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

In the Matter of:

ALPENA REGIONAL MEDICAL CENTER,
Public Employer-Respondent,

Case Nos. C08 E-104, C08 E-105, C08 E-106

-and-

MICHIGAN NURSES ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Dykema Gossett, P.L.L.C., by Martin J. Galvin, Esq., and Michael Little, Esq., for Respondent

Anita Szczepanski, Esq., Staff Counsel, Michigan Nurses Association, for Charging Party

## DECISION AND ORDER

On December 9, 2009, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

## ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

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Dykema Gossett, P.L.L.C., by Martin J. Galvin, Esq., and Michael Little, Esq., for Respondent

Anita Szczepanski, Esq., Staff Counsel, Michigan Nurses Association, for Charging Party

## 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 and 423.216, this case was heard at Lansing, Michigan on October 8 and 9, 2008, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 3, 2008, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charges:

On May 30, 2008, the Michigan Nurses Association filed three unfair labor practice charges against the Alpena Regional Medical Center. Case No. C08 E-104 involves Charging Party's unit of nonsupervisory general duty nurses employed by Respondent (Unit I). Case Nos. C08 E-104 and C08 E-105 involve smaller units of supervisory nurses (Unit II) and home health care nurses (Home Health) respectively. The charge in Case No. C08 E-104 was amended on August 13 and September 12, 2008. The three charges were consolidated for hearing.

Collective bargaining agreements for all three of the above units expired on February 23, 2008. The parties began bargaining successor agreements in December 2007. At the time the charges were heard, the parties had not reached agreement on new contracts. All three charges

allege that Respondent engaged in unlawful surface bargaining and committed other violations of its duty to bargain in good faith during the course of these negotiations.[1] First, Charging Party alleges that on or about May 13, 2008, Respondent violated its duty to bargain by unilaterally implementing a retirement/resignation incentive for members of all three bargaining units. Second, Charging Party alleges that on and after July 15, 2008, Respondent violated its duty to provide Charging Party with information necessary to perform its collective bargaining function by refusing to give it copies of a financial document entitled "Comparative Statistical and Financial Report." Finally, Charging Party argues that Respondent's conduct, taken as a whole, indicates that it engaged in surface bargaining without intent to reach agreement. In support of this argument, Charging Party asserts that Respondent: (1) refused to schedule a reasonable number of bargaining sessions prior to the expiration of the contracts; (2) cancelled scheduled sessions; (3) refused to pay holiday pay for negotiations scheduled on a holiday, forcing Charging Party to cancel the session; (4) made an unreasonable bargaining demand in its negotiations with Unit II; (5) undermined Charging Party's status as the exclusive bargaining representative and threatened union leaders in letters sent to Charging Party's members on February 19, March 31 and April 4, 2008; (6) in the summer of 2008, unilaterally altered established practices regarding unpaid association business leave; and (7) in July 2008, unilaterally reduced the frequency of regularly scheduled meetings between Charging Party's Unit I Negotiation and Contract Administration (NCA) Committee and Respondent's nursing administration.[2]

II. Findings of Fact:

A. The Retirement/Resignation Incentive

Respondent has established internship and recruiting programs for nurses with a local college, Alpena Community College (ACC). It tries to fill as many of its vacant nursing positions as possible with ACC graduates because it has found that nurses with local ties are less likely to leave their positions. In the spring of 2008, Respondent reviewed its staffing needs and concluded that it could not hire nurses from ACC's May 2008 graduating class unless nurses retired or resigned during the upcoming year.

In April 2006, and again in July 2007, Respondent had implemented retirement incentives consisting of lump sum payments to nurses eligible for full retirement who retired by a certain date. In both cases, Charging Party reviewed and agreed to the terms of the retirement

[1] Case Nos. C08 E-104 and C08 E-105 also included numerous separate allegations of unlawful interference and discrimination against individual unit members and union officers. On October 6, 2008, I bifurcated the charges and ordered these allegations heard separately under a different case number. In June 2009, Charging Party notified me that the parties had reached new contracts and that it was withdrawing the interference and discrimination charges. Charging Party stated that it woult not withdraw the bad faith bargaining charges.

[2] At the hearing, Charging Party amended the charge in Case No. C08 E-105 to allege that, shortly before the hearing, Respondent unilaterally implemented a proposal made during negotiations to eliminate a Unit II position, nurse manager, and transfer its work to a nonunit position. However, the only evidence offered at the hearing regarding this action was hearsay testimony which I ruled inadmissible.

incentives before they were implemented. On Thursday, May 8, 2008, Diane Shields, Respondent's vice president of human resources and support services, met with Unit I vice-president Lori Mousseau and showed her a copy of a letter Shields planned to send to Charging Party's members. The letter offered nurses $1,000 if they declared an intention to resign or retire between September 1, 2008 and February 28, 2009. Nurses had to meet certain criteria to be eligible for the incentive, including having at least five years of service and submitting a termination of employment form or retirement application by June 1, 2008.

The record does not indicate what Mousseau said to Shields. However, after talking to Mousseau, Shields sent an email to Lisa Harrison, Charging Party's labor representative, with a copy of the letter to employees. Shields explained that Respondent had heard rumors that nurses were planning to resign or retire in the near future and wanted to be able to hire graduating ACC students to fill positions that would come open during the year. She said that it was not Respondent's intention to encourage nurses to resign or retire. Shields asked Harrison for her thoughts on the letter. On Monday, May 12, Harrison emailed Shields that she had reviewed the letter, but needed an opportunity to discuss it with the union leadership.

On May 14, Harrison faxed Shields a letter stating that Charging Party could not agree to the incentive. She said that Charging Party had concerns about staffing and believed that Respondent should hire new ACC graduates to augment rather than displace its current staff. She also said, "The Hospital must start valuing its higher seniority, more experienced nursing staff." On the same day, Shields sent Harrison an email. She stated that since she had not received any alternative suggestions except a recommendation that Respondent not do anything, she would be sending the letter to all MNA members who qualified for the incentive. Shields told Harrison again that it was not Respondent's intention to encourage any nurse to resign or retire. The record did not indicate whether Shields received Harrison's fax before she sent the email.

A letter offering the incentive was mailed to members of Charging Party who were eligible for it. The letter is dated May 13, 2008. Aside from the date on the letter, the only evidence as to when the letter was mailed was Harrison's testimony that it was sent sometime before May 19, when she and Shields discussed it. No nurse responded to the offer.

### B. Information Request

Respondent prepares a monthly report titled "Comparative Statistical and Financial Report" for its governing board and its finance department. These reports summarize Respondent's financial status at the time the report is prepared. For several years prior to 2008, Respondent had been sending a copy of each month's report to Charging Party. In April 2008, Harrison requested copies of the monthly reports for 2003, 2004 and 2005. She was told that Respondent had already given Charging Party the 2003 and 2004 reports in response to an information request made in 2005. On July 15, 2008, Harrison sent Shields a written request for information citing both PERA and the Freedom of Information Act (FOIA). Among the items Harrison sought were the monthly reports for the years 2003, 2004, and 2005. In this request, Harrison stated that she was not the person who had requested these reports in 2005 and had no record of receiving them.

Shields replied to Harrison's July 15 information request on August 8. Instead of the Comparative Statistical and Financial Reports, Shields sent Harrison Respondent's audited end-of-year financial reports for 2003, 2004, 2005, 2006 and 2007. On August 13, Harrison sent Shields another written request for the monthly financial reports. On August 26, Shields replied that all the information was contained in the audited annual reports. Her letter also stated "There is no separate report such as you describe." Harrison, of course, knew that Respondent prepared a report with this title.

At the hearing, Shields testified that the end-of-the-year reports included all the information contained in the monthly reports. She also testified that the Comparative Statistical and Financial Reports for 2003, 2004, and 2005 no longer existed in August 2008. Charging Party did not contradict either of these assertions.

Shields also testified, without contradiction, that Respondent never claimed during negotiations that it was unable to meet Charging Party's economic demands. According to Shields, Respondent consistently told Charging Party only that Respondent needed to be a "wise steward of how we're spending our money," that the economics of the community were changing, and that Respondent expected in the future to have to serve more Medicaid patients or people who were unable to pay for services.

## C. Surface Bargaining

### Overview of the Negotiations

In negotiating previous contracts, the parties had held joint meetings with employee representatives from all three units. However, the parties agreed to begin negotiations in December 2007 by scheduling separate sessions for each unit. Although each unit had its own bargaining team, Harrison served as Charging Party's chief spokesperson for all three units. Shields, was Respondent's chief negotiator. In February 2008, the parties began holding joint sessions. In late February, they began meeting with a mediator. Between December and late February, the parties reached tentative agreements on many individual issues for all three units, but remained far apart on many other issues. At a mediation session on March 24, 2008, Respondent gave Charging Party a comprehensive package proposal covering all three units. On March 26, it presented the proposal again, this time designating it as its final offer. The offer was rejected by all three units at ratification meetings held on April 10 and April 11, 2008. Negotiations were then suspended, and Charging Party filed petitions for fact finding for all three units. At the time these charges were heard in October 2008, fact finding had not yet taken place and negotiations were still suspended.

### Scheduling of Meetings

On October 24, 2007, Harrison sent Shields an email offering ten dates in December 2007 for negotiation sessions. She did not indicate in this email how many meetings she wanted to hold or how much time she wanted to devote to each unit. On November 1, Shields proposed that the parties meet with Unit I on either three or five separate dates and hold a half day meeting with each of the other units. Shields and Harrison eventually agreed to meet with Unit I on four

days in December, including December 17, and to hold half day meetings with the other two units on December 18. Shortly thereafter, Harrison cancelled the Unit II session scheduled for the morning of December 18 because a member of Charging Party's bargaining team had a scheduling problem.

On December 5, 2007, Harrison sent Shields another email with a proposed schedule of meetings for January and February. Harrison suggested that the parties meet with Unit I on four days in January and three in February and meet with Unit II and Home Health for one half day each in both January and February. The parties agreed to meet with Unit I on January 14, 15, 22 and 23; with Unit II on January 3 and 16, and with Home Health on January 4 and 21. Shields said that she was not yet ready to agree to dates in February.

The parties met with the Unit I bargaining team on December 6, 12 and 13. On Sunday, December 16 there was a large snowstorm in the Alpena area. Harrison left Shields a voice mail stating that she could not make it to the Unit I session scheduled for December 17, but would be there for the Home Health meeting on the afternoon of December 18. Shields then emailed Harrison canceling the December 18 afternoon meeting. She asked her instead to email Charging Party's initial proposals for Unit II and Home Health. The parties did not meet with Unit II or Home Health in December. The parties did meet on all the dates they had agreed to in January.

On January 7, 2008, Harrison emailed Shields with fourteen dates on which she was available to meet in February. Over the next few days, the two women exchanged emails about scheduling meetings in February. Shields replied that she was available on February 7 (which she later changed to February 6) and February 20, two of the dates Harrison had proposed, and suggested that they reserve these dates for all three groups since by that time they would probably be discussing economics. Harrison responded that two meetings in February were insufficient. When Shields replied that she was optimistic that they could negotiate the contract in that time, Harrison "strongly suggested" that they schedule more meetings in February, particularly during the last two weeks of the month. At the next bargaining session in January, Shields told Harrison that she was willing to agree to more dates in February if they needed them. Harrison and Shields agreed to meet on a third date, February 18. However, on January 30, Shields sent Harrison an email stating that it had been brought to her attention that February 18 was a holiday for Unit I and Unit II nurses. Shields said that if they were to negotiate on that date, Respondent would only compensate the nurses on the negotiating teams at straight time rates, not holiday pay rates. Harrison responded that this was not acceptable; the nurses should not miss out on an opportunity to earn holiday pay. Shields replied that she would be willing to cancel her commitment on February 7 and negotiate on February 6, 7, and 20 instead of February 18. Harrison replied that she was no longer available on February 7. On January 30, Harrison told Shields that in addition to February 18, the parties should schedule meetings on February 21 and possibly February 27 and 29. A few days later, Harrison told Shields that if Respondent was not willing to pay holiday pay for the negotiations, Charging Party did not want to negotiate on February 18. Shields agreed to meet on February 6, 20 and 21, and stated that she would hold February 27 and 29 open on her calendar.

The parties met in joint negotiations for all three units on February 6, 20 and 21. The parties also agreed to meet on February 27, but this session was cancelled by Charging Party so

that it could conduct a membership meeting. Additional joint sessions, this time with a mediator present, were held on February 29, March 24, and March 26, 2008.

"Patently Unreasonable" Proposal in Unit II Negotiations

Unit II is a unit of supervisory nurses. In 2007, Unit II included the classification nurse manager, which encompassed several different positions. Sometime that year, Respondent eliminated the emergency room/intensive care unit nurse manager position. Charging Party filed a grievance over this action. The grievance was pending when contract negotiations began in December 2007. Respondent's first contract proposal for Unit II, delivered to Charging Party on January 3, 2008, proposed to eliminate the classification after the existing positions became vacant and transfer the "management role" of the nurse managers to a nonunit position, clinical nursing director. The existing nurse managers would be grandfathered.

Charging Party told Respondent that it believed the nurse managers played an important role and also that it was not interested in "giving away its work." Respondent said that its intent was to change the nurse managers' role, not eliminate a unit position. On January 16, 2008, the second negotiation session held for Unit II, Respondent presented Charging Party with a proposal to create a new Unit II position, clinical supervisor, to replace the nurse manager. Respondent's proposal included a list of proposed duties for the new position. The list did not include all the current duties of the nurse manager. Respondent said that the respective roles of the nurse manager, the clinical nursing director, and another nonunit position, chief nursing officer, needed to be clarified. Harrison responded that Charging Party did not object to a change in the name of the nurse manager position, and that it agreed that there was a need to clarify roles. She said, however, that it did not believe that the proposal really addressed these concerns and that, in any case, this clarification could take place outside of contract negotiations.

At the bargaining session held on February 20, 2008, Respondent proposed the following modification to the language of Unit II's recognition clause, replacing the language it had proposed in December:

> The Parties recognize nursing leadership functions are non-exclusive. The parties understand to improve efficiency and quality patient outcomes, delegation of non-exclusive work duties may be necessary. Clarification of supervisory nurse role, accountability and professional practice assignments will occur within two months after the contract ratification and as necessary.

Harrison told Shields that Charging Party could agree to the last sentence, but not the first two. She said that it could not agree to language that suggested that the work of Unit II was not exclusive to the bargaining unit.

Letters to Employees

Among the proposals Respondent presented to all three units were changes to their existing health care benefits, including higher co-pays and deductibles. Respondent also proposed that unit employees, for the first time, pay a percentage of their monthly health care premium. Respondent's initial proposal was that full-time employees pay twenty percent of their monthly premium and part-timers pay thirty percent. On February 6, Respondent modified its proposal to fifteen and twenty-five percent. At the time it received Respondent's initial proposals, Charging Party said that it did not believe that its membership would ratify a contract with health care concessions. In mid-February 2008, Charging Party had not yet presented any counterproposal on health care.

On February 19, 2008, Shields sent a letter to all members of Charging Party's bargaining unit. In this letter, Shields said that she wanted to set the record straight by explaining the proposals Respondent had on the table. The letter included an attachment comparing Respondent's proposals on health insurance, retiree health insurance, pensions, vacation pay, holiday pay and longevity with current benefits. Shields also defended Respondent's proposal to make employees bear more of the cost of their health insurance. The final sentence of this letter read, "I plan to communicate with you again soon after we have additional sessions with the MNA."

When the February 19 letter was sent, Charging Party's bargaining teams had just met in caucus to discuss the terms of a health care counterproposal. As a result of member reaction to the letter, Charging Party was forced to schedule an emergency membership meeting to discuss the health care proposals. Charging Party representatives testified that its members clearly indicated in the meeting that they would not accept any proposal similar to Respondent's health care proposal. According to Charging Party representatives, the timing of Respondent's letter made it much more difficult for Charging Party's bargaining teams to present a counterproposal on health care.

However, Charging Party did make at least one counterproposal on health insurance, including a proposal that provided for an employee contribution to the monthly premium. Harrison testified that Charging Party presented this proposal to Respondent through the mediator at one of their meetings in late February 2008. However, Shields denied receiving this proposal before March 7.

On March 7, 2008, Respondent sent a letter to its unrepresented employees and to employees in bargaining units not represented by Charging Party. The letter included this sentence, "Today, RNs at ARMC do not pay any of the monthly premium for their health insurance; the MNA wants it to stay that way."

As noted above, Respondent gave Charging Party a final offer on March 26. Charging Party agreed to take this offer to its membership for a vote. It scheduled meetings for Unit I on April 10 and for the other two units on April 11. Charging Party intentionally did not distribute copies of Respondent's final offer before the meetings. However, on March 31, 2008, Respondent sent a second letter to bargaining unit employees. It attached a copy of Respondent's final offer. The letter stated, in pertinent part:

> ARMC relies on nurses to serve our community, and we strive to create a positive work environment where all team members are treated with dignity and respect. Our organization offers nurses among the state's most generous compensation.
>
> On Wednesday, March 26, 2008, we met with Michigan Nurses Association's bargaining representatives. We have bargained in good faith with the MNA a total of 17 full days since the beginning of December. They will be sharing with you an offer that we believe is fair and competitive. Attached with this letter is the Hospital's last position. Also enclosed with this letter is a sheet that explains the potential compensation changes.
>
> The deductibles, co-pays and premium payments provided in the recently expired MNA contract were put in place long before the Hospital experienced changes in payor mix that has reduced the level of payment received for services provided, before we needed to add significant amounts of expensive new technology, and before our region's unemployment rate increased the amount of money that the hospital needs to provide in charity care.
>
> *If you ratify the agreement that your Union should be bringing for a vote,* your compensation package will continue to be among the most generous in Michigan's healthcare industry.
>
> Please review the enclosed sheet, which provides factual information about the proposed changes to your compensation. *If you have questions about this information, I encourage you to discuss them with ARMC's human resources team or your supervisor.* [Emphasis added.]

Sometime in late February 2008, a local newspaper had quoted Amy Pfiefer-Twite, a Charging Party officer, as stating that "a strike was not out of the picture." Pfiefer-Twite denied making this statement to the reporter. On April 4, 2008, Respondent sent letters to Charging Party's members, to members of Charging Party's negotiating teams, and to Harrison that included the following paragraphs:

> Despite your Union's filing with the State agency seeking the implementation of the Fact finding process, various Hospital Representatives have been informed by bargaining unit members of the Union's threat to participate in a work stoppage, a strike deadline and strike preparation. As you are well aware, ARMC is a public employer under Michigan' Public Employees' Relations Act, MCL 423.201 et seq. (PERA). As such, any concerted failure to report to duty, work stoppage, or other interference with the working conditions at ARMC is strictly prohibited by law. See MCL 423.202 "[a] public employee shall not strike . . .]
>
> The Union's encouragement, support and/or condonation of such illegal activity will not only subject the Union and its officers to possible civil and/or criminal liability, and expose employees to discipline or discharge, but will also potentially endanger the citizens/patients of Alpena, Alcona, Montmorency, Iosco, Oscoda

> and Presque Isle counties who rely upon ARMC for the provision of health care services. In the event of any patient care problems arising from the Union's actual or threatened strike, ARMC will pursue all civil remedies available to it, and encourage patients and their families to do the same.
>
> Please be advised that you have been placed on notice of the illegality of your planned/threatened actions. Should you proceed, you will be doing so willfully and fully informed of your misconduct.

The letter to members of Charging Party's bargaining committees included this additional paragraph:

> Please be advised that because of your position as either a Union officer and/or member of the Negotiations and Contract Administration Committee, it is your duty and obligation to comply with the laws of the State of Michigan and refrain from participating in illegal conduct. Furthermore, due to your Union representative position, it is expected that you will refrain from instigating, urging participation in or otherwise assuming a leadership role in an unlawful work stoppage. ARMC would expect you to behave responsibly and take affirmative action to make sure the Union members do not act inappropriately or participate in illegal action. Should you fail to act accordingly, you will be doing so willfully and fully informed of your misconduct.

Change in Practices Regarding Unpaid Union Leave

Each of Charging Party's units elects a committee of five members, its negotiations and contract administration (NCA) committee, to represent that unit in negotiations, special conferences and in the grievance procedure. Pursuant to Article 5.01 (B) of all three contracts, NCA Committee members are compensated for "scheduled time lost and all unscheduled time spent in special conferences, negotiations, grievance meetings or meetings with administration to discuss mutual concerns."

All three contracts also provide unpaid leave for union business. Article 18.03(G) of the three contracts which expired in February 2008 reads as follows:

> Association Business Leave of Absence
>
> A nurse who is elected or appointed by the Association for official Association business, including but not limited to local Staff Council Meetings, Chapter Meetings, and State Association meetings, shall be granted an Association business leave, except for Association business leave specifically provided for elsewhere in this Agreement. A nurse's hours for attendance at such required Association meetings will be counted as hours worked in all regards, such as but not limited to fringe benefits, seniority hours, and the mandatory overtime provision. The nurse will not be paid by the Hospital for these hours.

Since most Unit I nurses schedule their own hours, nurses from that unit who wanted credit for unpaid union leave simply scheduled themselves off for days they planned to use for association business. Nurses in Unit I were not required to get their supervisors' approval before taking the leave in order to receive credit. Charging Party periodically submitted requests to Respondent's human resources department asking that Unit I nurses be credited for unpaid union leave they had taken since Charging Party's last request. Respondent routinely approved requests for credit without detailed explanations of the purposes of the leave.

On August 18, 2006, Shields sent Harrison a memo expressing concern at an increase in the number of unpaid union days used and the impact on Respondent's ability to schedule. The memo announced that henceforth Respondent intended to restrict unpaid union leave hours to those allowed by Article 18.03(G), as Respondent interpreted it. The memo explained the changes Respondent intended to make. After Charging Party filed a grievance asserting that these changes violated Article 18.03(G), Respondent did not implement the changes it had announced.

On May 6, 2008, the grievance was arbitrated. Around the date of the arbitration, Charging Party submitted a request for credit for several NCA Committee members for unpaid business leave hours taken from December 13, 2007 through April 30, 2008. On June 17, 2008, while the parties were awaiting the arbitrator's decision, Shields sent Harrison a memo stating that "the Hospital will begin accepting unpaid union hours only as outlined in the now expired collective bargaining agreement Section 18.03," i.e., in accord with Shields' August 18, 2006 memo. Shields stated that the NCA Committee members would not get credit for meetings described in the May 2008 request as "meeting with Lisa," "negotiations meeting with Lisa," and "UAN conference." On June 27, 2008, Charging Party sent Respondent a request for unpaid union business leave credit for leave taken after April 30. On July 5, Shields responded to this request in a memo to Harrison. Shields stated that she was not crediting some of the hours requested as they did not meet the criteria as outlined in the expired contract. These included hours listed on the request as "meeting with Lisa," "MNA function," "bylaws meeting, "meeting in Lansing CEAP," and "conference ANA HOD."

On August 8, 2008, Arbitrator Mark Glazer issued his award on the 2006 grievance. Glazer held that Article 18.03(G) did not limit eligibility for unpaid union leave to NCA Committee members, as Respondent had argued. He also held, contrary to Respondent's argument, that the article covered not only the meetings specifically listed but matters of the "same kind, class or nature" as these meetings. He noted that while some union functions, such as a parade, were obviously not covered, in the absence of agreed-to changes in the language of the contract the specific events covered would have to be determined on a case-by-case basis. Glazer agreed with Respondent that Article 18.08(G) included an implied reasonableness limitation. That is, he concluded that Respondent had the right to determine whether patient safety or reasonable operational needs would be compromised by the release of an excessive number of nurses at a particular time. He stated that Respondent could properly request information to determine the nature of the leave request and the amount of time requested. He said that if leave was denied, Charging Party could challenge the denial through the grievance procedure on a case-by-case basis.

On August 26, 2008, Shields notified Harrison that nurses would henceforth be required to fill out association business leave request forms and submit them to their supervisors before taking unpaid union leave. She said that leave would not be accepted or approved after the event had passed. Shields also gave Harrison a copy of a new form created by Respondent. The form required nurses to describe the nature of the meeting for which they were seeking credit and to attach some type of verification of their attendance. Shields told Harrison to have NCA Committee members requesting credit for any meeting covered by Shields' July 17 and July 5 memos to fill out these forms. She also told Harrison to direct other union officers to submit forms for hours taken from June 15 through September 1 on or before September 15.

Charging Party filed a grievance over Respondent's imposition of a requirement that nurses get pre-approval to use unpaid union business leave and over the form itself. At least some of the NCA Committee members filled out forms as directed by Shields, but at the time of the hearing they had not yet received credit for any additional unpaid union business leave hours.

Reduction in Frequency of Regularly Scheduled Nursing Administration Meetings:

Prior to July 2008, Charging Party's Unit I NCA committee and Respondent's administrators had been holding monthly meetings to discuss topics of general concern. There was no indication in the record how long these meetings had been held every month. Article 5.0(D) of the expired Unit I contract referenced these meetings as follows:

> The NCA Committee and Nursing Administration will establish regular meetings with mutually developed agendas to discuss matters of mutual concern and to maintain conditions of employment conducive to quality nursing care. If there is a matter specific to a unit, then the NCA Committee will, by mutual consent with Nursing Administration, invite an RN from that unit to present the specific concerns.

On July 31, 2008, Respondent notified Charging Party that after the August 2008 meeting, Respondent would hold regularly scheduled meetings with the NCA Committee every other month, or six times per year. Harrison objected, asserting that neither party had the unilateral right to determine the frequency of the meetings. Respondent replied that the contract did not require it to agree to a set number of meetings per year, that it was reducing the number of meetings because of the time demands of implementing a new electronic medical records system, and that Charging Party could continue to raise employment or contract related issues at any time with the human resources department. Charging Party then filed a grievance asserting that Respondent had violated Article 5.0(D).

## III. Discussion and Conclusions of Law:

### Implementation of Retirement/Resignation Incentive

Section 15 of PERA requires a public employer to bargain with the exclusive bargaining representative of its employees over "wages." It is well established that this term extends beyond salary. In the early days of the National Labor Relation Act (NLRA), 29 USC 150 et seq, the National Labor Relations Board (NLRB) defined the term, as used in Section 9(a) of the NLRA, to include all "emoluments of value . . . which may accrue to employees out of their employment relationship." *Local Unions Nos 10 and 64, Steelworkers (AFL-CIO) (Inland Steel Co*), 77 NLRB 1, 4 (1948). In accord with this definition, the NLRB has held that incentive bonuses, including production and attendance incentives, are mandatory subjects of bargaining. See *United Parcel Service,* 223 NLRB 1381 (1976); *Johnson-Bateman Co,* 295 NLRB 180 (1989); *Harvard Folding Box,* 273 NLRB 1030 (1984).

In its May 2008 letter, Respondent offered to pay Charging Party's members $1,000 if they submitted a notice of resignation or intent to retire within the upcoming year before June 1, 2008. Respondent asserts that its letter asking employees to disclose whether they intended to retire or resign within the upcoming year was not a "retirement incentive" because it was not intended to encourage employees to retire or resign. However, the issue here is not whether Respondent really wanted to encourage employees to leave. Nor is the issue whether Respondent had the right to ask Charging Party's members to provide it with notice of their intention to leave their employment. Rather, the issue is whether Respondent could unilaterally decide to pay employees to provide such notice. Whether the purpose of this monetary incentive was to encourage employees to leave or merely encourage them to provide advance notice of their leaving, I find that the incentive constituted an "emolument of value which accrued to employees out of their employment relationship." I conclude, therefore, that Respondent had a duty to bargain with Charging Party over this incentive.

Respondent also argues that it satisfied any obligation it had to bargain over the offer by giving Charging Party notice of its intention to make it. According to Respondent, because Charging Party dismissed Respondent's proposal without offering a viable alternative or making a demand to bargain, Respondent had no further obligations toward Charging Party with respect to this proposal. Finally, Respondent argues that the offer had no impact on union members' terms and conditions of employment because no union member accepted it.

An employer's duty to bargain is contingent upon the union making a demand to bargain. *Local 586, SEIU v Village of Union City,* 135 Mich App 553, 558 (1984). When an employer proposes to alter terms and conditions of employment not covered by a collective bargaining agreement, it is not sufficient for the union merely to complain about the proposal; unless it also makes a demand to meet and bargain, it waives its right to object to the change. See, e.g., *City of Oak Park,* 1998 MERC Lab Op 519 (no exceptions). When parties are engaged in negotiations for a collective bargaining agreement, however, an employer's obligation to refrain from unilateral changes in terms and conditions of employment extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather, it encompasses a duty to refrain from implementation at all, absent the union's agreement, economic exigency or an overall impasse on the contract. *RBE Electronics of SD, Inc*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd 15 F3d 1087 (CA 9, 1994). A union's failure to make a separate demand to bargain is not a defense to unilateral action during contract negotiations. *Coastal Cargo Co, Inc*, 353 NLRB No. 86, fn 1

(2009). Here, the parties were still in negotiations for their new contracts in May 2008, although they had arguably reached impasse in April after Charging Party's members rejected Respondent's purported final offer. I find that Respondent was not free to implement a new employee benefit without either reopening negotiations on the contract or obtaining Charging Party's agreement to this new benefit. I conclude, therefore, that Respondent's May 2008 implementation of the retirement/resignation incentive constituted unlawful unilateral action.

Respondent also argues that the letter had no effect on working conditions since no union member responded to it. The Commission has held that it will not find an unfair labor practice when the alleged unilateral change constitutes an "isolated incident" rather than an actual alteration of existing terms and conditions of employment. See e.g., *Grass Lake Cmty Schs,* 1978 MERC Lab Op 1186; *Waldron Area Schools,* 1996 MERC Lab Op 115, 118. However, I find that Respondent's May 2008 incentive offer was not an isolated incident even though no employee accepted it at that time.

Failure to Provide Information

Respondent maintains that it had no duty to provide Charging Party with copies of its monthly Comparative Statistical and Financial Reports for 2003 through 2005. It asserts that information about an employer's financial condition is not presumptively relevant, that Respondent never asserted that it was unable to meet any of Charging Party's economic demands, and that Charging Party did not demonstrate that the requested financial information was relevant to its duty to engage in collective bargaining or police the administration of its contracts. Respondent also argues that it did not violate PERA by failing to provide the monthly reports because, first, the reports for the years requested no longer exist, and second, Respondent provided Charging Party with all the information contained in the monthly reports when it gave it copies of its audited year-end reports for these years.

I find that Respondent did not refuse to provide Charging Party with any financial information, past or current. Rather, it gave Charging Party copies of its audited year-end reports for the years 2003 through 2005 instead of the monthly financial reports for those years and told Charging Party that all the information contained in the monthly reports was in the year-end reports. Charging Party did not dispute this assertion or explain why it also needed the monthly reports. I conclude that under these circumstances Respondent did not violate its duty to provide information by furnishing only the audited year-end reports.

Surface Bargaining

In determining whether a party has bargained in good faith, the Commission examines the totality of the circumstances to decide whether the party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *Grand Rapids Pub Museum,* 17 MPER P 58 (2004); *City of Springfield*, 1999 MERC Lab Op 399, 403; *Kalamazoo Pub Schs,* 1977 MERC Lab Op 771, 776. Conduct that may lead to a surface bargaining finding includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of

meetings. *Atlanta Hilton & Tower,* 271 NLRB 1600, 1603 (1984). Delaying tactics may encompass refusing to schedule, canceling, or coming late to bargaining sessions, wasting time during meetings, and promising, but failing, to provide proposals. *City of Southfield,* 1986 MERC Lab Op 126, 134-135; *Unionville-Sebewaing Area Schs,* 1988 MERC Lab Op 86; *Celex Corp,* 322 NLRB 977 (1997); *Radisson Plaza Minneapolis and Hotel Employees and Restaurant Employees Union, Local 17 of St. Paul/Minneapolis and Vicinity, AFL-CIO* 307 NLRB 94, 96 (1992).

Both PERA and the NLRA explicitly state that the duty to bargain does not compel either party to agree to a concession. However, "unusually harsh, vindictive, or unreasonable proposals" that are clearly designed to frustrate agreement on a collective bargaining agreement may be, along with other conduct by an employer manifesting bad faith, evidence of surface bargaining. *Reichold Chemicals,* 288 NLRB 69 (1988), *aff'd in pertinent part* 906 F2d 719 (CA DC 1990); *Pease Co v NLRB,* 666 F2d 1044 (CA 6 1981). In *Oakland Cmty College*, 2001 MERC Lab Op 273, the Commission held that the employer had engaged in surface bargaining based, in part, on the employer's insistence on multiple proposals that would have effectively required the union to forfeit its role as the exclusive bargaining agent. These included a proposal to give the university chancellor complete discretion in making merit wage adjustments and a proposal to create employee participation committees that would replace the union in dealing with the employer over terms and conditions of employment during the term of the contract.

Charging Party argues that Respondent refused to agree to a reasonable number of bargaining dates between the beginning of December 2007 and the expiration of the contracts in February 2008. It also argues that Shields' canceling of the bargaining session scheduled for the afternoon of December 18, and Charging Party's cancellation of the February 18 session because Respondent refused to pay holiday to Charging Party's bargaining team, were also evidence of Respondent's intent to avoid meeting and, thus, reaching agreement. I do not agree with Charging Party that the evidence demonstrates that Respondent attempted to avoid meeting with it. Shields agreed to meet with Harrison on five dates in December 2007 – including a half day session each with Unit II and Home Health - and six dates in January 2008. Harrison did not press Respondent to meet more frequently during those months. Shields cancelled the half-day bargaining session for Home Health scheduled for December 18, but this was after Charging Party had cancelled the session scheduled for the day before because weather prevented Harrison from traveling and the session scheduled for the morning of December 18 because of a union scheduling conflict. In February 2008, Shields initially proposed to meet on only two days in February 2008. However, she agreed to meet on a third date after Harrison complained this was not enough. When the February 18 date was canceled due to the dispute over holiday pay, Shields agreed to another date in February, February 21, as well as February 27 and 29. The parties actually met seventeen times between December 6 and March 26. Although they did not reach tentative agreement on a contract during this period, they did reach tentative agreements on many individual issues. I find that Respondent did not refuse to agree to a reasonable number of bargaining dates and did not deliberately attempt to avoid meeting with Charging Party.

Charging Party also asserts that Respondent made a patently unreasonable demand that Unit II agree to add language to its recognition clause giving Respondent the right to unilaterally eliminate bargaining unit work and/or positions and reassign that work to non-unit employees. I

assume, for purposes of this argument, that this was what Respondent intended when it proposed on February 20, 2008 that the contract include the statement that "nursing leadership functions are non-exclusive." I conclude, however, that even if this was Respondent's intent, the record does not indicate that Respondent made this proposal to thwart agreement on a contract. First, the objectionable proposal was made late in the negotiations, after Charging Party had rejected more specific proposals to transfer work from the nurse manager to the clinical nursing director. Second, Respondent made this proposal to only one of Charging Party's three bargaining units. Finally, at the time the proposal was made the parties still had many other unresolved issues, including a major dispute over health insurance, which stood in the way of agreement. While Respondent's February 20, 2008 proposal may not have been any more acceptable to Charging Party than its predecessors, the circumstances do not indicate that it was part of a strategy to avoid reaching a contract.

Charging Party argues that Respondent undermined Charging Party's status as bargaining representative by: (1) sending a series of letters during negotiations which disclosed the details of bargaining and were meant to influence its members' decision on contract negotiations; (2) sending letters to other hospital employees in an attempt to use them to influence Charging Party's members; and (3) sending threatening letters to members of the Charging Party's bargaining committees in an effort to intimidate them. According to Charging Party, Respondent's March 7 letter misrepresented Charging Party's bargaining table position to other employees. Also, its March 31, 2008 letter falsely represented to Charging Party's members that Respondent's final offer was an agreement reached with Charging Party's bargaining team and invited Charging Party's members to discuss Respondent's contract offer directly with management.

An employer is prohibited from engaging in individual bargaining with employees over wages or other mandatory subjects. As the NLRB put it in a notable old case, *General Electric Co,* 150 NLRB 192 (1964), an employer's obligation is "to deal with the employees through the union, not with the union through the employees." In *General Electric,* the employer's bargaining tactics included taking a fixed position at the bargaining table and mounting a campaign to disparage and undermine the union, to persuade the employees to put pressure on the union to accept the employer's position, and to convince employees that the employer, rather than the union, was the true protector of their interests. *General Electric,* at 194. However, as the administrative law judge noted in *Bangor Twp Bd of Ed,* 1984 MERC Lab Op 274 (1984), the NLRB's conclusion that the employer violated its duty to bargain was based on the totality of the employer's conduct and not simply on the fact that it communicated its bargaining position to the employees. It is well established under Commission law that an employer's communication to employees of bargaining proposals that have already been presented at the bargaining table does not constitute unlawful direct bargaining or circumvention of the lawful bargaining agent. This is the case even if the employer also asks its employees to give favorable consideration to its bargaining positions. *Grand Haven Schs,* 1973 MERC Lab Op 1; *Gull Lake Cmty Schs,* 1977 MERC Lab Op 716; *Garden City Pub Schs,* 1977 MERC Lab Op 600. In addition, The Commission has also held that it will not police "negotiation propaganda" for accuracy since the other party general has an opportunity to rebut any misstatements. *Warren Consolidated Schs,* 1975 MERC Lab Op 129; *Melvindale-Northern Allen Park Pub Schs,* 1992 MERC Lab Op 400,407.

On February 19, 2008, Respondent sent a letter to Charging Party's members with copies of its current bargaining proposals. At that time, Charging Party had not offered any concessions on health care. Respondent's letter set out the reasons why it believed concessions were justified. On March 31, 2008, after Charging Party's bargaining teams had rejected Respondent's final offer, Respondent sent copies of that offer to Charging Party's members. This letter also included arguments for why Respondent's believed its health care proposals were fair. Apparently, the February 19 letter had the unintended consequence of making it politically difficult for Charging Party to make its planned counterproposal on health care. However, as the cases above indicate, Respondent did not violate its duty to bargain in good faith merely by informing its employees of its bargaining table positions or explaining its reasons for taking these positions.

I also disagree with Charging Party that Respondent attempted to bargain around, rather than with, Charging Party. In its March 7 letter, Respondent explained to its other employees its reasons for proposing health care concessions to Charging Party's units. There is no evidence that Respondent sought to enlist its other employees to persuade Charging Party's members to accept these concessions. Charging Party complains that this letter and Respondent's letters to its members contained misstatements, However, the Commission, for reasons explained in the cases above, does not police the accuracy of information communicated by the parties to employees or others during the course of negotiations.

In its March 31 letter to Charging Party's members, Respondent suggests that employees with questions about Respondent's proposed compensation changes discuss them with the human resources department. Respondent asserts that it simply intended to provide employees with an alternate source of factual information about the benefits it was offering. I agree with Charging Party that this sentence could be read as soliciting employees to engage in direct discussion of the merits Respondent's proposals with their supervisors or with Shields. However, the record does not indicate that Respondent's managers or supervisors made any other effort to encourage such discussions or that any discussions took place. I find on these facts that Respondent's did not attempt to circumvent Charging Party or engage unlawful direct bargaining with its members.

Charging Party also complains that Respondent's April 4, 2008 letters were attempts to intimidate its bargaining teams and its members. At the time these letters were sent, Respondent knew that Charging Party's members were preparing to vote on Respondent's final offer. However, the letters contain no threat to discriminate or retaliate against employees for exercising their rights protected by the Act. Rather, they remind employees of the illegality of strikes by public employees under Michigan law. They also inform them of Respondent's intent to assert its rights in the event of an illegal strike, which include the right to discipline employees who assume a leadership role in an unlawful strike more severely than employees who merely participate. *Redford Township*, 1982 MERC Lab Op 1289, 1294. I conclude that Respondent's communication of this information to its employees as they were preparing to vote on its final offer cannot be considered evidence that it bargained in bad faith.

Finally, Charging Party argues that alleged unilateral changes made by Respondent in the summer of 2008 were evidence of surface bargaining. I do not agree. The changes Respondent

implemented to its unpaid union leave practices that summer consisted of requiring Charging Party's members to get advance approval before taking unpaid leave and requiring them to provide more detailed information about the purpose of this leave when they requested it. Both of these changes were consistent with language of the expired agreement as interpreted by the arbitrator, who held that Article 18.03(G) did not cover all union-sponsored events and that Respondent had the right to deny unpaid union leave if patient safety or reasonable operational needs would be compromised. The other alleged unilateral change was Respondent's decision to meet bi-monthly, instead of monthly, with Charging Party's Unit I NCA Committee to discuss matters of general concern. Although the expired contract provided that these meetings would be "regularly scheduled," there was no evidence that the parties' had even a tacit agreement that these meetings would continue to be held at monthly intervals. I conclude that Charging Party did not establish that Respondent unilaterally altered existing terms of conditions of employment by the changes it implemented to its unpaid union leave practices or by its refusal to schedule Nursing Administration meetings every month instead of bi-monthly.

In sum, I find that Respondent violated its duty to bargain in good faith by unilaterally implementing a new employment benefit, in the form of a $1,000 payment for submitting a resignation letter or retirement application by a certain date, at a time that the parties were engaged in bargaining new collective bargaining agreements for Charging Party's three units. I find that Respondent did not refuse to provide Charging Party with information relevant to its duty to engage in collective bargaining or administration of the contract. I also conclude that Respondent's conduct, taken as a whole, does not support a finding that it engaged in surface bargaining with the intent to avoid reaching a good faith agreement. In accord with these conclusions, and with the findings of fact set forth above, I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

Respondent Alpena Regional Medical Center, its officers and agents, is hereby ordered to:

1. Cease and desist from unilaterally changing employment benefits for employees represented by the Michigan Nurses Association while the parties are engaged in negotiations for new collective bargaining agreements.

2. Post the attached notice to employees on Respondent's premises, including all places where notices to employees represented by the Michigan Nurses Association are normally posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____