STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURLEY MEDICAL CENTER,
Public Employer - Respondent,

Case No. C10 C-069

- and -

AFSCME LOCAL 1603,
Labor Organization - Charging Party.
_____/

APPEARANCES:

The Williams Firm, P. C., by Timothy R. Winship, for the Respondent

Scheff & Washington, P C, by George B. Washington, for the Charging Party

DECISION AND ORDER

On July 29, 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

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

The Williams Firm, P.C., by Timothy Winship, for Respondent

Scheff & Washington, P.C., by George Washington, 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 Detroit, Michigan on November 18, 2010, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on January 24, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFSCME Local 1603 filed this unfair labor practice charge against the Hurley Medical Center on March 11, 2010. The charge was amended on April 30, 2010. Charging Party represents a bargaining unit of nonsupervisory employees of Respondent. The charge alleges that on or about March 9, 2010, Respondent violated PERA by disciplining Charging Party Bargaining Chairperson Patricia Ramirez for releasing Deborah Tillman, another member of Charging Party's unit, from working her assigned shift to perform union business on February 7, 2010. Charging Party asserts that Ramirez's conduct was protected by Section 9 of PERA because she was exercising, in good faith, a right given her by the collective bargaining agreement. It also asserts that her conduct was protected because it involved the release of an employee to perform union activities.

Findings of Fact:

The parties' collective bargaining agreement contains several provisions addressing the release of employees to perform union duties. Pursuant to these provisions, Charging Party representatives are released from work without loss of pay to investigate, file and process grievances, and Charging Party's president and bargaining chairperson are released to work full-time as union representatives during their terms in office. Section 8(B) of the contract provides for a third type of union release time. It states:

> B. Any officer of the Union or any delegates certified by the president or chapter chairperson of the Union to any Union activity necessitating a leave of absence shall be granted a leave without pay for a minimum of two (2) hours. Written notice for such leaves, giving the length and the function of the leave, shall be given to the Labor Relations Office of the Medical Center as far in advance as possible, but in no event later than the day prior to the day such leave is to become effective, except when the Labor Relations Office is closed, the Union officers who are to be absent for Union activity will call the telephone operator who shall give them a call-in number.

Union officers or members of the unit who are released under Section 8(B) are paid by Charging Party for their time or are not paid at all.

Patricia Ramirez has served as Charging Party's bargaining chairperson since 2006. Ramirez releases unit members under Section 8(B) at least once a week. She provides the required notice by emailing Respondent's labor relations department and copying the employee's supervisor on the email. Her email typically reads, "Please release (name) for (period) for union business without pay." She does not typically explain in her email what union business the unit member will be doing, and Respondent routinely approves the release without asking for more information.

Charging Party's unit includes employees who work a variety of shifts, including midnights. Ramirez testified that it has been her practice, and was the practice of the bargaining chair who preceded her, to release members working the midnight shift from all or part of their shifts when they perform work for Charging Party on the day before or the day after that shift. As an example of the practice, Ramirez cited a midnight shift steward who worked with other union officers on a project before Ramirez became bargaining chair. This steward was released from working her shift so that she could work with the other officers on this project during the day. Ramirez testified that she releases midnight shift employees to do union business during the day about once every two or three months.

David Szcepanski has been Respondent's administrator for labor relations for roughly the same period of time as Ramirez has been bargaining chair. He testified that he knew that Ramirez regularly released midnight shift employees from their shifts under Section 8(B) to attend arbitrations or other scheduled hearings or meetings during the day. He testified, however, that he had not been aware, prior to this unfair labor practice hearing, that Ramirez released midnight shift employees to perform work at the union office.

Deborah Tillman is a registration clerk for Respondent. She is also a Charging Party steward. Tillman works a midnight shift from 12 a.m. to 8 a.m. On August 17, 2009, Tillman submitted a request to use twelve vacation days for her annual vacation in February 2010. It is unclear from the record whether Tillman initially asked for Sunday, February 7 as the first day of her vacation or whether she believed when she submitted her request that February 7 would be one of her regularly scheduled days off. It was not clear from the record why Tillman's request was not immediately acted upon, but Section 22(E) of the collective bargaining agreement states that requests for vacation leave made more than eight weeks prior to the leave will not be considered. However, at some point between submitting her request and the middle of January 2010, Tillman was told by her immediate supervisor, Odie Brown, that because of staffing concerns she would not be approved to use more than ten vacation days in February. Tillman also learned, or realized, that she was scheduled to work the shift beginning at midnight on Sunday, February 7, even though she had purchased a plane ticket for a flight leaving at 6 a.m. on Monday, February 8. On January 19, Tillman submitted a request to use four hours of personal leave at the end of her shift on February 7 so that she could catch her flight. However, Brown denied her request on the grounds that the collective bargaining agreement prohibits the use of personal leave to extend a vacation. On January 25, Brown returned Tillman's leave request, approving her request for leave from February 8 though February 21 only.

Ramirez learned of Tillman's problem and, sometime around the beginning of February, tried unsuccessfully to persuade Brown to allow Tillman to take February 7 off. According to Ramirez, she did not understand why Brown would not agree to this and believed it had something to do with the fact that Tillman was a steward. During this time, Charging Party was in the process of amending its constitution. Amending the constitution required Charging Party to notify its members of the proposed change, hold a series of meetings for readings of the constitution, and provide each of its members with a copy of the revised constitution. The first meeting was scheduled for February 14 and the second for February 24, 2010. Ramirez usually did most of Charging Party's clerical work, although she sometimes released unit members to help her. At beginning of February, according to Ramirez, she had to finish retyping the constitution, make the copies, put correspondence from the AFSCME International in order, and distribute brochures she had made to the members. Ramirez told Tillman that she would release Tillman for her shift on February 7 if Tillman agreed to help Ramirez with her clerical work during the day on that Sunday. Tillman agreed.

On the afternoon of Friday, February 5, 2010, Ramirez sent an email to labor relations, with a copy to Brown. The email stated:

> Please release Deborah Tillman on Sunday 2-7-10 for the balance of her entire shift. Union business without pay.

Brown brought this email to attention of her supervisor, Linda Hills, and Szcepanski. Brown told Szcepanski that Tillman had requested and had been denied personal leave on February 7 and that it seemed as if Charging Party might be using union release time to extend Tillman's vacation.

On February 5, shortly after Ramirez sent the email, she came to the labor relations office to pick up some grievances. While Ramirez was speaking to Szcepanski's assistant, Vanessa Nelson, Szcepanski came up to Ramirez and asked her about Tillman's release for union business. Ramirez testified, and her testimony was supported by Nelson's written account of the incident, that Szcepanski said that he thought that it was strange that she wanted to release Tillman on the third shift. Szcepanski asked Ramirez what union business Tillman was going to be doing on the midnight shift Sunday night. Ramirez replied, "Paperwork," and gave a little laugh. According to Szcepanski, that he told her that he always honored her requests, but that this one did not smell right. Ramirez shrugged her shoulders, said either that she did not really care what he thought, or that it was none of his business, and left the office. Ramirez's testimony, which I credit, was as follows:

> I mean he's got his feathers all ruffled up. I had been trying to work it out with Odie [Tillman's supervisor] earlier and she wouldn't. I just looked at him, I mean, because he was in full bloom Dave [sic] and I just looked at him and said, "She is doing paperwork." I think I just left.
>
> Ramirez admitted that she chuckled when she said this.

Around 4:30 p.m. on February 5, Szcepanski sent Ramirez an email stating that Tillman's release was not approved and that Tillman was expected to report to duty as scheduled on Sunday. After Ramirez received the email, she called Szcepanski but was not able to reach him. Ramirez made several other calls and, with the help of one of Tillman's supervisors, an agreement was reached that evening for Tillman to begin her vacation on February 7 and return to work on February 21.

Sometime during the following week, Szcepanski learned from Tillman's supervisors that Tillman had been trying to get off work on February 7 because she had a plane to catch during her shift. On February 12, Ramirez was called to a meeting with Szcepanski in his office. Either during or shortly before this meeting began, Szcepanski asked Ramirez what kind of paperwork she was going to have Tillman do in the middle of the night. Ramirez replied that Tillman wouldn't have been doing anything in the middle of the night, and that she had planned to have Tillman work during the daytime. Szcepanski asked Ramirez why she had not told him this when they talked on February 5, and Ramirez said something like "you didn't need to know" or "it was none of your business." At the beginning of the meeting, Ramirez was handed a memo from Szcepanski stating that she was being investigated for "an incident that occurred on February 5, 2010 when you attempted to release a Local 1603 representative." During the meeting, which was also attended by Charging Party's president and by an AFSCME staff representative, Ramirez admitted that she had known Tillman had to catch a plane when she sent the release. Ramirez said that she had wanted Tillman to help her with paperwork and that she told Tillman that she could have the night off in exchange.

On March 9, 2010, Ramirez received a written warning for violating a Respondent rule prohibiting the falsification of patient, personnel or work records. The warning, signed by Szcepanski, read as follows:

> For many years the Medical Center has been willing to exercise a high degree of flexibility when accommodating legitimate requests by Union representatives for release time from work to deal with Union business. Such flexibility has also involved the willingness of the Medical Center to forego the requirements of the collective bargaining agreement for approval of union release time requests. The willingness of the Medical Center to demonstrate this flexibility, and not strictly adhere to the requirements of the labor contract, has been based on the long standing working relationship and mutual trust the Medical Center has with Local 1603.
>
> On February 5, 2010, an incident occurred involving a Union leave request which breached this trust. On this date you made certain misrepresentations in order to support a Union leave request by a Local 1603 committee person. It was confirmed that this committee person's request for a Union leave was made for personal reasons. You made this request so that the committee person could catch a flight to begin their vacation. You clearly attempted to use the union release as a tool to offer the committee person inappropriate leave time. You explained this when you were put on notice as acceptable because you were going to have her do paperwork on dayshift so she could catch her flight. This is not appropriate and when I asked you about the release on 2/5/10 you chose not to mention this further displaying your brazen, inappropriate behavior.
>
> Accordingly, please consider this a formal written disciplinary warning regarding your misconduct as a Hurley Medical Center employee on February 5, 2010, I sincerely hope that you taking this warning seriously and will make every effort to ensure that Union leave requests are for legitimate business purposes and will not knowingly support improper requests for such leaves in the future.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to organize, form, join or assist in labor organizations and to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection. However, as the Commission stated in *City of Detroit, Dept of Transportation,* 1990 MERC Lab Op 254, 256, Section 9 does not give employees the right to engage in union business on an employer's time. Although the Union and the employer may agree to paid or unpaid release time for union officers or members, this is a negotiated benefit and not a right guaranteed by the Act. The fact that an employee is acting in his or her capacity as a union officer does not guarantee that these actions will be protected. For example, in *AFSCME, Michigan Council, Local 574-A v. City of Troy*, 185 Mich App 739, 746 (1990), the Court of Appeals upheld the discipline of two union officers for advising a member not to participate in an interview without union representation where, as the Court found, the union officers could not reasonably have believed that the member had a right to a union representative under the circumstances.

However, because collective bargaining agreements are the result of "concerted action," those actions taken by public employees in good faith to enforce rights claimed under a collective bargaining agreement are protected by Section 9, even if the employees are mistaken

in their interpretations of the contract. *MERC v Reeths-Puffer School Dist*, 391 Mich 253, 264 (1964). In *Reeths-Puffer,* the Supreme Court affirmed the Commission's finding that an employer violated PERA by discharging a substitute bus driver for allegedly harassing other drivers by calling them at home seeking information to support her claim that she had a right under the collective bargaining agreement to a permanent position. The Court noted that that while the other drivers had complained to the employer about the calls, there was no indication that the substitute driver had engaged in threats or other acts of misconduct.

The Court emphasized that whether the substitute driver's contractual claim had merit was irrelevant to the issue of whether her activity was protected by PERA. It commented, at 677,

> If an employee could be discharged for filing an unsuccessful grievance, filing would become hazardous indeed. Grievants who fail in the prosecution of their grievances are protected from discharge, except, possibly, if the grievance is without arguable merit or is advanced in "bad faith' or with "malice."

The Court's holding in *Reeths-Puffer* was in accord with the National Labor Relations Board's so-called *Interboro* doctrine, which held that an attempt by an individual employee to enforce or exercise rights grounded in a collective bargaining agreement was activity protected by Section 7 of the National Labor Relations Act (NLRA), 29 USC 150 et seq, the counterpart to Section 9 of PERA. See *NLRB v Interboro Contractors, Inc.* 388 F2d 495, 500 (CA 2 1967). In *NLRB v City Disposal Systems, Inc*, 465 US 822 (1984), the United States Supreme Court affirmed the NLRB's reliance on the *Interboro* doctrine to find that an employee's refusal to obey his supervisor's order to drive what he reasonably believed was an unsafe truck was protected by Section 7. The Court held that the employee's refusal to comply with the order was protected because it was based on his "honest and reasonable" assertion of a right under his collective bargaining agreement to be free from the obligation to drive unsafe trucks, even if the employee was not correct in his interpretation of the contract. *City Disposal*, at 840. The Commission explicitly adopted the holding of *City Disposal* in *Benzie Co Central Schools,* 1984 MERC Lab Op 836.

In addition to *Reeths-Puffer,* Charging Party relies on *National Labor Relations Board v Burnup & Sims, Inc.* 379 US 21 (1964). In that case, an employer discharged two employees because it mistakenly believed that they had made threats while soliciting support for a union organizing drive. The Court affirmed the NLRB's finding that the discharges were unlawful despite the employer's good faith belief that misconduct had occurred. It noted that the right to engage in protected activity would be destroyed if an employer could discharge employees based on what turned out to be an erroneous belief that misconduct had occurred during that protected activity. The Court held, at 22-23, that a discharge violates Section 8(a)(1) of the NLRA where the employee was engaged in protected activity, the employer knew the activity was protected, the basis of the discharge was an alleged act of misconduct in the course of that activity, and the employee was not, in fact, guilty of the misconduct. Charging Party argues that all these elements are present in this case, including that Ramirez was not, in fact, guilty of misconduct.

However, in this case Respondent did not discipline Ramirez because it erroneously believed that she had done something that she had not. When Szcepanski issued the written warning to Ramirez, he was in possession of all the relevant facts, including that Ramirez claimed that she intended to have Tillman do clerical work for the union on February 7. As indicated in the warning, he believed that Ramirez had acted inappropriately by releasing this particular person on this particular date so that she could catch a plane. Szcepanski also believed that Ramirez's request to release Tillman was deceptive because she did not disclose all the circumstances when she made the request.

As Charging Party asserts, Ramirez was unquestionably asserting a contractual right when she sent the email on February 5 asking that Tillman be released for union business. Whether or not Ramirez's conduct was protected, I find, depends on whether Ramirez honestly and reasonably believed that she had the right under Section 8(B) to release Tillman under the circumstances as she knew them to be. This is a difficult question. There is nothing in the language of Section 8(B) which explicitly prohibited Ramirez's action. Moreover, while Section 8(B) seems to require that the release include an explanation of the "function" of the leave, the record indicates that Respondent had not required anything more than "union business" as an explanation for the release. On the other hand, Ramirez's own testimony establishes that she saw Tillman's release as a way to get around what she believed was a supervisor's unreasonable decision. I do not find that Ramirez honestly believed that Section 8(B) gave her the right to do this. The fact that Ramirez did not fully explain her motives to Szcepanski when he asked her about the release on February 5 also suggests that Ramirez had doubts about the legitimacy of the release and that she hoped to keep her motives secret. I conclude that Ramirez was not engaged in conduct protected by Section 9 of PERA when she released Tillman to do union business on February 5, 2010 because this release was not an honest and reasonable exercise of a right given her by the collective bargaining agreement. Because I find that Ramirez was not disciplined for activity protected by the Act, I conclude that the charge must be dismissed. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____