STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Public Employer-Respondent in MERC Case No. C16 D-038,
Public Employer in MERC Case No. UC16 D-007,

-and-

UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION,
Labor Organization-Charging Party in MERC Case No. C16 D-038,
Petitioner in MERC Case No. UC16 D-007.
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APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by Christine M. Gerdes, for Respondent/Public Employer

Soldon Law Firm, LLC, by Kyle A. McCoy, for Charging Party/Petitioner

DECISION AND ORDER

On December 7, 2017, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above 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. Further, the ALJ recommended that the Commission dismiss the unit clarification petition.

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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

[1] MAHS Hearing Docket Nos. 16-011424 & 16-015530

Dated: March 1, 2018

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN HEALTH SYSTEM,
Respondent in Case No. C16 D-038; Docket No. 16-011424-MERC,
Public Employer in Case No. UC16 D-007; Docket No. 16-015530-MERC,

-and-

UNIVERSITY OF MICHIGAN HOUSE OFFICERS ASSOCIATION,
Charging Party in Case No. C16 D-038; Docket No. 16-011424-MERC,
Petitioner in Case No. UC16 D-007; Docket No. 16-015530-MERC.

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APPEARANCES:

University of Michigan, Office of the Vice President and General Counsel, by Christine M. Gerdes for the Respondent/Public Employer

Soldon Law Firm, LLC, by Kyle A. McCoy for the Charging Party/Petitioner

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON CONSOLIDATED CASES

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq.*, these consolidated cases were assigned to Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). The following findings are based upon the entire record, including exhibits and the transcript of the hearings held on September 21, 22, and 23, 2016, as well as post-hearing briefs filed by the parties on or before December 29, 2016.

On April 18, 2016, the University of Michigan House Officers Association ("HOA" or "Association") filed a unit clarification petition, Case No. UC16 D-007, seeking to clarify its bargaining unit to include a various number of unrepresented positions holding appointments with the University of Michigan Health System ("UMHS" or "Employer")[2].

2 The position(s) sought by the HOA and which it attempted to arbitrate over have never been identified with exacting detail. In fact, the parties themselves had trouble agreeing on a common name to ease in identifying such, with the Employer referring to them as "Clinical Lecturer Fellows" and the HOA arguing that "Clinical Fellows" was more appropriate. However, as discuss more fully below, the defining aspect of positions sought by the HOA relevant to this proceeding, irrespective of their titles, is that the fellowship programs under which these positions are being trained are not accredited by the American Council of Graduate Medical Education, the American Board of Obstetrics and Gynecology, or the Council on Dental Accreditation ("CODA").

Also that same day the HOA filed an unfair labor practice charge, Case No. C16 D-038, alleging that the UMHS's refusal to proceed to arbitration over a grievance involving the unrepresented positions, and its conduct surrounding that refusal, violated Section 10(1)(e) of PERA.

Facts:

The UMHS, is a large organization underneath the umbrella of the University of Michigan ("University") and includes, according to its website http://www.med.umich.edu/umhs/about-umhs/index.html, the University's Medical School, its various hospitals, medical centers, and clinics, its Faculty Group Practice, and other departments and entities.

The UMHS possesses its own human resources department separate from the University. Of the three bargaining units that include UMHS employees, the HOA and another unit are comprised solely of UMHS employees, while the third unit is a shared unit with the University.

In the United States, becoming a licensed medical doctor eligible to practice medicine independently is a multi-year process. That process, in addition to being lengthy, is also very complex and replete with national accreditation organizations and their accompanying acronyms. For purposes of these proceedings, the general process can be summarized as follows: (1) attain an undergraduate degree; (2) apply for and be accepted to an accredited medical school; (3) in the fourth year of medical school, students apply for residency programs; (4) complete residency. At certain times during medical school and the residency program, aspiring doctors are required to take and pass the United States Medical Licensing Examination ("USMLE"), a three-part examination. Following the completion of the residency program and successfully passing the third part of the USMLE, individuals are eligible to become "board certified" in their chosen specialty area. Individuals, whether they have chosen to become board certified or not, must then apply to be licensed to practice medicine in the state where they wish to practice.

As stated above, during the fourth year of medical school, medical students select and apply for admittance to a residency program. According to evidence provided by the parties, these residency programs are overseen and accredited by the American Council of Graduate Medical Education ("ACGME"). Typically, applicants for residency programs participate in a selection process commonly referred to as a "match" program.[3] All participants in the residency program ("Residents") are members of the HOA bargaining unit and therefore House Officers.

The purpose of the residency program is to provide proper training and education in order to allow Residents to eventually become independent practicing doctors. To this end, through the several year program, Residents are gradually given more and more responsibility. Despite their increasing scope of responsibility, Residents at the UMHS are precluded from independently practicing medicine and act, at all times, under the supervision or direction of a supervising physician, commonly referred to as an Attendant or Attending Physician. The Attendant must sign of on the work of the Residents. As such, while Residents may admit, diagnose, and treat patients, they never do so under their own name.

Some individuals choose to extend their training after their initial residency programs in order to receive additional or specialty training in a given field of medicine. These advanced training programs are commonly referred to as "fellowship programs." Many of these fellowship programs are recognized and

3 The "match" was described as a complex multi-step process governed by a third-party organization whereby an applicant's preferences in residency programs is matched to the programs he or she had been accepted into.

accredited by the ACGME, the American Board of Obstetrics and Gynecology ("ABOG"), and the Council on Dental Accreditation ("CODA"). For purposes of these proceedings, these fellowships will be referred to as "accredited fellowships." Other fellowship programs are either not accredited or accredited by an organization other than the ACGME, ABOG, or CODA. For purposes of this decision these fellowships will be referred to as "unaccredited fellowships." For reasons explained more fully below, accredited fellowship positions are included within the HOA and along with Residents make up the group identified as House Officers while unaccredited fellowships positions are excluded from the HOA.

The UMHS Graduate Medical Education ("GME") department oversees, manages, and handles the UMHS's accredited training programs including its residency program. Underneath the GME is the Graduate Medical Education Committee ("GMEC"). Article XXIX of the parties' current contract and Article X of the parties' 2004-2009 contract, requires that at least one HOA representative be included on the GMEC as well as several other identified committees. Article X of the parties' 2001-2004 contract requires HOA representation on the GMEC's predecessor, the Graduate Medical Education Review Board ("GMERB"), presumably no longer in existence.

Separate from the GME and the GMEC is the Executive Committee for Clinical Affairs ("ECCA"). The ECCA serves as the body that handles the credentialing and privileging of doctors at the UMHS.[4] Only doctors that are credentialed and privileged by the ECCA may independently treat patients at the UMHS or act as attendant physicians. The ECCA also includes representative(s) of the HOA as required by the parties' contract.

The UMHS's training costs for its House Officers, either Residents or accredited fellows, are partially subsidized by federal grant, through the Center for Medicaid Services ("CMS"). According to testimony provided by Dr. Janet Sybil Bierman, UMHS's Associate Dean for Graduate Medical Education, sometime in the 1960's the federal government, through CMS, established a funding model for hospitals to offset the cost and expense of training doctors in residency programs. According to Dr. Bierman, the amount that hospitals receive to train their residents has remained the same since 1997. The UMHS's cost and expense of training of its residents is not fully reimbursed by the CMS. However, the UMHS does provide CMS with a "cost report" which presumably accounts for the total expense of training the House Officers. Because of the above funding reimbursement from CMS, the UMHS does not allow House Officers to bill for services they have provided.

Turnover within the HOA is quite common because, as Residents complete their residency programs, they either leave to practice independently or move onto fellowships, accredited or unaccredited, either at the UMHS or other institutions. While turnover is common, and an individual's tenure in the unit may only last as long as their residency, there are occasions where House Officer could have begun their residency with UMHS and then moved on to one or more fellowships accredited by the ACGME, AOGB, or CODA, thereby remaining a member of the unit for several years. Dr. Joshua Glazer, HOA president at the time of the hearing, was one such HOA member that remained in the unit following his residency as he entered into a two year pulmonary care fellowship accredited by the ACGME. Accordingly Dr. Glazer had been a member of the HOA for six years.

House Officer Fellows vs. Unaccredited Fellows

4 UMHS Policy 04-06-053 governs the credentialing and privileging of UMHS staff. That policy defines credentialing as "the process of assessing and verifying the qualifications of a licensed or certified health care practitioner." Privileging is defined as "the process that health care organizations employ to authorize practitioners to provide specific services to patients in the health system."

Article 1 of the parties' collective bargaining agreement in effect for purposes of these proceedings, 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.

Each of the parties two preceding contracts, valid from November 1, 2001, through October 31, 2004, and from November 1, 2004, through November 31, 2009, contained essentially identical provisions as set forth above.[5]

As stated in the previous section all Residents are members of the HOA. Only after a given individual has completed their residency, either at the UMHS or another institution, and is accepted into one of the UMHS's many fellowship programs, does the question of exclusion from the HOA unit become an issue.[6]

UMHS Policy 04-06-049, entitled "Policy for Clinical Program Trainee Appointment" addresses the difference between accredited fellowship programs versus non-accredited fellowships as it relates to the HOA. That policy provides:

> The title of House Officer (a.k.a) Clinical Program Trainee, Resident must be used for individuals participating in ACGME, ABOG, and CODA approved residency/fellowship programs. The title of House [O]fficer does not apply to trainees in non-accredited programs (e.g., Advanced Endoscopy, Breast Imaging).

Policy 04-06-049 was approved by the GMEC on January 29, 2013, and by the ECCA on February 12, 2013. The record also establishes that a similar policy, the "Policy on Eligibility for GME Training Titles" had been in place and approved by the GMEC's precursor, the GMERB, as far back as 2004. That policy provided in the relevant part:

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5 The Employer introduced at the hearing excerpts from the parties' contract effective November 19, 1975, which also contained the identical provision.

6 Given the nature of matriculation between medical schools and learning institutions, HOA members can include individuals who are in the residency program, who have completed their residency programs with the UMHS and moved on to an accredited fellowship program, like Dr. Glazer, or individuals who completed their residency at another institution and came to the UMHS to participate in an accredited fellowship program.

> Only residents who are in Centers for Medicare/Medicaid Services (CMS) approved residency programs may be considered house officers (Clinical Program Trainee) at the University of Michigan Health System. Individuals pursuing post residency training through non-approved or non-hospital programs may be appointed to a non-CPT title or other designated title.

Dr. Bierman testified that the positions within accredited fellowship programs are included in the CMS Cost Reports alongside Residents. However, participants in the non-accredited training programs, along with attending physicians, are not included on those cost reports; the UMHS receives no reimbursement in relation thereto from CMS. Instead, the cost and expenses related to training the individuals in the non-accredited training programs is borne or offset by billing revenue; i.e., those individuals, while still in training do in fact practice independently and UMHS bills for their services.

According to testimony provided at hearing, HOA Fellows in accredited fellowship programs continue to operate very similarly to Residents in so far as they admit, diagnose and treat patients under the supervision of an Attendant. Despite finishing their residency, the HOA fellows do not practice medicine independently and still require that their actions are signed off by an Attendant. There was some testimony regarding "moonlighting" whereby House Officers who had completed their residency and were participating in accredited fellowships would work shifts in areas outside of their program area and outside the direction or supervision of an Attendant. [7] The record indicates that these "moonlight" positions were considered separate and distinct from the fellowships and were not part of the salaries provided thereunder.

Several members of the UMHS faculty testified that unaccredited fellowships had been in existence for quite some time prior to the instant proceedings. Dr. Beirmann, who first joined the UMHS faculty in 1993, testified that since that time unaccredited fellowships positions had been excluded from the HOA bargaining unit. Medical School Executive Vice Dean of Academic Affairs, Dr. Carol Bradford, who completed medical school and her residency at the University of Michigan before joining the UMHS faculty in 1992 with the Department of Otolaryngology, testified that even before 1992 there were unaccredited fellowships in her department which were excluded from the HOA bargaining unit. Dr. James Wooliscroft, a former Medical School Dean and serving at the University since 1976, claimed that there have been unaccredited fellowships in place for decades.

Dr. Erika Mowers, a former unaccredited fellow sponsored by the Academy of Gynecologic Laparoscopists within the Obstetrics-Gynecology Department, testified that her salary during the two-year program was in accordance with what it would have been had she been a member of the HOA at that time. The appointment letter received by Dr. Mowers indicated that her position was titled "Clinical Lecturer." Mowers testified that her primary duty during her fellowship program involved patient care that included admitting, diagnosing and treating patients. While Dr. Mowers initially claimed that her fellowship was not that much different from her residency, she did admit that in her unaccredited fellowship, she served as the "physician on record as the supervising person of other house officers or ultimately responsible for the

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7 Dr. Timothy Alves, a fellow in the non-accredited musculoskeletal radiology training program and who will be discussed in greater detail below, testified that, prior to his current program, he had been in an accredited radiology program and a member of the HOA. While in that accredited program, Dr. Alves had been allowed to "moonlight" at a UMHS facility without an attending physician. However, Dr. Alves clarified that at that time he was operating as a general physician and not performing radiology services – the accredited training program he was in at the time.

medical decision making, and also that I would be the person billing for that care and those services." Dr. Mowers did work alongside several HOA members within the Obstetrics-Gynecology Department.

Dr. Abigail Fahim, who began her career at the UMHS as a Resident, testified that in her current unaccredited fellowships position in the UMHS Ophthalmology Department she sees patients on her own "without needing another attending [staff member]." Dr. Fahim's salary in this fellowship is below what it would be if the position was part of the HOA. However, as Dr. Fahim admits, she only sees patients three days a week, with the other two days devoted to research. According to Dr. Fahim, her fellowship area is in inherited retinal dystrophy and she requested her current part-time arrangement. There are other fellows within the Department alongside Dr. Fahim, none of whom are in the HOA.

Dr. Timothy Alves currently serves as a Clinical Lecturer in the Radiology Department. Prior to that he was a Resident and a member of the HOA. Dr. Alves testified that while he does believe he is doing the same work now as he had been as Resident and that he still works under an Attendant, later in his program he should be able to "interpret plain radiographs or x-rays" on his own. Dr. Alves further testified that he believed that he would be giving two or three lectures at some point in his program.[8]

Dr. Amy Hosmer, an unaccredited fellow in Advanced Endoscopy, testified that for the three years prior she had been a member of the HOA as a Gastroenterology Fellow.[9] According to Dr. Hosmer, it was not until just before the hearing that she realized that her current position was not within the HOA bargaining unit. Dr. Hosmer testified that while most of her working time is spent under the direction of an Attendant, one day a week she does serve as an attending physician.

Dr. Kyle Hornsby testified that while he is currently a Clinical Lecturer in the second year of a two year cardiology fellowship program, he was a member of the HOA for his first year because that year his fellowships was accredited.[10] Dr. Hornsby admitted that he would be required to serve as the attending physician at certain points during his fellowship. Dr. Hornsby claimed that the changes from his first year to his second year had been "minimal."

HOA's Grievance

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.

8 Once Dr. Alves completes this current unaccredited fellowship, he will begin an ACGME accredited fellowship and once again be a member of the HOA.

9 Dr. Hosmer's current unaccredited fellowship is specifically listed in Policy 04-06-049 as an example of a fellowship position excluded from being a House Officer.

10 Dr. Hornsby testified that the GME was working to get the second year accredited which would presumably result in Dr. Hornsby's position being placed back in the HOA.

According to Robin Tarter, the HOA's Executive Director and its only employee, the parties had previously settled a grievance filed by the HOA over surgery employees the Union claimed were being removed from the unit wrongly.

On June 19, 2015, the HOA filed a grievance over the University's exclusion of unaccredited fellowships from its bargaining unit, identifying the positions in dispute as "Clinical Lecturer." The grievance provided a summary that in part stated:

> On or about June 1, 2015, the HOA learned definitively that the Employer based its decision on which trainees were part of the bargaining unit based on the type of work being performed, not by any particular governing body…
>
> Upon further investigation, the Clinical Lecturer title was given to trainees in order to preemptively remove them from the bargaining unit.
> These clinical lecturers are trainees recognized by the University as Fellows and whose normal duties are to admit patients to the hospital and diagnose or treat patients.

On July 29, 2015, the University issued a written denial of the HOA's grievance claiming that the positions identified therein as Clinical Lecturer(s) were faculty positions and had been in existence for many years. That denial stated:

> [M]ost Clinical Lecturers function independently and not under the direction of the attending, courtesy, and/or honorary staff and no clinical lecturers are participating in an ACGME accredited training program that leads to board certification.

The denial was signed by Kevin Newman who at the time was employed as a Contract Administrator with the UMHS.

On August 6, 2015, the HOA provided the UMHS with its "Notice of Intent to Arbitrate." That notice identified the issues as:

> Did the Employer violate the parties' Agreement when it failed to include any of the current employees designated "Clinical Lecturers" in the HOA bargaining unit?

The remedy sought by the HOA included that the disputed positions be put in its bargaining unit.

In early September of 2015, the parties mutually agreed upon the selection of an arbitrator. Sometime thereafter, on or around November 2015, the parties scheduled the arbitration hearing for March 30, 2016, at the University's campus.

Sometime in January of 2016, the UMHS's Human Resources Department underwent a reorganization during which both Newman and Kathy Jordan-Sedgeman, the UMHS's Director of Labor Relations at the time of the grievance, left the employ of the University.

On February 29, 2016, Michelle Sullivan officially assumed Jordan-Sedgeman's vacated position; however, Sullivan did not actually begin the job "in earnest until about a week later" due to a pre-planned trip. Prior to coming to the University, Sullivan worked as a labor attorney practicing in Ohio. According to Sullivan, she oversees the UMHS's Labor Relations portion of the Human Resources Department,

which includes three labor relations specialists responsible for each of the UMHS's three bargaining unit contracts.

Sullivan testified that she first became aware of the facts surrounding the HOA's grievance and upcoming arbitration on or about March 24, 2016, during a meeting with attorneys from the University's Office of General Counsel ("OGC"). According to Sullivan, she was surprised that the UMHS was proceeding to arbitration over the issue of who was part of the HOA bargaining unit because she understood that question to be one reserved for the Commission.

Following the meeting with OGC attorneys, Sullivan took her concerns to Joe Fournier, her supervisor and the UMHS Chief Human Resources Officer. Eventually the decision was made that UMHS would not arbitrate the HOA's grievance.

On March 28, 2016, OGC Attorney, Christine M. Gerdes, sent the HOA's attorney a letter indicating that it was now the University's position that the HOA's grievance lacked substantive arbitrability and that the dispute should be before the Commission instead. That letter stated in part:

> It is the University's position that this matter lacks substantive arbitrability. The determination of bargaining unit placement falls within the exclusive jurisdiction of the Michigan Employment Relations Commission ("MERC"). MCL 423.213.

The letter went on to cite various Commission decisions in support of its position and ultimately concluded by stating that the University would not participate in the March 30, 2016, arbitration hearing.

Discussion and Conclusions of Law:

Case No. UC16 D-007

When faced with a unit clarification petition, it is first necessary to determine whether such a petition is the appropriate mechanism for the case presented. A primary objective of the Commission is to constitute the largest unit which, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law, and which includes within a single unit all employees sharing a community of interest. *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). A unit clarification petition is appropriate for resolving questions in unit placement caused by the creation of a new position or recent substantial changes in the job duties of existing classifications. *Tuscola Co Rd Comm*, 27 MPER 57 (2014).

When newly-created, or recently changed, positions share a community of interest with the unit that seeks to include them, it is appropriate to accrete them to the existing unit rather than permit them to remain with a residual group of excluded employees. *Chelsea Sch Dist*, 1994 MERC Lab Op 268, 276. Community of interest is determined by examining a number of factors, including similarities in duties, skills, and working conditions, similarities in wages and employee benefits, amount of interchange or transfer between groups of employees, centralization of the employer's administrative and managerial functions, degree of central control of labor relations, common promotion ladders and common supervision. *Delhi Charter Twp*, 27 MPER 28 (2013).

The preceding notwithstanding, a unit clarification petition is not appropriate to accrete positions historically excluded from the bargaining unit whether that exclusion was by express agreement or

acquiescence, unless the employer substantially changed the duties and responsibilities or hours of work of the position in question. *Grosse Pointe Pub Library,* 19 MPER 32 (2006).

The Commission has long relied on the holding of the National Labor Relations Board ("NLRB") in *Union Electric Co*, 217 NLRB 666, 67; 89 LRRM 1535 (1975), as first adopted in *Genesee Co*, 1978 MERC Lab Op 552, 556:

> Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent. (Emphasis added.)

As indicated in *Genesee Co*, and the progeny of Commission cases that follow it, a position is historically excluded from a bargaining unit when the employer and the union representing the bargaining unit expressly agree to its exclusion, or when they acquiesce in its exclusion. See, for example, *Jackson Pub Sch*, 23 MPER 97 (2010); *Grosse Pointe Pub Library*, 1999 MERC Lab Op 151; *Jackson Pub Sch*, 1997 MERC Lab Op 290, 299-300.

While PERA does not provide a specific time limit for filing a unit clarification petition, our Commission has dismissed unit clarification petitions for positions created as little as a year to eighteen months before the filing of the petition based on its finding that such positions were historically excluded. See *Washtenaw Community College,* 1993 MERC Lab Op 781 (Petitioner's inadvertence or mistake in seeking a position did not excuse the union's delay of at least a year in filing the petition). However, the Commission has nonetheless clarified the unit placement of positions that were in existence for several years before the filing of a petition where the union was not aware of the exclusion. See e.g. *City of Novi*, 30 MPER 41 (2016) (Acquiesce of a previous bargaining agent could not be attributed to a newly certified bargain agent).

The record is flush with testimony and evidence that not much separates HOA unit members in accredited fellowships from those working in unaccredited fellowship positions, as each position essentially functions the same – each admit, diagnose and treat patients. As such, it seems obvious to the undersigned that there clearly exists a community of interest between the members of the HOA and the petitions sought herein. Furthermore, while the Employer sought to emphasize the difference in funding sources, i.e., HOA represented fellowship program positions are funded through CMS while unrepresented unaccredited fellowship program positions are funded through revenue billing, such differences would not prevent the positions from being placed in the same unit.[11]

The obvious community of interest notwithstanding, the HOA's petition must be dismissed as a unit clarification petition is not the appropriate mechanism by which to accrete positions that have been historically excluded from the unit. Furthermore, Petitioner did not introduce any evidence that could cause the undersigned to conclude that the unaccredited positions have undergone any changes, significant or otherwise.

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11 Regarding difference in funding sources, the Commission, while recognizing such can potentially be a bargaining problem, said differences do not prevent the placement of a position in the unit where a community of interest is apparent. See *Beecher Community Schools*, 1989 MERC Lab Op 311.

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.

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 Offices to be physicians within training programs accredited by the ACGME, ABOG, and CODA as evidenced by the various policies approved by 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.

Further evidence supporting the express exclusion of the unaccredited fellowship positions from the HOA is the contractual requirement that HOA Officers "act under the direction of an Attendant." Here, the record clearly shows that current members of the HOA, when acting within their program parameters, never practice independently and must have everything "signed off" by an Attendant. This is further reflected in the UMHS refusal to allow unit members to bill directly for their services. However, while the unaccredited fellowship positions are not practicing independently all the time, the record does show that, for the most part, they do practice independently and even act as attending physicians at various times. Even in situations where those positions have not acted independently, the testimony establishes that being able to do so and actually doing that are goals of those particular training programs. In those cases, the clear intent is that those fellows will be practicing independently before they complete their program. Lastly, the record is clear that in those situations where HOA unit members are moonlighting, they are working outside of the scope of their fellowship program and is considered separate and distinct from their training.

The HOA argues it "had no knowledge of any exclusion and acted quickly upon notice." The HOA claims that, given the rate of turnover within the unit and the hectic nature of a physician's job, it is "very difficult for the HOA to police its unit composition meticulously." While I understand and sympathize with the preceding claims, that cannot excuse the HOA from failing to recognize the existence of these positions throughout their decades long exclusion of these positions from the unit or the fact that committees, on which the HOA retains a membership, approved of policies memorializing the exclusion.

Accordingly, I conclude that ordering the accretion of the unaccredited fellowship positions would upset the parties' agreement and past practice that the HOA only include those physicians in accredited fellowships and who are acting under the direction of an attending physician. Accordingly, for the reasons set forth above, I find that, under the facts present herein, the HOA's petition for unit clarification must be dismissed.

The HOA argues that the Employer's conduct surrounding its refusal to arbitrate the grievance, including the timing of that decision, repudiated the parties' agreement, undermined the HOA and violated its duty to bargain in good faith.

The Commission has long held that a party's refusal to arbitrate a grievance under an existing contract which contains an arbitration clause is a violation of its duty to bargain in good faith. *Hurley Hospital*, 1973 MERC Lab Op 584. An employer' s refusal to participate in the arbitration process for a grievance which is arguably arbitrable constitutes a repudiation of its agreement with the union. *Id.* Accordingly, an employer violates its duty to bargain in good faith unless the contract clearly excludes the grievance from arbitration. See *City of Ann Arbor*, 1993 MERC Lab Op 186*; Lake Co, 22 MPER 59* (2009). However, in such situations the Commission is not concerned with whether the grievance has merit or that it is arbitrable under the terms of the contract, as those questions are not within its jurisdiction. *Maud Preston Palenske Memorial Library,* 27 MPER 53 (2014).

The Respondent argues that because the Commission, under Section 13 of PERA, retains exclusive jurisdiction over bargaining unit placement, the HOA's grievance raised "a real and substantial question of substantive arbitrability." However, Respondent's belief that a dispute is outside of the power of an arbitrator to resolve does not excuse its actions as that argument is one that should be properly made before the arbitrator. See *Hurley* at 588 (It is for the arbitrator to decide whether the grievance is properly before him/her); See also *Charter Township of Marquette*, 22 MPER 82 (2009). While I recognize that had the arbitration moved forward and that any award issued may have conflicted with my findings and holdings set forth in, such situations are not unforeseen. In *Bay City School District v Bay City Education Ass'n*, 425 Mich 426 (1986), the Court contemplating just such a scenario concluded that, in those cases, the arbitrator's award could be set aside. The HOA's grievance on its face implicated a contractual interpretation of what constituted bargaining unit work; i.e., whether the work being performed by the positions at issue was being done within an "recognized training program." Accordingly, one party's unilateral termination that a subject lacks arbitrability is inappropriate and as such, it is my finding that the Employer's refusal to proceed to arbitration violated its duty to bargain in good faith. In making this determination I am cognizant that my decision to recommend the dismissal of the petition in Case No. UC16 D-007 effectively renders the arbitration moot and as such, I will not order the parties to arbitration as requested by the HOA.

Furthermore, to the extent that the HOA contends that the Employer's delayed decision regarding its refusal to arbitrate was made in bad faith or that the totality of the Employer's conduct amounted to repudiation of the agreement, I disagree. Firstly, the circumstances surrounding the delay, i.e., significant staffing changes within the UMHS's Human Resources Department, do not support the HOA's claim of bad faith or an intent to undermine its status.

Secondly, clearly there existed a bona fide dispute over the term "recognized training program."[12] I find Sullivan's testimony regarding the late decision to cancel arbitration to be credible and devoid of bad faith. Accordingly, the HOA's other requested remedies, including awarding attorney's fees incurred preparing for the cancelled arbitration and other financial requests, is inappropriate under the facts herein.[13]

12 It is well-established that repudiation exists only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over contract interpretation is involved. Wayne County Airport Authority, 29 MPER 14 (2015).

13 Even if I concluded that the decision was made in bad faith, I note that the Commission has steadfastly refused to authorize an award of attorney fees and costs. See e.g. *Pontiac Sch Dist*, 28 MPER 34 (2014).

I have considered all other arguments as made by the parties and conclude such does not warrant any change in the outcome. Accordingly, and for the reasons set forth above, I recommend that the Commission issue the following orders:

Recommended Order in UC16 D-007

The petition filed by the House Officers Association to clarify its bargaining unit to include the position of Clinical Lecturer is hereby dismissed in its entirety.

Recommended Order in Case No. C16 D-038

Having been found to have committed an unfair labor practice, the University of Michigan Health System, its officers and agents, are hereby ordered to:

1. Cease and desist from failing to fulfill their obligation, as established by contract, to arbitrate grievances filed by the House Officers Association.

2. Post the attached notice in conspicuous places on UMHS's premises, including all places where notices to employees in the House Officers Association bargaining unit are customarily posted, for a period of thirty consecutive days

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 7, 2017

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **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 arbitrate grievances, as required by contract, filed by the House Officers Association.

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. Case No. C16 D-038; Docket No. 16-011424-MERC