STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

UNIVERSITY OF MICHIGAN,
Respondent-Public Employer,

Case No. C03 C-049

-and-

GRADUATE EMPLOYEES ORGANIZATION, MICHIGAN FEDERATION OF TEACHERS & SCHOOL RELATED PERSONNEL, AMERICAN FEDERATION OF TEACHERS,
Charging Party-Labor Organization.
_____/

APPEARANCES:

David J. Masson, Esq., for Respondent

Mark H. Cousens, Esq., and Gillian H. Talwar, Esq., for Charging Party

DECISION AND ORDER

On November 30, 2004, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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In the Matter of:

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APPEARANCES:

David J. Masson, Esq., for Respondent

Mark H. Cousens, Esq., and Gillian H. Talwar, Esq., 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 August 6, 2003 and October 24, 2003, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and briefs filed by the parties on or before December 18, 2003, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On March 3, 2003, the Graduate Employees Organization, Michigan Federation of Teachers & School Related Personnel, American Federation of Teachers (Charging Party or the GEO) filed this unfair labor practice charge against the University of Michigan (Respondent or the Employer). The charge, as amended, alleges that Respondent violated Sections 10(1)(e) and 15(1) and (3) of PERA by unilaterally modifying health care coverage and refusing the GEO's demand for bargaining over the changes. Specifically, the GEO contends that Respondent, without bargaining, increased co-pays for prescription drugs and office and emergency room

visits. In addition, Charging Party asserts that the Employer modified the structure and terms of the prescription drug plan, resulting in increased costs to GEO members.

Findings of Fact:

The 2002-2005 Collective Bargaining Agreement

Charging Party is the collective bargaining representative for graduate student assistants employed by the University of Michigan. The GEO bargaining unit was certified by the Commission in 1974. The collective bargaining agreement currently in effect between the parties covers the period May 7, 2002 to February 1, 2005. Pursuant to that contract, bargaining unit members and their dependents are eligible for benefits, including life and health insurance. With respect to the latter, Article XI, Section A, of the agreement provides, in pertinent part:

> During the term of this Agreement, and consistent with the terms of each program or plan, employees with a one-quarter or greater employment fraction in a term are eligible to participate in the University's Group Health Care programs and Group Dental Option 1 Plan, and Basic Group Life Insurance plans. University contributions toward the Group Health and Group Dental premiums shall be in the same amount as that provided to the University instructional staff for the coverage selected.
>
> * * *
>
> In the event of any changes in the coverage from any of the programs or plans, the GEO Steering Committee will be notified sixty (60) days prior to the effective date of the change.

The collective bargaining agreement does not set forth specific co-pays required of bargaining unit members, nor does the contract specify the level or scope of benefits to be made available under the various health care plans offered by the University.

Pursuant to Article XV of the 2002-2005 contract, disputes arising under and during the term of the agreement are to be resolved pursuant to a multi-step grievance procedure culminating in final and binding arbitration. The contract also contains a zipper clause, Article XXIV, which states:

> The University and the Union acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the University and the Union, except as provided in Article XXVII, Term of Agreement, each voluntarily and unqualifiedly waives the right, and agrees the other shall not be obliged, to bargain collectively with respect to any subject or matter referred to or covered in

this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed the Agreement.

Health Care Plans -- Background

Respondent offers a number of health care plans from which its employees can choose. The vast majority of GEO members are enrolled in the "GradCare" plan, which is available only to graduate student assistants employed by the University. GradCare has been managed by M-Care since it was established in 1994, with AdvancePCS, a private pharmacy benefit manager, serving as administrator of the prescription drug component of the plan. Other plans offered by the Employer include Blue Cross/Blue Shield of Michigan (BCBSM) United, BCBSM Comprehensive Major Medical Plan, Health Alliance Plan, Care Choices HMO, M-Care Major Medical, and M-Care HMO.

The University has, over the years, unilaterally increased co-pays for both prescription drugs and medical treatment. For example, Respondent raised the prescription drug co-pay for the M-Care HMO from $0 in 1986 to $3.00 in 1991. In 1994, the M-Care co-pay was increased again to $5. That same year, the HAP co-pay for prescription drugs was increased from $2 to $5. By 1998, the University had implemented a two-tier co-pay structure for prescription drugs in a majority of the plans for which GEO members are eligible, with $5 payable by enrollees for generic drugs and a $10 co-pay for brand-name drugs. Co-pays for office and emergency room visits have been subject to similar unilateral increases by the Employer since Charging Party's unit was certified.

With respect to the GradCare plan specifically, Respondent increased the co-pay for prescription drugs from 20 percent in 1995 to $5 in 1997. Thereafter, the University implemented the two-tier structure for GradCare enrollees, with a $5/$10 co-pay for prescription drugs in 1998. At the time the current contract between Charging Party and Respondent went into effect, the co-pay for prescription drugs under the GradCare plan was $7 for generic medications and $14 for brand-name drugs. These co-pays were identical to what was available under all but one of the health care plans available at the time.[1] The GradCare co-pay for medical treatment was $10 for office visits and $25 for emergency room visits, again comparable to the other plans offered by Respondent. The GEO never demanded to bargain over co-pay increases prior to 2002, when the instant dispute arose.

2003 Modifications To Health Care Plans

On January 22, 2002, during negotiations which resulted in the 2002-2005 collective bargaining agreement, Respondent indicated to members of Charging Party's bargaining team

[1] The one exception is the BCBSM/United plan, which covers all medications at cost, with a 20 percent co-insurance. In addition, there are no office or emergency room co-pays under the BCBSM/United plan; rather, enrollees are subject to a deductible. BCBSM/United is a self-funded plan managed by a third-party administrator, United of Omaha.

that the University was considering consolidating the various prescription drug plans available to eligible employees and their dependents.

Several months later, Respondent began publishing articles in the *University Record* a publication for the Employer's faculty and staff, concerning modifications to the prescription drug plans offered by the Employer. In an article dated March 11, 2002, Respondent announced that it intended to implement a single prescription drug plan administered by an outside vendor. The article also stated, in pertinent part:

> **Highlights of the New Plan**
> The following highlights of the new pharmacy benefit plan apply to all participants [who] are enrolled in medical plans other than BCBSM/United:
>
> ? Co-Payments. There will be a three-tier co-payment for prescription drug purchases. The three tiers include:
> ? A $7 discounted co-payment for use of generic drugs;
> ? A $14 co-payment for preferred brand-name drugs; and
> ? A $24 co-payment for the brand name drugs that are selected and placed [on the] non-preferred drug list.
>
> * * *
>
> **Bargained-for Groups**
> The University has many employees who are represented by labor unions and [covered] by collective bargaining agreements that contain provisions regarding health care [and] prescription drug coverage. The obligations set forth in those Agreements will be honored. The leadership of each of the labor unions will receive individual communication from the University.

On June 10, 2002, the *University Record* published an article stating, "Advance PCS has been selected as the vendor for the new 2003 U-M [self]-managed prescription drug program." The article further indicated that modifications to co-pays would not immediately apply to members of bargaining units represented by "AFSCME, IUOE and HOA" due to provisions concerning prescription drug coverage in their respective contracts.

In a letter to Charging Party dated September 16, 2002, Respondent indicated that there would be certain changes in the University's benefit plan levels. According to the letter, which was addressed to "Alyssa Picard, Bargaining Chairperson," prescription drugs would be administered for all University medical plans by AdvancePCS. In addition, the letter indicated that there would be "co-pay changes for 2003 for office visits, urgent care visits [and] in and out-of-network area Emergency Room coverage."[2]

[2] Picard testified that her term as bargaining chairperson ended in May of 2002, and that she never saw the letter until the first day of hearing in this matter. There is no evidence in the record indicating that any other GEO representative received this letter.

In October of 2002, Picard sent an e-mail to Respondent inquiring as to whether the changes in health care benefits referred to in the *University Record* would apply to members of Charging Party's bargaining unit. On October 18, 2002, the Employer responded to Picard in an e-mail stating, in part:

> There are only 3 union groups that have two-tier copay plan designs (AFSCME, Trades and IUOE). GEO along with all other actives and retirees are in the 3-tier copay plan design, unless they select BCBSM/United of Omaha where they have a 20% co-insurance for prescription drugs. All participants (including GEO) will receive in early December the new UM Prescription Drug Plan book that details everything they need to know, and in late December everyone will receive a "welcome kit" with their new drug ID cards from AdvancePCS.

On November 26, 2002, the Union filed a grievance protesting the proposed changes to the health insurance plans, arguing that the unilateral modifications violated Article XI of the parties' collective bargaining agreement. A third-step hearing was held on December 17, 2002, following which Respondent denied the grievance.[3]

Effective January 1, 2003, Respondent implemented the new, three-tier prescription drug plan applicable to all University health care plans for which GEO members are eligible, with the exception of the BCBSM/United plan. The three-tier plan retained the $7 co-pay for generic drugs. However, brand-name medications are now split into two categories: preferred and non-preferred. Preferred medications are those selected by a committee of physicians and pharmacists based upon considerations of safety, clinical value and cost effectiveness. Such medications are subject to a $14 co-pay. The co-pay for non-preferred drugs, which includes all of those medications not designated by the Employer as preferred, is $24. Prescription drugs are no longer provided through the individual medical plans; rather, the University implemented a consolidated, single-source plan administered by AdvancePCS. Respondent also increased the co-pays for medical treatment to $15 for office visits and $50 for emergency room visits. In addition, the University made certain modifications to prior authorization policies, prescription drug supply limits and the list of excluded medications.

Positions of the Parties:

Charging Party contends that Respondent violated PERA by unilaterally changing health care coverage, a mandatory subject of bargaining, resulting in higher expenses for GEO members. Although the collective bargaining agreement does not specify the level of health care benefits available to GEO members, Charging Party contends that the contract's reference to the "University's Group Health Care programs" means those plans as they existed at the time the contract was signed. Charging Party further contends that Respondent failed to prove that the Union waived its statutory right to bargain over changes to health care coverage, either by contract or past practice. Charging Party also argues that even if the Employer had established the existence of a past practice, the Union's acquiescence to certain co-pay increases did not establish a broad waiver of its right to bargain over health care benefit changes. Finally,

[3] Charging Party advanced the grievance to arbitration and, in a decision issued on December 2, 2003, the arbitrator found no contractual violation.

Charging Party asserts that its charge was timely filed, since the first formal notification of the changes was a letter from the Employer dated September 16, 2002, less than six months prior the filing of the charge. According to Charging Party, prior announcements to the University community at large did not serve as notice to the Union itself, and the information set forth therein was not specific with respect to the details of the changes or whether they would even apply to GEO members.

Respondent argues that the contract currently in effect between the parties covers the issue of health insurance benefits, and that the parties have a bona fide dispute over interpretation of that agreement. Therefore, according to Respondent, resolution of the dispute should be left to grievance arbitration process. Alternatively, Respondent contends that Charging Party waived its right to bargain over changes in health insurance benefits, both by agreeing to language in Articles XI and XXIV of the 2002-2005 collective bargaining agreement, and by its longstanding practice of acquiescing to modifications in co-pays for prescription drugs and medical treatment. Finally, Respondent alleges that Charging Party failed to make a timely bargaining demand, since the Union was on notice as early as January of 2002 that changes to the prescription drug co-pay structure were being considered.

Discussion and Conclusions of Law:

At the hearing in this matter, Respondent argued that the unfair labor practice charge was not timely filed because the Union had notice of the University's intent to modify health insurance benefits more than six months prior to the filing of the charge and in a manner sufficient to trigger the running of the statute of limitations under Section 16(a) of PERA. Specifically, the Employer asserted that Charging Party was aware of the alleged unfair labor practice as early as March 11, 2002, when articles about the changes began appearing in the *University Record*. Although Respondent failed to raise the statute of limitations as a defense in its post-hearing brief, I will nonetheless address the issue here due to the fact that the limitations period is a jurisdictional prerequisite to the consideration of a charge and may be raised at any time.[4] See *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583; *Detroit Federation of Teachers, Local 231*, 1986 MERC Lab Op 477.

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The limitations period under PERA commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). The statute of limitations on a charge of unilateral change runs from the date of the announcement of the decision rather than the implementation of the change. *Tuscola Intermediate School District*, 1985 MERC Lab Op 123. Therefore, it must be determined whether Charging Party knew or should have that the University had decided to implement changes to the health care plans for which GEO members were eligible on or before September 3, 2002, six months prior to the date upon which the instant charge was filed.

[4] In its brief, Respondent raised the somewhat related issue of whether Charging Party's bargaining demand was timely.

In the March 11, 2002 *University Record* article, Respondent announced that it intended to implement a single prescription drug plan administered by a single outside vendor, and that the co-pay structure for prescription drug coverage would be changed from a two-tier to a three-tier system. However, the article also indicated that the Employer intended to honor its contractual commitments regarding health care benefits, and that University would be in contact with the leadership of the various labor organizations. Although a later article identified by name several bargaining units which would not be immediately affected by the changes, nothing in any of the subsequent publications explicitly indicated whether the new rules and policies would apply to GEO members. Even assuming arguendo that articles in newspapers or other periodicals may be sufficient to put a labor organization on notice of a potential unfair labor practice, a proposition for which Respondent has cited no legal support, I find that the publications relied upon by Respondent were not sufficient to start the running of the six month limitations period.

With regard to the merits of the refusal to bargain charge, however, I conclude that the GEO has failed to establish that the Employer violated PERA by making changes to the health care plans for which Charging Party's members are eligible. Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours and other terms and conditions of employment. MCL 423.215(1). It is well established that health insurance is a mandatory subject of bargaining. In fact, Section 15(3)(a) of PERA explicitly recognizes the obligation of public employers and labor organizations to bargain with respect to "types and levels of benefits and coverages for employee group insurance. MCL 423.215(3)(a). See also *St. Clair County ISD*, 2000 MERC Lab Op 55, 61-62.

A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 317; *Detroit Board of Education, supra*. A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement. *Port Huron, supra* at 318; *St. Clair County ISD, supra*. As the Michigan Supreme Court stated in *Port Huron, supra* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement."

In the instant case, the parties' agreement with respect to health insurance is contained within Article XI of the contract, pursuant to which GEO members are eligible to participate in the University's group health care programs. This provision does not set forth any specific benefit levels, nor does it specifically identify the deductibles or co-pays required of GEO members. Rather, the agreement merely requires the Employer to make contributions toward premiums for eligible members "in the same amount as that provided to the University instructional staff for the coverage selected" and obligates Respondent to provide timely notice to the GEO before making any changes. The Union had the opportunity to bargain for more specific language with respect to health care coverage levels and the financial obligations of the Employer and GEO members, but failed to do so. See *Gogebic Community College*, 1999

MERC Lab Op 28, 31, aff'd 246 Mich App 342 (2001). Based upon Article XI, I find that health insurance is a matter "covered by" the collective bargaining agreement and that the GEO has already exercised its bargaining right regarding the issue. *Houghton Lake Community Schools*, 1997 MERC Lab Op 42, 47; *Twp of West Bloomfield*, 1991 MERC Lab Op 525. Under such circumstances, any disagreement of the Union with respect to the Employer's actions in connection with this matter must be resolved through the grievance-arbitration machinery of the contract. Accordingly, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____