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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Public Employer-Respondent,

-and-

MERC Case No. C18 F-054

UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.

_____/

APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by Gloria A. Hage, for the Respondent

Soldon McCoy LLC, by Kyle A. McCoy, for the Charging Party

DECISION AND ORDER

On June 12, 2019, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: AUG 12 2019

[1] MOAHR Hearing Docket No. 18-013247

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STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Public Employer-Respondent,

Case No. C18 F-054
Docket Number. 18-013247-MERC

-and-

UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.

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APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by Gloria A. Hage, for the Respondent

Soldon McCoy LLC, by Kyle A. McCoy, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On June 8, 2018, the University of Michigan House Officers Association (Charging Party or Association) filed the present unfair labor practice charge against the University of Michigan Health System (Respondent or UMHS). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the above captioned case was assigned to Administrative Law Judge Travis Calderwood, of the Michigan Office of Administrative Hearings and Rules, formerly the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). Based upon the entire record, including the transcript of hearing held on October 26, 2018, the exhibits admitted into the record, and post hearing briefs filed by the parties on December 21, 2018, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charge and Background:

Charging Party alleges that the Respondent violated Sections 10(1)(a), (c) and (e) of PERA, in connection with its decision to no longer allow the Association to present at a new-hire orientation, its rescission of the Association's Executive Director's access to University intranet and email, its stated intent to modify the Family Medicine Program's holiday break period, and removal of positions that had been part of the Association's bargaining unit.

On October 1, 2018, Respondent filed a Motion for Summary Disposition in which it argues that Charging Party's allegations are covered by the parties' collective bargaining agreement and therefore more properly before an arbitrator as opposed to the Commission. The Association filed its response to the motion on October 9, 2018. In an interim order, dated October 11, 2018, I denied the motion.

These same parties have been involved in prior unfair labor practice proceedings before the undersigned relevant to the present dispute. In Case Nos. C16 D-038 and UC16 D-007, the Association sought to accrete a group of residents who were participating in unaccredited training programs together with unfair labor practice allegations surrounding the Respondent's refusal to agree to the accretion. In a Decision and Recommended Order issued on December 7, 2017, and adopted by the Commission on March 1, 2018, when no exceptions were filed, I determined that the residents participating in the unaccredited training programs had been historically excluded from the unit and that accretion through a unit clarification proceeding was inappropriate. The accompanying unfair labor practice charge was similarly dismissed. See *Univ of Mich Health System*, 31 MPER 46 (2018) (no exceptions) (hereinafter *Univ of Mich Health System I*). In Case No. C17 I-077 the Association alleged that UMHS Associate Dean for Graduate Medical Education, J. Sybil Biermann had violated the Act on June 19, 2017, when she interrupted a presentation being given by an Association representative to new unit members during an orientation for incoming medical residents and told them that regardless of their membership status with the Association, they would receive all the benefits of the parties' collective bargaining agreement. In a Decision and Recommended Order, issued on December 6, 2018, adopted by the Commission, on February 19, 2019, where no exceptions were filed, I found that Biermann did in fact violate PERA and issued a cease and desist order. See *Univ of Mich Health System*, 32 MPER 43 (2019) (no exceptions) (hereinafter *Univ of Mich Health System II*).

Findings of Fact:

General Background[1]

The UMHS is a division of the University of Michigan (University) and includes the University's Medical School, its various hospitals, medical centers, and clinics, its Faculty Group Practice, and other departments and entities. The UMHS's department of Graduate Medical Education (GME) operates, oversees, manages, and handles the Medical School's residency program. Residents are recently graduated medical doctors who have been accepted to the University's residency program. The purpose of the residency program is to provide proper training and education to allow Residents to eventually become independent practicing doctors. All participants in the residency program are members of the Association's bargaining unit and are called House Officers.

Dr. J. Sybil Biermann oversees the GME and serves as the department's Director and Associate Dean. Michelle Sullivan is the UMHS's Director of Labor Relations and oversees Respondent's Labor Relations portion of its Human Resources Department.

[1] The following factual background describing the structure of the UMHS and its residency program is summarized from both the record as developed in the present matter and also from *Univ of Mich Health System I* and *Univ of Mich Health System II*.

At the time of hearing, the Association had two full-time employees, Robin Tarter, its Executive Director and her assistant, Christine Hollis. Tarter has occupied her position since January of 2012 while Hollis was recently hired in September of 2018. Neither Tarter nor Hollis are doctors or considered employees of the Respondent or the University.

The parties are signatories to a collective bargaining agreement effective from July 1, 2017, through June 30, 2020. Article I of that agreement, entitled "Description of Bargained - For Unit" provides the following numbered paragraphs:

> 2. The employer recognizes the Association as the sole and exclusive bargaining representative for the purposes of collective bargaining in respect to wages, hours, and other conditions of employment for all employees in the following bargaining unit: All House Officers employed by the Regents of The University of Michigan possessing the equivalent of a minimum of an M.D., D.O., or D.D.S. degree, excluding pharmacy interns, dietetic interns, physical and occupational therapy trainees, nurse anesthetist trainees, chaplaincy interns, and all other employees.
>
> 3. A House Officer shall be a physician or dentist who is in a recognized training program and whose normal duties, under the direction of either the attending, courtesy, and/or honorary staff, are to admit patients to the hospital, diagnose or treat patients, and assume all the functions and responsibilities of the House Officer staff, including, when appropriate, emergency case service and consultation assignments. House Officers, collectively, shall be known as the House Officer Staff.

Article XIX of the parties' contract sets forth the agreed upon grievance procedure which culminates in binding arbitration. Section A of that article, entitled Definition of Grievance, provides:

> A grievance is a disagreement, arising under and during the term of this Agreement, between either (1) the employer and any employee concerning (a) his/her employment and (b) the interpretation or application of the provisions of this Agreement or (2) the Association and the employer concerning the interpretation and application of this Agreement on a question which is not an employee grievance or which concerns more than one employee, and involves a common fact situation and the same provision(s) of the Agreement.

Article XXXIV of that agreement, entitled Orientation for House Officers, provides in the relevant part the following:

> The Employer will provide an orientation for new House Officers at the beginning of employment. A representative of the House Officers Association will be provided the opportunity to make a presentation.

Orientation

As indicated above, the Parties appeared before the undersigned in a prior unfair labor practice proceeding involving issues surrounding the Association's presentation at the GME's orientation for new program participants. See *Univ of Mich Health System II.* In that case it was established that, for the entirety of Tarter's tenure as the Association's Executive Director, the Association has presented as part of the orientation. The parties, during the hearing for *Univ of Mich Health System I,* both agreed that Association's allotted time for their presentation in the orientation was fifteen (15) minutes. The record in the present matter indicates that at least for 2017, there were two orientations, one on June 19, 2017, and the second on July 3, 2017.[2] Tarter testified that for both orientations the Association presented for fifteen (15) minutes.

Dr. Elias Taxakis, a year five radiology resident and the Association's President, testified that during the negotiations over the parties' current collective bargaining agreement, the Association sought to increase its allotted time of fifteen minutes during the in-person orientation to thirty minutes. Tarter, when asked why the Association sought to increase its presentation time, stated:

> To address the right to work issue. It was our first contract to negotiate under right to work. And we wanted to make sure that not only did we, you know, explain the nuances of a union, that we put our, you know dues, answer questions, take care of all those union housekeeping details.

Despite the Association's efforts, the Respondent did not agree to increase the time. Moreover, there is no indication within the record that the language of Article XXXIV changed at all. Both Taxakis and Tarter both testified, unchallenged, that the Respondent did not at any point during the negotiations over the Association's presentation time indicate that it would soon transition to a wholly online orientation format.

On July 10, 2017, the Association filed a grievance with respect to the July 3, 2017, orientation. That grievance proceeded to arbitration where, on July 20, 2018, the arbitrator issued a decision denying the grievance. According to that decision, the subject of the grievance involved seven new House Officers who were instructed to leave the July 3, 2017, orientation early and therefore missed the Association's presentation. The Association requested as the remedy that the Respondent be required to conduct a makeup for the seven House Officers. It was established during the arbitration that the House Officers who left the orientation had done so at the direction of their individual program heads and that the GME did not approve their leaving early. Moreover, Respondent provided the seven House Officers with the Association's written materials and had notified individual programs that excusal of the House Officers was not to be repeated in the future. It was also established during that case that when House Officers missed orientation for one reason or another the UMHS would not conduct make-up orientations and would instead simply provide the relevant written materials. The Arbitrator in considering the grievance wrote:

[2] As previously stated, the incident giving rise to the unfair labor practice charge finding in *Univ of Mich Health System I,* occurred at the June 19, 2017, orientation.

> As indicated, the Union's grievance in this case was initiated because seven new House Officers had been allowed by the Employer to leave the July 2017 orientation early which meant that they missed [the Association's] presentation which was towards the end of the session. This clearly constituted a violation of Article XXXIV of the Agreement which again provides that [the Association] is to be provided with the opportunity to make an oral presentation before new House Officers.

The Arbitrator, after considering the steps taken by the Respondent in remedying the issue together with the fact that make-up orientations were never provided in the past for House Officers that might have missed the orientation, wrote:

> Therefore although it was improper and a violation of Article XXXIV for seven new House Officers to be excused early from the orientation on July 3, 2017, this arbitrator must find that under the circumstances presented the subsequent actions taken by the University provided a reasonable remedy for the contract violation which occur.

Sometime in April, Tarter spoke with Sullivan by telephone where the Director of Labor Relations informed Tarter that the UMHS would be "getting rid of" the in-person orientation and that the Association would be working with Ellen Grachek, a labor relations specialist, in order to make a video. Moreover, according to Tarter, she was informed during this call that the incoming House Officers would not be provided with printed materials, including but not limited to the Association's dues authorization form, as they had been in the past. A video was eventually made and included in the online only orientation.

While the statements made by Tarter and Taxakis that the UMHS did not indicate in any way during negotiations for the current contract that the UMHS would be moving to an online only orientation were not challenged by the Respondent, Shiela Julin, an accreditation specialist with the GME, and who has several responsibilities relating to the orientation, testified that there were discussions within the GME or the UMHS since as far back as 2013 on switching to an online orientation. Julin, who has held her current position since January 2012, has also been the coordinator for the orientation that entire time. On September 30, 2014, Julin sent an email to various individuals regarding the upcoming 2015, House Officers orientation. That email, in part stated the following:

> In anticipation of budgetary constraints, MiChart training needs for incoming House Officer's [sic], and other factors, it is necessary to make changes to the GME Orientation Speaker Day typically held in the Dow Auditorium each year. Institutions across the country have moved to an orientation information module for the 2015 year. The GME office is prepared to coordinate the creation of short video presentations, 5-10 minutes in duration, for House Officers to review and be quizzed on prior to meeting you on Orientation Speaker Day.

Tarter and Julin shared several emails back in forth in direct response to the above message discussing scheduling and other ancillary issues related to recording a video. The record does not

indicate that the videos were ever recorded or presented to House Officers at the time. Tarter, when discussing her understanding at the time of the videos, testified the videos were "supposed to a supplemental." Moreover, there was no testimony provided at hearing that indicated that the above videos were intended to replace the orientation completely.

Sometime in or around May of 2017 a task force was created, the purpose of which according to Julin was to "have our stakeholders give us their opinion on different options for orientation events." That task force met for the first time on May 22, 2017, then again on July 17, 2018, and August 28, 2017. Julin testified that she believed the Respondent "sent out a call for volunteers" to participate on the task force. Julin claimed that second-year House Officer and unit member Dr. Natassia Sylvestre attended the task force meetings.[3] Julin could not recall whether Tarter or any member of the Association's executive board were invited to the task force. Additionally, there was no testimony provided to indicate that the Respondent took any step to actively notify the Association of the task force. Moreover, there was no testimony as to what the task force discussed. Julin, during cross-examination, did however admit that at no point during the Respondent's discussions over the transition did the subject of the House Officer's contract come up.

Unit Placement of Jessica Billig

The National Clinician Scholars Program (NCSP) is a two-year research program which enable Houses Officers to achieve an advanced degree upon completion independent of the UMHS House Officer Program. Respondent's website for the NCSP describes the program as follows:

> The [NCSP] aims to offer unparalleled training for clinicians as change agents driving policy-relevant research and partnerships to improve health and healthcare. Growing out of the Robert Wood Johnson foundation (RWJF) Clinical Scholars program, an independent consortium of community, health system, policy and academic partners have come together to offer this important two-year, site based training program.

At the time of the hearing Respondent had four individuals participating in the NCSP, including Dr. Jessica Billig, a fifth-year plastic surgery resident and Dr. Ana DeRoo, also a plastic surgery resident, along with two others.[4] The record indicates that the NCSP is a separate and distinct program from that of the UMHS's residency program and that House Officers could complete their residency without participating in the program. According to testimony, participants of the NCSP can be sponsored by an internal University program or by an external third-party entity and further that the program itself is not exclusive to UMHS residents only. Both Billig and DeRoo, who were initially appointed to their positions within the NCSP on or around July 1, 2018, maintain a physical presence on the Respondent's campus. DeRoo was placed in a program sponsored by a University department while Billig's placement was sponsored by the

[3] Sylvestre was not called to testify and the record is devoid of any indication whether she might have attended the task force meetings on behalf of the Association.

[4] Charging Party had originally challenged the Respondent's decision to remove Billig and DeRoo; however at the hearing the Association withdrew its charge as it related DeRoo because the Respondent had previously agreed to return her to the Association's bargaining unit.

Veteran's Administration (VA). Billig receives a stipend and other benefits, including health insurance from the VA directly; the record is not clear how or from where DeRoo's stipend or benefits are paid, but it is apparent it is not from the VA.

GME Administrative Manager Christine Rupkey testified that sometime in 2014, 2015, or 2016, the program at issue, and as described above on Respondent's website, was called the Robert Wood Johnson Foundation Clinical Scholars Program (RWJF Program). It appears that the funding model changed when the RWJF Program was transitioned into the current NCSP. After the transition, according to Rupkey, a House Officer was set to begin their participation in the NCSP and a request was made that they remain a member of the Association as a House Officer; that request was granted.[5] Rupkey testified that a question arose whether DeRoo and Billig should remain House Officers following their appointment to the NCSP. Because of that question, Rupkey claims she researched how the Respondent had treated past House Officers who participated in either the RWJF Program and/or the NCSP. According to Rupkey's research, excluding DeRoo and Billing, the Respondent has had six participants in either program since 2008. From 2008 to 2010, Dr. Nick Osborne, a Vascular Surgery Resident, who was also a Clinical Lecturer was removed from the Unit while in that position. From 2009 to 2011, Dr. Kerianne Holman, a General Surgery Resident, took a position as a Research Fellow and was removed from the unit while in the program. From 2010 to 2012, Dr. Erika Sears, a Plastic Surgery Resident, also took a position as a Research Fellow and was removed from the unit. From 2011 to 2013, Dr. Aliu Oluseyi, a Plastic Surgery Resident, took a position as a Research Fellow and was removed from the unit. Osborne, Holman, Sears and Oluseyi were all returned to the unit on July 1 of the respective year they left the program. From 2016 to 2018, Dr. Sarah Shubeck, a General Surgery Resident, participated in the NCSP but an exception was made for her to remain in the unit because her placement was with Respondent and not an outside and/or third-party entity. From 2017 through the time of the hearing, Dr. Calista Harbaugh, also a General Surgery Resident, remained in the unit while participating in the NCSP apparently because she was not awarded a NCSP stipend and instead received funding from the Respondent's Department of Surgery.

As stated above, a question arose regarding whether DeRoo and Billig would remain in the unit during the time that they were participating in the NCSP but not working towards their respective residency requirements.[6] DeRoo, as already indicated, was placed within the Respondent as part of her NCSP position and as such was allowed to remain in the unit. Because Billig was placed with the VA and would be receiving her stipend and benefits from the VA and not the Respondent, Billig and/or the UMHS sought the opinion of the VA on the appropriateness of her remaining in the unit. By email, dated July 11, 2018, a Deputy Ethics Official/Staff Attorney stated that, in the opinion of the VA, were Billig permitted to remain in the unit and receive payments from the University equal to the difference between the VA stipend and what she would have been paid under the parties' contract, such payments would constitute a "gift from a prohibited source" and therefore in violation of federal law. See 5 CFR §2635.201. According to

[5] Although not entirely clear through witness testimony or through the parties' post hearing briefs, it appears, that during the times that residents were participating in the RWJF program they were removed from the Associations bargaining unit and were possibly placed on leaves of absence from the Respondent's residency program.

[6] One of the practical effects of allowing a participant to remain in the unit while in the NCSP is it would allow the Respondent to make up whatever shortfall would occur with respect to the NCSP's stipend and what the parties' contract required that House Officer to be paid.

Respondent's witnesses, this opinion was the direct cause of Billig's removal from the unit.

Entered into the record by the Charging Party was a Settlement Agreement between the parties executed in June of 2013. According to that agreement and emails also admitted relevant thereto, there was a dispute in 2013 regarding the status of certain surgery residents who were participating in a research-year not required for program accreditation. The University was classifying those residents as Advanced Post Graduate Trainees and removing them from the Association's bargaining agreement. The parties, through the Settlement Agreement, agreed that the Association's bargaining unit would include:

a. Individuals in general surgery or any of the other surgical training programs who are engaged in research or other academic development activities are included in the unit during such time, even if this research or other academic development activity (e.g. pursuit of a degree) is not necessary for Board eligibility.

b. Individuals who opt to extend their research time during their residency/fellowship training program are included in the unit during such extended research time.

Rescission of Email and Intranet/Internet Access

As stated above, Tarter has been the Association's Executive Director since 2012. She has never been employed by the Respondent or the University in any fashion. For the entirety of her employment with the Association, Tarter has maintained an office in the House Officers lounge located on the second floor of the University of Michigan Hospital (Hospital). Tarter, when describing the lounge, stated it was more of a "clinical workspace" than a traditional lounge and/or relaxation area. Tarter, when asked why it was important for the Association and its members that she maintain an on-site office, explained:

> Because they work so many hours. And it would be impossible for them to get excused from their duties to come over to talk to me. It's very difficult for them. Schedules are very tight. They can't just not show up or leave or say, I'm going to, you know, Robin Tarter's office. It just doesn't work that way. I need a convenient space for them. And this is a convenient space, more or less.

In addition to maintaining the onsite office space at the University's hospital, Tarter, until April of 2018, had enjoyed University granted intranet access and a "med.umich.edu" email address and email access.[7] As part of the intranet access, Tarter was able to access the internet, internal policies relevant to the House Officers, and the printers physically located within the House Officers' lounge.

During the same phone conversation with Sullivan in April of 2018 regarding the UMHS's

[7] According to testimony provided by a former University employee and current Information Technology Contractor Steven Smith, the Respondent, through the University, maintains two levels of access with respect to its internal intranet and email servers. Smith described Level 1 access as having a general University logon, while Level 2, with respect to the UMHS, would grant the user access to the UMHS email servers, provide a "med.umich.edu" email address, as well as access to the UMHS internal intranet sites.

decision to move to an online orientation, Sullivan also communicated to Tarter that she would soon be losing her email and intranet access. The record does not establish what, if any reason, Sullivan may have provided Tarter during that call as to why her access was being revoked. A follow-up letter was sent by Sullivan to Tarter by email on April 20, 2018. That letter was signed by Sullivan and Tony Denton, the UMHS's Senior Vice President and Chief Operating Officer, and read, in the relevant part, the following:

> Michigan Medicine will no longer support your use of a University of Michigan Login ID and passwords or your use of an internal "med.umich.edu" email account. We appreciate your understanding that these privileges and access are reserved for Michigan Medicine employees. We understand that you will need to continue to communicate with house officers in the bargaining unit at the same level you currently do and that it may take some time to transition the information currently housed on UM servers in order to facilitate this. Please let us know how much time you will need to allow an orderly transition, although we would expect it to occur no later than May 11, 2018.

Tarter, at the hearing, described several consequences that resulted directly from her loss of intranet and email access. Foremost for the Executive Director was the difficulty she now faced when attempting to communicate with the over 1200 House Officers in the unit. According to witness testimony, Tarter must now email unit members in batches of 100 from an outside email address; previously Tarter was able to batch email the entire House Officer unit. Moreover, now that her emails are coming from an external address, each email she sends to the House Officers at their respective umich.edu addresses begins with a warning message in the following format, "**CAUTION:** This email originated outside the University [-] DO NOT click links or open attachments if the sender is unknown to you." [emphasis in original].

An additional consequence of losing intranet access is that Tarter must now attempt to utilize the UMHS's public Wi-Fi where previously she was able to access the internet directly through the Hospital's ethernet system. According to both Tarter and Smith, the Wi-Fi access is both unsecure and unstable. Moreover, Tarter is no longer able to directly access certain policies or other documents that are relevant to the unit and instead must make information requests. According to Tarter, the Respondent's response to these requests is that she should get the information from a unit member. As an example, Grachek, in an email sent to Tarter on October 8, 2018, in response to an earlier request for information, wrote, "As you know, all HOA members, and in particular the HOA Executive Board, have access to the job description information you've requested, which indicates the HOA is already in possession of the information you seek."

During the hearing Tarter, when asked whether she would consider using a unit member's email address or intranet access, stated that doing so would be "absolutely inappropriate" and further offered an opinion that such an action could violate one or more of the University's policies. Tarter further testified that when House Officers are present at the hospital they are supposed to be working. Tarter did admit during cross-examination that she had never sought Respondent's interpretation as it related to the policies she thought may be violated were she to utilize a unit member's intranet and/or email access.

According to Sullivan, Level 2 access, which Tarter enjoyed prior to April of 2018, is reserved for employees of the University and certain sponsored affiliates of the University which are typically vendors or companies that perform services for the UMHS. Sullivan testified that she believed there was an application and approval process for sponsored affiliates that is overseen by Respondent's Office of Compliance. Sullivan claimed that the University is no longer allowing non-vendors sponsored affiliate access to its intranet and email servers. Sullivan revealed that she had just recently received a request from John Caribbean, the Executive Director for the Michigan Nurses Association (MNA), a bargaining representative for unit(s) at the University, for sponsored affiliate access; that request was denied.[8] Sullivan testified that if a vendor abused its sponsored affiliate access the UMHS could revoke their access.

As an apparent impetus to Tarter losing her Level 2 access, Sullivan described an incident that occurred on March 29, 2018. On that date a House Officer, Jordan Talia, was seeking to view and/or copy his personnel file and had apparently had an agreement with his direct supervisor to do so. However, that supervisor was unavailable to grant access to the file which was located in a locked cabinet. According to Tarter's testimony, Talia was upset that he could not access his file at that time and sent an email to Biermann, herself, and others explaining that he was supposed to have access to the file. Tarter claimed several emails and phone calls were exchanged between various individuals during which it appears comments or a comment was made about breaking locks. One email response written by Tarter, taken from the email chain described by Tarter and introduced into the record by the Respondent, stated, "I've added Tim Sarver, our head locksmith, on to this email in hopes that he has some success in opening the file cabinet." Sullivan testified that she was approached by the locksmith regarding the above incident and instructed him not to open the cabinet. There is no indication that the Respondent ever took any steps to notify Tarter that it took objection to Tarter's email prior to revoking her access. Moreover, as stated above, there was no testimony that during the phone call with Sullivan that the same was communicated and the letter following up that call did not make mention of that incident either.

Family Medicine Holiday Block Scheduling

Article III, Section C, of the parties' contract sets forth the applicable provisions of the contract governing holidays and holiday pay for House Officers. Paragraph 20 of that section identifies ten specific holiday days. Paragraph 22 provides that, "[t]o the extent practicable" the Respondent would try not to schedule House Officers to duties on holiday days. Moreover, under that paragraph the Employer is to also "make every effort to honor the requests for the religious requirements by House Officers for observances of religious holidays."[9]

Paragraph 23 requires that if a House Officer is scheduled duties on one of the ten identified holidays set forth in Paragraph 20, that House Officer is entitled to an additional 1/365th of their respective annual salary as further compensation regardless of the number of hours actually worked on one of the enumerated holidays.

Paragraph 25 provides a mechanism by which House Officers can switch up to two

[8] There was no indication in the record that the MNA had at any time in the past sponsored affiliate access.

[9] Presumably this clause is referring to those House Officers who celebrate religious holidays other than those set forth in Paragraph 20, i.e., Hanukkah, Ramadan, etc.,.

different days to be counted as holidays. That paragraph provides in the relevant part:

> Any House Officer may substitute up to two (2) alternative days of his/her choice for any of the previously defined House Officer holidays within any twelve (12) month appointment period ... That House Officer will be eligible for holiday pay if he/she has any assigned responsibilities by their training program on those agreed-upon substitute days.

While not presented very clearly by either party at the hearing or in their post hearing briefs, a practical effect of Paragraph 25, when read in context with the other paragraphs referenced above, appears to be that a House Officer could choose to substitute an enumerated holiday, like Thanksgiving day, for another day of their choosing, possibly although not required to be a religious holiday, that particular House Officer might observe but is not an enumerated holiday, such as the first day of Ramadan. In that situation, it appears the Respondent would attempt to not schedule the House Officer for the first day of Ramadan but would instead treat Thanksgiving Day as a regularly scheduled day. If that House Officer were to work on Thanksgiving Day they would not receive the additional compensation required under Paragraph 23 but would receive the same if they worked the first day of Ramadan.

At the time of hearing the Family Medicine Department, a three-year program, had 13 first-year residents, 11 second-year residents, and 13 third-year residents, all House Officers. The Department had been headed for the past five years by Dr. Margaret Dobson. According to Dobson, her two primary responsibilities as the head of the Department was to first maintain the educational clinical environment and second, to ensure the program was lining up/complying with national accreditation requirements. Dobson recounted that as part of her approach to the Department and the program, she was focusing a lot on resident wellness. To that, she admitted that resident wellness included having residents and doctors take sufficient time off and offering self-care half-days.

Dobson testified that the national accreditation board overseeing her program required thirty-six (36) months of training. Included within that time is a mandatory two years of uninterrupted time in a continuity clinic. Moreover, the board allows residents one month of vacation during their program, which is defined as either twenty-one (21) workdays off or a total of thirty (30) days.

According to Dobson, there exists a culture within the various clinical departments, including her own, where the department would try to give residents a "chunk of time" off during the Christmas and New Year's holiday time. In the Family Medicine Department, the practice for some time had been to build a six-day block by allowing residents to substitute up to two additional days off in lieu of holiday. To do this, the Department would apparently provide additional days off in exchange for a House Officer agreeing to forgo the additional holiday pay compensation if they were scheduled duties on an enumerated holiday. According to Dobson, if the accreditation board overseeing her department ever attempted to make an issue of these extra days off in relation to maximum days off allowed under the program, she believed she could rely on the fact that she thought she was following the collective bargaining agreement.

In a grievance filed on January 19, 2018, the Association challenged the Family Medicine Department's policy of withholding holiday pay from certain House Officers. The Employer denied the grievance on timeliness grounds. Despite this denial of the grievance, everyone involved agreed that the Department's policy did in fact violate or was otherwise inconsistent with the terms of the parties' contract. Presumably because of this the Employer did agree to make whole those House Officer who did not receive holiday pay despite working on an enumerated holiday in 2016 and 2017. According to Tarter, in the December preceding the grievance filing, she had a conversation with Deborah Wright, the Department's program coordinator. Tarter testified that Wright told her that, "if they file a grievance and they want to get paid for working holidays, then we're just going to take one of those holiday days away." Wright did not testify.

Following the realization that the holiday block scheduling done by the Family Medicine Department had been based on an incorrect interpretation of the contract, Dobson was now faced with what the effect would be going forward and how to proceed with what the program was required to maintain per the accreditation board as opposed to the six-day holiday block which she had wanted to maintain. In an email sent to members of the Department on March 23, 2018, Dobson wrote:

> We are going to readjust the holiday block for our residents to 5 dedicated days off (not vacation, just scheduled days off) which will line up with the departmental holiday-days, to more closely align ourselves with other institutional residency peers.

That email went on to list the holiday blocks, four and five days respectively, for two other residency programs.

Dr. Liz Marshal, a resident in the Family Medicine Department, responded to Dobson's email describing how the Family Medicine Department holiday block would be reduced from six-days to five-days the next morning, and wrote in part:

> I am significantly disappointed in in this news. When I first began to discuss holiday pay and my concerns with Robin [Tarter], I was nervous and did not want to rock the boat in anyway because of this exact reason – changing the holiday block that residents love and value. Robin assured me that [the] holiday block wouldn't necessarily have to change and that a change in the holiday block could be perceived as retaliation for utilizing our union to settle a longstanding misunderstanding in the holiday pay system.

Marshal's email went on to ask Dobson to "clarify further... why the number of days in [the] holiday block must change?" Dobson's response stated in the relevant part:

> Holiday [Block] is not linked to holiday pay in the contract. Now that I understand this I'm working to align us with institutional norms to keep us in line with our accreditation body...

Dobson did reveal that while her email indicated that the upcoming holiday block for the

Department would only be five days, due to a change in the curriculum, she had been able to maintain the six-day holiday block for 2018. She was unsure whether she would be able to maintain that same block going forward.

Discussion and Conclusions of Law:

The Association maintains that the Respondent's actions, as identified above, violated Sections 10(1)(a), (c), and/or (e) of PERA.

Section 10(1)(a) of PERA makes it unlawful for a "public employer or an officer or agent of a public employer" to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed" by PERA. It is well established that a determination of whether an employer's conduct violates Section 10(1)(a) is not based on either the employer's motive for the proscribed conduct or the employee's subjective reactions thereto. *City of Greenville,* 2001 MERC Lab Op 55, 58. While anti-union animus is not a required element to sustain a charge based on a Section 10(1)(a) violation, a party must still demonstrate that the complained of actions by an employer have "objectively" interfered with that party's exercise of protected concerted activity. *Macomb Academy,* 25 MPER 56 (2012). The test is whether a reasonable employee would interpret the statement as an express or implied threat. *Id.;* See also *Eaton Co Tramp Auth,* 21 MPER 35 (2008). In order to determine what actions violate Section 10(1)(a) of PERA, in so far as they can be seen to restrain or coerce a public employee in the exercise of his or her rights under the Act, it is necessary to consider the actual actions in the context in which they occurred. See *City of Ferndale,* 1998 MERC Lab Op 274, 277; *New Haven Community Schools,* 1990 MERC Lab Op 167, 179. Furthermore, it is the chilling effect of a threat and not its subjective intent which PERA was created to reach. *University of Michigan,* 1990 MERC Lab Op 272.

In order to establish a prima facie case of discrimination under Section 10(1)(c) of the Act, a charging party must show, in addition to an adverse employment action: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Interurban Transit Partnership,* 31 MPER 10 (2017). The aforementioned analysis was first enunciated by the National Labor Relations Board (NLRB) in *Wright Line, A Division of Wright Line, Inc, 251 NLRB 1083 (1980),* enf'd 662 F2d 899 (CA 1, 1981) and approved by the United States Supreme Court in *NLRB v Transportation Management Corp,* 462 US 393 (1983). Under the *Wright Line* test, later adopted under PERA in *MESPA v Evart Pub Sch,* 125 Mich App 71, 74 (1983), it is only after a prima facie case has been established that the burden of proof shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. However, while the ultimate burden of proof remains with the charging party, the outcome usually turns on a weighing of the evidence as a whole. *Id.* at 74.

Inferences of animus and discriminatory motive may be drawn from competent circumstantial evidence, including, but not limited to, the timing of the adverse employment action in relation to the protected activity, indications that the respondent gave false or pretextual reasons for its actions, and the commitment of other unfair labor practices by the employer during the same period of time. *Keego Harbor,* 28 MPER 42 (2014). Although anti-union animus may be proven

by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Moreover, it is well established that suspicious timing, in and of itself, is insufficient to establish that an adverse employment action was the result of anti-union animus. See *Southfield Pub Sch*, 22 MPER 26 (2009) (A temporal relationship, standing alone, does not prove a causal relationship. There must be more than a coincidence in time between protected activity and adverse action for there to be a violation).

Under Section 15 of the PERA, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. *Detroit Police Officers Ass ' n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates Section 10(1)(e) of 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 Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996). 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* at 318. Bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375.

The above principles notwithstanding, our Commission has consistently held that it will not involve itself with purely contractual disputes or decide questions of mere contract interpretation. To that end, where the alleged unfair labor practice amounts to no more than an isolated breach of a contract and not a repudiation of the collective bargaining agreement, the charges will be dismissed. *C.S. Mott Community College*, 1982 MERC Lab Op 1478. The Commission has defined repudiation as an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501. An alleged breach of contract will be considered a repudiation when (1) the contract breach is substantial and has significant impact on the bargaining unit and, (2) no bona fide dispute exists over interpretation of that contract. See *Plymouth Canton Community School District*, 1984 MERC Lab Op 894.

Orientation

Charging Party maintains that the Respondent's switch to the wholly online orientation constituted a repudiation of the parties' contract and/or that it was in retaliation in response to the Association's prior unfair labor practice proceeding and arbitration involving the orientation.

Viewing the orientation dispute through the lens of a possible Section 10(1)(e) violation, it is clear to the undersigned that at the time the charge was filed the contract language was ambiguous as to what is required with respect to the orientation for new House Officers. The preceding notwithstanding, while the Respondent is correct that the arbitrator denied the Association's grievance, that denial was not a vindication and/or exoneration of the University's conduct: rather the arbitrator determined that while a contract violation did occur, the Respondent's subsequent actions amounted to a "reasonable remedy" for said violation. Additionally, as part of that decision, the arbitrator did state that Article XXXIV of the parties'

contract, "provides that the [the] HOA is to be provided with the opportunity to make an oral presentation before new House Officers." Accordingly, were the charge brought following the arbitrator's decision as to what the contract required with respect to the orientation and predicated upon a repudiation of the obligation established within that award, the outcome may have been different. However, under the circumstances and timing set forth herein, because the charge was filed at a time that the contract's language was ambiguous a finding of repudiation is inappropriate, and the proper venue would have been through grievance arbitration.

Clearly the parties are not strangers as it relates to disputes regarding the two annual, and long-standing, House Officer orientations sessions. As stated above, the Respondent, in Univ of Mich Health System II, supra, was found to have violated Section 10(1)(a) of the Act with respect to statements made by Bierman during the 2017 orientation. That matter was heard on March 19, 2018. In support of its claim of retaliation, Charging Party points to the close proximity in time between the first notice of the transition, mid to late April 2018, and its hearing before the undersigned in *Univ of Mich Health* on March 19, 2018, and the arbitration, filed on July 10, 2017, and heard on April 25, 2018. Both of these actions are protected activities under PERA.

The Respondent argues first that the Association has failed to establish either that the transition to the online orientation was in retaliation for the above actions and/or that the Respondent would not have undertaken the transition regardless of the protected activity. The Respondent claims in its post-hearing brief that, "[t]he wheels were in motion for the move to [an] on line [sic] orientation years before the April 2018 arbitration." Moreover, the Respondent points to Tarter's notification of the transition in 2014 as well as the inclusion of Sylvestre on the 2017 task force. Additionally, Respondent argues that the issue of the orientation is covered by the parties' contract, and as such any dispute regarding the same should proceed through the agreed upon grievance procedure.

Addressing the Respondent's argument that the transition was "in motion" for years, I note that while the Respondent did establish that the Association had been made aware in years past that a move to an online orientation might be occurring, there is no indication that such knowledge, delivered several years prior and not repeated, encompassed a complete transition such that the Association would no longer be able to address incoming House Officers in person. Moreover, while the Respondent did apparently impanel an orientation task force in 2017, there is no testimony as to what occurred during its three meetings in May, July and August of that year. Curiously, while Julin claimed the task force was formed so that the "stakeholders" could provide opinions regarding orientation events, the Association, presumably an important stakeholder, was not actively sought as a participant. [10] This lack of notice is even more concerning when considering that the parties had just engaged in contract negotiations in which the Charging Party had sought additional time and communicated the importance it placed on the orientation and that an unfair labor practice charge, *Univ of Mich Health System II*, regarding the orientation was filed during the period of time that the task force was meeting and had been filed following negotiations. Further compounding Respondent's actions is its apparent lack of consideration regarding what

[10] While Sylvestre did participate on the orientation task force, the record does not indicate that her participation was on behalf of the Association as opposed to as simply a GME resident. Moreover, I find it unreasonable for the Respondent to rely on her participation on the task force to act as any sort of advance notice regarding this transition, especially given the then on-going disputes between the parties regarding other aspects of the orientation.

impact, if any, a decision regarding the orientation could possibly have with respect to the parties' contract.[11] While I do note that the Association was permitted to make a video, that video was not of the same length by which the Association had been able to present in the past. Moreover, there can be no dispute that the medium by which a video conveys a message is by no means the same as one done in person. Lastly, the new online orientation precludes the hand-out of printed materials, which was something the Association had done in connection with their presentation. When the above is viewed in connection with the timing of the transition relative to the unfair labor practice charge and arbitration, both of which effectively find the Respondent in violation of some right or obligation relative to the orientation, it is my finding that the Association has met its burden in showing that the transition was based on anti-union animus.

Upon the above violation under Section 10(1)(c), the question remains what remedy is appropriate. I do not believe that an order requiring the Respondent to scrap its online orientation is appropriate and unlike the arbitrator, I do not find that the substitutes put in place by the Respondent are suitable to correct its unlawful actions. As such, it is my finding that an appropriate remedy would be to require the Respondent to provide the Association the opportunity to present in the same fashion as it had done so prior to the change to the online orientation. Whether this occurs as part of a larger orientation or a single purpose presentation or somewhere in between is better left to the parties to establish. I am mindful that the benefit the Association has enjoyed for several years is not a mandatory subject of bargaining which the parties have chosen to bargain over. As such, the right to present established herein is effective only through the term of the parties' current contract. Upon expiration of said contract the parties are free to address this situation through bargaining.

Unit Placement of Jessica Billig

In *Univ of Mich Health System I*, supra, I considered the Association's unit clarification petition seeking to add a group of residents who participated in unaccredited programs, i.e., unaccredited fellows, into the existing bargaining unit and wrote:

> The Employer claims, correctly, that the parties' contract provides a three-part test that must be satisfied for someone to be the HOA, i.e., (1) be a physician or dentist; (2) be in recognized training program; and, (3) act under the direction of an Attendant. Accordingly, should an individual fail to satisfy any one of the three elements, it stands that the parties, by contract, agreed to exclude them.

In denying the petition, I first focused on the what the term "recognized training program" meant, writing:

> While it is true that the parties' contract does not define what a "recognized training program" means, the record clearly establishes that the UMHS has long considered House Officers to be physicians within training programs accredited by the ACGME, ABOG, and CODA as evidenced by the various policies approved by

[11] As indicated above, Julin testified that at no point during the Respondent's discussions over the transition did the subject of the House Officer's contract come up.

different UMHS committees going as far back as 2004. The most recent iteration of this policy, Policy 04-06-049, was approved by the GMEC on January 29, 2013, and by the ECCA on February 12, 2013 - committees on which the HOA is mandated, by contract, to have a representative. Furthermore, testimony provided by Drs. Beirmann, Bradford and Wooliscroft reveals that distinction between accredited and unaccredited fellowship positions has been in place since at least 1992 and presumably even before that. I find, therefore, that there exists a clear practice, of which the HOA was aware, that defined "recognized training program" as only those training programs accredited by the ACGME, ABOG, and CODA. Accordingly, any individual in a training program not accredited by the ACGME, ABOG, and CODA, is not participating in a "recognized training program" under the parties' contract.

Moreover, further supporting the exclusion of the unaccredited fellows from the unit, I noted that the record clearly established that House Officers participating in accredited programs always acted "under the direction of an Attendant," meaning that everything they did as it related to patient care was "signed off" by a supervising doctor; unaccredited fellows practice independently.

Generally speaking, an employer may not alter bargaining unit placement unilaterally or after bargaining to impasse, but must either obtain the Association' s agreement to changes in bargaining unit composition or obtain an order from the Commission by filing an unfair labor practice charge or, if appropriate, a unit clarification petition. *City of Grand Rapids*; *Livonia Pub Schs*, 1996 MERC Lab Op 479; *Michigan State University*, 1993 MERC Lab Op 345. The present dispute, with respect to Billig however does not fall into the above stereotypical mold of a placement dispute as the Employer has not unilaterally removed those participants of the NCSP, and formerly the RWJF Program, as a matter of course but rather has appeared to make a good faith inquiry into the circumstances surrounding these appointments to determine whether the participants remain appropriate members of the Association's bargaining unit. The record establishes that a question was posed as it related to the placement of Billig and DeRoo following their appointment to the NCSP program and that the Employer undertook to investigate what had been done in the past when the program operated under different parameters. The record clearly indicates that neither Billig or DeRoo, in their NCSP positions, satisfy the test set forth above to be included in the House Officer unit in so far as neither is in a "recognized training program" nor do either operate "under the direction of an Attendant." The preceding failure of the position to fit into the unit notwithstanding, the Respondent chose to make an exception as it relates to DeRoo because DeRoo's placement was within the UMHS itself and not an outside entity. Even if I were to impugn the above anti-union animus onto this issue as well, the record clearly establishes that Billig's exclusion was predicated on her placement with the VA. As such, and in consideration of the totality of the circumstances, I find that Billig's exclusion from the unit while she participates in a program sponsored by an outside entity that does not meet the criteria to be designated as a House Officer to not violate the Act.[12]

[12] The Association also argued that under the terms of the parties' 2013 settlement agreement Billig should remain with the unit. However, that position is misplaced as the agreement is clear in that the two groups of residents it includes in the unit are engaging in extended research while either in the "general surgery or any other surgical training program" or "during their residency/fellowship training program" and Billig is participating in a VA sponsored position which is separate and distinct from her plastic surgery program.

Rescission of Email and Internet/Intranet Access

It is necessary to note through the onset that the Respondent is free to establish rules and policies governing its email and internet/intranet access. Similarly, it is within its right to restrict access to those items from use by non-employees. Generally, that would not become an issue under the Act absent claims that an employer's application of said rules and policies was not applied fairly to different bargaining representatives. As such, in a vacuum were Respondent to have made a decision not to grant access to these systems to Charging Party and was consistent as to the other unions, like the MNA, no PERA issue would arise. However, that is not what occurred as Respondent voluntarily provided Charging Party with that access and had done so for several years. Respondent suddenly, and seemingly without warning, took steps to unilaterally revoke that access. See *North Memorial Health Care,* 364 NLRB No 61 (2016) (An employer's unilateral denial or reduction of a union's ability to access unit employees for purposes of representation is a substantial and material change). Under that situation, it is appropriate for the Commission to consider whether that action was undertaken in violation of PERA. For the reasons set forth below, it is my finding that it did.

In terms of temporal proximity, similar to the communication regarding the orientation discussed above, the actions taken with respect to Tarter's email, internet, and intranet occurred very close in time to the hearing in *Univ of Mich Health System II* and on the eve of the arbitration hearing. Moreover, the initial communication regarding the change in access occurred during the same conversation between Sullivan and Tarter in which the Director indicated that the UMHS would be switching to a wholly online orientation program.

The Respondent did introduce testimony at the hearing that the impetus for the change in Tarter's access was a direct result of the incident on March 29, 2018, and argued in its post-hearing brief that "[u]nder no circumstances is asking a University locksmith to open a cabinet to which one does not otherwise have access considered protected activity." However, Charging Party does not maintain that Tarter's involvement in this situation is the protected activity for which it was retaliated against, rather the premise of this proceeding ties everything to the prior issues regarding the orientation. The preceding notwithstanding, there is no indication in the record that Sullivan, or anyone else representing the University, communicated any concern at that time to Tarter or later when Tarter was informed of the change through the phone call or follow-up letter. See *Frontier Hotel & Casino,* 323 NLRB 815, 817 (1997) (even where an employer accuses a union agent of misconduct, the employer is required to give the union notice and an opportunity to bargain before changing rules regarding the agent's access so that the parties can work together to arrive at a solution to the problem). Moreover, the Respondent's characterization that Tarter was somehow utilizing her University email address to portray authority is belied by the actual language of the email at issue and Tarter's testimony regarding her purpose of including the locksmith on the email chain. Considering the "after-the-fact" look of the proffered reason, together with the temporal proximity of the decision to restrict access and the above findings regarding the transition to the orientation, I find that the Charging Party has established a prima facie case of retaliation with respect to the recession of the Association's Executive Director's long-enjoyed intranet and email access. Moreover, it is my finding that the reason proffered by the Respondent as to why it took the action it did was pretextual.

The Respondent argues that Tarter has not been harmed or otherwise suffered any adverse effects following the rescission of her access and describes the situation in its post-hearing brief as, "[a]t its worse... a minor inconvenience and certainly not the type of adverse action that would meet." Moreover, according to the Respondent, Tarter could utilize the Unit's executive board, each of which enjoy the same level of access the Executive Director previously had, in order to send emails to the entire unit and to retrieve documents or policies relevant to the unit. Respondent points to how it had recently denied a request for level 2 access from individuals with the MNA. While presumably true that Tarter could utilize unit member's access, that fact does not obviate the reality of a situation where she, as the Association's Executive Director, had a level of access that was taken away in violation of the Act. Additionally, I do not find significant nor compelling that the MNA's request for access was denied as there is no indication that they ever enjoyed that level of access. Accordingly, it is in inappropriate to consider the two labor organizations similarly situated as it relates to intranet and email access.

Family Medicine Holiday Block Scheduling

The Association, in its post hearing brief, seemingly concedes that Dobson's expressed reason why she had initially announced that the Department's holiday block would be five days as opposed to the traditional six days, was predicated on oversight requirements and not as retaliation for the Association's grievance. Accordingly, the Association shifts its approach for a Section 10(1)(c) claim to that of a violation viewed under the lens of Section 10(1)(a), writing in its post-hearing brief:

> The [Association] has no reason to disbelieve Dr. Dobson, quite the contrary; however, it is the perception of unit members that matters, not some hidden albeit innocent, motivation.

The Association argues that Wright's statement to Tarter that if a grievance is filed the Department would lose a holiday day and the closeness in time of Dobson's announcement of the shortened holiday block violated Section 10(1)(a) of the Act. As further support of its position, the Association points to the email of unit member Marshal in which the House Officer makes statements alluding to the perception that the change was retaliatory. Summarizing its position, the Association, in its post-hearing brief, states:

> If the University had an innocent explanation all along, it would have been welcome much earlier... Alas it failed to explain itself temporally and instead caused unit members to believe in violation of the Act, that filing grievances would result in benefit forfeiture.

As stated above, a determination of whether an employer's actions violate Section 10(1)(a) is an objective test and not subjective to any one specific employee. Moreover, it is necessary to consider the totality of the circumstances surrounding the alleged threat. Here, the surrounding circumstances relevant to the Association's allegations involve a Department head's incorrect interpretation of a contract provision which had been relied upon in order to provide a longer holiday block despite that schedule's potential violation of the program's oversight requirements.

Upon the realization that the contract did not permit a longer holiday block and that it could no longer be used to justify the same should a conflict ever occur with the Department's oversight board, it is entirely reasonable and, in the opinion of the undersigned, an expected outcome that should not surprise any employee is that the Department might have to now abide by the contract. While the Association claims it was not made aware of the reasons for the initial, although unexecuted, change in the block schedule, I find that Dobson's emails clearly indicate said reasons; the first email stated that the new schedule was to "more closely align ourselves with other institutional peers" and the second email further clarifying the change as being necessary "to keep us in line with our accreditation body..."

Accordingly, it is my finding that a reasonable employee could expect that a practical effect of a grievance that challenges an employer's incorrect application of a contract provision would result in that contract provision being properly applied.

I have considered all other arguments of the parties and I conclude such does not warrant any change in the result. As such, and in accordance with reasons and conclusions stated above, I recommend that the Commission issue the following order:

Recommended Order

Respondent, the University of Michigan Health System, its officers and agents, are hereby ordered to:

1. Cease and desist from discriminating or retaliating against the University of Michigan House Officers Association regarding terms or other conditions of employment in order to encourage or discourage membership in a labor organization.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

    a. Provide the University of Michigan House Officers Association the opportunity to address incoming house officers in a manner consistent with prior years' orientation programs for the remaining term of the parties' collective bargaining agreement.

    b. Immediately restore internet, intranet and email access for the University of Michigan House Officers Association's Executive Director to the same level as existed previously.

3. Post the attached notice for a period of thirty (30) consecutive days, to employees in conspicuous places on Respondent's premises, including, but not limited to, all places where notices to employees represented by the University of Michigan House Officers Association, are normally posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Date: June 12, 2019

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION,** THE COMMISSION HAS FOUND THE **UNIVERSITY OF MICHIGAN HEALTH SYSTEM** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL provide the University of Michigan House Officers Association the opportunity to address incoming house officers in a manner consistent with prior years' orientation programs for the remaining term of the collective bargaining agreement.

WE WILL immediately restore internet, intranet and email access for the University of Michigan House Officers Association's Executive Director to the same level as existed previously.

WE WILL NOT discriminate or retaliate against the University of Michigan House Officers Association regarding terms or other conditions of employment in order to encourage or discourage membership in the labor organization.

UNIVERSITY OF MICHIGAN HEALTH SYSTEM

By: _____

Title: _____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

Case No. C18 F-054/Docket No. 18-013247-MERC