STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GOGEBIC COMMUNITY COLLEGE,
Respondent-Public Employer,

Case No. C97 J-219

-and-

GOGEBIC COMMUNITY COLLEGE, MEA
SUPPORT PERSONNEL ASSOCIATION (MESPA),
Charging Party-Labor Organization.
_____/

APPEARANCES:

A. Dennis Cossi, Esq., for the Public Employer

White, Przybylowicz, Schneider & Baird, P.C., by Arthur R. Przybylowicz, Esq., for the Labor Organization

DECISION AND ORDER

On October 26, 1998, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above case, finding that Respondent Gogebic Community College did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10), by terminating a privately-written dental health insurance plan for members of a bargaining unit represented by Charging Party Gogebic Community College, MEA Support Personnel Association (MESPA) and replacing it with a self-funded dental plan.

On November 23, 1998, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. Respondent filed a brief in support of the recommended order and in opposition to the Union's exceptions on December 11, 1998.

Background:

The facts in this case are not materially in dispute. MESPA represents a bargaining unit consisting of all part-time and full-time secretarial and clerical employees of the College. The Employer and the Union were parties to a collective bargaining agreement covering the period August 1, 1996 to June 30, 1998. Article 21 of that contract, which was entitled "Insurance Protection," contained the following language:

C. The College will pay the full premium cost for all full-time employees for a

dental program based on a $50.00 deductible and 50% co-pay progressing to 100% each year the program is in effect. Benefits structure will be furnished to employees. This program will include major services and an orthodontic rider.

D. Beginning with the 1983-84 year, the College shall provide an additional $5.00 per month per employee to improve the total dental program. The order of improvement shall be as follows:

a. Purchase of Missing Tooth Waiver; then

b. Denture and Prosthetic 5-year waiver; then

c. Major services modification; then

d. Basic services modification.

The contract also contained a waiver clause, providing that the contract constitutes the full agreement of the parties and that each side waives the right to further bargaining over matters covered by the agreement or not specifically referred to therein.

For many years, the Employer provided MESPA members with the Ultradent dental insurance plan of the Michigan School Employers Group (SEG), a privately-written, fully insured program administered through the School Employers Trust (SET). On September 30, 1997, the Board of Trustees voted to approve a change to a self-funded plan under which the College would pay a monthly premium based on claims made, as well as an administrative cost of $2.25 per person, rather than paying a predetermined set premium. The Employer notified MESPA of the change by letter dated October 1, 1997, approximately one month before the new plan became effective.

Discussion and Conclusions of Law:

On exception, Charging Party contends that the College violated its bargaining obligation under PERA by changing from the SET-SEG Ultradent dental plan to the self-funded, uninsured insurance program. According to MESPA, the Employer's longstanding use of the Ultradent plan created a term of employment that could not be altered absent waiver of bargaining. In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be a "tacit agreement" that the practice would continue. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 325 (1996), quoting *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455 (1991). Where the agreement unambiguously covers a term of employment that conflicts with a party's past behavior, however, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Education Ass'n,* 452 Mich at 329. In such circumstances,

the party "seeking to supplant the contract language must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions – intentionally choosing to reject the negotiated contract and knowingly act in accordance with past practice." *Id*. See also *Grand Rapids Community College*, 1998 MERC Lab Op ___, issued 12/29/98.

In the instant case, the collective bargaining agreement does not require the Employer to utilize any particular dental insurance carrier. Rather, Article 21 of the contract merely provides that the Employer will pay the full premium cost for all full-time employees. As noted by the ALJ, the Union had the opportunity to bargain for more specific language, as it did for the health insurance plan and the vision program, but failed to do so. Moreover, the parties agreed to a waiver clause which provides that the contract constitutes the full agreement of the parties. Under such circumstances, we conclude that the agreement gives the Employer the unilateral right to select a carrier for the dental insurance program. Therefore, the dental plan is a matter "covered by" the contract and the higher standard of proof applies with regard to the establishment of a past practice. After carefully reviewing the record, including the transcript and pleadings, we conclude that the Union has failed to meet its burden on this issue. In support of its contention that a past practice existed, Charging Party refers to testimony that its chief negotiator expected that the SET-SEG Ultradent plan would continue to be utilized by the Employer throughout the duration of the 1996-1998 collective bargaining agreement. However, such testimony is insufficient to establish that the Employer ever intentionally agreed to relinquish its right to select a carrier. Similarly, the fact that the College has utilized the SET-SEG Ultradent plan since at least 1983 does not, in and of itself, constitute a past practice sufficient to overcome the unambiguous contract language. Tacit or informal acquiescence does not prevail over contradictory contract language. *St. Clair Intermediate School District v Intermediate Education Ass'n*, 458 Mich 540, 572 (1998)*; Port Huron*, *supra*. There is simply no evidence in the record to suggest that the parties had a meeting of the minds with respect to the continuation of the SET-SEG Ultradent plan.

The Union also challenges the ALJ's determination that the change to a self-funded plan resulted in no substantive alteration to existing benefit levels and plan administration. MESPA contends that the change altered the method, dispatch and efficiency of processing of dental insurance claims. When the new plan went into effect, the Employer deposited $4,557.44 with SET. This money is used by the administrator to pay incoming dental insurance claims and is replenished by the Employer each month. If the deposited amount is depleted during any given month, however, the administrator will refuse to process any new claims until it receives additional funding from the College. According to MESPA, this potential for delay in processing constitutes a substantive alteration to existing benefit levels and plan administration. In addition, Charging Party argues that the Employer now has the ability to disallow or veto SET's payment of individual claims by refusing to fully replenish the deposit. While these scenarios may theoretically be possible under the new plan, we find the Union's arguments unpersuasive. The record indicates that the most the Employer has paid out for the entire group in one year since 1992 was under $20,000. Thus, it is not likely that the $4,557.44 deposit would be depleted in any one month. Moreover, the Employer has set aside $25,000 in a designated fund as a contingency fund for the dental plan, and it has a general contingency fund of approximately $45,000 which could be utilized if necessary. Finally, the College's Dean of Business Services testified that SET would continue to administer the program in

the same manner as it had in the past and that the Employer would not become involved with the decision whether to approve or deny claims. Based on this evidence, we agree with the ALJ's determination that the change to a self-funded program did not have a significant impact on the wages, hours or working condition of unit employees.

Finally, the Union's reliance on *St. Clair Intermediate School District*, *supra*, is without merit. In that case, the Court held that the respondents had unlawfully implemented a midterm modification in the parties' collective bargaining agreement when it increased the lifetime maximum benefit available to unit members under the health insurance plan. This finding was based on the Court's conclusion that the terms of the collective bargaining agreement contained the specific health care coverage and benefit levels bargained for by the parties. *Id*. at 568. Thus, neither party had the right to unilaterally make benefit changes to the insurance coverage specified in the contract. As noted, the contract at issue in the instant case made the choice of carrier for the dental insurance plan a matter of management prerogative. For the reasons stated above, we adopt the findings and conclusion of the Administrative Law Judge as our own.

ORDER

The unfair labor practice charges in this case are hereby dismissed.[1]

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

_____
C. Barry Ott, Commission Member

Date: _____

[1] Commissioner Bishop did not participate in this decision.