STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MICHIGAN EDUCATION ASSOCIATION, its local affiliate INTERMEDIATE EDUCATION ASSOCIATION, and its agent MICHIGAN EDUCATION SPECIAL SERVICES ASSOCIATION,
Respondents,

Case No. CU98 H-44

-and-

ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT,
Charging Party-Public Employer.
____/

APPEARANCES:

White, Przybylowicz, Schneider & Baird, P.C., by Arthur R. Przybylowicz, Esq., for Respondents Intermediate Education Association and Michigan Education Association

Fraser Trebilcock Davis & Foster, P.C., by Iris K. Linder, Esq., for Respondent Michigan Education Special Services Association

Scott C. Moeller, Esq., Director of Legal Services, and Thrun, Maatsch & Nordberg, P.C., by Donald J. Bonato, Esq., for Charging Party

DECISION AND ORDER

On July 30, 1999, Administrative Law Judge James P. Kurtz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondents Michigan Education Association (hereafter "MEA"), its local affiliate Intermediate Education Association (hereafter "IEA") and its agent Michigan Education Special Services Association (hereafter "MESSA"), did not violate Section 10(1)(a) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210(a); MSA 17.455(10)(a) by implementing a midterm modification of the collective bargaining agreement in effect between the parties. The ALJ also found that Respondents did not violate Section 10(3)(c) of PERA by failing to provide Charging Party St. Clair Intermediate School District (ISD) with information relevant and necessary to the administration and enforcement of the contract. The Decision and Recommended Order of the Administrative Law Judge was served

on the interested parties in accord with Section 16 of PERA, MCL 423.216; MSA 17.455(16).

On August 30, 1999, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. On September 10, 1999, Respondent MESSA filed a brief in support of the ALJ's Decision and Recommended Order. Respondents IEA and MEA filed a brief in support of the ALJ's Decision and Recommended Order on September 17, 1999. On September 27, 1999, Charging Party filed a reply to the briefs filed by Respondents IEA, MEA and MESSA.[1]

I.

The following facts were derived from the pleadings and briefs submitted by the parties to the ALJ, as well as the exhibits attached to those documents. MESSA is an agent of the MEA and the policyholder of health insurance plans covering most MEA members. See *St. Clair Intermediate School District v Intermediate Education Association*, 458 Mich 540, 561-563 (1988). The MEA and its local affiliate, the IEA, represent a bargaining unit of teaching personnel employed by the ISD. The most recent collective bargaining agreement entered into between the ISD and the labor organization covers the period from July 1, 1997, through June 30, 2000. Article VIII, Section 2(A) of that agreement governs health insurance coverage. That section provides, in pertinent part:

> The District agrees to pay premiums for health insurance for each teacher through a carrier determined by negotiations. The District agrees to provide MESSA Super Care 1 coverage without cost to the member, except as otherwise expressly provided for in this agreement, for each month the member is actually employed by the District. Coverage shall commence in the month the teacher is hired, to commence within fifteen (15) days of hiring date and coverage shall terminate at the end of the month in which the teacher's employment with the District ends. All coverage will be governed by the policies, provisions and rules and regulations of the carrier.

Blue Cross/Blue Shield of Michigan (hereafter "BCBSM") and BCS Life Insurance Company (hereafter "BCS") are currently the underwriters for MESSA health insurance plans, including MESSA Super Care 1. MESSA and BCBSM share responsibility for administering the plans.

The insurance certificate filed with the Michigan Insurance Bureau for the Super Care 1 plan provides that benefits will be "available for services which are determined by MESSA/BCBSM to be medically necessary" and that "BCBSM's criteria will be used to make this determination." According to the certificate, "medically necessary" means that the covered service, supply or care

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[1]Commission Rules 66 & 67, R 423.466 and R 423.467, give parties the right to file exceptions or cross-exceptions to an ALJ's Decision and Recommended Order and the right to file a brief in support of the ALJ's decision. The rules do not, however, provide for the filing of replies to the latter. *City of Grand Rapids*, 1997 MERC Lab Op 358, 361; *Taylor School District*, 1994 MERC Lab Op 285, 289. Charging Party did not request special permission to file a reply brief, nor did it set forth any compelling reason for doing so. Accordingly, the reply brief filed by Charging Party on September 27, 1999, will not be considered in this matter.

meets all of the following conditions:

a. It is rendered for the treatment, diagnosis or symptoms of an injury, condition or disease.

b. The care, treatment or supply is appropriate, given the patient's symptoms, and is consistent with the diagnosis. "Appropriate" means that the type, level and length of care, treatment or supply and setting are needed to provide safe and adequate treatment.

c. It is not needed for convenience of the patient, physician or patient's family.

d. It is not treatment the MESSA/BCBSM generally regard as experimental or research.

e. It is not determined to be medically unappropriate [sic] by BCBSM Utilization Management and Quality Assessment Programs or by any other MESSA/BCBSM programs.

MESSA/BCBSM have the discretion to determine medical necessity in accordance with BCBSM's criteria.

The certificate explicitly excludes certain medical procedures from coverage, including artificial insemination, dental care, eye examinations and Radial Keratonomy (RK), a type of refractive eye surgery. The certificate also excludes "services . . . that are not medically necessary according to accepted standards of medical practice including any services which are experimental or research in nature." The list of excluded procedures does not make reference to either Photo Refractive Keratotomy (PRK) or Laser Assisted In Situ Keratomileusis (LASIK), two forms of refractive eye surgery which were developed after the Super Care 1 plan was designed. The plan summary booklets which are provided to employees contain the same general language as the certificate filed with the Insurance Bureau.

MESSA began covering PRK for its members sometime between 1992 and 1997. In March of 1997, MESSA implemented coverage of LASIK. On February 16, 1998, the Employer requested from MESSA information regarding coverage for various types of refractive eye surgery. MESSA responded to the information request on March 12, 1998, by confirming that LASIK was covered under standard surgical benefits "provided that the procedure is determined to be medically necessary based on specific criteria." Later that month, the Employer asked MESSA for additional information regarding LASIK coverage and a list of other benefits for which coverage was added following negotiation of the contract. On April 23, 1998, MESSA responded by objecting to the inference that there had been any modification of the health plan which would constitute a unilateral change in the working conditions of ISD employees. MESSA asserted that its decision to cover LASIK was authorized by the broad language of the insurance certificate, which provides for coverage of

procedures which are medically necessary and not experimental. Because the decision to cover LASIK did not result in a change in the language of the certificate, MESSA argued that the requested information was not relevant to the collective bargaining relationship between the ISD and the IEA. MESSA also indicated that it would provide further information concerning LASIK if the Employer promised not to use that information in connection with a lawsuit or unfair labor practice proceeding.

On May 22, 1998, the Employer sent a letter to MESSA alleging that it was refusing to provide information required under PERA and demanding that MESSA "bargain over any and all unilateral and/or midterm changes" to the contract. Copies of the letter were also forwarded to the IEA and the MEA. MESSA responded to the letter on June 4, 1998, again denying that there had been any change in coverage that would require modification of the certificate. MESSA also noted that it was not a party to any labor agreement with the ISD, and that its coverage of LASIK "in no way relates to or prompts a need to bargain." In addition, MESSA briefly explained the rationale for its decision to cover LASIK and the criteria upon which it was relying to determine whether coverage for an individual member was warranted. The IEA responded to the Employer in a letter dated June 11, 1998. The Union argued that it, not MESSA, was the sole and exclusive bargaining agent for the ISD's employees, and that any demand to bargain should be directed to the president of that labor organization. The IEA also assured the Employer that no demand to bargain was necessary because it was not planning on making any changes in the terms or conditions of the collective bargaining agreement.

On June 12, 1998, the Employer again wrote to MESSA, this time requesting cost data regarding coverage of LASIK and information concerning any corresponding increase in the ISD's policy premiums. The ISD also asked for information concerning other benefits or procedures that may have been added, including the date each benefit was added, eligibility criteria and cost data, along with supporting documentation. The Employer sent a follow-up letter to the IEA on July 15, 1998, explaining that it would be forced to consider filing an unfair labor practice charge if it did not receive the requested information and an agreement to negotiate any changes in the insurance coverage by July 28, 1998. MESSA responded in a letter dated July 23, 1998, indicating that it had provided as much information to the Employer as possible concerning LASIK surgery, and reiterating its position that there had been no addition or deletion of coverage "that would require a change in its certificate for the plan offered to St. Clair ISD employees."

On August 27, 1998, the ISD filed an unfair labor practice charge with MERC alleging that Respondents' decision to cover LASIK and "any other benefits not negotiated" constituted a mid-term modification of the contract in violation of Section 10(3)(c) of PERA. The Employer also alleged that Respondents violated PERA by refusing to provide information required by the Employer to "monitor and enforce the terms and conditions of the collective bargaining agreement and to develop collective bargaining strategies for future negotiations" with the labor organizations. After the charge was filed, BCBSM sent a letter to MESSA stating that it still considered LASIK and PRK to be experimental in nature, and instructing MESSA to discontinue paying for the procedures. MESSA notified both the ISD and its members that the procedures would no longer be covered in a letter dated September 22, 1998.

On December 3, 1998, Respondent MESSA filed a motion to dismiss the unfair labor practice charge or, in the alternative, to defer the hearing. MESSA argued that the ISD had waived its right to determine which procedures are to be covered under the MESSA Super Care 1 plan. In addition, MESSA asserted that coverage issues are within the exclusive jurisdiction of the Michigan Insurance Bureau and that a dispute over coverage of LASIK was pending before that agency. The labor organization filed a brief in support of MESSA's motion to defer the hearing on December 7, 1998. The parties also filed numerous pleadings concerning evidentiary matters which have no direct bearing on this decision. On January 27, 1999, a hearing was held before the ALJ on MESSA's motion to dismiss. No evidence was introduced and no witnesses were called to testify. Following the hearing, the ALJ issued a Decision and Recommended Order dismissing the charge.

II.

In determining that Respondents did not unlawfully modify the collective bargaining agreement, the ALJ held that coverage disputes of this nature should be left to the Insurance Bureau to resolve. It is true that Section 404 of the Nonprofit Health Care Corporation Reform Act (hereafter "NHCCR"), MCL 550.1101 *et seq.*; MSA 24.660(101) *et seq.,* sets forth an administrative procedure for resolving disputes between patients and health corporations over payment of benefits, culminating in a contested case hearing before the insurance commissioner. However, PERA, not the NHCCR, is the dominant law regulating public employee labor relations, and it prevails over other conflicting statutes "to ensure uniformity, consistency, and predictability in the critically important and complex field of public sector labor law." *Kent County Deputy Sheriffs' Ass'n v Kent County Sheriff*, 238 Mich App 310, 313 (1999). See also *Rockwell v Crestwood School District*, 393 Mich 616 (1975); *Plymouth-Canton Community Schools*, 1998 MERC Lab Op 545; *Detroit Board of Education*, 1986 MERC Lab Op 121, 123. Under Section 16 of PERA, MCL 423.216; MSA 17.455(16), this Commission alone has jurisdiction and administrative expertise to remedy unfair labor practices. *Rockwell*, *supra* at 630. Accordingly, if Respondents' decision to cover LASIK would, if wrongful, be an unfair labor practice, then the matter is within MERC's exclusive jurisdiction. See e.g. *Kent County*, *supra* at 318-319.

Based upon the limited record before us in this case, we believe that MESSA's decision to cover PRK and LASIK may indeed raise an unfair labor practice issue. Public employers and labor organizations have a duty to bargain over "wages, hours, and other terms and conditions of employment . . . ," MCL 423.215(1); MSA 17.455(1), which constitute mandatory subjects of collective bargaining. *St. Clair, supra* at 550-551; *Pontiac Police Officers Ass'n v Pontiac (After Remand)*, 397 Mich 674, 679 (1976). Mandatory subjects of bargaining are comprised of issues that "settle an aspect of the relationship between the employer and employees." *St. Clair*, *supra* at 551, quoting *Allied Chemical & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 178; 92 S Ct 383; 30 L Ed 2d 341 (1971). These include, but are not limited to, terms and conditions of employment concerning hourly, overtime, and holiday pay, work shifts, pension and profit sharing, grievance procedures, sick leave, seniority and compulsory retirement age. *St. Clair*, *supra*; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44 (1974). It is well-established that health insurance benefits are mandatory subjects of bargaining. *St. Clair*, *supra* at 551; *Port Huron Education Ass'n*

v Port Huron Area School District, 452 Mich 309, 317 n 12 (1996). In fact, Section 15(3)(a) of PERA explicitly recognizes the obligation of public employers and unions to bargain with respect to "types and levels of benefits and coverages for employee group insurance." MCL 423.215(3)(a); MSA 17.455(15)(3)(a).

Under PERA, a party commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. See *Port Huron, supra* at 317 (1996); *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450 (1991). A party can fulfill its statutory duty by bargaining about a subject and memorializing resolution of that subject in the collective bargaining agreement. *Port Huron*, *supra* at 317-318; *Gratiot Community Hosp v NLRB*, 51 F3d 1255, 1261 (CA 6, 1995). Under such circumstances, the matter is "covered by" the agreement. *Port Huron*, *supra* at 318. In the instant case, the ALJ concluded that Respondents had fulfilled their bargaining obligation by negotiating a contractual provision which effectively removed all coverage issues from the care and concern of the Employer, and which foreclosed the need to bargain over such issues during the life of the agreement. Specifically, the ALJ cited Article VIII, Section 2(A) of the collective bargaining agreement which, as noted, provides that "[a]ll coverage will be governed by the policies, provisions and rules and regulations of the carrier." The ALJ determined that the purpose of this clause was to "shield employers and labor organizations from issues raised by employees by way of grievances or law suits [sic] regarding what is or is not covered under contracts for insurance," and that MESSA's decision to implement coverage for LASIK was explicitly authorized by this provision. We believe that the ALJ's conclusion with respect to the meaning and import of this clause is, at the very least, premature.

As noted, the clause cited by the ALJ in the Decision and Recommended Order appears to authorize "the carrier" to make all coverage decisions. Although Respondents argue that both MESSA and BCBSM may be considered "the carrier" for purposes of the contract, the record before us does not support this contention. In addition to the clause relied upon by the ALJ, the contract entered into between the IEA and the Employer states that the ISD agrees to provide MESSA Super Care 1 coverage, and that it will "pay premiums for health insurance for each teacher through a *carrier* determined by negotiations." (Emphasis supplied.) Moreover, the Group Enrollment and Coverage Agreement and Service Contract between MESSA and BCBSM define BCBSM as a "nonprofit health care corporation *and carrier*" of the health insurance plan, and identify MESSA as the "Third Party Administrator" with authority to "provide one or more administrative services *to carriers*." (Emphasis supplied.) The above language strongly suggests that neither party to the contract, nor BCBSM itself, understood MESSA to be "the carrier" with respect to the health care plans which it administered.

The mere fact that MESSA is an agent of BCBSM does not, as the ALJ concluded, make the distinction between these entities irrelevant for purposes of determining whether MESSA was authorized to implement coverage for LASIK. Fundamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to it. *St. Clair*, *supra* at 557-558; *Capitol City Lodge No 141, FOP v Meridian Twp*, 90 Mich App 533,

541 (1979). The delegation of power from principal to agent does not vest the agent with the authority to take action which is specifically forbidden by the principal. *Renda v International United Auto, Aircraft and Agr Implement Workers of America*, 366 Mich 58 (1962). Here, the ISD contends that MESSA's decision to cover LASIK was contrary to the wishes of BCBSM, and there appears to be some merit to this argument. The insurance certificate explicitly excludes RK and "related services" from coverage, and the record establishes that BCBSM has actively resisted covering other refractive eye surgeries. Moreover, immediately after the unfair labor practice charge was filed in this matter, BCBSM notified MESSA that it still considered LASIK to be experimental and ordered MESSA to refrain from covering that procedure.

There is also no evidence in the record to support the ALJ's finding that Article VIII, Section 2 of the agreement was negotiated to protect the ISD and the Union. In fact, the Employer argued to the ALJ that this provision was inserted into the contract during the pendency of a dispute involving an alleged unilateral mid-term modification of the prior contract between these same parties, see *St. Clair Intermediate School Dist v IEA/MEA*, 458 Mich 540, and that the clause was actually intended to prevent MESSA from having any input as to coverage decisions. Clearly, the Employer has a financial stake in preventing MESSA, an agent of the Union, from unilaterally modifying the contract. Even assuming arguendo that the decision to cover LASIK did not affect the ISD's premiums, future bargaining for a new contract will start "not from the terms of the cost levels attendant in the previous health care contract, but from the uncertain cost levels of the modified contract." *St. Clair*, *supra* at 569.

Given the many questions which exist as a result of the limited record before us, we believe that the Employer should be given the opportunity to call witnesses and present evidence in support of its contention that the IEA/MEA unilaterally implemented a mid-term modification of the contract. Accordingly, we remand for an evidentiary hearing.[2] On remand, the ALJ should attempt to ascertain the meaning of the disputed clause for purposes of determining whether Respondents committed an unfair labor practice. See *Detroit Wastewater Treatment Plant*, 1993 MERC Lab Op 716, 719; *University of Michigan*, 1971 MERC Lab Op 994. Additional findings of facts with respect to the following issues may also be of aid in resolving this dispute: (1) the relationship between MESSA and BCBSM; (2) the legal significance of the insurance certificate (including whether the parties incorporated that document into their agreement by reference); (3) the past practice of the parties with respect to the implementation of coverage for new benefits and procedures; and (4) the effect of MESSA's decision to cover LASIK on the Employer's premiums.

III.

In order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer

[2]Because the ALJ repeatedly questioned the merits of the unfair labor practice charge, we remand to a different ALJ. While we have no doubt as to the ability of the ALJ to resolve this dispute in a fair and impartial manner, we believe that reassigning this case will best protect the integrity of the process and serve to avoid any appearance of impropriety.

must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *City of Battle Creek, Police Department,* 1998 MERC Lab Op 684, 687; *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Where the information sought concerns the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer itself rebuts the presumption. *Battle Creek*, *supra*, *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; 117 LRRM 2497 (CA 6, 1984). The standard applied for relevancy is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Battle Creek*, *supra; SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer*, *Inc*, 268 NLRB 916; 115 LRRM 1105 (1984), enforced 763 F2d 887 (CA 7, 19985). A union's duty to furnish relevant information is parallel to that of an employer. See e.g. *Iron Workers Local 207,* 319 NLRB 87; 150 LRRM 1294 (1995); *Printing & Graphic Communications Local 13*, 233 NLRB 994; 97 LRRM 1047 (1977), enforced 598 F2d 267; 101 LRRM 2036 (CA DC, 1979).

In dismissing the charge, the ALJ determined that MESSA had responded to the Employer's information request in a satisfactory manner by explaining that its decision to cover LASIK did not constitute a modification of the contract for which bargaining was required. The ALJ concluded that further information was not relevant to any concern that the Employer might have regarding administration and enforcement of the contract, since the parties are bound by the decisions of Blue Cross with respect to what procedures are covered during the term of that agreement. Regardless of whether the ISD in fact delegated its responsibility to make coverage decisions, we believe that the Union violated its duty to bargain by failing to provide cost and coverage information pertaining to LASIK and other benefits and procedures. The Employer is entitled to the information so that it may effectively police administration of the contract and ensure that its employees are receiving the benefits which it is contractually obligated to provide. We do not find that the Employer in any way forfeited its right to this information by the negotiation of the contractual provision referenced above. We also disagree with the ALJ's determination that the information was not relevant because the parties are not currently in contract negotiations. A claim that an information request is premature is an affirmative defense which, in this case, Respondents waived by failing to raise it prior to the filing of the charge. See e.g. *Scott Brothers Dairy*, 1999 NLRB LEXIS 430; *Providence Hospital*, 320 NLRB 790; 152 LRRM 1085 (1996). Lastly, the fact that the information may be in MESSA's possession does not affect the Union's duty to furnish, or at least attempt to obtain, relevant requested information in the possession of its agent. See e.g. *Congress De Uniones Industriales De Puerto Rico*, 966 F2d 36; 140 LRRM 2739 (1992); *International Brotherhood of Firemen and Oilers, Local 288, AFL-CIO*, 302 NLRB 1008; 137 LRRM 1153 (1991); *Printing & Graphic Communications Local 13 (Oakland Press)*, 233 NLRB 994, 996; 97 LRRM 1047, enforced 598 F2d 267; 101 LRRM 2036 (1979).

ORDER

With respect to the issue of whether Respondents unilaterally implemented a mid-term modification of the collective bargaining agreement, we hereby remand to a different ALJ for further hearing and the issuance of additional findings of fact, conclusions of law, and a supplemental recommended order. Following service of the supplemental recommended order on the parties, the provisions of R 423.466 through R 423.470 of the Commission's Rules and Regulations shall be applicable.

With respect to the issue of whether Respondents failed to provide requested information, we hereby order that the MEA and its local affiliate, the IEA, its officers, agents and assigns to:

1. Cease and desist from failing and refusing to bargain collectively with the ISD, by refusing to provide it with information relevant and necessary to the administration and enforcement of its collective bargaining agreement.

2. Within 30 days from the date of this order, provide the Employer with cost and coverage information concerning LASIK and any other benefit or procedure for which coverage was added or deleted since the effective date of the contract, as the Employer requested in its correspondence with MESSA and the IEA/MEA prior to the filing of the charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:________

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERMEDIATE EDUCATION ASSOCIATION (IEA),
and MICHIGAN EDUCATION ASSOCIATION (MEA); and
MICHIGAN EDUCATION SPECIAL SERVICES ASSOCIATION (MESSA),
Labor Organizations and Agent-Respondents

- and - Case No. CU98 H-44

ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT
Public Employer-Charging Party
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APPEARANCES:

White, Przybylowicz, Schneider & Baird, P.C., by Arthur R. Przybylowicz, Atty, for the Respondent Unions, IEA and MEA

Fraser Trebilcock Davis & Foster, P.C., by Iris K. Linder, Atty, for MESSA

Scott C. Moeller, Atty, Director of Legal Services, and Donald J. Bonato, Atty, Thrun, Maatsch & Nordberg, P.C., Co-Counsel for Charging Party-Public Employer

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was brought on for hearing at Detroit, Michigan on January 27, 1999, before James P. Kurtz, Administrative Law Judge for the Michigan Employment Relations Commission, based upon a motion to dismiss and pursuant to the service of a complaint and notice of hearing originally dated September 3, 1998, issued under Section 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCLA 423.216, MSA 17.455(16). Based upon the record, pleadings and exhibits, and the post-hearing briefs filed on or before March 1, 1999, the undersigned makes the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

This charge was filed by the public employer, St. Clair Intermediate School District (ISD), on August 27, 1998, against the bargaining representative of its teaching personnel, Michigan Education Association (MEA) and its local affiliate, Intermediate Education Association (IEA), collectively referred to as the Union, and against their agent and the administrator for the health benefits of the bargaining unit, the Michigan Education Special Services Association (MESSA). As an agent of the Union, and at the same time an agent of the Employer through the express terms of the collective bargaining agreement accepting the MESSA insurance plan, it was not necessary that MESSA be named as a separate Respondent, since the acts of MESSA and its agents and

underwriters, Blue Cross Blue Shield of Michigan and BCS Life Insurance Company (BCBSM/BCS), are attributable to, and binding upon, their principals. MESSA and Blue Cross are parties to a service contract and a group enrollment and coverage agreement, under which MESSA performs administrative services for Blue Cross as its designated agent. MESSA, however, has appeared separately in this case and has defended what it considers to be its interests, so for purposes of this proceeding MESSA is treated as a Respondent, and the anomaly of a principal demanding that its own agent bargain with it and then charging that agent with unfair labor practices will not be considered further.

The charge alleged in great detail, with exhibits attached, the failure of Respondents to provide certain coverage and cost information under the contract health plan in violation of the duty to bargain under Section 10(3)(c) of PERA. The charge contended that the requested information was needed to effectively monitor and enforce the parties' contract and to develop collective bargaining strategies for future negotiations. The charge further alleged that the periodic changes in coverage of medical procedures under the health plan amounted to unilateral changes and/or midterm modifications of the terms and conditions of employment set forth in the collective bargaining agreement, which is effective from July 1, 1997 through June 30, 2000.

The filing of the charge generated a plethora of pleadings and counterpleadings, with attached documentation, among the three parties involved. Many of these motions relate to procedural matters relative to depositions and the like, which were denied by the undersigned and which have no direct bearing on this decision. There is no reasonable dispute in the facts essential to a decision on the charge herein, despite the litigiousness of the parties and the valiant efforts of the Charging Party to posit a triable factual issue. Thus, such questions relative to whether MESSA was the insurance carrier, rather than Blue Cross, and who pays what to whom and why, makes for an interesting exercise in semantics, but have little bearing on this case under agency principles. Therefore, the undersigned determined that the matter was ripe for a decision on the pleadings and exhibits without the necessity of taking testimony. *Smith v Lansing School Dist.*, 428 Mich 248, 126 LRRM 3169 (1987), on remand, 1989 MERC Lab Op 210, *aff'd in 2-1 dec.,* Mich App No. 116345 (Unpub., 3-26-91), *lv app den* 439 Mich 958 (1992). Accordingly, this case was brought on for hearing based upon the request of MESSA that the charge be dismissed. See, for example, *Edelberg v Leco Corp*, __Mich App ___, 15 IER Cases 359 (1999).

At the hearing held on January 27, after hearing arguments by the parties, the undersigned granted the motion to dismiss on the ground that no change had taken place in the medical plan agreed to in the contract by the Employer and the Union; that the Respondents had adequately responded to the Employer's requests for information; that the Employer was attempting to challenge decisions on what is covered by the medical plan, as distinguished from a change in the plan itself; and that by contract and Michigan law any dispute over coverage or the denial of benefits under the insurance certificate filed by MESSA or Blue Cross with the Michigan Insurance Commissioner is resolved in proceedings before the Michigan Insurance Bureau. Such disputes are litigated by the patient and the health care corporation responsible for payment of the health benefits, under the provisions of 1980 PA 350, the Nonprofit Health Care Corporation Reform Act, MCL 550.1404, MSA 24.660(404). The following decision briefly summarizes the background of this dispute, the pleadings filed herein, and the indisputable facts supporting the motion to dismiss, virtually all taken from the Charging Party's charge or exhibits.

Background and Pleadings:

This dreary dispute over changes or alleged changes to MESSA health care plans dates back to at least the Spring of 1990, and flows out of the Michigan Supreme Court ruling involving the same parties, *St Clair Int School Dist v IEA/MEA*, 458 Mich 540 (1998), *aff'g* 218 Mich App 734 (1996), and 1993 MERC Lab Op 101. In these decisions, as in the instant case, MESSA and its underwriter, Blue Cross, shared responsibility for administering the health care plans under the contract. MESSA, as holder of the health insurance policy under the contract, had raised the lifetime maximum of its plans from one to two million dollars with the acquiescence of the Union, but without any notice or bargaining with the Employer. The Commission and the Courts held that this change altered the health plan in the contract, requiring a change in the health insurance certificate filed with the State, and that the change was a midterm modification of the contract in violation of the obligation to bargain imposed by Section 10(3)(c) of PERA.

After the filing of this charge, MESSA and the Union filed answers with affirmative defenses, admitting the relevant facts and denying that any change in benefits had taken place, and that there was any obligation to bargain in mid contract. Both answers alleged that whether a particular medical or surgical procedure is covered by the health plan certificate is within the exclusive jurisdiction of the Michigan Insurance Bureau under the statute cited above. The Employer filed a response to the affirmative defenses, and on October 30, 1998 it filed a motion for an order causing depositions to be taken relative to the "coverage decisions" referred to in Respondents' pleadings. The Union and MESSA filed responses opposing the motion for depositions, and the motion was denied by the undersigned by letter dated November 9, 1998.

MESSA filed a motion to dismiss the charge, or in the alternative to defer the hearing, with a brief in support, on December 3, 1998. This motion contended that the issue raised by the charge relative to coverage of laser assisted in situ keratomileusis (LASIK) eye surgery under the contract health care plan, which had been implemented in March 1997 by MESSA, was pending before the Insurance Bureau, and that the charge should be dismissed, or at least deferred until that agency has issued a final order. The Union filed a brief in support of MESSA's motion to defer the hearing, and the Charging Party filed motions opposing both the motion to dismiss and the motion to defer, with supporting brief, on December 28, 1998. MESSA then filed a motion to quash subpoenas issued by Charging Party to two of its employees, requesting that they produce extensive records relative to various medical procedures on the eyes, and thereafter a response in opposition was filed by the Employer. The undersigned granted the motion to quash the subpoenas by letter dated January 13, 1999.

A motion to conduct a video trial deposition was filed by MESSA on January 15, 1999, and a response and brief in opposition was thereafter filed by the Charging Party. MESSA filed a reply brief to that filed by the Employer, and letters requesting clarification as to the status of all outstanding subpoenas were filed by the Employer and MESSA. On January 22, 1999, the undersigned issued a letter to the parties clarifying that the January 27 hearing would be limited to arguments on the motion to dismiss, that it would not be necessary to produce any further documentation or witnesses, and that the request to conduct a video trial deposition was denied. The pleadings outlined above contained extensive attachments, such as the contract provisions, the health care plan and its certificate, the correspondence of the parties, and other relevant documentation, which is considered part of the record herein.

Factual Summary:

During the pendency of the Supreme Court case involving these parties, they executed their present collective bargaining agreement, effective from July 1, 1997 through June 30, 2000. The contract provided that health insurance for the unit would be provided "through a carrier determined by negotiations." Coverage for health insurance was to correspond to the MESSA Super Care I plan, limited to its actual cost. The contract contained the common provision that, "All coverage will be governed by the policies, provisions and rules and regulations of the carrier." The purpose of this latter clause is to shield employers and labor organizations from issues raised by employees by way of grievances or law suits regarding what is or is not covered under contracts for health insurance; that is, what is "medically necessary," and what is not, under the insurance plan and certificate, determined by criteria established by Blue Cross and the medical profession. Any disputes or controversies over coverage are left to procedures, including contested case hearings, before the Insurance Bureau, where patients and underwriters such as Blue Cross litigate whether a service, treatment, or procedure has evolved to the point where it is no longer considered experimental and must be covered by the insurance plan.

The insurance plan itself contains certain explicit exclusions and limitations, and other than these exclusions what medical procedures are covered by the insurance is determined by the carrier or underwriter who administers the health plan. Thus, the Super Care I plan excludes such procedures or devices as artificial insemination, dental care, eye examinations, radial keratotomy (RK) and related services, and "services and supplies that are not medically necessary according to accepted standards of medical practice including any services which are experimental or research in nature." It is clear and an obvious fact that such medical services, procedures, drugs, and the like are constantly in a state of development and flux as technology and services progress and change. Other than those services that are explicitly exempted in either the contract or the medical plan itself, it is also clear that any disputes over coverage of the medical plan have been subject to the Insurance Bureau procedures described above. According MESSA, it is estimated that in a typical year over 200 new medical procedures are added as medically necessary, between 100 and 200 procedures deleted, and between 100 and 200 procedures revised.

As set forth in the pleadings, the Employer's initial requests for information related to various types of refractive eye surgery, including RK, LASIK, and photo refractive keratectomy (PRK). The first procedure is explicitly excluded by the health plan, but the other two newer refinements are not. By letter of February 16, 1998 the Employer asked for information regarding coverage for these eye procedures. MESSA responded on March 12, confirming that RK had not been paid for since about 1992. The letter also stated that under current technological developments LASIK surgery was covered under standard surgical benefits, "provided that the procedure is determined to be medically necessary based on specific criteria." The letter went on to discuss various changes in surgical benefits as technology improved, and then stated:

> Once a surgical procedure is determined to be accepted medical practice, it will become available for coverage under our standard certificate language so long as it is determined to be medically necessary, unless the procedure is expressly excluded.

The letter concluded with the fact that MESSA was taking steps to preclude active marketing in regard to surgical eye procedures engaged in by certain providers.

The Employer was not satisfied with this response, and on March 26 asked MESSA for

additional information regarding the details of LASIK coverage. It further requested a list of any other procedures added since the contract, the date of their coverage, the criteria used to determine their medical necessity, and any MESSA information about said procedures. The tone of this letter was not lost on MESSA, and it responded on April 23 objecting to any inference that ongoing changes in medical procedures would be viewed as changes in working conditions, and covered by the legal propositions involved in the pending Supreme Court case. The letter pointed out that the pending dispute over the change in lifetime maximum benefits involved a modification of its certificate filed by Blue Cross with the Insurance Bureau. Such changes in the insurance plan itself were contrasted with the broad coverage given to surgical or medical procedures under the certificate, which must be paid if determined by a physician to be "medically necessary," and which are continuously changing as medical science progresses. The letter stated that these procedures do not require a change in its certificate, and that since the contract was entered into there had been no modifications in the health plans requiring a change in their underlying certificates.[3] The letter concluded with MESSA's concerns over the intent of the Employer, and indicated it would provide more information that it had developed specific to LASIK surgery, provided it would not be used in any lawsuit or unfair labor practice proceeding.

Despite the assurance of MESSA that no changes had occurred in the insurance plan itself, the Employer continued to promote this dispute by responding on May 22 about how "disappointed" it was with MESSA's alleged refusal to provide information and lecturing it on how it needed the information under the provisions of PERA to monitor and enforce the terms and conditions of the collective bargaining agreement and to develop collective bargaining proposals. The letter demanded that MESSA "bargain over any and all unilateral and/or midterm changes" to the contract. On June 4 the Employer sent a copy of its May 22 letter to the local uniserve director of the MEA, asking him to respond, copies having previously been sent to the IEA and the Lansing office of the MEA.

MESSA responded to the May 22 letter on June 4, again stating that it "has not added or deleted coverage for any benefit or procedure that would require a change in its certificates for the plans offered to St. Clair ISD employees." It noted that it was not party to any labor agreement with the Employer, and that its coverage of LASIK surgery "in no way relates to or prompts a need to bargain." The letter went on to explain that LASIK surgery began to be covered by MESSA about a year before "once the procedure was no longer considered experimental." The letter explained the medical review procedure for the surgery and what the criteria was to determine "medical necessity and appropriateness." On June 11 the IEA also responded to the Employer's May 22 letter, pointing out that it, not MESSA, was the sole and exclusive bargaining agent for the Employer's employees, and that any demands to bargain should be directed to the IEA.[4] The letter assured the Employer that no demand to bargain was necessary in the present circumstances, since the Union was not planning to make any change in the terms or conditions of the collective bargaining agreement.

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[3]The record also reveals that there has been no increase in the premiums for the coverage.

[4]The IEA also argued its position in the pending Supreme Court case that MESSA was not its agent. This position had been rejected by both the Commission and the Court of Appeals. Why the agency status of MESSA was so contested when it is clear on the face of the contract that it had been named by the parties as the source of their health plan remains a mystery.

Still unsatisfied with the May 22 response of its agent for administering the health plan, the Employer again wrote to MESSA on June 12, asking for further information. The letter asked for cost data and any premium increase due to the LASIK, or any other benefit or procedure that may have been added, along with all supporting documentation, eligibility criteria, and the like. This letter was sent to the IEA by the Employer on July 15, contending that MESSA was unilaterally changing the terms of the health care coverage. The July 15 letter indicated that if the Employer did not receive the information requested of MESSA in its June 12 letter and an agreement to negotiate any changes in the insurance coverage by July 28, the District would be forced to consider filing an unfair labor practice charge against the Union and MESSA.

The last piece of correspondence attached to the Employer's charge is a July 23 letter from MESSA to the Employer, responding to its June 12 letter. This letter summed up the position of the Respondents as follows:

> In my previous correspondence with you regarding LASIK surgery I attempted to explain MESSA's position regarding coverage for surgical procedures which is determined by our certificate booklet.
>
> The certificate language sets out standards for surgical benefits provided that the procedure is determined to be medically necessary, accepted medical practice and a procedure that are not excluded by specific language.
>
> I have provided as much information regarding LASIK surgery as I can in an attempt to respond to your inquiries. Also, as I explained in earlier letters, MESSA has not added or deleted coverage for any benefit or procedure that would require a change in its certificate for the plan offered to St.Clair ISD employees.

Discussion and Conclusions:

The major purpose of a collective bargaining statute such as PERA is to produce a contract that is final and binding on both parties, in order to foreclose disputes like the present one. See, for example, *NLRB v Sands Mfg Co.*, 306 US 332, 4 LRRM 530, 534 (1939), *enf'g* 96 F2d 721, 2 LRRM 712 (6th Cir, 1938). If there is any bad faith in this case, it would be the Employer's attempts to provoke a dispute over a matter that is so clearly covered by the contract, by the ongoing practice of the parties and the health care industry, and by Michigan law. The contract provides that, "All coverage will be governed by the policies, provisions and rules and regulations of the carrier." Thus, all medical procedures under the insurance plan, such as LASIK, are either excluded from coverage when the parties entered into the collective bargaining agreement, or they are subject to the decision of the carrier. The contract provision, therefore, effectively removes all health insurance coverage issues from the care and concern of either the Employer or the Union, and insulates them from being parties to any coverage disputes. At the same time the contract language forecloses any need to bargain over such issues during the life of the contract.

The above contract language leaves any disgruntled unit member to deal with the carrier or its agent, such as MESSA, over coverage issues. The employee, in turn, is protected by the "medical necessity" provisions of the insurance plan, which requires coverage once a treatment or procedure passes out of the experimental stage. State law has provided a forum for the resolution of any coverage disputes by mandating the Insurance Bureau procedures noted above. Accordingly, the

contract has expressly excluded such disputes from resolution by the contracting parties and delegated them to the insurance carrier to resolve, and such procedure is expressly sanctioned by and subject to State law. See *BPS Clinical Labs v Blue Cross*, 217 Mich App 687 (1996); for a case on the federal level dealing with the exclusion of medical claims from contractual grievance-arbitration procedures, see *Steelworkers v Commonwealth Aluminum Corp.*, ___ F3d ___, 159 LRRM 3037 (1998). Any other interpretation of the contract would render the language quoted above useless, and would create an administrative nightmare for the parties.

The midterm modification of the certificate of insurance involved in the recent Supreme Court case involving these same parties has no application to this case. The increase in the maximum benefit from one to two million dollars per employee without notice or bargaining involved a fundamental change in the potential liability of the Employer and required a change in the insurance certificate filed with the State. In the instant case the insurance plan itself did not change, but what did and does change are the medical procedures that are currently considered necessary and appropriate to cover, and which are the responsibility of the insurance carrier. The attempt by the Employer to insert itself in such decisions in mid contract is not explained in the record, and makes little sense in the light of the possible 600 procedure code changes in medical coverage during a given year, according to the estimate of MESSA. If the Employer feels compelled to exclude any particular coverage, such as LASIK, it will have the opportunity to do so when the present contract comes up for renewal.

In conclusion, assuming for the present case that the Union is alone responsible for the response of MESSA to the Employer's requests for information, I find that MESSA did respond, and that by at least its April 23 response this dispute should have been laid to rest once and for all. Any further information was not relevant to any concern that the Employer might have with the Union regarding the administration and enforcement of the contract, since both parties are bound by the decisions of Blue Cross as to what medical procedures are covered during the term of the contract. Having delegated that responsibility in the contract, the Employer cannot attempt to take it back during the term of the contract or require the Union to bargain about it under the guise of a request for information. The Union, and the agents of the parties, have changed nothing in this case relating to the contract, and there is no showing that any information is being withheld from the Employer that would aid it in any way in the policing and enforcement of its contract. As for preparations for the next contract, the parties are not in negotiations and any such demand for information is clearly premature at this time. Therefore, I renew my decision to grant the motion to dismiss herein, and I recommend that the Commission enter the following order:

ORDER DISMISSING CHARGE

Based on the discussion and conclusions above, the charge filed by the Employer in this case against the labor organizations and MESSA is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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James P. Kurtz
Administrative Law Judge

Dated: ___________________