and wage issues, such as negotiating a higher

percentage for the lower paid employees. According to Burt, they never represented that any agreement had been reached on these issues, only that the issues had been put on the table and the administration had generally approved the concepts. Burt indicated that they could go back to the bargaining table when the decertification election was over. Barbara Hannah, an employee who attended the meeting, testified that she got the impression that the issues discussed had been agreed upon and settled and would be in the contract.

December 7 Meeting:

The decertification election was scheduled for December 8, 1998. Loss scheduled a meeting for the night before the vote, December 7, at the Quality Inn in Coldwater. The meeting was scheduled from 4:30 to 7:30 p.m., to give employees the opportunity to meet Hunter and ask him questions about the issues. Employees were notified of the meeting by flyers and phone calls.

Burt called Loss on the Friday before the meeting to ask if she and MEA representative Crim could attend and give employees the opportunity to hear both sides. Loss indicated that she would check with other employees. Loss subsequently called Burt back and advised her not to attend since employees did not want them there. When Burt asked if they could simply observe the meeting, Loss again indicated that she would have to check with the others. Loss attempted to reach Burt on Monday to tell her not to attend; she did not speak to Burt directly but left a message that it was a closed meeting.

On December 7, Hunter and Mark Fischer, an attorney working with him on the decertification effort, arrived at the Quality Inn around 3:45. They joined attorney LaRae Munk, who was already at the hotel. The Quality Inn has two buildings; the main hotel building and a smaller annex with meeting rooms as well as guest rooms. Hunter and Munk went to the annex to inspect the Hawthorne Room where their meeting was scheduled. They decided that it was too small and changed the location of the meeting to a larger room designated the Rockwell Room.

Burt arrived at the Quality Inn around 4:00 p.m. When Munk approached Burt to introduce herself, Burt told her that she was from the MEA and was there for the meeting. Munk then told Burt that it was a closed meeting. Burt responded that she was the MEA representative and wished to attend to answer employee questions. Hunter then told Burt that it was illegal for her to be there and if she did not leave they would file an unfair labor practice charge. Burt left the area, responding that perhaps she would speak with MEA attorneys.

Burt then met Crim in the parking lot and they decided to reserve a room themselves in order to be available to employees in case they had questions. They requested a room in the annex in the vicinity of the meeting rooms and had a sign posted at the entrance indicating that the MEA meeting was in Room 345. Room 345 is located to the right of the building entrance; the Rockwell Room is directly opposite the entrance, across the lobby area. According to Crim, at an earlier MEA meeting he had told the membership that they would hold a meeting prior to the election to respond to employee questions. Crim testified that they decided to meet at the Quality Inn in order to make it convenient for employees if they wished to hear from both sides. No employee came to the MEA

suite that evening. Burt and Crim each left the room briefly on two occasions. On one of these occasions Burt observed Fischer in the lobby and he took her picture. Four employees including Loss came to the meeting in the Rockwell Room. Of these employees, only Loss testified that she saw Crim and Burt on the premises.

The election took place as scheduled on December 8, 1998. A total of 46 votes were cast, with 30 votes for the union and 16 No votes. On December 15, 1998, Hunter filed objections to the election alleging that the MEA representatives had interfered with the election by spying on and surveilling employees.

Communication of January 20, 1999

On January 13, 1999, Loss sent a letter to members of the bargaining unit, making comments on the election, the conduct of the MEA, and the upcoming Commission hearing on the objections. On January 20, 1999, Crim responded to the letter, indicating that a number of statements needed correction and clarification. He concluded as follows:

> MEA's position is clear: We do not feel any action on our part, including any attempt to attend meetings of members we represent (and then leaving when asked to), should overturn the clear decision your group made in the election.

Discussion and Conclusions:

Charging Party asserts that the Commission has made it abundantly clear that an employer's conduct that interferes with, restrains, or coerces employees in the exercise of their statutorily guaranteed rights is a violation of the Act, and a union should be held accountable under the Act to the same extent as an offending employer. According to Charging Party, the MEA's surveillance, interrogation, and implied promises to confer benefits demonstrate a pattern of deliberate interference with employees' Section 9 rights in violation of Section 10(3)(a)(i) of PERA. Charging Party cites numerous Commission cases with respect to employer conduct as controlling precedent.

Charging Party's contention that a union's conduct with respect to employees should be evaluated in the same manner as that of an employer is in error. An employer occupies a far different position with respect to the coercive impact of its actions upon employees than does a union. *Branch County Int School District,* 2000 MERC Lab Op __ (1/19/00). This area was thoroughly examined by Administrative Law Judge Sperka in *Detroit Assoc of Educational Office Employees,* 1980 MERC Lab Op 4, 9-11. In that case, the ALJ construed the language of Section 10(3)(a)(i) by looking to the parallel section of the National Labor Relations Act, Section 8(b)(1)(A), and its interpretation by the NLRB. Unlike Section 10(1)(a) of PERA and Section 8(a)(3) of the NLRA

which make it unlawful for a public employer to "*interfere with*, restrain, or coerce public employees, Section 10(3)(a)(i), like Section 8(b)(1)(A) of the NLRA, omits the words "interfere with." In *National Maritime Union of America CIO (The Texas Co),* 78 NLRB 971, 22 LRRM 1289 (1948), the NLRB examined the legislative history of this section and concluded that it was aimed at eliminating physical violence and intimidation against individuals by unions, rather than prohibiting any words or actions attempting to persuade an employee to join a labor organization. In *International Typographical Union (American Newspaper Publishers Assoc),* 86 NLRB 951, 956, 25 LRRM 1002, 1006 (1949), the NLRB held that the application of this section is limited to situations:

> . . . involving actual or threatened economic reprisals and physical violence by unions or their agents against specific individuals or groups of individuals in an effort to compel them to join a union or to cooperate in a union's strike activities.

The ALJ also cited the U.S. Supreme Court decision in *NLRB v Drivers Local 639 (Curtis Bros, Inc),* 362 US 274, 45 LRRM 2975 (1960) as approving this interpretation. That case involved peaceful picketing by a minority union which was challenged by the employer as violating Section 8(b)(1)(A) of the NLRA. The Court stated:

> Basic to the right guaranteed to employees in Section 7 [equivalent to Section 9 of PERA] to form, join or assist labor organizations, is the right to engage in concerted activities to persuade other employees to join for their mutual aid and protection. Indeed, even before the Norris-LaGuardia Act. . . and the Wagner Act . . . , this Court recognized a right in unions to "use all lawful propaganda to enlarge their membership."

The Court reiterated that Section 8(b)(1)(A) was a grant of power to the Board "limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof. . ." When, as here, the statutory language is similar, the Commission has looked to federal precedent in construing the language of PERA. *Detroit Police Officers Assoc v City of Detroit,* 391 Mich 44 (1974). Based on the above precedent, a union may legitimately attempt to solicit employees and influence their vote through peaceful means; what it may not do is intimidate and coerce employees by threats of reprisal or physical violence. It is against this standard that the charges of illegal conduct of MEA representatives must be judged.

In its consideration of the election objections, the Commission commented that the concept of unlawful surveillance has no real meaning when applied to a union's conduct since the

element of retaliation is missing. Charging Party cites *Peninsula Shipbuilders'Assn (Newport News Shipbuilding)* 239 NLRB 831, 100 LRRM 1028 (1978), to support its position that a union commits a coercive unfair labor practice by unlawfully surveilling meetings of a rival union. However, the NLRB's finding of unlawful surveillance in that case cannot be isolated from the total circumstances. The respondent union had followed employees, threatened supporters of the rival union with bodily harm, committed assault and battery on a supporter of the rival union, and refused to represent one employee because he was not a member and another because he was not a union supporter. In this context the ALJ concluded that "employees could well fear that knowledge of their presence at union meetings would result in their being deprived of rights of fair representation by respondent." It is clear that the finding in *Peninsula Shipbuilders' Assn* was based on the totality of the union's conduct, which included threats of violence and withholding of representation.

In contrast, the preelection efforts of MEA representatives to solicit employee support were made in a completely peaceful atmosphere with a total absence of any threat of economic reprisal or physical violence. Their conduct on each of the dates in question shows nothing more than efforts to protect the MEA's organizational interests by being available to answer employee questions, and attempting to determine what was causing dissatisfaction with MEA representation. Burt's questioning of members of the MEA bargaining team after the October 13 meeting lacks any element of coercion. The discussion at the meeting of October 26 updating employees on the status of negotiations did not constitute a promise of benefits and, even if it did, would fall in the category of campaign propaganda rather than an illegal attempt to interfere with employees' free choice as characterized by Charging Party. Finally, the letter sent by MEA representative Crim on January 20, 1999, was in response to comments made in a memo to employees by the leader of the decertification effort. This letter countered statements which reflected poorly on the MEA and provided information regarding the election objections. Again, this was a legitimate effort by the MEA to protect its interests; it contained no threat to engage in conduct which would restrain or coerce employees.

In summary, I find that Charging Party has failed to demonstrate any violation of Section 10(3)(a)(i) by Respondent. It is therefore recommended that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the charges be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: _____