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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN (HOSPITAL/MEDICAL CENTER),
Public Employer-Respondent,

MERC Case No. C18 F-052

-and-

MICHIGAN NURSES ASSOCIATION,
Labor Organization-Charging Party.

APPEARANCES:

Office of the Vice-President & General Counsel, by David J. Masson, Senior Associate General Counsel and Chief Litigation Counsel, for Respondent

White Schneider P.C., by Erin M. Hopper, for Charging Party

DECISION AND ORDER

On February 7, 2019, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order¹ 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 charges and complaint.

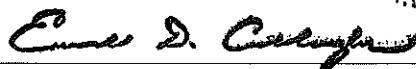
The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

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: APR 25 2019

¹ MAHS Hearing Docket No. 18-012459

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN (HOSPITAL/
MEDICAL CENTER),
Respondent-Public Employer,

-and-

Case No. C18 F-052
Docket No. 18-012459-MERC

MICHIGAN NURSES ASSOCIATION,
Charging Party-Labor Organization.

APPEARANCES:

Office of the Vice-President & General Counsel, by David J. Masson, Senior Associate
General Counsel and Chief Litigation Counsel, for the Respondent

White Schneider P.C., by Erin M. Hopper, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Michigan Nurses Association against the University of Michigan (Hospital/Medical Center). 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 charge was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the stipulation of facts, the transcript of the hearing held in Detroit, Michigan on August 13, 2018, exhibits and post-hearing briefs filed on or before October 19, 2018, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

The charge was filed by the Michigan Nurses Association (Charging Party or the Union) on June 11, 2018. The charge asserts that the University (Respondent) violated Section 10(1)(e) of PERA when, without bargaining, it announced that the hospital would be increasing the number of shifts that Nurse Practitioners (NPs) employed in the cardiovascular intensive care unit (ICU) and the accompanying "step-down" unit would be required to work in order to qualify for their full salary. Although the University announced a corresponding reduction in hours worked per shift, the Union contends that

this change was illusory and that, as a result, NPs will be required to work more shifts without receiving any additional compensation.

Findings of Fact:

I. Background

Charging Party represents a bargaining unit consisting of all full-time and regular part-time and per diem registered professional nurses employed by the University of Michigan Hospital/Medical Center at all facilities, including NPs. The most recent collective bargaining agreement between the Union and Respondent covers the period March 25, 2013, through June 30, 2018.¹ Article 2 of that agreement, Management Rights, provides that “[a]ll management rights and functions, except those which are clearly and expressly abridged by this Agreement, shall remain vested exclusively in the University.” The rights enumerated within Article 2 include:

(1) full and exclusive control of the management of the University, the supervision of all operations, the methods, processes, means and personnel by which any and all work will be performed, the control of property and the composition, assignment, direction and determination of the size and type of its working forces; (2) the right to determine the work to be done and the standards to be met by employees covered by this Agreement; (3) the right to change or introduce new operations, methods, processes, means or facilities, and the right to determine whether and to what extent work shall be performed by employees; (4) the right to hire, establish and change work schedules, set hours of work

The contract also contains language specifically pertaining to staffing and scheduling for bargaining unit members, including a process to determine and evaluate workloads. Article 13 of the agreement states, in pertinent part:

SECTION A. GENERAL PROVISIONS

88. The parties agree that a process to determine staffing levels to provide nursing care for the projected nursing workload in the patient care units is necessary. Further, the University, in those areas where a patient classification system determined by the University to be valid and reliable is available, will utilize this system as one of the management tools to assist in determining staffing needs based on measured workload. In those areas, which do not currently utilize such a classification system, the University will continue to improve internal means to determine staffing, including evaluating classification systems when such systems may be useful. A joint meeting, with the Association and the University, will be held every 3-6 months with the Directors from Ambulatory Care, to discuss and share data

¹ The agreement identifies the Union as the Michigan Nurses Association and its University of Michigan Professional Nurse Council (UMPNC), while the Employer is identified in the contract as the Regents of the University of Michigan.

on workload, for the purpose of monitoring and measuring activity for projecting growth. All benchmarks used to set staffing in Ambulatory Care are shared with staff and UMPNC annually. The actual staffing levels or the inclusion of other management tools is not subject to the Arbitration procedure. The budgeted staffing will include an allowance for paid time off. The University and the UMPNC will meet to evaluate existing workload/acuity models and make recommendations for capital purchase.

88A. A joint meeting, with the Association and the University, will be held prior to any hospital-wide full time equivalent (FTE) reduction, concerning the effect on patient care, workload, staff mix, appropriate delegation, safety and work design.

89. Whenever an employee's workload concerns have not been satisfactorily addressed, they may be referred to the unit workload review committee referenced in Article 14, "Workload Review."

* * *

STAFFING AND SCHEDULING GUIDELINES

95. In this connection, the University will provide the Association with a copy of Staffing and Scheduling guidelines developed for each Director of Nursing area at University of Michigan Hospitals. Those areas where guidelines do not presently exist will endeavor to develop and implement them six (6) months from the date of this Agreement, but not later than one (1) year from this date. Some or all employees in the area will be provided opportunity to comment on the Guidelines before implementation. Changes in the Guidelines will also be provided to the Association.

Article 14 of the collective bargaining agreement contains provisions pertaining to the establishment of a committee consisting of staff nurses and supervisors to evaluate and address issues of workload and the impact of expanded services on staffing. Article 14 provides, in relevant part:

133. When a problem of excessive workload arises, it must be addressed to ensure the long-term viability of the unit, including quality of patient care and employee satisfaction.

* * *

136. Following a review of data, or whenever a workload concern is identified, the committee will review a number of possible actions, including, but not limited to, temporary modification of task expectations, obtaining additional personnel, resources and modification of the workload. When expanding services, the University will engage in joint discussions with the workload review committees of the units affected by the change to solicit committee input into staffing scenarios. Where there is no WRC, the

UMPNC will designate representatives. In any given situation, the actions most appropriate to implement will depend on a number of factors. These include, but are not limited to, the experience and skill level of the staff, the extent and expected duration of the problem, the nature of the work to be done, the availability of personnel, resources and time saving equipment. An analysis of available objective data, such as patient acuity and workload index data will be included in the review.

The contract also contains a waiver provision, Article 55, which states that the parties had a full opportunity to bargain with respect to “any subject or matter not removed by law from the area of collective bargaining” and that the University and the Union each “voluntarily and unqualifiedly” waives the right to bargain over any matter “referred to or covered in” the contract or “with respect to any subject or matter not specifically referred to or covered in” the agreement.

In addition to the collective bargaining agreement, the parties entered into a Memorandum of Understanding (MOU) which governs issues pertaining to NPs specifically, including scheduling and compensation. The MOU states that NPs “may be required to periodically work extra hours to meet the needs for patient care without compensation.” When a concern arises regarding excessive workload or persistent additional hours related to patient care, NPs may request a workload review meeting to review possible actions, including obtaining additional personnel and modification of load. If excessive workload or persistent additional hours continue after such a meeting is held, the MOU authorizes the University to provide additional compensation for an extended period of time. The MOU further provides, “NPs who work additional shifts of at least four hours that cannot be provided an equal amount of time off within three (3) months will be compensated for that time at their regular rate of pay.”

II. Cardiovascular ICU and Step-Down Unit

Respondent employs NPs in various units throughout the hospital, including the cardiovascular ICU and the associated step-down unit. NPs assigned to the step-down unit take over the care of patients after they leave the cardiovascular ICU until they are ready for discharge or transfer to another unit. NPs are exempt employees who do not suffer loss of pay or receive overtime due to daily variances in their schedules. They do not punch a time clock. Rather, as professional employees, NPs are required to ensure that patient safety is maintained before they leave at the end of the work day. This responsibility includes handing off patient information to the staff who are coming on shift. Thus, while there is a specified time that their shifts are supposed to end, NPs may be required to work past that time until they have completed the hand off of patients to the next nurse on duty. NPs may also leave before their designated end time, depending on when they complete the hand off and the safe transfer of care. The time that NPs leave work does not affect their pay.

Both the cardiovascular ICU and the step-down unit operate on a 24-hour schedule, with the NPs divided into two shifts per day. Prior to the events giving rise to this dispute, NPs in the ICU and step-down unit worked three shifts per week which equated to 39 shifts per 13-week quarter. Once every quarter, each NP worked an additional shift in order to

ensure that he or she reached 40 shifts per quarter, the amount required for NPs to qualify for their full salary. This additional shift was referred to as either “D plus 1” or “N plus 1” depending on whether it was a day or night shift. The day shift ran from 6:00 a.m. to 7:30 p.m., while the night shift operated from 6:00 p.m. to 7:30 a.m. Each shift concluded with a 1.5 hour hand-off period. Although shifts were 13.5 hours long in total, NPs received credit for 13 hours of work because each shift included a half-hour unpaid lunch break. In total, NPs worked 160 shifts per year.

13.5-hour shifts were unique to the cardiovascular unit and management was concerned that the 1.5 hour hand off period was not being fully utilized. According to Stefanie Peters, the chief administrative officer for the unit, NPs in cardiovascular were utilizing approximately 45 minutes to an hour for hand off.

In early April 2018, management announced that a new schedule would be implemented for the NPs in the cardiovascular ICU and the step-down unit. Under the new schedule, NPs will still work 39 shifts per 13-week quarter, but instead of one additional shift each quarter to reach the 40 shifts necessary to qualify for full salary, NPs will be assigned three additional shifts. In total, NPs will work 166 shifts per year. The shifts will be 12.5 hours long, including a half-hour unpaid lunch break. The day shift will operate from 6:00 a.m. to 7:00 p.m., while the night shift will run from 6:00 p.m. to 7:00 a.m.

NPs in the cardiovascular ICU were informed of the schedule change at a mandatory staff meeting held on April 3, 2018, while the step-down NPs received news of the change at a staff meeting the following day. The meetings were conducted by Peters and Kristin Cox, supervisor of the ICU and step-down NPs. Cox announced that in addition to the schedule change, the cardiovascular department would be growing. New patient beds would be added to both the ICU and step-down units and staff increases were being considered. At the same time, Peters informed the NPs that the hospital was facing a \$50 million budget deficit. At hearing, witnesses for the Union testified that Peters told the meeting attendees that the schedule change was related to the deficit and that every department in the hospital would be subject to a five percent budget cut. Although Peters admits to having referenced budget cuts during the meetings, she testified that the cardiovascular unit was excluded from the budget cuts and that the changes were unrelated to those issues. According to Peters, it was a “really interesting time” because the department was being asked to grow at the same time the University was having budget problems.

III. Bargaining Demand and Aftermath

On May 18, 2018, Union representative Barbara Van Kainen sent a demand to bargain over the impending changes to management. Thereafter, there was a series of communications between Union representatives and the University regarding the bargaining demand, including an allegation from Charging Party that the length of each shift was not actually going to change. In these communications, the Union alleged that “[w]hat management actually is proposing is to begin paying the NPs for only 12.5 hours for each such shift, citing the existence of an unpaid half an hour lunch break.” In an email to the University dated May 22, 2018, Charging Party made a request to bargain “over these effects before any change is implemented.”

On or about June 11, 2018, Cox sent an email to her staff announcing that there would be a four-week long “pause” on implementation of the scheduling changes in order to allow time to convene the Workload Review Committee (WRC). In the email, Cox wrote that the WRC would meet to “discuss and determine ways to address the concerns related to lunchbreaks you brought to our attention, as well as any other workload issues that may exist as a result of the schedule change.” According to the Cox email, the pause was to conclude on July 14, 2018, and the schedule changes would be fully implemented by July 15, 2018.

Prior to the issuance of the Cox email, new work schedules had already been issued to staff which reflected the shift changes. Amber Mason, an NP employed in the step-down unit, received a schedule which required her to work two extra shifts. Mason contacted Cox and asked how the four-week pause would affect her schedule and compensation. Cox instructed Mason to work the additional shifts and promised that she would “make sure it’s done correctly for timekeeping purposes and in a fair manner.” On or about June 20, 2018, Cox informed Mason that she would receive two days of Paid Time Off (PTO) as compensation for working the extra shifts. According to Mason, other employees who had worked extra shifts during the pause were provided additional compensation for doing so.

A meeting of the WRC was held on June 13, 2018. According to the minutes of that meeting, the parties discussed the following topics:

1. Lunch discussion- The purpose of the meeting as defined by management was to address the topic of a protected, uninterrupted 30 minute lunch break and to brainstorm ideas that may facilitate that option. As this issue had not been brought to the workload committee as a workflow issue, we spent time trying to seek to understand the " why and how" this topic came about. Management and the Union representatives explained that the 30 minute uninterrupted lunch break had been discussed at their previous management/union meetings in relations to their discussions regarding the change in shift length to 12.5 hours. Management indicated that the intent is to continue the shift duration from 6:00-7:00 to allow for a 12.5 hour shift with a 30 minute uninterrupted lunch break. There was no resolution discussed in regards to the "uninterrupted lunch" discussion. A separate email will be generated regarding the barriers to the resolution of the lunch break discussion.

* * *

3. Summary of discussions around shift length: Multiple members of the APT expressed their concerns regarding the change in shift length to 12.5 hours. As Exempt employees there was confusion regarding change in shift duration. APT indicated that the 12.5 hour shift reduction results in a pay reduction (working more shifts for the same compensation), or a reduction in appointment resulting in less compensation. Dr. Lynch provided and [sic] ICU attending's

perspective of his work with our team as a significant value to the ICU.

4. Summary of discussion around 4 week "Pause:" Kristin and the Union explained that the "Pause" of the 12.5 hour shift was a result of their current discussions. Kristin indicated that the "Pause" of the 12.5 hour shift would be 4 weeks in duration June 17-July 14th. APT expressed concerns regarding those disadvantaged staff members whose additional shifts (asterisk days) had already been completed.
5. Summary of Conclusion Discussion: APT . . . expressed that current staffing model was safe for expansion and requested their shift duration be left intact to allow for safe patient hand off.

On or about June 29, 2018, the Union filed a grievance challenging Respondent's decision to change how NPs in the cardiovascular ICU and associated step-down unit are scheduled. Specifically, the grievance asserts that the University's action constituted a violation of "Article 1/Recognition, Article 3/Professional Nursing, Article 13/Staffing, Article 28/Work Redesign, the NP MOU, and any other relevant language of the Agreement." There is no evidence in the record pertaining to the disposition or status of the grievance.

On July 10, 2018, the University announced that the pause was being extended until August 19, 2018, due to fact that discussions were underway related to the WRC and concerning the staff's "ability to take an uninterrupted lunch." Thereafter, Respondent requested that the NPs attend a follow-up meeting of the WRC on July 30, 2018. Although the NPs disagreed that the meeting constituted a "workload committee meeting" under the contract, they participated in the discussion. At the meeting, the NPs clarified to management that they were not seeking an uninterrupted, unpaid lunch, but rather that they were opposed to any change in scheduling whatsoever. The University did not agree to continue with the old schedule and no resolution was reached.

At some point during this process, the NPs asked management about the possibility of reducing their schedules to below a 1.0 FTE so that they could reduce the number of shifts while still qualifying for a full salary. In an email to staff dated August 13, 2018, Peters rejected that request. The message from Peters stated, "In order to promote a staffing model that focuses on patient care and safety (particularly in light of the bed expansion on 09/04), we will be maintaining everyone at a 1.0 FTE status at this time."

The record does not reflect whether or when the new schedule became effective. At the August 13, 2018, hearing, the parties stipulated that it is "not known what the impact will be on workload with the impending changes. It is anticipated that additional beds will be added to each unit at issue, and 3 FTEs have been added to the step-down unit." In addition, the parties stipulated that "the University's position, at least prior to review by the Workload Review Committee, is that NPs will not receive additional compensation for the impending change."

Discussion and Conclusions of Law:

Under Section 15 of the Act, 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. MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. It is well established that the obligation to bargain over hours includes the number of hours worked, the particular hours and days of the week to which employees are assigned and the starting and ending times of work shifts. See e.g. *Royal Oak Pub Sch*, 23 MPER 95 (2010); *Wayne State Univ*, 1987 MERC Lab Op 899 (no exceptions); *Detroit Bd of Ed*, 1986 MERC Lab Op 121.

In the instant case, Respondent asserts that it has satisfied its obligation to bargain by negotiating a management rights provision giving it the authority to “establish and change work schedules [and] set hours of work” and by entering into detailed contract provisions, as well as a separate MOU specifically addressing NPs, neither of which restrict the University’s right to change the starting and ending times for NPs or alter the number of shifts to which they are assigned. 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; *St Clair Co ISD*, 2005 MERC Lab Op 55, 61-62; *Houghton Lake Community Sch*, 1997 MERC Lab Op 42. Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement. *Port Huron* at 327; *Calhoun County*, 29 MPER 71 (2016) (no exceptions).

The Commission has repeatedly found that a unilateral change in working hours by a public employer does not constitute a violation of PERA where there is contract language giving management the right to establish work schedules. For example, in *City of Detroit*, 1985 MERC Lab Op 606, the employer unilaterally added an extra half-hour of unpaid lunch for members of the bargaining unit. The change had the effect of lengthening the workday without providing employees with additional pay. The Commission held that the modification of the work schedule was within the scope of the employer’s right to unilaterally establish hours and schedules of work. In so holding, the Commission relied on the management rights clause in the parties’ contract which gave the employer “the right to establish hours and schedules of work.” Similarly, in *Detroit Bd of Ed*, 1996 MERC Lab Op 30, the union filed a charge alleging that the school district violated its duty to bargain when it capped the number of hours that faculty members were able to work. The Commission concluded that the employer’s actions were authorized by a clause in the contract which gave it the right to set hours when necessary. See also *Royal Oak Pub Sch*, 23 MPER 95 (2010) (union waived its right to bargain over starting and ending times by agreeing to contract giving employer the right to determine class schedules and hours of instruction); *City of Detroit*, 1991 MERC Lab Op 601 (unilateral reassignment of shifts lawful where management rights clause gave the employer the authority to determine schedules and hours of work); *City of Romulus*, 1988 MERC Lab Op 504 (contract giving

employer broad discretion regarding the length of the work week and employee schedules constituted a waiver of union's right to bargain over schedule change).

In the instant case, I agree with Respondent that the subject matter of this dispute, scheduling for NPs in the cardiovascular ICU and associated step-down unit, is a matter "covered by" the parties' collective bargaining agreement. Article 2, the management rights clause, provides that "[a]ll management rights and functions, except those which are clearly and expressly abridged by this Agreement, shall remain vested exclusively in the University." The rights enumerated within Article 2 include the right to determine "the work to be done," "to change or introduce new operations, methods, processes [and] means" and the right to "establish and change work schedules [and] set hours of work." I find that the Union, by agreeing to these terms, has already exercised its right to bargain over the changes announced by the University in April of 2018, including the decision by Respondent to increase the number of shifts worked by NPs while simultaneously reducing the length of each shift. Although the parties also agreed to detailed staffing and scheduling guidelines, as well as an MOU containing terms and conditions of employment specific to NPs, Charging Party has not identified any provision in the contract or MOU which would constitute a restriction of Respondent's authority to make these changes, nor has the Union advanced an argument that the University has repudiated any of those provisions.

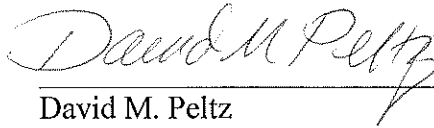
In its charge and during the pretrial conference held in this matter on the morning of hearing, the Union repeatedly asserted that the changes announced by the University in April 2018 would result in its members having to work more hours while receiving less compensation. In support of this contention, the Union argued that while Respondent claimed that there would be a reduction in the length of each shift, NPs would still be required to arrive for and leave each shift at the same time as prior to the implementation of the changes. However, there is no evidence to support such a contention. In fact, the parties stipulated that before the impending change "the NP's shift was 6:00-7:30 (am and pm)" and that upon implementation of the changes, the "new shifts will be 6:00-7:00 (am and pm), with both shifts taking into account a half-hour unpaid lunch break, as well as time for patient handoff. Moreover, the parties stipulated in writing that NPs are "exempt employees" who may leave before or after their designated end time and that their pay is not affected by daily variances in their schedules.

For the above reasons, I conclude that Respondent did not violate its duty to bargain by unilaterally changing the schedules for NPs employed in the cardiovascular ICU and the accompanying step-down unit. I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by the Michigan Nurses Association against the University of Michigan (Hospital/Medical Center) in Case No. C18 F-052; Docket No. 18-012459-MERC, is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 7, 2019