STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LANSING COMMUNITY COLLEGE AND THE BOARD OF TRUSTEES,
Public Employer-Respondent,

-and-

LANSING COMMUNITY COLLEGE PART-TIME TECHNICAL UNION, MEA/NEA,
Labor Organization-Charging Party in Case No. C14 E-056; Docket No. 14-009450-MERC,

-and-

LANSING COMMUNITY COLLEGE CHAPTER OF THE MICHIGAN ASSOCIATION FOR HIGHER EDUCATION,
Labor Organization-Charging Party in Case No. C14 E-057; Docket No. 14-009333-MERC.
_____/

APPEARANCES:

Mika, Meyers, Beckett & Jones, PLC, by David R. Fernstrum, for Public Employer-Respondent

White, Schneider, Young & Chiodini, P.C., by Timothy J. Dlugos, for Labor Organizations-Charging Parties

DECISION AND ORDER

On October 23, 2015, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order 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 any 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: December 7, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, these cases were assigned to Travis Calderwood, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). An evidentiary hearing was held on August 20, 2014, in Lansing, Michigan. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on or before October 21, 2014, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charges and Procedural History:

On May 9, 2014, the Lansing Community College Part-Time Technical Union, MEA/NEA (PTCTU) and the Lansing Community College Chapter of the Michigan Association of Higher Education (MAHE) filed separate unfair labor practice charges against the Lansing

Community College and its Board of Trustees (Respondent or Employer) challenging the Employer's implementation of a policy limiting the maximum hours worked for part-time employees. On May 16, 2014, the parties were provided notice that these proceedings were consolidated. By the same correspondence I directed Respondent to submit a position statement responding to the specific allegations set forth by Charging Parties; Respondent provided such on June 6, 2014.

Charging Parties each allege that Respondent unilaterally implemented a mid-contract change in hours and other terms and conditions of employment in violation of Sections 10(1)(a) and 10(1)(e) of PERA and has refused to bargain in good faith. Specifically, the charges allege that on November 11, 2013, the Board instituted a rule change wherein it limited the maximum number of hours that part-time employees could work.

Findings of Fact:

Charging Party MAHE is the sole and exclusive bargaining representative for "all full-time and part time-time Faculty, including Teaching Faculty who are scheduled to teach at least three (3) workload hours per academic year and Academic Professionals who are scheduled to work at least ninety-six (96) hours per academic year…" Respondent employs approximately 1,845 faculty members represented by MAHE. Of those 1,845 unit faculty members, approximately 210 are full-time employees, while the remaining 1,635 are part-time faculty members who work schedules that range from less than 100 hours to approximately 1,560 hours per year, depending on the needs of Respondent.

Charging Party PTCTU is the sole and exclusive bargaining representative for "all regular part-time support, technical, and paraprofessional employees of Lansing Community College…" Respondent employs approximately 166 part-time technical and support employees, 140 of which are represented by the PTCTU and who work schedules that range from less than 100 hours annually to more than 1,500 annually depending on the needs of Respondent.

MAHE Contract

Respondent and Charging Party MAHE are parties to a collective bargaining agreement that took effect on May 21, 2012, and which shall expire on August 21, 2016. That contract contains the following articles relevant to the present controversy.

Article III of the contract, entitled "Employer Rights," provides in the relevant part:

A. Employer Rights in General

1. The Employer possesses and retains the sole power, duty and right to operate and manage its departments, agencies, programs and facilities; to carry out its business; and to carry out all constitutional, statutory and administrative policy mandates and goals.

   Except as limited by the express provisions of this Agreement, such retained Employer Rights include, but are not limited to, the right, without

engaging in negotiations, to determine and change matters of managerial policy and administrative control of the College and its facilities, equipment and operations; the mission of the Employer and its parts; the services to be provided and the methods, means, and procedures to be used in providing them; the organizational structure; the nature and number of facilities and departments and their locations; to establish and change the classifications of work and the duties and responsibilities of each; to hire and increase or decrease the size of the work force; to assign personnel; to recognize and reward success; to maintain order and efficiency; and to use new and/or improved methods or outside assistance.

2. The Employer also reserves certain rights and powers, which are limited by the express provisions of this Agreement. These include, but are not limited to, the right, without engaging in negotiations, to discipline, suspend or discharge members whose conduct or job performance is unsatisfactory to the Employer; to establish reasonable work rules and to fix and determine penalties for violation thereof; to fill vacancies within the bargaining unit; to lay off and recall personnel; to make judgments as to the skills and abilities of members; and to establish and change work schedules. The Employer may exercise such expressly limited rights, provided, however, that these rights shall not be exercised in violation of any specific provision of this Agreement and, as such, the exercise of such limited rights shall be subject to the Grievance Procedure.

Article Xl(B)(2)(a) of the contract states the following with respect to "part-time Academic Professionals":

> Except as otherwise provided in this Article, part-time Academic Professionals will be assigned a base workload that does not regularly exceed thirty (30) clock hours per week, to be scheduled as necessary during the 12-month academic year. Higher workloads may be assigned from time to time based on fluctuations in required work, provided that workload of a part-time academic professional will not exceed 1560 hours of actual work in an academic year.

Article XI(D)(2) of the contract states the following with respect to "Part-time Teaching Faculty":

> Professional Activities and Duties. In addition to or in lieu of teaching assignments, part time Teaching Faculty may be given non-teaching assignments such as course development or revision, curriculum development, student advising, leadership assignments, etc., provided their workload does not regularly exceed the nominal equivalent of thirty (30) clock hours per week or 1560 clock hours in an academic year.

Article XIII of the previous contract, contained several individual subsections, not repeated in the current contract, which addressed the workload maximums of specific part-time

unit members. Those provisions each contained language limiting the number of hours to thirty (30) in a week.

Article XXIV of the current contract, entitled "Agreement Interpretation" provides as part of that article the ability for the parties to hold "Special Conferences." Article XXIV(A)(1) and (5) provides:

> 1. Special Conferences on important matters, including administration or interpretation of the Agreement, excluding grievances and negotiations, will be arranged between the Employer and the Association upon the request of either party, but not more frequently than once per calendar quarter absent mutual agreement.
>
> ***
>
> 5. This Special Conference provision is not to be used as a substitute for the Grievance Procedure and is not subject to the Grievance Procedure; nor will participation in Special Conferences obligate either party to negotiate, modify or otherwise change the terms of this Agreement. However, this does not prohibit the discussion of grievances, negotiations, or items of concern to the parties in the interpretation and enforcement of this Agreement.

Article XXV, of the current contract provides a grievance procedure culminating in arbitration. That Article defines a grievance as:

> [A] a claim made by one (1) or more bargaining unit members, alleging a violation, misinterpretation and/or misapplication of a specific article or section of this Agreement as written and/or the College's Policies related to employment practices.

PTCTU Contract

Respondent and Charging Party PTCTU are parties to a contract that took effect September 17, 2012, and which shall expire June 30, 2016. The PTCTU contract contains identical "Employer Rights" language in Article III to that which is contained in the MAHE contract. The PTCTU contract also contains almost identical language with respect to grievances and "Special Conferences" as is contained in the MAHE contract.

The current contract's glossary defines "part-time employee" as:

> A part-time employee is an employee who is employed by the College whose normal schedule of work usually consists of less than forty (40) hours per week. The status of part-time employees does not change based on occasional periods during which they may be scheduled to work forty (40) hours or more per week (e.g., to fill in for an absent co-worker, during periods of heavy work load, etc.).

The previous contract between Respondent and Charging Party PTCTU did not define the term "part-time employee." Testimony was provided that the addition of the definition of "part-time employee" was proposed by Respondent during the negotiations leading to the 2012-2016 contract.

Hour Limit

On February 21, 2013, Rulesha Payne, the MEA UniServ Director for both Charging Parties, sent an email to James Mitchel, Respondent's Director of Labor and Organizational Development, and Mary Stroebel, another College employee, which stated:

> I have been informed that the College has instituted a hard cap on the number of hours part-timers can work at the college. Will you please provide specifics to the mandate you are implementing?

On February 25, 2013, Mitchel responded by email stating "the College has had a long-standing 30 Hour Rule, to limit the hours of Part-time employees, which was in place long before the passage of the Patient Protection and Affordable Care Act." Mitchel attached a document to that email, dated January 6, 1998, and entitled "Maximum Hours for Part-Time Staff." The first line of that document states clearly "Part-time employees at Lansing Community College can work a maximum of 30 hours per week." The document went on to set the calculation method used to determine the number of hours worked as well as a phase in period for certain employees who had regularly worked in excess of thirty-five (35) hours. The document provided that by July 1, 1999, all part-time employees would work a maximum of thirty (30) hours a week, regardless of hire date. That document concluded with the statement that "[n]othing in this statement or practice is intended to alter course hour, lab hour, or other limitations prescribed in the current or forthcoming MAHE contract."

Respondent introduced testimony at the hearing which established its purpose for imposing the thirty (30) hour limit was to maintain a distinction between the workloads of its full-time employees and its part-time employees.

Despite the existence of the 1998 Policy, it was revealed during testimony that the Respondent had not strictly enforced the thirty (30) hour limit and that members of both the MAHE and PTCTU units had worked more than thirty (30) hours at various times. Furthermore, it is undisputed that Respondent has consistently exercised its management authority to establish the weekly work schedules for members of both the MAHE and PTCTU bargaining units and that Respondent often changes those work schedules based on its needs and the needs of its students.

In a letter dated October 1, 2013, provided to both Charging Parties, as well as a third bargaining unit operating at the College, Respondent provided notice of a "planned change in the College Rule with respect to the maximum hours that part-time staff may work." More specifically, that letter stated:

> Effective September 1, 2013, LCC has limited the hours of all student-employees to a maximum of 25 hours per week. We believe it is critical to impose a similar limitation on NEW PART-TIME EMPLOYEES hired on or after November 1,

> 2013. This is to avoid burdensome penalties under the Patient Protection and Affordable Care Act (PPACA), which would sap resources from LCC with no benefit to any of our employees.

Included with the October 1, 2013, letter was the revised "Rule on Maximum Hours for Part-Time Staff." Respondent's letter requested that the unions provide "written suggestions or concerns by October 14, 2013, so that your thoughts can be considered before a final decision is made on implementation."

The revised rule provided very clearly at the top the following:

> Part-time employees at Lansing Community College hired before November 1, 2013 can work a maximum of 30 hours per week in the part-time positions they hold before November 1, 2013.
>
> Part-time employees hired on or after November 1, 2013 and current employees awarded a different part-time position on or after November 1 2013, can work a maximum of 25 hours per week. [emphasis in original]

The revised rule went on to provide disclaimer language similar to that of the 1998 policy by stating "[n]othing is this statement of practice is intended to alter course hour, lab hour, or other limitations prescribed in the current collective bargaining unit contracts."

By memorandum dated October 12, 2013, both Charging Parties, together with Payne and a representative of the AFT bargaining unit, requested a "Special Conference" be held between themselves and representatives for Respondent to discuss the proposed rule change. That memorandum also requested that Respondent "cease and desist the implementation" of the rule change.

Four separate "Special Conference" meetings took place on October 22, 2013, October 29, 2013, November 1, 2013, and November 11, 2013. Representatives from both Charging Parties were present at each of the four meetings. At the October 29, 2013, meeting, the parties were provided a revised draft of the proposed rule change which increased the maximum number of part-time hours from twenty-five (25) to twenty-eight (28) but retained the November 1, 2013, trigger date and disclaimer language with respect to the current contracts.

On November 12, 2013, Respondent provided Charging Parties with a draft of the proposed rule change and indicated it was planning on rolling out the rule change later that day. This draft retained the hour increase first revised in the October 29, 2013, draft but extended the trigger date to November 14, 2013. This draft, as did all earlier drafts, contained the same disclaimer language with respect to the current contracts.

The actual final rule as adopted by Respondent, and disseminated on November 13, 2013, retained the twenty-eight (28) hour maximum and the November 14, 2013, trigger date for new employees, but extended the trigger date for current employees who accept a different part-time position to January 1, 2014. The same disclaimer language as before was retained.

By memorandum dated November 25, 2013, Payne further objected to the rule change and alleged that the Respondent "ignored [the] collective bargaining rules of engagement under PERA." Respondent responded by letter dated December 5, 2013, and again by letter dated December 9, 2013. Respondent, in the December 5, 2013, letter stated:

> As noted during our four Special Conferences, this change is merely a revision to an administrative rule that has been in place for a quarter of a century, without protest, and does not conflict with any CBA provisions. [1]

That letter went on to claim that the Respondent properly exercised its "Employer Right" under the contracts to "change matters of managerial and administrative control of the College" without engaging in negotiations. Respondent also claimed in that letter that it had made changes to certain parts of its proposed rule as a result of the discussion during the four Special Conferences.

On December 9, 2013, Charging Party MAHE filed a grievance under the contract protesting the rule change. On December 10, 2013, Charging Party PTCTU did the same. At the time of hearing, the grievances were being held in abeyance.

Discussion and Conclusions of Law:

Charging Parties claim that Respondent has violated Sections 10(1)(a) and (e) of PERA by its unilateral implementation of a policy that changes the maximum number of hours worked by a part-time employee from thirty (30) to twenty-eight (28). Charging Parties both allege that the Respondent's actions show a clear effort to repudiate the negotiated language of their respective contracts.

Respondent contends that it merely exercised its managerial authority in accordance with Article III of its contracts with Charging Parties. Respondent asserts that because the subject in dispute is "covered" by the respective collective bargaining agreements between the parties, arbitration is the appropriate forum for resolution. Alternatively, Respondent urges the undersigned to conclude that Charging Parties expressly waived their right to bargain over changes in employees' schedules and hours of work during the term of their collective bargaining agreements. As another alternative, Respondent claims that even if arbitration is not the proper forum for resolution or if the finding is made that Charging Parties did not waive their right to bargain over changes to their members' schedules and hours during the term of the respective agreements, there still was no obligation to bargain over said changes absent a significant adverse impact on the bargaining unit members. Lastly, Respondent claims that if all else fails, the record establishes that it engaged in good faith negotiations with both Charging Parties before implementing its new administrative policy.

Under Section 15 of PERA, a public employer is required to bargain collectively with the representatives of its employees over "wages, hours, and other terms and conditions of employment." Once a specific subject has been classified as a mandatory subject of bargaining, neither party to a collective bargaining relationship may take unilateral action on the subject

[1] The December 9, 2013, letter corrected the claimed length of time that the rule had been in place from a "quarter of a century" to merely fifteen (15) years.

absent an impasse in negotiations. *Central Michigan Univ. Faculty Ass'n v Central Michigan University*, 404 Mich 268, 277 (1978). A party may satisfy its obligation to bargain over a mandatory subject of bargaining when it negotiates a contract provision that fixes the parties' rights with respect to that subject, for the term of that agreement. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 318 (1996). Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of then-obligations regarding that topic as covered by the agreement.

When a term or condition of employment is covered by a provision in a current collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of such provision are generally left to arbitration. *Port Huron Ed Ass'n*, 317-321. As our Supreme Court recently reaffirmed in *Macomb Co v AFSCME Council 25*, 494 Mich 65, 81 (2013), "when the parties have agreed to a separate grievance or arbitration process, the [Commission's] review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim."

It is clear from a plain reading of the current MAHE contract that the maximum number of hours that a part-time employee may work is covered by and addressed in that contract. Articles Xl(B)(2)(a) and XI(D)(2) clearly state that part-time employees who are members of that bargaining unit will not be regularly assigned workloads that exceed thirty (30) hours in a week. Equally clear is that Article III of MAHE contract expressly reserves the right of the Respondent to "the right, without engaging in negotiations, to … establish and change work schedules."

The PTCTU bargaining unit is comprised entirely of "regular part-time support, technical, and paraprofessional employees." The contract defines the term "part-time employee" as someone whose "normal schedule of work usually consists of less than forty (40) hours per week." Furthermore, the PTCTU contract contains identical language regarding the authority of Respondent to establish and change work schedules without engaging in negotiations. Accordingly it is the opinion of the undersigned that the PTCTU contract also covers the subject in dispute between the parties.

However, even when a collective bargaining agreement covers a subject in dispute between the parties and that contract includes a grievance and arbitration procedure, an employer's conduct or actions may still give rise to an unfair labor practice charge. A party's repudiation of a provision or provisions of its collective bargaining agreement may be tantamount to a rejection of its duty to bargain. The Commission has defined repudiation as an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. In order for the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over interpretation of the contract language. *Plymouth-Canton Cmty Schs*, 1984 MERC Lab Op 894, 897.

With respect to repudiation, in *Genesee County*, 23 MPER 69 (2010) (no exceptions), relied upon by Charging Parties, the ALJ held that the employer's decision to implement furlough days without pay amounted to a repudiation of the parties' contract. The employer, in justifying its actions, relied on the "Employer Rights" language of that contract - language which is very similar to that which appears in both the MAHE contract and the PTCTU contract. That contract language reserved onto the employer the right:

> [T]o establish and change work schedules and hours … provided, however, that these rights shall not be exercised in violation of any specific provision of this Agreement and, as such, they shall be subject to the Grievance and Arbitration Procedure established herein.

Contained elsewhere in that contract was language that expressly and specifically defined the work period as "eighty (80) hours per bi-weekly pay period." The ALJ concluded that because the language of the contract clearly established an eighty (80) hour work period and that no language had been presented by the employer to support a claim that it was within its right to impose furlough days, no bona fide dispute over contract interpretation existed. Furthermore, the ALJ determined that the implementation of eight unpaid furlough days that affected more than 400 employees had a significant impact on the bargaining units.

The facts at issue in the present case, while similar to those of *Genesee County*, are distinguishable such that, when considering either the MAHE or PTCTU contract, they support a conclusion that a bona fide dispute as to contract interpretation does exist. In the MAHE contract, there is agreed upon a maximum number of hours that a part-time employee may be regularly scheduled for – not a guarantee of a certain amount of hours as there was in *Genesee County*. Furthermore, while both the MAHE contract and the contract at issue in *Genesee County* contained very similar management rights clauses, including limiting the exercise of those rights in violation of any specific provision of those contracts, the latter contained an explicit provision – the definition of "work period" - not open to a bona fide dispute as to its interpretation, while the former does not.[2]

Similarly, the PTCTU contract defines part-time employees, of which its entire bargaining unit is comprised, as those employees "whose normal schedule consists of less than forty (40) hours per week." As with the MAHE contract, the language in the PTCTU contract is not a guarantee of a certain number of hours but rather is a guarantee that the unit members will not be subjected to regularly working more than forty (40) hours a week. I conclude that a bona fide dispute does exist as to contractual interpretation in this case as well.

Having concluded that both the MAHE and PTCTU contracts both contain provisions that "cover" the current dispute and that bona fide dispute exists with respect to contract interpretation, it is the opinion of the undersigned that the present dispute should proceed

[2] The distinction between contractual interpretation and contract repudiation in the instant matter is more easily explained by considering the following scenario – if under the current MAHE contract language the employer unilaterally began regularly scheduling part time employees to work schedules greater than thirty (30) hours a week, no bona fide dispute over contract interpretation would exist because such an action would be in clear violation of the thirty (30) hour limit.

according to the parties' agreed upon grievance and arbitration procedure. As such, consideration of the alternative defenses as set forth by the Respondent is not necessary.

I have considered all other arguments as set forth by the parties, whether in pleadings, at hearing or within their post hearing filings, and conclude they do not warrant a change in the conclusion. Accordingly, it is the recommendation of the undersigned that the Commission issue the following order:

Recommended Order

The unfair labor practice charges in consolidated cases C14 E-056;14-009450-MERC and C14 E-057; 14-009333 are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 23, 2015