

**ARBITRATION PROCEEDING  
BEFORE MARGARET M. KERN**

**YALE-NEW HAVEN HOSPITAL**

**and**

**Index Nos. 080  
081**

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

*Bill Aseityne, 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. These cases was submitted for resolution on February 28, and March 5, 2007, 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 March 29, at which all parties were present. Witnesses were examined and cross-examined under oath and documents were admitted into evidence (Appendix A). The employer filed post-hearing memoranda.

In Index No. 081, the employer alleges the union disparaged the employer in testimony given before the Connecticut State Legislature on February 20, 2007, and in a press release issued on February 26, 2007. In Index No. 080, the union alleges the employer disparaged the union in a letter distributed to employees on February 26, 2007. The union further alleges that the employer's distribution of that letter during work time violated the employer's no-solicitation/no-distribution rule as well as previous arbitration rulings enjoining the employer from distributing campaign literature on work time.

## A. The Facts

### 1. Index. No. 081

On February 20, 2007, SEIU attorney and lobbyist Daniel Livingston testified before the Connecticut General Assembly in support of a bill restricting the right of employers to conduct mandatory union meetings with employees. Livingston testified in relevant part:

...despite signing a written contract promising not to, Yale New Haven Hospital used lies, threats and intimidation to fight a union drive, and has become the poster child for captive audience meetings...it derives from 16<sup>th</sup> Century English master/servant law, which says that on work time, you belong to your boss...It is long past time Connecticut recognizes that workers are entitled to be treated as free human beings, not servants or slaves...the largest single recipient of state funds should not use those funds to be our state's largest abuser of the rights of workers. [There is] a long and cynical history of the hospital's abuse of worker's rights...

William Meyerson is the union's campaign communications director. He testified that on occasion the union has retained Livingston's services but that Livingston was not representing the union when he testified on February 20, nor was Meyerson even aware of the fact that Livingston was going to testify that day. Meyerson had no discussions with Livingston concerning the content of his testimony

On February 26, 2007, at about 4:30 p.m., the union withdrew the petition for an election and unfair labor practice charges previously filed with the National Labor Relations Board. That same day, the union issued a press release explaining its actions:

[E]vidence of widespread violations of the fair election agreement and federal law by YNHH management destroyed the chance for a fair election...[M]anagers throughout the hospital were trained and conducted a systematic, illegal campaign that violated our fair election agreement and prior rulings of the arbitrator...[V]iolations were so widespread they destroyed any hope for a fair election...managers threatening workers with loss of benefits, overtime and time off; illegally polling workers about union sympathies; holding one on one meetings and mandatory meetings with workers; spreading false information about the union that managers knew was untrue; campaigning against the union on work time and in work areas and other violations of the fair election agreement and federal labor law...workers were "simply terrified" by the hospital's campaign.

## 2. Index No. 080

Within several hours of the issuance of the union's press release, CEO Marna Borgstrom distributed a letter to eligible employees in which she stated:

We were advised tonight at 5 p.m. that SEIU/1199 withdrew its charges pending before the NLRB and withdrew its petition for an election. We are very disappointed that the union does not want an NLRB secret-ballot election to be held.

We will explore every option available to provide our employees with an opportunity to vote on the critical issue of union representation.

As always, we will keep you updated on any developments in this matter. Thank you for your continued support.

Sharre Johnson is a PCA in the pediatrics primary care center. She testified that she was given a copy of Borgstrom's February 26 letter by Lisa Cunningham, a nurse manager, during her work time. Cunningham told Johnson to read the letter.

## B. Analysis

### 1. Index No. 081

The evidence indicates that Livingston is an attorney who, on occasion, represents the union. However, there is no evidence to establish that when he testified on February 20 before the Connecticut State Legislature that he was representing the union or testifying at their request. Meyerson's uncontradicted, credible testimony establishes that he was not even aware that Livingston would be testifying at that time and had no discussions with Livingston about this testimony. Since there is no evidence that Livingston, an agent of the SEIU, was acting as an agent of the union when he testified, there is no basis for holding the union responsible for his statements. See, *Overnite Transportation Co.*, 334 NLRB 1074, 1078 (2001).

On the other hand, the union's press release of February 26 was disparaging of the employer. Although there was a factual basis for many of the union's assertions, the tone and intent of the press release was to disparage the employer. The parties had agreed not to engage in such rhetoric during the life of the election principles agreement, and by issuing the press release, the union violated paragraph 3A of that agreement.

## 2. Index No. 080

Borgstrom's letter to employees was disparaging of the union. If Borgstrom wanted to advise employees that the union had withdrawn the petition she could have done so. But it was a gratuitous and inaccurate to say, as she did, that the union did not want an NLRB secret-ballot election to be held. The thrust of the union's press release was that a fair election could not be held due to the employer's unfair labor practices. The union was not withdrawing the petition because it did not want to proceed to an election. Rather, it was withdrawing the petition because the conduct of a free and fair election had been precluded by the employer's misconduct. Borgstrom's statement disparaged the union in violation of Section 3A of the election principles agreement.

I dismiss the union's claim that Borgstrom's letter of February 26 was campaign literature since, at the time she issued the letter, there was no election petition pending.

## 3. Remedy

Both the union and the employer disparaged each other on February 26, 2007. In view of the fact that both sides engaged in misconduct on the same day relating to the same issue, and that there was no recurrence of that behavior prior to the expiration of the election principles agreement, no further remedy is warranted.

Dated: June 13, 2007  
Chappaqua, NY

  
Margaret M. Kern  
Arbitrator

Appendix A

Exhibits

Index No. 080

- Joint Exhibit 1 Letter and fax cover sheet dated March 7, 2007 from John M. Creane invoking arbitration
- Joint Exhibit 2 Letter dated March 5, 2007 from John M. Creane to Susan Robfogel
- Joint Exhibit 3 Letter dated March 7, 2007 from Susan Robfogel to John M. Creane
- Employer Exhibit 1 Post-hearing memorandum

Index No. 081

- Joint Exhibit 1 Letter dated March 7, 2007 from Susan Robfogel invoking arbitration
- Joint Exhibit 2 Letter dated February 28, 2007 from John M. Creane to Susan Robfogel
- Joint Exhibit 3 Letter dated March 1, 2007 from John M. Creane to Susan Robfogel
- Joint Exhibit 4 Letter dated March 7, 2007 from Susan Robfogel to John M. Creane
- Joint Exhibit 5 Testimony of Daniel E. Livingston, February 20, 2007
- Joint Exhibit 6 Union press release February 26, 2007
- Employer Exhibit 1 Post-hearing memorandum