STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND RAPIDS COMMUNITY COLLEGE,
Respondent-Public Employer,

-and- **Case No. C97 F-114**

GRAND RAPIDS COMMUNITY COLLEGE FACULTY ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Miller, Canfield, Paddock and Stone, by Thomas P. Hustoles, Esq., for Respondent

Pinsky, Smith, Fayette & Hulswit, by Edward M. Smith, Esq. and Katherine M. Smith, Esq., for Charging Party

DECISION AND ORDER

On June 25, 1998, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above matter finding that Respondent Grand Rapids Community College did not violate its bargaining obligation under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210(1)(e); MSA 17.455(10)(1)(e), when it denied a faculty member the right to teach a sociology course on the ground that she was not qualified. The Administrative Law Judge concluded that there was no evidence that the College ignored the criteria set forth in the expired contract or violated any established past practice in making the decision.

On August 19, 1998, Charging Party Grand Rapids Community College Faculty Association filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent filed a brief in support of the recommended order and in opposition to the Union's exceptions on October 27, 1998.

Discussion and Conclusions of Law:

The facts in this case are not materially in dispute. The College and the Union were parties to a collective bargaining agreement which expired in August of 1995. Negotiations failed to produce a successor agreement, and a fact finder was assigned to the case. The fact finder issued his report on April 12, 1996. On August 20, 1996, the College implemented several articles of its last proposal,

including Article 7.F., which set forth criteria for the assignment of overload hours to members of the faculty. Overload refers to those hours voluntarily assumed by a faculty member during a given semester in addition to his or her normal teaching load. Article 7.F. provides as follows:

> 1. Overload assignments shall be offered to qualified personnel as stated in this section F.
>
> "Qualified" may include, but is not limited to, study, satisfactory work experience, satisfactory teaching experience, and/or academic achievement related to the overload assignment.

The contract also contained a management rights article, which endowed the College with the responsibility for the "assignment . . . of faculty."

In December of 1996, faculty member Loretta Lind met with other members of the school of social science and humanities for the purpose of selecting overload classes. Lind chose three classes, including Sociology 251, a telecourse subtitled "Principles of Sociology." Subsequently, Lind was advised by Gert Croom, the divisional chairperson, that she would not be allowed to teach the sociology class because she was not qualified. Lind discussed the matter with the Union's grievance chairperson, Fred van Hartesveldt, who advised her to speak to the dean of the division. The dean advised Lind that he thought that any qualified person in the division should be able to teach an introductory course, but that the vice president of academic affairs would have to determine her qualifications. The dean told Lind that he would look into the matter and get back to her. Approximately one week later, the dean sent Lind an E-mail stating that he had discussed the matter with Croom and that he was denying Lind the right to teach the class. Thereafter, the Union filed a grievance on Lind's behalf. The grievance alleged that Lind was qualified to teach Sociology 251 under the terms of the collective bargaining agreement, the imposed terms of employment, and the administration's past practices and policies. On May 8, 1997, the executive vice president of the College denied the grievance, finding that Lind was not qualified to teach Sociology 251 because of her lack of study within that discipline. The decision noted that Lind's work experience had been in psychology, and that there were no specific past practices or policies of the College referenced in the grievances. The Union filed the instant unfair labor practice charge on June 2, 1997.

On exception, Charging Party contends that the Administrative Law Judge erred in finding no evidence to establish that the College, in denying Lind the right to teach the sociology class, ignored the contractual criteria or that it violated established past practice. In support of this contention, the Union refers to a stipulation between the parties that some instructors have taught more than one discipline, and the fact that the dean told Lind that any qualified person in their department should be able to teach an introductory class. In addition, Charging Party relies on the grievance chairperson's testimony that he once taught a class outside of his discipline.

Central to this dispute is whether there is sufficient evidence of an established past practice regarding the criteria for assignment of overload classes which the College unilaterally changed. In

order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be a "tacit agreement" that the practice would continue. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 325 (1996), quoting *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455 (1991). Where the agreement unambiguously covers a term of employment that conflicts with a party's past behavior, however,
the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Education Ass'n*, 452 Mich at 329. In such circumstances, the party "seeking to supplant the contract language must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions – intentionally choosing to reject the negotiated contract and knowingly act in accordance with past practice." *Id*. Regardless of which standard of proof applies in the instant case, we agree with the Administrative Law Judge that the evidence falls short of establishing the existence of any established past practice.

Although the parties stipulated that faculty members have, on occasion, taught overload courses outside their discipline, there is nothing in the record establishing the qualifications or work experience of those instructors. Similarly, the testimony of the grievance chairperson is of little value in establishing any binding past practice. Although van Hartesveldt taught a course outside his discipline at the request of the College in 1993 or 1994, he had degrees in journalism and law at the time and had practiced law for nine years. Moreover, the political science course which he taught included material on the judicial system. Thus, we agree with the Administrative Law Judge's finding that the circumstances involving the grievance chairperson are not sufficiently similar to the Lind situation. We also agree with the Administrative Law Judge that the evidence does not establish that Lind was held to a more rigid standard for teaching overload assignments outside of her normal teaching area than other faculty members in the bargaining unit, nor is there any evidence that the Employer ignored established contractual criteria in denying Lind the opportunity to teach the sociology course. The record clearly supports the Administrative Law Judge's conclusion that this case is not an argument over whether contract criteria for teaching assignments has been changed, but rather a dispute over the application of those criteria to the particular assignment of Lind.

Because there is nothing in the record to support any finding that the College was attempting to circumvent the status quo of the expired contract or any established past practice, we conclude that Respondent did not violate its duty to bargain under PERA. In view of this finding, it is not necessary to address the remainder of Charging Party's exceptions.

For the reasons stated above, we affirm the findings and conclusions of law of the Administrative Law Judge.

ORDER

Pursuant to Section 16 of the Act, we hereby adopt and incorporate the Administrative Law Judge's Decision and Recommended Order as our final order in this case and dismiss the charges in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND RAPIDS COMMUNITY COLLEGE,
Public Employer-Respondent

- and - Case No. C97 F-114

GRAND RAPIDS COMMUNITY COLLEGE
FACULTY ASSOCIATION,
Labor Organization-Charging Party
_____/

APPEARANCES:

Patterson, Kinney & Ruga, L.L.P., by Peter A. Patterson, Atty, for Respondent-Public Employer

Pinsky, Smith, Fayette & Hulswit, by Edward M. Smith, and Katherine M. Smith, Attys, for Charging Party-Labor Organization

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case came on for hearing at Grand Rapids, Michigan on August 28, 1997, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to a complaint and notice of hearing dated June 9, 1997, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.216, MSA 17.455(16). Based upon the record and post-hearing briefs filed on or before October 31, 1997, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Charge and Background Matters:

This decision is the fourth in a series of unfair labor practice charges filed by the Faculty Association of the Grand Rapids Community College in the course of a contract dispute between the Association (Union) and the College (Employer) to replace their four-year agreement that expired on August 25, 1995. The first decision in Case Nos. C96 F-141 and C96 F-144 involved the issue of whether the elimination by the College of what is known as "released time" for faculty members in the Union's bargaining unit constituted a unilateral change in working conditions. The Commission issued its pro forma 20-day order in this case on April 14, 1998, based upon a finding of no violation of PERA. See 1998 MERC Lab Op _____. The second decision in Case Nos. C96 A-21 and C96

F-143, issued by the undersigned on April 28, 1998, involved the unilateral limitation of what is referred to as faculty "overload hours," which are teaching hours voluntarily assumed over and above the normal contractual teaching load. This decision held that overload was similar to overtime and, therefore, was a permissive subject of bargaining that could be limited without first bargaining with the Union. Exceptions to this ruling were pending before the Commission when this decision was issued. The third decision, issued on May 21, 1998 in Case No. C97 D-76, held that there was insufficient evidence to establish that the cancellation of a chemistry telecourse was to retaliate against a faculty member for filing a grievance. A request for withdrawal of this latter case was received on June 19, 1998. Official notice will be taken of the contents of the above decisions.

The charge in this proceeding, Case No. C97 F-114, was filed on June 2, 1997, and recited the background facts relative to the partial implementation by the College of its last offer on August 20, 1996, after fact finding had been held. Among the contract terms imposed by the College were those relating to "Overload Assignments" (Article 7.F.). The charge then alleged:

> In December 1996, a faculty member, Loretta Lind, chose to teach an overload class section, the Sociology 251 telecourse. A number of days after her selection, the division chairperson denied her selection because, ostensibly, she wasn't qualified to teach Sociology. However, Loretta Lind is qualified to teach sociology under the administration's past practices and policies, the terms of the collective bargaining agreement, and the imposed terms of employment in Article 7.F.
>
> Further, the administration's refusal of Loretta Lind's overload selection of Sociology 251 changed the terms of employment without negotiation and without submitting the changes to the fact finder for his hearing and recommendation, all in violation of the administration's past practice and policy, the negotiated agreement and the Public Employees [sic] Relations Act.

On June 18, 1997, the Employer filed a motion for more particulars, and a response to this motion was filed by the Charging Party on June 23, 1997. The undersigned responded by letter dated June 26, 1997, granting the motion in regard to only the identity of the chairperson involved and the date of the denial of the overload class. These particulars were filed on July 9, 1997, indicating that the class was denied on December 27, 1996 by division chairperson Gertrude Croom. No answer to the charge was filed by the Employer. There is no dispute as to the relevant facts in this matter.

It is noted that the April 28 decision in Case Nos. C96 A-21 and F-143 held that the limitation of overload hours was not a mandatory subject of bargaining. In the instant case, the Union is claiming, in effect, that the criterion for assigning overload classes, or the method of determining the qualifications of the faculty, has been unilaterally changed by the Employer without bargaining. In response to the Employer's contention that only a contract dispute is involved in this matter, the Union notes that its contract is expired and that the Employer has refused to arbitrate this dispute, thereby invoking the Commission's decision in *Plymouth-Canton Comm. Schools*, 1984 MERC Lab Op 894, 898. For purposes of this decision, the undersigned will assume, without deciding, that the

contractual criterion for determining the qualifications for the assignment of overload classes is a mandatory subject of bargaining and subject to the *Plymouth-Canton* doctrine and its progeny. See *Central Michigan Univ. Faculty Ass'n v CMU*, 404 Mich 268, 280, 100 LRRM 2401, 2403 (1978).

Factual Findings:

> Article 7.F.1. of the August 20, 1996-imposed contract provides as follows:
>
> 1. Overload assignments shall be offered to qualified personnel as stated in this section F.
>
> "Qualified" may include, but is not limited to, study, satisfactory work experience, satisfactory teaching experience, and/or academic achievement related to the overload assignment.

The contract also contained a management rights article, which endowed the College with the responsibility for the "assignment . . . of faculty."

The record did not set forth the history or how the above provisions had been interpreted by the parties, but it emphasized the personal background and qualifications of the faculty member involved, Lind. Sociology, psychology, and anthropology are all disciplines in the Employer's school of social science and humanities, which is headed by a dean. The dean is responsible for determining whether a faculty member is qualified to teach a particular course. The parties did stipulate that some instructors have taught more than one discipline, but the circumstances of such assignments were not explained. The grievance chair of the Union testified that he has a journalism and a law degree, and that he practiced law for nine years. As evidence of the past practice of the College, he testified that he taught a political science course not in his department or division in 1993 or 1994. Among the topics in this course was the judicial system.

In mid-December, 1996 a meeting of the language arts faculty of the humanities school met with the division chair, Croom, to choose overload classes for the following semester. Among the three courses chosen by Lind was an introductory sociology telecourse, Sociology 251, "Principles of Sociology." On December 27 Croom called Lind and informed her that she would not be teaching that class on the ground that she was not qualified. Lind went to the Union grievance chair, who suggested she talk with the dean. A meeting with the dean took place in early January 1997, and he expressed his opinion that any qualified person in the division should be able to teach an introductory course. However, about a week later, the dean sent Lind an E-mail stating that after talking with Croom he was denying Lind the right to teach the class.

Lind filed a grievance with the Union, which was denied at the second level by the College vice-president of human resources on February 18, 1997. In the denial the vice-president noted that Lind had not previously taught sociology for the College, and that the transcript that he reviewed indicated that she had not taken sociology in college. The grievance was appealed to level three, the

executive vice-president, and after three meetings she denied the grievance in a communication dated May 8, 1997. The decision stated that Lind was not qualified to teach Sociology 251 because of her lack of study in sociology. The executive vice-president had reviewed Lind's transcripts, and she determined that the only sociology course Lind had taken as a student was an introductory anthropology course, which was then part of the sociology discipline. This decision noted that Lind's work experience had been in psychology, and that there was no reference to specific past practices or policies of the College.

The Union put the past experience and background of Lind into evidence, along with her arguments that she was qualified to teach the sociology telecourse with the preparation expected of any newly assigned course. Lind, for example, had on her own developed a course on death and dying, which is, at the very least, related to the field of sociology. Lind had attended in 1969 and 1970 Grand Rapids Junior College, the predecessor to the Employer, and at that time she had taken two introductory sociology courses. These courses had been overlooked by the Employer in processing the grievance, but the College maintained at the hearing that the existence of such courses would not have affected its decision on offering the telecourse to Lind. The College conceded that Lind is an excellent psychology teacher, but it did not waver from its decision that she was not qualified under the contract to teach the sociology course in question.

Discussion and Conclusions:

Without in any way disparaging the experience, background, and abilities of Lind as a teacher in the Employer's school of social science and humanities, there is simply no evidence in this case that the Employer changed anything, contract or otherwise, when it denied her the right to teach the sociology telecourse. The imposed contract invests the College administration with broad discretion in determining who are "qualified personnel" for teaching assignments. There is no hard evidence that in making the decision not to give Lind the sociology course, the College ignored the contractual criteria, which include "teaching experience" and "academic achievement," or that it violated any established past practice. Lind did not have teaching experience or an academic background in sociology, and the record does not establish that the decision of the College was unreasonable, arbitrary, or intended to punish Lind in any way. The Union's reliance on the grievance chair's assignment of a political science course to support its position is not factually similar to Lind's situation and is insufficient to dictate a different outcome. The record does not establish that Lind was held to a more rigid standard before receiving overload assignments outside of her normal teaching area than other teachers in the bargaining unit.

What is evident in this case is not an argument over whether contract criteria for teaching assignments has been changed, but a dispute over the application of those criteria to a particular assignment. A somewhat similar situation was presented to the undersigned in *St. Clair Probate Court (Children's Shelter)*, 1991 MERC Lab Op 24, 29-30, which involved an employer's decision that one employee was more qualified for a promotion than another. The undersigned found no unilateral change in a *Plymouth-Canton* situation, holding that the employer had not ignored the contract terms in reaching its decision on whom to promote, and that to constitute a violation of

PERA "there must be something more than a good faith disagreement over the application of the contract or the employer's exercise of its judgement in fulfilling the contract terms." In the instant case, the exercise of judgement by the College relative to Lind's qualifications cannot constitute a unilateral change in a working condition in violation of its bargaining obligation without clear evidence that the Employer was attempting to circumvent the status quo represented by the expired contract and/or established past practice. No such evidence was presented in this case.

Accordingly, based upon the above findings and conclusions, I recommend that the Commission issue the following order:

ORDER DISMISSING CHARGE

Based upon the findings of fact and conclusions of law set forth above, the unfair labor practice charge filed in this matter is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

James P. Kurtz,
Administrative Law Judge

Dated: _____