

**ARBITRATION PROCEEDING
BEFORE MARGARET M. KERN**

YALE-NEW HAVEN HOSPITAL

and

Index No. 068

**NEW ENGLAND HEALTH CARE
EMPLOYEES, DISTRICT 1199, SEIU**

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Statement of the Case

MARGARET M. KERN, Arbitrator. This case was submitted to arbitration on December 18, 2006 pursuant to the terms of the Election Principles Agreement (agreement) entered into between Yale-New Haven Hospital (employer) and New England Health Care Employees, District 1199, SEIU (union or District 1199) on April 13, 2006.

A hearing was held on January 19, 2007 at which all parties were present. Documents were admitted into evidence (Appendix A) and at the conclusion of the proceedings both sides were offered the opportunity to file a brief.

A. Facts

1. Previous Findings

This is the third arbitration case in which the subject of union dues has been a subject of controversy between the parties. In previous decisions I made findings of fact which are relevant to the present case and repeated here.

For a number of years District 1199 has been the collective bargaining representative of 140 dietary workers employed by the employer.¹ Those employees render periodic dues to District 1199 pursuant to union security and dues checkoff provisions. The employer calculates the dues, withholds the money from each employee's pay, and then remits the money to the union. The calculation used by the employer is in accordance Article V, Section 7 of the union's bylaws, and is based upon the number of hours worked per week by each employee. The calculation has not changed since 2002 and is based upon the following parameters:

For monthly deductions:

0-9.99 hours paid for the week	1 hour's pay
10-19.99 hours paid for the week	1 hour's pay + \$6.00
20-29.99 hours paid for the week	1.5 hours' pay + \$6.00
30 hours paid or more for the week	2 hours' pay + \$6.00

There is a cap on the amount of dues that any employee member is required to pay regardless of the employee's hourly wage rate. In 2006, the maximum monthly dues amount was \$60.00. By letter dated November 20, 2006, the union's comptroller sent a letter advising the employer that the dues structure effective January 1, 2007 would remain the same with the exception that the maximum monthly amount was increased to \$65.00.

In contrast to District 1199's bylaws which set forth an hourly-based formula for dues calculation, the SEIU constitution and bylaws provide for a percentage-based formula for dues calculation. Pursuant to the terms of a 1991 affiliation agreement between District 1199 and the SEIU, however, District 1199 has always retained the right to set its own dues structure and has never adopted the SEIU percentage-based formula.²

2. Steve Merz

Steve Merz is the employer's vice-president for administration and he is responsible for the management of 382 eligible employees in 19 departments. He also manages the food and nutritional services department which includes the 140 dietary workers represented by the union.

3. December 4, 2006 meeting

Sharmont Little is employed as a patient care associate (PCA) at the Yale Psychiatric Hospital and he is an eligible employee. His immediate supervisor is Gina O'Leary, patient service manager.

On December 4, 2006, Little attended his department's weekly staff meeting along with 10 to 12 other eligible employees. Present at the meeting on behalf of

¹ See decision in Index No. 011.

² See decision in Index No. 054.

management were O'Leary, Merz, Charles Pearson, adult inpatient services manager, and Ted Pilonero, a consultant from IRI Consultants to Management (IRI). The first 10 to 15 minutes of the meeting were taken up with routine staff matters including a recent staff performance assessment and the institution of a non-smoking policy for patients in the psychiatric hospital. At the conclusion of that discussion, Pearson announced they would turn their attention to the union situation. He said this portion of the meeting was voluntary and that employees were free to leave if they so chose. No one left.

During the second part of the meeting, the subject of union dues was discussed. According to Little, Merz said District 1199's dues structure was two hours of pay plus \$6.00 and that monthly dues were going up to \$65 per month. Merz said he knew this because he was in charge of the food service department and District 1199 had sent him a letter stating that dues were going up to \$65 per month. According to Little, Merz held up a piece of paper purporting to be the November 20, 2006 letter from District 1199 but Merz did not circulate the letter among employees in attendance. Pilonero then said that in the summer of 2007, SEIU was changing the dues structure to a percentage of wages and that District 1199 would have to follow suit and change over to a percentage-based formula for dues calculation. Little took issue with Pilonero's statement and said that he had a copy of District 1199's rules and that dues were not going to be changed to a percentage-based formula. According to Little, Pilonero insisted that the District 1199 dues structure was going to change.

Merz testified that at the meeting he told employees he did not know how dues would be assessed for them, but that he had just received a letter from District 1199 indicating that "dues were going up" for the food and nutritional service workers and he circulated a copy of the November 20, 2006 around the room for employees to examine. Merz further testified that Pilonero introduced to the group "the concept" of a percentage-based formula for dues assessment. Pilonero said employees could look up the SEIU's website and see that the SEIU assessed dues on a percentage-of-wages basis. Merz acknowledged that Little strenuously objected to Pilonero's statement and said that the percentage dues formula would not apply to District 1199 members. Pilonero's response was that SEIU was superior in authority to District 1199 and the percentage formula would prevail. The exchange between Little and Pilonero became confrontational and Merz testified he tried to de-escalate the situation by telling employees they should do their own research and investigate the dues issue for themselves.

A second topic discussed during the union portion of the meeting was employees' relationships with managers. According to Little, Pearson said if the union came in employees would need a union representative present in order to talk with their managers. Merz also recalled Pearson stating that that union stewards would always have to be present in meetings held with employees.

Finally, there was a discussion about job classifications. According to Little, Pearson said that if the union came in employees' duties would be strictly defined by their job titles and that employees would no longer have the flexibility to perform tasks outside their job description. Merz did not testify with respect to this subject.

O'Leary, Pearson, and Pilonero did not testify.

4. December 11, 2006 meeting

On or about December 11, 2006, Little attended another staff meeting with 15 to 20 other eligible employees. Among those present at the meeting on behalf of management were Merz, Pearson, and Leslie O'Connell, director of the psychiatric hospital. Again the meeting began with a discussion of staff issues including a new promotion track for PCAs. After 10 to 15 minutes, O'Connell said they would turn the meeting over to a discussion about the union. She said this portion of the meeting was voluntary and employees were free to leave. None of the employees left.

As he had at the previous meeting, Little again got up and spoke on behalf of the union. He repeated that the District 1199's dues structure was not going to change to a percentage-based formula. He then addressed Merz and said that Merz had claimed at the earlier meeting that dues were going up to \$65 per month. Merz responded, "well they are." Little stated that dues would go up to \$65 only for employees making close to \$29.00 per hour and that Merz had never mentioned that fact. Before Merz could respond, O'Connell told Little, "get off your soapbox."

Merz was asked on cross examination if he had made any attempt to find out if Little's statements regarding union dues were accurate. Merz responded:

I didn't feel it was appropriate for me. The only way I could investigate that would be to go to talk to officials at the union to ask about what the dues were. I didn't feel that was my responsibility nor something that would be appropriate for me to do. I don't think it was appropriate to get a hold of the 1199 bylaws to review and research it...

Merz was then asked how many dietary employees earn \$29.00 per hour. He responded, "I don't know. I haven't reviewed the pay for the union employees in awhile. I hadn't reviewed that at the time of this meeting either."

5. Employer's records regarding employee wages

There are 1,736 employees on the eligible voting list and their wage rates range from \$12.50 to \$29.00 per hour with an average wage rate of \$16.00 per hour.³ Only those employees earning more than \$27.00 per hour would be subject to the 2007 increase in monthly maximum dues.⁴ The employer's records show that only two of the 1,736 eligible employees earn more than \$27.00 per hour (See, employer exhibit 2), and none of the 140 dietary workers managed by Merz earn more than \$27.00 per hour.

³ See decision in Index No. 047.

⁴ Two hours pay (\$27.00 x 2 hours = \$54.00) plus \$6.00 = \$60.00.

In response to a demand for discovery by the union, the employer provided documents that it distributed to employees during the course of the union campaign. Among the documents was a copy of the SEIU constitution and bylaws which states, in relevant part, that as of January 1, 2007, "every Local Union shall be required to have a membership dues system based on a percentage of monthly gross earnings" (employer exhibit 3, pp. H-47-49). In a handwritten notation, the employer wrote "will possibly be 1-2% of gross which includes OT, bonus, PIP, merit increases, etc." In another handout to employees, the employer prepared a chart of how dues were presently calculated for an hourly employee earning \$15.00 per hour, stating, "OT [overtime] has no impact." The employer then recalculated a higher amount assuming overtime wages were included. The employer wrote, "After January 1, here is approximately what your dues would be if you worked one shift OT each week" (employer exhibit 3, p. H-50).

B. Analysis

1. Unlawful polling of employees

This case presents evidence of two more instances when the employer unlawfully polled eligible voters regarding their sentiments about the union. The employer required employees to attend staff meetings on December 4 and 11, 2006, and, after a brief period of time, told employees that the balance of the meetings would deal with the union. Employees were given the choice of either staying and listening to the employer's anti-union presentation, or leaving. By putting employees in the position of having either to accept or reject the employer's offer, they were pressured into making an observable choice regarding their own sentiments about the union. This conduct violated Section 8(a) (1) of the National Labor Relations Act and also violated paragraph 3A of the election principles agreement.

2. Mandatory nature of December 4 and 11 meetings

The employer compelled employees to attend the first, work-related portions of these meetings and then unlawfully coerced them into remaining for the second, anti-union portions of the meetings. I find employee attendance at the entire meetings was mandatory.

Paragraph 3B of the election principles agreement prohibits the employer from conducting mandatory meetings of employees to discuss the union. By conducting the December 4 and 11, 2006 meetings, the employer violated this provision of the agreement.

3. December 4 and 11 meetings held on work time

The purpose of the latter portions of these two meetings was to persuade employees to vote against the union and constituted solicitation. *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (2004). As I have pointed out in previous decisions, since 1995 the employer has maintained a valid no-solicitation/no-distribution rule which

prohibits all solicitation during work time. The employer's solicitation of employees at these two meetings therefore not only violated its own rule, but also contravened previous arbitration rulings wherein I enjoined the employer from engaging in this type of conduct.⁵

4. Unlawful comments made by Charles Pearson at December 4 meeting

Manager Pearson told employees that if the union came in employees would lose the ability to speak directly with their managers regarding any topic, and that they would lose the flexibility to perform tasks outside their job descriptions. By making such blanket, unequivocal statements, Pearson threatened employees with more onerous working conditions if they selected the union to become their collective bargaining representative. I therefore find the employer, through Pearson, violated Section 8(a)(1) of the Act by threatening employees in this manner. Pearson's conduct also violated paragraph 3A of the election principles agreement.

5. Misrepresentations regarding union dues

Steve Merz is a high-ranking management official who supervises over 500 employees in 20 different departments. I had the opportunity to observe Merz testify on two occasions, and he is intelligent, articulate, and fully-versed in hospital operations. He also has no regard for the truth when it comes to delivering the employer's anti-union message.

Merz lied to employees on December 4 when he said that hourly-based union dues were going up for the dietary workers. Merz knew full well that not a single dietary worker earned more than \$27.00 per hour and that the increase in the monthly maximum dues from \$60.00 to \$65.00 would affect no one in that department. Merz was also aware, or should have been aware, that only 2 out of 1,736 eligible employees would be subject to the 2007 increase in hourly-based dues. His sweeping statement that "dues were going up" for everyone was an unabashed misrepresentation.

Merz further sought to deliberately confuse employees when he, along with IRI consultant Pilonero, told employees that union dues would become a percentage of pay on January 1. Merz had a copy of the November 20 letter in his hand which stated, unequivocally, that dues would remain hourly-based. It is clear that Merz and Pilonero made these statements on December 4 and 11 as part of an overall campaign theme the employer had developed regarding the issue of union dues. The documents produced by the employer show that the employer disseminated copies of the SEIU bylaws to managers, supervisors, and employees even though the SEIU bylaws had no relevancy to this union campaign. The employer used these bylaws to fabricate the argument that District 1199 would convert its hourly-based dues system to a percentage-based system. Further embroidering on the fabrication, the employer falsely represented that the percentage-based system would not only include regular hourly wages but would also

⁵ See decisions in Index Nos. 014 (October 15, 2006) and 042 (November 19, 2006).

include overtime, bonuses, PIP benefits, and merit increases, resulting in significantly higher union dues.

In the course of the hearings, two employer witnesses, Steve Merz and Marna Borgstrom, were asked about the misrepresentations made about the union dues structure. Merz' unsettling explanation, detailed above, was that it was not "appropriate" for him to actually read the District 1199 bylaws, nor was it his responsibility to bother to get the facts. Borgstrom's explanation was equally unavailing:

BORGSTROM: ...I think there was a lot of confusion on the part of managers, as it's been related to me in terms of, you know, what they had - what they believed and what the hospital was, you know, telling them. And to this day, I can't tell you what the 1199 New England dues structure is. I understand now that it is different than general SEIU but I think there was a lot of - there was a lot of sort of conflicting material out there. And the supervisors were seeing, you know, the material that was being handed out by the [anti-union] employee groups as well. So I know that there was a lot of discussion and effort to clarify the dues issue...

ARBITRATOR: Given the state of confusion, apparent confusion that you're testifying to...why was there not a decision made to simply drop the issue...Or, alternatively, to ask [the union], "what is your dues structure?"

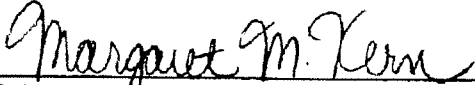
BORGSTROM: In hindsight, it's a really good question and I can't answer that...in retrospect, that would have been a great question to ask, yes.

Based upon all of the facts and circumstances, I find the employer, including Ms. Borgstrom, Mr. Merz, Mr. Pilonero, and the IRI consultants, knew exactly what the union dues structure was and that, at most, union dues would increase in 2007 for 2 out of 1,736 eligible employees. Since that fact was not likely to garner much attention in an anti-union campaign, the employer purposefully lied to employees and told them dues would go up for all employees and by significant amounts. It was simply not true and the employer knew it. By disseminating this misrepresentation, the employer violated Section 3A of the election principles agreement.

C. Remedy

I am reserving ordering a remedy in this case until a later date.

Dated: Chappaqua, New York
June 10, 2007


Margaret M. Kern
Arbitrator

Appendix A

Exhibits

Joint Exhibit 1	Letter and fax cover sheet dated December 18, 2006 from John M. Creane invoking arbitration
Joint Exhibit 2	Letter dated December 6, 2006 from John M. Creane to Alvin R. Johnson
Joint Exhibit 3	Letter dated December 14, 2006 from Alvin R. Johnson to John M. Creane
Joint Exhibit 4	List of departments managed by Steve Merz
Joint Exhibit 5	Letter dated January 17, 2007 from John M. Creane to Ernest J. Collazo
Employer Exhibit 1	Letter dated November 20, 2006 from David Zevin, Comptroller for New England Health Care Employees Union, District 1199, SEIU to Yale-New Haven Hospital
Employer Exhibit 2	List of non-professional bargaining unit employees earning over \$27/hour
Employer Exhibit 3	Discovery documents provided by the employer, pages H-47-H-50