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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C18 K-105

-and-

EASTERN MICHIGAN UNIVERSITY,
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (EMU-AAUP),
Labor Organization-Charging Party.
_____/

APPEARANCES:

Butzel Long, by Craig S. Schwartz, for Respondent

Nacht & Roumel P.C., by Joseph X. Michaels, for Charging Party

DECISION AND ORDER

On July 15, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charge and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: SEP 12 2019

[1] MOAHR Hearing Docket No. 18-021075

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

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer-Respondent,

Case No. C18 K-105
-and- Docket No.18-021075-MERC

EASTERN MICHIGAN UNIVERSITY,
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (EMU-AAUP),
Labor Organization-Charging Party.
_____/

APPEARANCES:

Butzel Long, by Craig S. Schwartz, for Respondent

Nacht & Roumel P.C., by Joseph X. Michaels, for Charging Party

DECISION AND RECOMMENDED ORDER
ON
SUMMARY DISPOSITION

On November 2, 2018, the Eastern Michigan University, American Association of University Professors, (EMU-AAUP), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Eastern Michigan University pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge with the Michigan Office of Administrative Hearings and Rules, formerly Michigan Administrative Hearing System.

On January 29, 2019, Respondent filed a motion for summary disposition pursuant to Rule 165(1) and (2)(f) of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165, asserting that there is no genuine issue of material fact and that it is entitled to summary disposition as a matter of law. On March 1, 2019, Charging Party filed a response in opposition to the Respondent's motion and seeking summary disposition in its favor. Respondent filed a reply and response to Charging Party's motion on March 14, 2019. Based on facts set out in the charge and pleadings, and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of tenured and tenure-track faculty members employed by the Respondent University. The collective bargaining agreement covering this unit covers the period September 1, 2015, through August 31, 2019. Article XX of this agreement allows unit members to elect a "voluntary phased retirement (VPR)" pursuant to which unit members can work reduced schedules for a maximum of three years prior to their final retirement dates. In May 2018, Respondent, without Charging Party's agreement and without prior notice, extended the VPR of a faculty member, Dr. Susan Moeller, by one semester, causing her VPR to exceed the three-year maximum. Charging Party accused Respondent of violating Article XX and suggested, as a remedy, that the parties enter into a memorandum of understanding (MOU) giving all faculty members the right to have their VPRs extended by one semester. Respondent asserted that under Article XX it had the right to extend a VPR and rejected the proposed MOU.

Charging Party alleges that Respondent engaged in unlawful direct dealing with Moeller and that it violated its duty to bargain in good faith and Section 10(1)(e) of PERA by repudiating the collective bargaining agreement.

Facts:

Article XX of the parties' collective bargaining agreement is entitled "Retirement Options and Benefits." VPR first became part of the parties' collective bargaining agreement in 2012, after Charging Party proposed it as an additional benefit for its members. Article XX(A) states:

1. Eligibility

   Faculty members who are at least fifty-five (55) years of age and who have at least fifteen (15) years of full-time service as EMU Faculty or who are at least sixty (60) years of age and who have at least ten (10) years of full-time service as EMU Faculty have the option to enter into a Voluntary Phased Retirement (VPR) agreement with EMU.

2. Notice and Approval

   The Faculty Member must sign such an agreement by March 15 of the academic year preceding participation in VPR. By signing this agreement, the Faculty Member agrees to retire at the end of the VPR agreement under the provisions of the contract. The agreement to retire by the end date of the agreement is binding; however, a Faculty member can decide

to retire earlier than the end date of the agreement through the standards [sic] procedure described in Article XX(C).[1]

The Department Head or School Director shall approve a requested VPR by March 31 prior to the Fall semester in which VPR will be effective. However, the Department Head or School Director may defer the start of a VPR by one calendar year due to core programmatic requirements.

If approval is not granted in the first year, the requested VPR will commence the following academic year. The Faculty Member will be given the opportunity to withdraw the agreement or amend the appointment terms of the requested VPR by March 15 prior to the revised academic year.

3. VPR Options

The VPR agreement creates an irrevocable intent to retire at the end of a period not to exceed three academic years from the Fall semester in which the VPR commences. (For example, Faculty signing an agreement by March 15 agree to retire by no later than the last day of the first, second, or third academic year following the initial notification of intent.)

Participation in the VPR means that a Faculty Member's workload will be reduced to fifty percent (50%) which can be configured as . . .

Article XX(A)(3) allows Faculty to choose from among three work schedule options: (1) a 50% workload in both Fall and Winter semesters; (2) 100% in the Fall semester and 0% in the Winter semester, and (3) 0% in the Fall semester and 100% in the Winter semester. The division of the appointment may be different in each year of the VPR agreement but must be set by the Faculty Member at the time the agreement is signed.

A faculty member applying for VPR submits an application to his or her Department Head or /School Director. They then typically have conversation about the timing of the VPR in connection with the reassignment of the faculty member's courses to other faculty members.

The collective bargaining agreement also contains a grievance procedure, Article VII, ending in binding arbitration.

In February of 2017, Moeller, a faculty member in the School of Business, Department of Accounting and Finance, entered into a VPR agreement with her department head. Moeller elected in this agreement to have a 50% workload in both the

[1] Article XX(C) covers regular retirement. Article XX(C)(1) states, "If possible, a Faculty Member planning to retire should inform his/her Department Head one (1) year in advance of his/her anticipated date of retirement."

Fall and Winter semesters of the 2017-2018, 2018-2019, and 2019-2020 academic years. The form agreement that she signed stated that by signing that agreement, Moeller was indicating her irrevocable intent to retire no later than August 31, 2020. Moeller commenced teaching the reduced schedule in the Fall semester of 2017.

According to an affidavit by David Woike, Respondent's Assistant Vice President for Academic Human Resources, sometime prior to the start of the fall semester, Woike, Provost Rhonda Longworth, and Phil Lewis, Interim Chair of the Department of Accounting and Finance, discussed whether Moeller's retirement should be delayed a semester, to December 31, 2020, because of the unusual number of new and untenured faculty in the Department of Accounting and Finance and the role Moeller had assumed in helping the new faculty navigate the tenure review process. Moeller was also teaching the core class for undergraduate finance majors, and Lewis expressed concern about finding a suitable replacement to teach this class. According to Woike's affidavit, he, Longworth, and Lewis all spoke to Moeller sometime during the Fall 2017 semester about delaying her retirement date by a semester.

On April 13, 2018, Lewis submitted a memo to Woike and Longworth formally requesting that Moeller's retirement date be delayed until December 31, 2020. The memo stated that extending Moeller's VPR through December 2020 would allow her to guide one of the untenured faculty members though the tenure review process and to help the two new faculty members starting in the fall of 2018 through their first interim evaluations. According to Woike's affidavit, by the time Lewis submitted this memo, Moeller had agreed to delay her retirement by a semester. Charging Party was not notified of Lewis' request.

On May 3, 2018, Woike wrote to Lewis granting his request to extend Moeller's VPR through December 31, 2020. Woike cited the department's staffing circumstances and the role Moeller was playing in the department, including mentoring new faculty. Woike also noted that he had received confirmation from Moeller in writing that she agreed to the extension of her VPR. Moeller's written VPR was then modified to change her irrevocable retirement date to December 31, 2020.

On May 8, 2018, another faculty member, Laura Davis, submitted a VPR application seeking to begin her three-year VPR in the fall of 2018 and to retire no later than August 31, 2021. Charging Party became involved in Davis' request, although the pleadings do not indicate why. On May 16, 2018, Woike, Charging Party President Judith Kullberg, and Davis entered into a memorandum of understanding extending the March 15 application deadline for VPRs and allowing Respondent to approve Davis' request to begin her VPR in the fall of 2018.

On June 5, 2018, Charging Party requested that Respondent supply it with information about all the VPR extensions it had granted and all that it had denied. In its response, Respondent mentioned Moeller and another faculty whose "second request to extend her retirement date," it had denied. Respondent also listed several other situations where it had agreed to "VPR exceptions." These included waiving the age eligibility

requirement in one case, agreeing to a 75%/25% schedule in another, and two cases where it had allowed faculty members to apply for a VPR long after the March 15 deadline. In the latter, both faculty members withdrew their applications before signing a VPR.

On October 10, 2018, Kullberg wrote Woike about the extension granted to Moeller. Kullberg told Woike that this was a violation of the language in Article XX stating that a VPR agreement created an irrevocable intent to retire at the end of a period not to exceed three years. Kullberg also said that Moeller's extension constituted preferential treatment allotted to a single employee and unlawful direct dealing. As a remedy for the contract violation, Kullberg proposed that the parties enter into a MOU allowing any faculty member to extend their VRP by one semester. By email on October 19, 2018, Woike denied that the extension had violated the contract, citing the "core programmatic requirements" and delayed start language in Article XX. Charging Party did not file a grievance.

Discussion and Conclusions of Law:

An employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain by negotiating a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron EA v Port Huron Area Sch Dist,* 452 Mich 309, 318, (1996). In *Port Huron*, the Court noted that where the matter is "covered by" an agreement, the union has already exercised its bargaining rights. According to the Court, the Commission's initial charge is to determine whether the agreement "covers" the dispute. If it does, and the parties have agreed to a grievance process ending in binding arbitration, the enforceability of the provision is normally left to the parties' contractual grievance mechanism. *Port Huron,* at 321; *Macomb Co v AFSCME Council 25 et al,* 494 Mich 65, 80 (2013). As the Commission stated in *St Clair Co Rd Comm,* 1992 MERC Labor Op 533, 538:

> Where there is a contract covering the subject matter of a dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented.

In this case, the parties clearly bargained over VPR and entered into contract provisions covering this subject. The Commission has recognized, however, that a party's repudiation of a provision or provisions of its collective bargaining agreement may be tantamount to a rejection of its duty to bargain and thus violate its duty to bargain in good faith under PERA. 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. *36th District Court,* 21 MPER 19 (2008); *Central Michigan Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. For the Commission to find an unlawful repudiation, the contract breach must be substantial and

have a significant impact on the bargaining unit, and there must be no bona fide dispute over interpretation of the contract language. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

Charging Party alleges that Respondent repudiated the collective bargaining agreement by extending the term of Moeller's VPR. It asserts that the contract expressly and unambiguously makes the decision to retire "binding" and "irrevocable." According to Charging Party, "irrevocable" is not an ambiguous term and the contract clearly provides that once a VPR decision is made, it cannot be changed, extended or revoked under any circumstances. Therefore, it asserts, there is no bona fide dispute over the interpretation of Article XX(A). Charging Party also argues that while Article XX(A)(2) gives Respondent the right to "defer the start of a VPR by one calendar year because of core programmatic requirements," this language is clearly inapplicable to Moeller's situation since the start of Moeller's VPR was not deferred - it began with the Fall semester of 2017 as she had requested - but rather extended beyond the maximum three year term. Charging Party points out that the Commission has rejected employers' arguments that no unfair labor practice should be found because of a bona fide dispute over the interpretation of contract language when the Commission has found the language to be unambiguous. See, e.g. *Wayne Co Cmty College,* 20 MPER 59 (2007) (contract unambiguously required employer to continue to provide employees with traditional Blue Cross health plan or a comparable traditional plan); *Garden City Pub Schs,* 28 MPER 63 (2015) (contract unambiguously required employer to provide employees with a particular health plan); *Wayne Co,* 24 MPER 25 (2011) (no bona fide dispute existed where the contract clearly and unambiguously defined the term "layoff").

Respondent, however, disagrees with Charging Party's interpretation of Article XX(A) and maintains that there is, in fact, a bona fide dispute over the meaning of this provision. According to Respondent, while an agreement to retire at the end of the VPR period is "binding" and "irrevocable" with respect to the faculty member, the collective bargaining agreement does not prohibit Respondent from seeking to extend or modify a VPR for reasons related to programmatic or teaching concerns, as long as the faculty member agrees to the extension or modification.

Article XX(A)(1) states that when a faculty member signs a VPR agreement, he or she agrees to retire at (or before) the end of his or her VPR term as set out in the agreement. Moreover, under Article XX(A)(3), that agreement is irrevocable. A faculty member, therefore, clearly has no contractual right to *require* Respondent to approve either a VPR agreement longer than three years or an extension of a VPR agreement beyond its original term.

The absence of language explicitly prohibiting Respondent from extending the term of a VPR does not necessarily mean that Respondent's interpretation of Article XX(A) best embodies the parties' intent. Like the VPR itself, an extension of the VPR beyond its original term, if done at the faculty member's request, constitutes an employee benefit. If Respondent can unilaterally decide to extend that benefit to one faculty member but not another without providing a justification, questions about the fairness of

that decision will naturally arise. Moreover, since Charging Party is not normally involved in the VPR process, it has no way of verifying that Respondent, rather than the faculty member him or herself, initially sought the extension. I find, however, that Article XX(A) does not clearly and unambiguously prohibit *Respondent,* from extending the term of a VPR. I conclude that because the parties have a bona fide dispute over the interpretation of Article XX(A), Respondent did not repudiate the collective bargaining agreement by extending Moeller's VPR beyond its original end date. Rather, the parties' dispute must be resolved either by an arbitrator or at the negotiating table.

Charging Party also alleges that Respondent violated its duty to bargain by engaging in unlawful direct dealing with Moeller over the terms of her VPR. An employer violates its duty to bargain in good faith when it bypasses the designated representative and negotiates or attempts to negotiate directly with its employees over terms and conditions of employment. As Charging Party correctly notes, the Commission has adopted the three-part test developed by the National Labor Relations Board (NLRB) for determining whether direct dealing has occurred under the National Labor Relations Act (NLRA), 29 USC 150 et seq. *City of Detroit (Housing Commission),* 2002 MERC Lab Op 368, 376 (no exceptions); *Wayne Co,* 31 MPER 17 (2017) (no exceptions). The criteria are: (1) that the employer communicated directly with union-represented employees; (2) that the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) that such communication was made to the exclusion of the union. *Permanente Med Group,* 332 NLRB 1143, 1144 (2000); *Southern California Gas Co,* 316 NLRB 979 (1995).

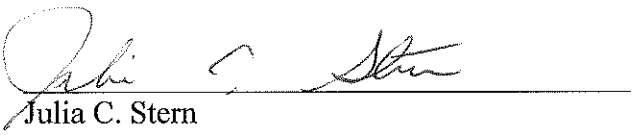
In this case, however, the parties' disagreement over whether Article XX(A) gives Respondent the right to unilaterally extend the term of a VPR is the heart of their dispute. If Respondent had the right to unilaterally extend Moeller's VPR, then it did not bypass Charging Party by consulting with Moeller before making its decision. If it did not have the right to extend the term of a VPR without Charging Party's agreement, then the extension constituted a contract breach. That determination, however, is not one that can properly be made by the Commission in this case. I conclude, therefore, that both Charging Party's direct dealing and contract repudiation allegations should be dismissed.

Based on the facts and conclusions of law set forth above, I recommend that the Commission grant Respondent's motion for summary dismissal and that it issue the following recommended order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 15, 2019