STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CALHOUN COUNTY MEDICAL CARE FACILITY,
Public Employer - Respondent,

Case No. C11 A-011

- and -

SEIU HEALTH CARE MICHIGAN,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by Grant Pecor, for the Respondent

Krista Sturgis, Assistant Organizing Director, for the Charging Party

DECISION AND ORDER

On April 20, 2011, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 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

_____
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

In the Matter of:

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APPEARANCES:

Nantz, Litowich, Smith, Girard & Hamilton, by Grant T. Pecor, for Respondent

Krista Sturgis, Assistant Organizing Director, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISPOSITION

On January 20, 2011, Charging Party SEIU Healthcare of Michigan filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Calhoun County Medical Care Facility. The charge alleges that Respondent violated Section 10(1)(a) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by acts committed while a petition to decertify the Charging Party as the bargaining representative of its employees was pending (Case No. R10 K-108). Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, administrative law judge for the State Office of Administrative Hearings and Rules.

Charging Party also filed objections to the election conducted pursuant to the decertification petition. The charge and the objections were originally consolidated for hearing. However, the objections were dismissed due to Charging Party's failure to properly serve them on the other parties. On February 16, 2011, the Commission issued a certification of the results of the election.

On February 14, 2011, Respondent filed a motion to dismiss the unfair labor practice charge. Charging Party was given an opportunity to respond to the motion, but did not do so. Based upon the facts set forth in the charge and in Commission documents from the file in Case No. R10 K-108, I make the following conclusions of law and recommend that the Commission take the following action.

The Unfair Labor Practice Charge:

The charge alleges that Respondent unlawfully interfered with its employees' exercise of their rights under Section 9 of PERA by: (1) failing to provide Charging Party with a list of the names and addresses of all eligible voters at least seven days prior to date of the mailing of the ballots in the decertification election, as required by Rule 147(2) of the Commission's General Rules, 2002 AACS, R 423.147(2); (2) on or about January 4, sending voters campaign material containing a misleading comparison of union benefits with those received by Respondent's unorganized employees and a promise that if employees voted to decertify the union Respondent would not reduce or take away wages or other benefits.

Respondent's Failure to Provide the List:

Facts:

On November 3, 2010, a petition to decertify Charging Party as the bargaining representative was filed by employee Sheri Inman in Case No. R10 K-108. An election was conducted by mail ballot pursuant to a consent election agreement. The ballots were mailed on January 3, 2011 and counted on January 20, 2011. Charging Party failed to get a majority of the ballots cast.

Respondent submitted a list of the names and addresses of eligible voters to the Commission as required by Rule 147(2). The rule requires an employer to submit the list to the Commission and "other interested parties." Charging Party did not receive a copy of the list from Respondent. Respondent does not deny that it failed to serve Charging Party with the list.

Discussion and Conclusion of Law:

Rule 147(2) requires an employer to provide the Commission and other interested parties a list of the names and addresses of all eligible voters" "not less than 7 days before the date of an election, or the date of the mailing of the ballots in a mail ballot election, excluding Saturdays, Sundays, and legal holidays." The reason for the rule is to provide the union(s) with the means to contact eligible voters before the election. An employer's failure to submit an eligibility list within the time limits set forth above is grounds for setting aside the election without a specific showing by the union that it needs the names and addresses, although an election will not be set aside if the employer has substantially complied with the rule. *Northwest Guidance Clinic*, 1986 MERC Lab Op 771, 776; *Utica Cmty Schs*, 19 MPER 85 (2006).

Rule 147(2) is modeled on a similar rule first announced by the National Labor Relations Board (NLRB or the Board) in *Excelsior Underwear, Inc*., 156 NLRB 1236, 1240 (1966). In that case, the Board explained the rationale for the rule as follows:

> The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone. In discharging that trust, we regard it as the Board's function to

> conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the Act, but also from other elements that prevent or impede a free and reasoned choice. Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

The so-called Excelsior rule was based on the NLRB's earlier holding in *General Shoe Corp,* 77 NLRB 124, 126 (1948) that conduct which does not constitute an unfair labor practice may nevertheless warrant invalidating an election if that conduct renders employee free choice improbable. As indicated above, the NLRB has held that an employer's failure to provide a union with a list of the names and addresses of eligible voters interferes with the laboratory conditions necessary to a fair election and may warrant setting that election aside if objections are filed. It does not, however, constitute unlawful interference, restraint or coercion violative of Section 8(a) (1) of the National Labor Relations Act (NLRA), 29 USC 158. Since, as noted above, Rule 147(2) was clearly modeled on the Excelsior rule, I conclude that even if Respondent failed to provide Charging Party with the names and addresses of the eligible voters, this failure did not violate Section 10(1) (a) of PERA or constitute an unfair labor practice. I recommend, therefore, that this allegation be dismissed.

Respondent's Early January Letter

Facts:

On January 3 or January 4, 2011, Respondent mailed a packet of materials to all employees eligible to vote in the decertification election. The packet consisted of a letter from Donna Mahoney, Respondent's administrator, and several attachments. The letter included these paragraphs:

> Lastly, I want to take this opportunity to alleviate some of the concerns that have been expressed to me by some of our staff. Specifically, individuals have approached me because they were told that the Facility would reduce their pay and benefits if the Union is voted out. Unfortunately, while I can appreciate the concern that rumors like this generate amongst our staff, the labor laws prohibit me from telling you what the Facility will do following the upcoming election. As such, I am significantly limited in what I can tell you about future wages or benefits. Needless to say, I am incredibly frustrated that the Facility's lawyers are keeping me from providing you with information I think you are entitled to. However, this is the law and I do not want to do anything to jeopardize your election.
>
> I would hope that the Facility's historical treatment of staff would speak for itself. Nevertheless, if you are truly concerned as to how you might be treated if you

voted the Union out and were a "non-union" employee, I encourage you to look at how the Facility has treated its "non-union" staff over the years. To aid in this review, I am including with this letter a side by side comparison of the benefits enjoyed by our "union" versus "non-union" staff. While I cannot guarantee that you will be able to participate in these benefits if you vote the Union out, this comparison should help demonstrate that the facility has consistently treated its "non-union" staff fairly. Again, it is illegal for me to commit to you that you will be able to partake in these benefits; therefore, I am only providing you this information so that you can see how others are treated.

The attachments included a document which read as follows:

NO CUT GUARANTEE

Many of you may have been told by the Union that the Calhoun County Medical Care Facility will cut your pay and take away your fringe benefits if the Union is voted out.

This is *not true***.** The Facility will not cut your pay or fringe benefits if the Union is voted out. We promise:

No one's pay will be cut

No one will lose any paid leave days

No one will lose any holidays

Nobody will cut your medical insurance

No one's seniority will be taken away.

This is your guarantee that there will be no cuts. So when you vote, don't worry about union rumors and threats. You can rely upon our written guarantee. [Emphasis in original].

This sheet was signed at the bottom by Mahoney and William Comai, chair of Respondent's governing board.

The attachments also included this chart:

Union	**Non-Union**
No paid lunch	Paid lunch
8 Holidays	9 Holidays
Health Insurance	Health Insurance
$1600 cap for longevity	$1800 cap for longevity
Pay union dues ($39.74/month or 23	No union dues

cents/hour	
Required weekend make-up	No weekend make-ups
Changes in hours would require negotiation	Flexibility to adjust staffing hours
Grievance procedure	Grievance procedure
2-hour call-in notice	1 hour call-in notice
January 31st- Vacations must be submitted	2 week notice for PLDs
Must adhere to contract as it relates to termination, attendance, LOA, etc.	Flexibility to work with employee on an individual basis
Step increases include negotiated raises	Step increases and annual increases
Shift/weekend differentials	Shift/weekend differentials
Working Holiday pay	Working Holiday pay
Attendance Premium	Attendance Bonus
No on-call pay	On-call pay

Discussion and Conclusions of Law:

The Commission has long held that in the absence of explicit or implicit threats or promises of benefits, it will not probe into the truth or falsity of a party's pre-election statements. The Commission does not set aside elections based on misleading or even false statements made during an election campaign because it recognizes that unless presented with forged documents, voters are generally capable of recognizing propaganda for what it is, evaluating the competing claims of the parties, and sorting out facts from false statements and half-truths. *City of Dearborn*, 1983 MERC Lab Op 121; *Godfrey-Lee Pub Schs*, 1987 MERC Lab Op 438, 440; *Saginaw Co Mental Health*, 1996 MERC Lab Op 488. The chart comparing the benefits received by union employees with those received by Respondent's unorganized employees, even if misleading in its comparisons, falls into the category of permissible campaign material. I conclude, therefore, that Respondent did not violate Section 10(1)(a) by providing its employees with the chart.

However, under PERA, the NLRA, and the Michigan Labor Mediation Act (LMA), MCL 428.8, an employer unlawfully interferes with the exercise of its employees' protected rights when it explicitly or implicitly promises its employees' benefits if they reject union representation. See, e.g., *Pioneer Service*, 1971 MERC Lab Op 300*; Capitol EMI Music*, 331 NLRB 997, 1012 (1993); *Chesterfield Twp*, 1976 MERC Lab Op 58, 68) (no exceptions). Although the Commission does not appear to have addressed this issue, the NLRB has held that an employer's assurance to employees, during a union campaign, that it will not cut or reduce benefits if the employees reject the union does not constitute an unlawful promise of benefits. In *Langdale Forest Products Co*, 335 NLRB 602 (2001), an employer, in response to reports that union supporters were claiming that if the employees voted the union out the employer would cut wages and benefits, gave its employees a "No Cut Guarantee." The employer's president personally pledged that if the employees voted the union out, the employer would not cut their wages and would not take away any of their benefits or pension. While the Board members disagreed over whether other statements made by the employer during the election campaign constituted unlawful interference, all three Board members agreed with the administrative law

judge that the "No Cut Guarantee" was not unlawful because it did not promise new benefits if the union was voted out. The Board subsequently concluded, in *Evergreen America Corp,* 348 NLRB 178 (2006), that an employer that committed numerous other unfair labor practices during a union campaign did not make an unlawful promise of benefits when, the day before the union election, it issued a written "guarantee" to employees that it would not close its facility in response to union claims during the campaign that the employees needed to vote for the union to prevent the employer moving or closing its plant. Like the "guarantees" in *Langdale* and *Evergreen,* Respondent's "No Cut Guarantee" did not offer inducements to employees to vote against the union but merely promised to maintain the status quo if the union was decertified. I conclude, therefore, that Respondent did not violate Section 10(1)(a) of PERA by providing its employees with a "No Cut Guarantee."

Mahoney's letter to employees expressed frustration that the "Facility's lawyers" were keeping her from providing the employees with information that she believed the employees were entitled to about future wages and benefits. Since Respondent had told employees that it would not cut wages or benefits if the union was decertified, this statement, standing alone, might be interpreted as promising better benefits or wages if the union was rejected. However, this statement immediately follows Mahoney's discussion of "rumors" of cuts in pay and benefits, and, later in her letter, Mahoney explicitly states that she cannot guarantee that employees will be able to participate in the benefits enjoyed by unorganized employees. I find that a reasonable employee would not have interpreted Mahoney's letter, read in its entirety, as a promise that employees would receive the same benefits as unorganized employees, or better wages or benefits than they currently received, if Charging Party was decertified. I conclude, therefore, that Respondent did not promise employees benefits if they rejected the union in its early January letter and that the letter did not violate Section 10(1)(a) of PERA.

In accord with the conclusions of law above, I recommend that the Commission grant Respondent's motion for summary disposition and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____