STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer- Respondent, Case No. 20-G-1052-CE

-and-

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN FEDERATION OF TEACHERS LOCAL 6075,
Labor Organization- Charging Party.
_____/

APPEARANCES:

Amy Sterling Lammers, Assistant General Counsel, for the Respondent

Gregory, Moore, Brooks & Clark, P.C., by Gordon A. Gregory, for Charging Party

DECISION AND ORDER

On April 26, 2021, Administrative Law Judge David M. Peltz issued his 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

Tinamarie Pappas, Commission Chair

Robert S. LaBrant, Commission Member

William F. Young, Commission Member

Issued: June 1, 2021

[1] MOAHR Hearing Docket No. 20-010665

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

In the Matter of:

WAYNE STATE UNIVERSITY,
Respondent-Public Employer,

Case No. 20-G-1052-CE;
Docket No. 20-010665-MERC

-and-

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN FEDERATION OF TEACHERS LOCAL 6075,
Charging Party-Labor Organization.

_____/

APPEARANCES:

Amy Sterling Lammers, Assistant General Counsel, for the Respondent

Gregory, Moore, Brooks & Clark, P.C., by Gordon A. Gregory, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed on July 1, 2020, by the American Association of University Professors (AAUP), American Federation of Teachers (AFT) Local 6075 against Wayne State University. Pursuant to §§ 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission).

This matter concerns Respondent's decision to ask clinical faculty members employed by the Wayne State University School of Medicine in its Department of Emergency Medicine to agree to a salary reduction for the last quarter of 2020. Charging Party asserts that the proposed salary reduction constitutes a unilateral change in terms and conditions of employment and that the University violated § 10(1)(e) of PERA by dealing directly with members of its bargaining unit. In addition, the Union asserts that Respondent's actions constitute unlawful discrimination because the salary reduction did not apply to other

employees, including administrators, program coordinators or support staff.[1] The case was heard in Detroit, Michigan on July 28, 2020. Post-hearing briefs were filed by the parties on or before September 14, 2020.

Findings of Fact:

Charging Party represents a bargaining unit which includes all teaching faculty employed by Respondent at one-half fractional time or more as lecturer, senior lecturer, instructor, senior lecturer, assistant professor, associate professor, professor, faculty (clinical) and faculty (research). The collective bargaining agreement which was in effect between the parties at the time of the events giving rise to this dispute contained a grievance procedure culminating in final and binding arbitration.

Salaries and fringe benefits for members of the bargaining unit are set forth in Article XII of the contract. With respect to salaries, Article XII provides, in pertinent part:

> A. General Compensation Provisions
>
> Adjustments in the compensation of individual faculty members and academic-staff members may be called for to reflect competitive changes in the academic market, to reward outstanding professional contributions, and to effect [sic] the correction of inequities.
>
> Salaries, salary increases, and fringe benefits as specified in this Agreement are minimum requirements. The University may provide salaries, salary increases and fringe benefits in excess of these minima when such extra salaries and fringe benefits are essential for the maintenance or improvement of the academic quality of the unit. In such cases, there shall be prior review with the appropriate department, School/College, or unit salary committee except in unusual circumstances where it is impractical. The University's implementation of any such salary and/or fringe benefits shall be reported to the salary committee of the unit and to the Association, and the required funds shall not be taken from negotiated compensation-increase pools of current or future bargaining-unit budgets.
>
> * * *
>
> Salary adjustments under the foregoing provisions are not subject to the Grievance Procedure under this Agreement or under any previous agreement. This prohibition precludes grievances under this and all other provisions of this and previous agreements.

Table 12. 1 of the collective bargaining agreement, which is entitled "Faculty Salary Minima" contains the salary schedules for faculty members within the bargaining unit. The salary schedules list the minimum salaries for 9-month and 12-month appointees for each

[1] Charging Party did not raise the discrimination issue in its post-hearing brief. Accordingly, I consider that allegation to have been abandoned.

year of the agreement. For example, Table 12.1 provides that professors employed for 9 months per year are to receive a minimum salary of $60,671 for 2020-2021. The minimum salary for 12-month professors for the same period is $72,710. 9-month and 12-month lecturers are to earn $39,794 and $47,649 respectively in 2020-2021.

Article XX of the contract between the parties governs term appointments for bargaining unit members. A term appointment is defined by the agreement as "an employment contract for a specified period of time. The collective bargaining agreement requires that such appointments be in writing and shall "indicate compensation and the period of the appointment." The initial term appointment is normally for a period of one year or less. For bargaining unit members on the tenure or employment-security track, subsequent renewals of term appointments are normally for multiple years. For full-time or fractional-time lecturers or senior lecturers, renewal appointments can be for one, two or three years. After three years of service as a lecturer or senior lecturer, a unit member's renewal appointment is normally for two or three years.

There is no dispute that Respondent has the authority to negotiate salaries directly with individual members of the bargaining unit without the intervention or involvement of the Union. Brian O'Neil, Chair of the Department of Emergency Medicine, testified that he negotiates individual salaries with faculty "[a]ll the time." According to O'Neil, term contract negotiations typically occur at a faculty member's annual review but may transpire at other times, such as when there has been an increase or decrease in a faculty member's duties or for inadequate performance. O'Neil testified that such negotiations may result in an increase or reduction of the faculty member's salary. Charles Parrish, Charging Party's president, acknowledged that the parties' collective bargaining agreement does not prohibit Respondent from establishing individual salaries, but testified that he is not aware of any instance in which the University reduced a faculty member's salary to the minimum level set forth in the contract.

Funding for the salaries of faculty is derived primarily from the University itself, as well as from reimbursement for services faculty members render in connection with clinical studies. When the Covid-19 pandemic began in February of 2020, the Department of Emergency Medicine experienced a loss in revenue due to a decline in clinical trial enrollment. As of June 2020, the Department was facing a budget deficit of $168,000. Based on the recommendation of the faculty salary committee, which is comprised of bargaining unit members, O'Neil decided to ask clinical faculty members to accept a 26% salary reduction for the last quarter of 2020. At the hearing in this matter, O'Neil explained that because the loss in revenue was related entirely to the pandemic, the University would be able to use funding from the Coronavirus Aid, Relief, and Economic Security (CARES) Act to cover the salary reductions and make all affected employees whole for the loss of income.

The salary reduction request was first communicated to faculty members in an email sent by O'Neil on or about June 19, 2020. That email provided, in pertinent part:

> Our department has never been more present, productive or influential. Each and every one of you should be very proud of what you have built! Everyone is struggling financially due to COVID and our department is no exception.

> The loss of revenue from clinical trial enrollment and previous budget cuts obliges us to rework our budget.
>
> After much consternation and many painful decisions, our salary committee has determined that we need to reduce the faculty budget. In order to remain within budget, we are asking for a voluntary, 3 month, 26% across the board reduction in faculty salaries . . . . This 26% reduction is only for the period of 7/1/2020 to 9/30/2020. This 26% reduction over the last quarter of 2020 is equivalent to a 6.5% annual salary reduction. This reduction only applies to paid faculty and not to our administrators, program coordinators or medical school or residency support staff.
>
> * * *
>
> Why a voluntary reduction? Because this is one of the few methods allowed by contract to reduce salaries.
>
> * * *
>
> Due to union rules, we will need to send out a letter of non-renewal to all faculty up for renewal, 3 months before their renewal date. This is necessary in order to assure we are able to renegotiate these contracts in order [to] meet budget for FY 10/1/20.

On June 22, 2020, the Department of Emergency Medicine sent an email to individual clinical faculty members requesting written approval for the salary reduction. Three days later, O'Neil sent an email to faculty indicating that the 26% reduction had been calculated incorrectly in the prior correspondence. In the letter, O'Neil promised that revised calculations would be issued and that all faculty would be receiving a notice of non-renewal for the purpose of ensuring a balanced budget for the 2021 fiscal year. The letter stressed that despite the notice of non-renewal, it was the Department's "absolute intent" to renew all current faculty. A revised salary reduction letter was subsequently sent to faculty members by email. The letter contained a space for the faculty member to sign and attest that the salary reduction was accepted voluntarily

In an email to bargaining unit members dated June 26, 2020, O'Neil referenced reports that there was reluctance on the part of some faculty members to agree to the salary reduction. The letter explained that all faculty members were being asked to accept the pay cut with the exception of one faculty member who had previously agreed to take a voluntary reduction and those employees for whom a 26% salary reduction would result in compensation below the minimum salary specified in the collective bargaining agreement.[2] The letter indicated that affected employees would be made whole through the utilization of CARES Act funds and explained Respondent's reasoning for not asking employees in other positions to agree to the same salary reduction.

[2] O'Neil testified that one faculty member had agreed to a 75% salary reduction after a change in duties.

Respondent did not notify the Union in advance of its intention to seek a salary reduction from faculty members. Upon learning of Respondent's decision, the Union elected to file the instant unfair labor practice charge rather than pursue a grievance under the terms of the parties' collective bargaining agreement because, according to Parrish, the Union believed that pursuing a charge with the Commission would lead to a faster resolution of this dispute. Parish testified, "We felt that [filing a grievance] would take a long time, and it would be very complicated."

Ultimately, every clinical faculty member in the Department of Emergency Medicine agreed to take the salary reduction as proposed by Respondent. However, according to Parrish, the reduction had not been implemented as of the date of the hearing in this matter. It is undisputed that none of the salary reductions proposed by the University would have caused any individual unit member's salary to fall below the minimum levels specified in the contract.

Discussion and Conclusions of Law:

Charging Party contends that the University violated § 10(1)(e) of PERA by unilaterally imposing a 26% percent salary reduction on members of its bargaining unit. 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.

A party can fulfill its obligation under § 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. As the Michigan Supreme Court stated in *Port Huron* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, 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*. See also *Wayne Co Community Coll*, 20 MPER 59 (2007). A contract must contain language fairly specific to the disputed subject matter in order to "cover" it and thereby relieve a party of the duty to bargain over changes to terms of employment. *University of Michigan Health System*, 34 MPER 37 (2021). At a minimum, there must be a reasonable basis upon which to conclude that the matter is subsumed within the existing language of the agreement. *Id*.

For example, in *Gogebic Cmty College*, 1999 MERC Lab Op 28 (2001), the Commission held that the employer did not unlawfully modify its contract with the union when it unilaterally terminated a privately-written, fully insured, dental insurance plan and replaced it with an uninsured, self-funded dental plan. The contract in *Gogebic* contained a waiver clause which stated that the document constituted the full agreement of the parties. Health, vision, and dental insurance benefits were set forth in a contract provision entitled "Insurance Protection." Although the contract provided that a specific insurance carrier was

to be used for health and vision benefits, no particular dental insurance carrier was identified. Rather, the contract simply required the employer to pay the full premium cost for all full-time employees and maintain a specified level of benefits. After using the same dental carrier for many years, the employer changed to a self-insured dental program without bargaining with the union.

The Commission held that the employer's imposition of a self-funded dental plan did not constitute a midterm unilateral change in violation of PERA. Specifically, the Commission found that because the contract did not specify any particular dental carrier, the agreement gave the college the unilateral right to select a carrier for the dental insurance program. According to the Commission, the union had the opportunity to bargain for more specific language, as it did for the health insurance plan and the vision program, but failed to do so. On appeal, the Court affirmed the Commission's findings and conclusions of law. *Gogebic Cmty College Mich Educational Support Personnel Ass'n v Gogebic Cmty College*, 246 Mich App 342 (1999). See also *Berrien County* ISD, 21 MPER 22 (2008) (employer did not violate PERA by changing to self-funded health insurance plan where parties bargained language concerning health insurance coverage but did not identify a specific insurer or a particular funding method); *Twp of West Bloomfield*, 1991 MERC Lab Op 525 (no exceptions) (modification to promotional examination was not a unilateral change where the contract contains an article dealing specifically with promotions). But see *University of Michigan Health System*. *supra* (contract which contained very specific and limited provisions regarding parking locations did not cover dispute over the relocation of employee parking spaces).

Charging Party and Respondent both characterize the instant case as a dispute involving a change in compensation for clinical faculty members in the Department of Emergency Medicine and the non-renewal of the term appointments governing those employees. As in *Gogebic*, these very issues were indisputably bargained by the parties. Article XX of the collective bargaining agreement, which was in effect at the time this dispute arose, governs the renewal, non-renewal and length of term appointments. That provision defines a term appointment as "an employment contract for a specified period of time" and states that such appointments "shall be in writing and shall indicate compensation and the period of appointment." With respect to the salaries negotiated by the University and individual faculty members as part of those term appointments, the contract does not set forth specific compensation levels for any member of the bargaining unit. To the contrary, Article XII explicitly provides that the salaries as specified in the collective bargaining agreement are "minimum requirements" only and that Respondent has the authority to make adjustments in the compensation of individual faculty members. The minimum salaries for faculty members are set forth in Table 12.1 of the contract. Notably, there is no claim in this matter that the salary of any member of Charging Party's bargaining unit would have fallen below the minimum requirements set forth in the collective bargaining agreement upon implementation of the proposed salary reductions.

At the hearing in this matter, Charging Party did not dispute the University's authority to bargain compensation levels with individual faculty members. Charles Parrish, the President of AAUP Local 6075, admitted that term employment contracts are bargained by individual faculty members and the chairs of their respective departments and that the parties' collective bargaining agreement does not prohibit Respondent from renewing term

appointments at a lower salary rate. The Union contends, however, that such salary reductions can occur only under limited circumstances and that a voluntary salary reduction is not one of the methods authorized under the agreement. In contrast, Respondent asserts that there is no such limitation contained within the contract and that its only obligation is to compensate members of the bargaining unit at a rate equal to or above the minimum requirements set forth in Table 12.1. I conclude that the parties have each articulated a credible interpretation of the relevant contract language and, therefore, no cognizable claim under PERA has been stated. Under such circumstances, Charging Party is left to its contractual remedies for its claim that the language of the collective bargaining agreement is not being properly applied.[3]

I also find no merit to Charging Party's assertion that the University engaged in unlawful direct dealing with individual members of its bargaining unit. Although PERA prohibits employers from negotiating directly with individual employees who are represented by an exclusive bargaining agent, the inquiry into alleged direct dealing focuses on whether the employer's conduct is "likely to erode the union's position as exclusive representative." *City of Detroit (Housing Commission)*, 2002 MERC Lab Op 368, 376 (no exceptions), citing *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). Given that the collective bargaining agreement authorizes Respondent to negotiate directly with individual faculty members, and in light of the well-established past practice pursuant to which the University routinely negotiated term appointment contracts without the involvement of the Union, there can be no legitimate claim of direct dealing in this case.

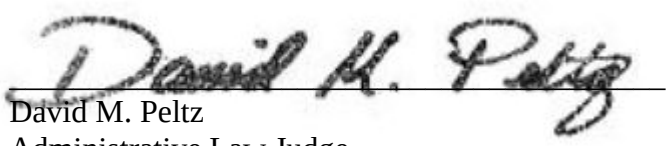
I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order.

[3] This would ordinarily mean having the issue resolved in grievance arbitration. In the instant case, however, the parties specifically agreed that any dispute over the meaning and interpretation of Article XII shall not be pursued via the contractual grievance procedure. The inclusion of such language indicates that Charging Party has waived its right to challenge Respondent's interpretation of salary issues and agreed that the University's interpretation of Article XII will be final and binding. Cf. *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 897, in which the Commission held that it would exercise jurisdiction over a contract dispute where the collective bargaining agreement did not include a procedure for binding arbitration.

RECOMMENDED ORDER

The unfair labor practice charge filed by the American Association of University Professors (AAUP), American Federation of Teachers (AFT) Local 6075 against Wayne State University in Case No. 20-G-1052-CE; Docket No. 20-010665-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings & Rules

Dated: April 26, 2021