

**ARBITRATION PROCEEDING
BEFORE MARGARET M. KERN**

YALE-NEW HAVEN HOSPITAL

and

Index No. 061(a)

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

*Bill Aseltyne, Esq., General Counsel, and Susan Robfogel, Esq., Nixon Peabody LLP, for
Yale-New Haven Hospital*
*John M. Creane, Esq., Law Firm of John M. Creane, for New England Health Care
Employees, District 1199, SEIU*

Statement of the Case

MARGARET M. KERN, Arbitrator. This case was submitted for resolution on December 12, 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) on April 13, 2006.

A hearing was held on January 29, 2007, at which all parties were present. Witnesses were examined and cross-examined under oath and documents were admitted into evidence (Appendix A). At the conclusion of the proceedings the employer filed a brief in support of its position.

A. The Facts

Kim Carter is a patient service manager who has been employed by the employer since 1999. On November 28, 2006, she attended a management training session on the election principles agreement. During this session, she shared her past negative experiences as a union member and volunteered to share those experiences with employees as well. An IRI consultant present at the training session encouraged managers to contact Carter if they wanted her to speak to their employees about the union.

Minnie DaCosta Clark is a PCA who has been employed by the employer for seven years. She works on the ninth floor of the hospital on the 3:00 p.m. to 11:00

p.m. shift and her immediate supervisor is John Sward. DaCosta Clark is an eligible employee.

Early in the day on December 5, 2006, DaCosta Clark received a cell phone message from an nurse manager named Joshua who stated there was going to be a department meeting that day at 2:30 p.m. and that a woman who had been in a union was going to talk to employees about her experiences. Joshua stated it was his duty to inform DaCosta, "to come in if you want to come in." Clark testified there have been previous occasions when she was called in early to work to attend a staff meeting and on those occasions she was always paid for her time.

DaCosta Clark arrived at the hospital at 2:45 p.m., clocked in, and immediately went to the meeting which was already in progress. Present were Carter, Brenda Fionia, a nurse manager, Sward, six registered nurses, and six other PCAs.

As she entered the meeting, Carter was speaking. DaCosta Clark heard Carter say that in January or February 2007, union dues would go up by two percent. Carter was also heard to say that if employees went on strike, they would be permanently replaced. The employer "would hire a whole new crew, permanently replace us. And they would call us back one by one. Some may get their jobs back, some may not." Carter then said that she never met a union representative during her three years of employment at an unnamed hospital in New York, and that when employees have a union, they have to work mandatory overtime. At that point, Clark spoke up and said that what Carter said was not true, that Clark had been a member of the union while she was employed at a nursing home and there was no mandatory overtime. Carter responded, "Oh really? I didn't know that." Carter continued to address the employees and said, "Every time that you needed to speak to your supervisor, you would have to have a union representative at all times. You could...no longer go in and talk one-on-one." Clark left the meeting at 3:00 p.m. to go to work and as she was leaving, she saw Fionia making copies of by-laws and distributing them to the employees at the meeting. DaCosta Clark was paid by the employer for the time she spent at the meeting.

Carter's version of the meeting was as follows. She began her presentation by talking about her experience as a PCA working at Bradley Memorial Hospital some years before.¹ There was a strike at the hospital at the time. Carter testified, "And I shared the experience that the inpatient operations for that hospital were diverted during the strike and only the emergency department was kept open. And I was forced to find different work." Carter also told the assembled employees that three days prior to the beginning of the strike at Bradley Memorial Hospital she expressed her concern about the strike and the loss of income to a fellow employee. The employee responded at the time, "Well, you'll be in really big trouble if you cross the picket line."

¹ Although Carter did not tell employees specifically how long ago, during her testimony Carter stated she worked at Bradley Memorial Hospital 25 years ago.

Carter testified she next told the employees that she had also previously worked as a nurse at Columbia Presbyterian Hospital in New York and had been represented by the New York State Nurses' Association (NYSNA). During the course of the 2 ½ years that she worked there she never saw, nor spoke to, a NYSNA representative. In addition, she said that the NYSNA contract required employees to work mandatory overtime. At that point, according to Carter, Clark challenged her and said that mandatory overtime was unlawful and that Carter was being deceitful. Carter responded she could only speak about the contract that she worked under, and it had provided for mandatory overtime.

According to Carter, the next subject discussed was union dues: "There were some employees who... were very concerned about whether union dues would be a fixed amount per month or whether [dues] would be a percentage of earnings." Carter testified that at the November 28 training session, managers had been given copies of the SEIU laws and had been told that the local union could choose whether or not to adopt a percentage for dues or a fixed amount. Carter testified she relayed this message to the employees at the meeting and Fionia distributed copies of the SEIU bylaws.

Several employees commented they were very happy with the flexibility in their schedules and they were fearful that it might change if the union represented them. Fionia assured them that as long as they were the management team in the department they would continue to work with the staff. Carter added she could not speak to what may happen if the union came in, "but that the relationship may change."

B. Analysis

1. December 5 meeting held on work time

DaCosta Clark was called on December 5 by a nurse manager and told there would be a department meeting that afternoon to discuss the union. DaCosta Clark had received similar calls in the past to come in before her shift to attend staff meetings. DaCosta swiped her time card and was paid for the time she attended the meeting. I find the meeting was held during employees' work time in violation of the employer's no solicitation/no distribution rule and in violation of previous arbitration decisions enjoining the employer from engaging in such conduct.

2. Union dues

Carter admitted that she told employees that in 2007 the union might change to a percentage-based dues structure and that Fionia distributed copies of the SEIU bylaws to employees at the meeting. As I previously found in decision no. 068 (issued June 11, 2007), Carter's statement and Fionia's distribution of the SEIU bylaws was part of a deliberate plan by the employer and its consultants to misrepresent the union's dues structure in order to convince eligible employees that there would be significant increases in union dues, thereby undermining employee support for the union. Carter's

statement regarding union dues, and Fionia's distribution of the SEIU bylaws, constituted misrepresentations of fact in violation of Section 3A of the election principles agreement.

3. Threat of loss of employment

The credible testimony of DaCosta Clark establishes that Carter told employees if they went on strike they would be permanently replaced; the employer would call employees back one by one and some might be reinstated, others would not. Because this statement failed to differentiate between economic strikers and unfair labor practice strikers, it constituted an unlawful threat of loss of employment in violation of Section 8(a)(1) of the Act. The statement further violated paragraph 3A of the election principles agreement.

4. Threat of unspecified reprisals

Carter acknowledged in her testimony that she warned employees if they crossed a picket line they could get into "really big trouble." The interdependent guarantees of Section 7 and Sections 8(a)(1) and 8(b)(1)(A) grant to employees the right to choose for themselves, free of any coercion, whether to support a union or to refrain from supporting a union. This includes, among other things, the right to work in the face of a strike. *1199, National Health & Human Service Employees Union*, 339 NLRB 1059, 1060 (2003). Carter's statement constituted a threat of unspecified reprisals if employees chose to work during a strike and violated Section 8(a)(1) of the Act and paragraph 3A of the election principles agreement.

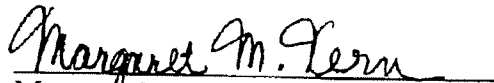
4. Threat of more onerous working conditions

The credible testimony of DaCosta Clark further establishes that Carter told employees if the union came in they would no longer be able to speak individually with their supervisors regarding any matter, that they would be mandated to work overtime, and that they would lose scheduling flexibility. These statements each constituted a threat of more onerous working conditions in violation of Section 8(a)(1) of the Act and paragraph 3A of the election principles agreement.

C. Remedy

I reserve ordering a remedy in this case until a later date.

Dated: Chappaqua, New York
June 13, 2007


Margaret M. Kern
Arbitrator

Appendix A

Exhibits

Joint Exhibit 1	Letter and fax cover sheet dated December 12, 2006 from John M. Creane invoking arbitration
Joint Exhibit 2	Letter dated December 10, 2006 from Alvin R. Johnson to John M. Creane
Joint Exhibit 3	Letter dated January 17, 2007 from John M. Creane to Ernest J. Collazo
Employer Exhibit 1	Post-hearing brief