STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

JACKSON COUNTY MEDICAL CARE FACILITY,
Public Employer-Respondent,

MERC Case No. C17 J-078

-and-

MICHIGAN NURSES ASSOCIATION,
Labor Organization-Charging Party
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for Respondent

Benjamin Curl, Labor Relations Representative, for Charging Party

DECISION AND ORDER

On February 23, 2018, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 16, 2018

[1] MAHS Hearing Docket No. 17-021753

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

JACKSON COUNTY MEDICAL CARE FACILITY,
Public Employer-Respondent,

Case No. C17 J-078
Docket No. 17-021753-MERC

-and-

MICHIGAN NURSES ASSOCIATION,
Labor Organization-Charging Party
_____/

APPEARANCES:

Clark Hill PLC, by Steven K. Girard, for Respondent

Benjamin Curl, Labor Relations Representative, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On October 2, 2017, the Michigan Nurses Association filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Jackson County Medical Care Facility alleging a violation of Section 10(1)(a) and 10(1)(e) of the Michigan Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS).

Respondent filed a motion for summary dismissal of the charge on October 24, 2017, and a supplemental motion on November 30, 2017. Charging Party filed a response in opposition to the motion on November 7, 2017, and a response to the supplemental motion on December 14, 2017. Based upon undisputed facts as alleged in the charge and pleadings, and as set forth below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of registered nurses employed by Respondent. Charging Party and Respondent are parties to a collective bargaining agreement which expires on March 31, 2019.

The agreement contains a grievance procedure ending in binding arbitration. Article 16 of that agreement gives Respondent the right to establish and revise "standards of conduct" and gives Charging Party the right to grieve the new or revised standards based on their conflict with other specific provisions of the agreement and/or their unreasonableness. On September 29, 2017, Respondent notified Charging Party that it was issuing a revised attendance standard of conduct to become effective on October 16, 2017. Charging Party alleges that Respondent violated its duty to bargain in good faith under PERA by refusing Charging Party's demand to bargain the effects of the new policy.

Facts:

Article 16(1) and (2) of the parties' current collective bargaining agreement reads as follows:

> Section 1. Standards of Conduct. The Employer has the right to promulgate and establish Standards of Conduct, on a departmental basis, which are reasonably related to the goals and objectives of the Employer and the welfare and safety of Employees.
>
> Section 2. Presentation to Association. At least ten (10) days prior to publication of a new or revised Standard of Conduct the Employer shall submit the proposed Standards of Conduct to the Association by email to the local RN President and the designated Association Labor Relations Representative and by certified mail to the designated Labor Relations Representative at the Association's offices . . . In the event that the Association believes a Standard of Conduct is in conflict with a specific provision of this Agreement or is unreasonable, then following the publication and establishment of such Standard by the Employer, the Association may file a grievance with respect thereto commencing at Step II of the Grievance Procedure as outlined in Article 17, Section 8 …

Article 17 of the contract contains a grievance procedure culminating in binding arbitration.

Respondent maintains a set of standards of conduct containing rules and disciplinary policies applicable to all employees. One of the standards of conduct is a progressive disciplinary policy covering approximately thirty separate offenses. Another is a separate progressive disciplinary policy covering attendance violations.

It is not clear from the pleadings when Charging Party first became aware that Respondent was planning to issue a revised attendance standard of conduct. On September 14, 2017, Charging Party sent Respondent Human Resources Director Anna Dancy a letter demanding to bargain over "changes to the terms and conditions of employment due to changes in the attendance policy." The second and third paragraphs of this letter read as follows:

> The MNA, as the exclusive representative of the RNs at Jackson Medical Care Facility ("JCMCF") does not waive its right to bargain in good faith, unilateral changes in the terms and conditions of employment which are material, substantial, and significant.
>
> Under PERA (MCL Section 423.211) a change to the terms and conditions of employment is a mandatory subject of bargaining. MNA was not provided notice of proposed changes to the attendance policy in advance, *nor did the MNA have the opportunity to negotiate the effects of said changes.* [Emphasis added.]

Charging Party asked Respondent for its available dates to meet and informed Respondent that it expected Respondent to take no action until an agreement was reached.

Dancy responded to Charging Party's letter by email the same day. In the email, Respondent declined Charging Party's request to "formally bargain over the matter." Dancy's email cited Article 16 of the contract and asserted that Respondent had a long history of modifying its attendance policies without union involvement. Dancy's email did not specifically mention effects.

On September 29, 2017, Respondent sent Charging Party an email notifying it that Respondent was implementing a revised attendance policy effective October 16, 2017, and attached a copy of the revised policy. In this email, sent by its attorney, Respondent asserted that Article 16 constituted a waiver of Respondent's duty to bargain over the revised standard or, at the minimum, demonstrated that the dispute was covered by the contract. It asserted that any challenges to the new policy had to be resolved through the contractual grievance procedure. Like its September 14 email, Respondent's September 29, 2017, email did not specifically address whether Respondent had a separate duty to bargain over effects of the changes.

Respondent's new attendance standard of conduct, like the one it replaced, was a system of progressive discipline based on the accumulation of "occurrences" of absenteeism and tardiness. The new policy, which was four pages long, explained under what circumstances occurrences would be assessed. The policy also included a chart setting out what type of discipline would be assessed for what "number of occurrences in a 12-month rolling period." The new policy, like the one it replaced, provided for a certain number of "physician-excused" absences within a 12 month period. The document sent to Charging Party on September 29, 2017, did not address how occurrences assessed under the prior policy, or physician-excused absences used before the effective date of the new policy, would be dealt with under the new policy.

On October 2, 2017, Charging Party filed a grievance asserting that the new attendance policy was unreasonable, and that Charging Party's request to bargain the effects of the policy had been denied. The relief sought in the grievance was to negotiate attendance policy changes and the effects in good faith, and to make members whole.

In its unfair labor practice charge, filed this same date, Charging Party acknowledged that the collective bargaining agreement established a process by which Respondent could create or revise a standard of conduct, such as the attendance policy, subject to challenge through the grievance procedure. The charge alleged, however, that in addition to filing the grievance it had demanded to bargain the effects of the revised attendance policy. The charge did not state when or how the demand had been made or when or how Respondent had refused it.

Sometime between the beginning of October and October 16, 2017, Respondent posted a document entitled "Attendance Policy Update" which summarized the changes made by the new policy. The document also explained how Respondent intended to deal with occurrences employees had accumulated before the new policy took effect and how Respondent would treat physician-excused absences that occurred before the effective date of the new policy. Neither of these topics was specifically covered in the revised attendance standard of conduct.

Respondent's Motions for Summary Disposition and Charging Party's Responses:

As noted above, Respondent filed its first motion for summary dismissal on October 24, 2017. In that motion, Respondent pointed to Section 16 of the contract and argued that the charge should be dismissed because the dispute was covered by the contract. The motion did not address Charging Party's claim that Respondent had a separate obligation to bargain over the effects of the new attendance policy and that it had refused Charging Party's demand to bargain over these effects.

In its response to this motion, Charging Party pointed out that its charge did not allege that Respondent had a duty to bargain over the decision to issue the new policy, but rather that it was required to bargain over the effects of the decision. Charging Party stated that regardless of the outcome of its October 2, 2017, grievance, there were immediate effects that needed to be bargained, including but not limited to how the new attendance policy would account for attendance events that had already occurred and were documented in the employee's records. Charging Party asserted that the contract did not cover the impact or effect of changes in the attendance policy. According to Charging Party, since there was no evidence that Charging Party had waived its right to bargain over effects, Respondent had the obligation to provide Charging Party with a meaningful opportunity to bargain the impact and effect of the changes.

Respondent was granted permission to file a supplemental motion for summary disposition. In the supplemental motion, Respondent reiterated its argument that the subject matter of the parties' dispute, which Respondent identified as the revision of the attendance policy, was covered by the contract. It also asserted that any related issues, such as how occurrences assessed under the former policy would be treated under the new policy, were simply "details left to arbitration."

In its response to the supplemental motion, Charging Party took issue with Respondent's claim that all issues related to the new policy were covered by the policy. As an example, it pointed out that Respondent's revised standard of conduct did not address the treatment of prior occurrences.

Discussion and Conclusions of Law:

The Commission has long recognized that certain types of employer decisions fall within the scope of its inherent managerial prerogative. These include the decision to lay off employees and the decision to eliminate positions and transfer work as part of a legitimate reorganization. See e.g., *AFSCME, Metropolitan Council #23 and Local 1277 v City of Centerline*, 414 Mich 642 (1982) *; Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501 (1986). However, it is equally well established that even where there is no bargaining obligation with respect to a particular decision, an employer does have a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. *Centerline,* at 661-662; *Ishpeming,* at 508; *Wayne Co Cmty College*, 20 MPER 98 (2014); *Ecorse Bd of Ed*, 1984 MERC Lab Op 615.

In *City of Flint (Police Dept)*, 28 MPER 6 (2014) (no exceptions), cited by the Charging Party in its response to Respondent's first motion, the Commission's ALJ applied this principle to an employer's "decision" to pass along to unit employees increases in the costs of their health care plans that occurred after their collective bargaining agreement expired, an action mandated by Section 15b of PERA. The ALJ held that although the employer had no duty to bargain over the "decision" itself, it did have a duty to bargain over the effects or impact of the decision. He found that this duty included, but was not limited to, bargaining over whether the employer should schedule a new open enrollment period to allow employees to switch to lower-cost plans after the employees' costs for their current plans suddenly increased.

As Respondent correctly notes, *City of Flint* did not involve potentially conflicting legal and contractual obligations. There are well-established principles for dealing with these conflicts when they arise in the context of an unfair labor practice charge under PERA. As the Supreme Court noted in *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area Sch. Dist*, 452 Mich. 309, 317–18, (1996), a public employer can fulfill its statutory duty to bargain over a mandatory subject of bargaining duty by bargaining about a subject and memorializing resolution of that subject in the collective bargaining agreement. When the collective bargaining agreement includes a grievance procedure that culminates in binding arbitration, the Commission's initial task is to decide whether the parties' dispute is "covered by" a provision or provisions in the agreement. *Port Huron*, at 321. If the term or condition in dispute is "covered by" a provision or provisions of the agreement, the Commission generally leaves the details and enforceability of the provision to arbitration. *Port Huron; Macomb Co v AFSCME*

Council 25, 494 Mich 65, 70 (2013). An exception is when the facts indicate that the employer's conduct amounts to a "repudiation" of the collective bargaining agreement.[2]

In *Calhoun Co*, 29 MPER 71 (2016) (no exceptions), a provision in the parties' contract gave the employer the right to establish reasonable rules and regulations not conflicting with any other provision of the agreement. The union filed a charge alleging that the employer's unilateral implementation of a new attendance policy violated its duty to bargain because it conflicted with a specific provision of the contract dealing with the use of paid time off. The ALJ found that the parties had agreed that the employer could make reasonable rules, including attendance rules, and determine penalties for violation of the rules, and that they had further agreed that questions of whether rules were in conflict with other provisions of the agreement would be dealt with in arbitration. The ALJ concluded, therefore, that the dispute over whether the rules conflicted with the contract was covered by the collective bargaining agreement. According to Respondent, *Calhoun* stands for the proposition that once the Commission finds that an issue in dispute is covered by the collective bargaining agreement, there is no further duty to bargain about "effects."

I agree with Respondent, of course, that except when an employer has repudiated the contract, once the Commission finds that the issue in dispute between the parties is covered by the collective bargaining agreement and the agreement provides for binding arbitration, the employer has no further duty to bargain over that issue. In *Calhoun*, the issue in dispute was whether the new attendance policy conflicted with a provision of the collective bargaining agreement. As the ALJ found, that issue was covered by the parties' agreement. However, I do not agree that when, as here, parties have agreed that the employer will be allowed to unilaterally promulgate disciplinary rules and the union will then have the right to grieve them, *all disputes related to these disciplinary rules are ipso facto covered by the parties' agreement.* For example, in this case Respondent, adhering to the contract, submitted the revised attendance standard of conduct to Charging Party more than 10 days before the revised standard took effect. This gave Charging Party opportunity to review the revised standard. However, when Respondent realized that it needed to decide how occurrences incurred, and physician-excused were used, under the old standard would be accounted for under the revised standard, it simply announced its decision on these matters to employees. This suggests that even Respondent recognized that these matters were outside the scope of Article 16(1) and (2).

[2] Repudiation exists when no bona fide dispute over interpretation of the contract is involved, and the contract breach is substantial and has a significant impact on the bargaining unit. *Detroit Regional Convention Center, 25 MPER 8 (2011); Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897. The Commission will find repudiation only when the action of a party amounts to a rewriting of the contract or a complete disregard for the contract as written. *Goodrich Area Sch*, 22 MPER 103 (2009); *City of Detroit (Dep't of Transp)*, 19 MPER 34 (2006). The Commission will not find repudiation on the basis of an insubstantial or isolated breach. *Michigan State Univ*, 1997 MERC Lab Op 615, 618.

However, even when an employer clearly has an obligation to bargain over a particular subject, that duty to bargain is conditioned on the union making a timely demand. *SEIU Local 586 v Village of Union City,* 135 Mich App 553 (1984); *City of Pontiac*, 22 MPER 46 (2009)*; City of Grand Rapids* 22 MPER 70 (2009)*; Holland Pub Sch,* 1989 MERC Lab Op 346, 355. A bargaining demand does not have to take any particular form or contain any specific wording, but the employer must know that a request is being made. *St Clair Intermediate Sch Dist*, 17 MPER 77 (2004); *Michigan State Univ,* 1993 MERC Lab Op 52, 63.

In the instant case, Charging Party sent a letter to Respondent on September 14, 2017, demanding to bargain "regarding changes to the terms and conditions of employment due to changes in the Attendance policy." There was no explicit demand to bargain over the "effects" of the changes in the attendance policy, as opposed to the changes themselves. Nor did the letter identify any specific issue over which Charging Party sought to bargain. I find that this letter, on its own, was not sufficient to put Respondent on notice that Charging Party was demanding to bargain over anything other than changes to its existing attendance standard of conduct, a subject clearly covered by the parties' collective bargaining agreement.

It is unclear from the pleadings whether Charging Party made any other demand to bargain, either over the changes to the existing policy or their "effects." Charging Party concedes, however, that it did not identify any specific issue over which it might wish to bargain before November 7, 2017, when it filed its response to Respondent's first motion for summary disposition. There are some circumstances in which a union's general demand to bargain over the effects of an employer decision may be adequate to trigger a duty on the part of the employer to meet. For example, if an employer announces its decision to eliminate unit positions, it may be apparent to both parties that there are issues, other than the decision itself, remaining to discuss. These might include how the work will be redistributed and what will happen to the employees whose positions are being abolished. In this case, however, Charging Party had agreed to permit Respondent to unilaterally revise disciplinary standards of conduct, subject to challenge through the grievance procedure. I find that if Charging Party believed that there were issues outside the scope of this agreement that remained to be bargained, it was obligated to identify them in its bargaining demand. I conclude that Respondent did not violate its duty to bargain because, although given the opportunity to do so, Charging Party did not make a timely demand to bargain over how the new attendance policy would account for attendance events that had already occurred, or any other bargainable issue. In accord with this and other conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 23, 2018