STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer - Respondent

Case No. C02 B-035

-and-

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
EASTERN MICHIGAN UNIVERSITY CHAPTER,
Labor Organization – Charging Party

_____/

APPEARANCES:

Dykema Gosset, PLLC, by James P. Greene, Esq., for the Respondent

Benjamin Palmer, PhD., Grievance Officer, for the Charging Party

DECISION AND ORDER

On December 30, 2003, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

_____
Harry Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer - Respondent

Case No. C02 B-035

-and-

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
EASTERN MICHIGAN UNIVERSITY CHAPTER,
Labor Organization - Charging Party
_____/

APPEARANCES:

Dykema Gossett, PLLC, by James P. Greene, Esq., for the Respondent

Benjamin Palmer, PhD., Grievance Officer, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION TO DISMISS

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on November 15, 2002, and June 4, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. At the close of the Charging Party's testimony on the second day of hearing, Respondent made a motion to dismiss the charge and I indicated my intention to recommend that the Commission grant this motion. Based upon the evidence presented by Charging Party, including testimony and exhibits, and arguments made by both parties at the hearing, I make the following findings of fact and conclusions of law, and recommend that the Commission dismiss the charge for the reasons set forth below.

The Unfair Labor Practice Charge:

The American Association of University Professors, Eastern Michigan University Chapter, filed this charge on February 8, 2002 against Eastern Michigan University. Charging Party represents a bargaining unit of tenured and tenure-track faculty employed by Respondent. The charge alleges that Respondent violated its duty to bargain in good faith under Section 10(1)(e) of PERA by repudiating a provision of the parties' contract requiring the employer to fill vacant positions with members of Charging Party's bargaining

unit. Charging Party asserts that by hiring non-unit lecturers to replace bargaining unit members in contravention of their agreement, Respondent eroded Charging Party's bargaining unit and increased the workload of the remaining faculty.

Facts:

As noted above, Charging Party represents a bargaining unit of tenure and tenure-track faculty employed by Respondent.1 Lecturers are excluded from Charging Party's unit. Lecturers are non-tenure track employees hired, generally for a fixed period, to teach University classes. Full-time lecturers employed by Respondent are part of a bargaining unit represented by another labor organization, while part-time lecturers are not organized.

The parties' current collective bargaining agreement went into effect in 2000 and expires on August 31, 2004. Article III(C) of this agreement, also referred to as marginal paragraph 17, states:

> It is the policy of EMU not to reduce the Bargaining Unit by arbitrary changes in titles or by the creation of new classifications. The University further agrees that in the absence of a change in circumstances, it will not permanently replace regular Faculty Members by a change in its historical uses of part-time lecturers. Nothing in this paragraph is intended to diminish in any respect the University's rights pursuant to the provisions of Article VIII.2

Respondent hires lecturers to teach classes formerly taught by faculty in several situations. If a faculty member takes a leave of absence, Respondent may hire full-time or part-time lecturers to teach these classes. If a faculty member dies, retires, or leaves, Respondent may assign the faculty member's classes to full-time or part-time lecturers until it finds a suitable candidate for the faculty position. If there are delays in filling the position, whether due to a failure to fund the position or difficulties in the search process, lecturers may continue to teach the classes. Finally, if a department experiences an increase in enrollment, Respondent may hire lecturers to teach additional sections of classes taught by faculty members.

Faculty members have a number of responsibilities that lecturers do not, including developing and monitoring curriculum, advising students, and performing research. In addition, a personnel committee in each department made up of faculty members is responsible for offering support to lecturers teaching the department and for evaluating their classroom teaching abilities. For these reasons, and because lecturers are paid less than faculty, the replacement of faculty by full-time or part-time lecturers has been an ongoing concern for Charging Party.

Since at least 1993, the parties' collective bargaining agreements have included the first sentence of marginal paragraph 17 above. These contracts also have included a restriction on the length of individual lecturers' appointments (marginal paragraph 411 in the parties' 1996-2000 contract), but provided that there would be no limitation on the reappointment of lecturers appointed to replace faculty members on

1 In this decision the terms "faculty" or "faculty member" refer only to members of Charging Party's bargaining unit.
2 Article VIII covers layoff and recall procedures.

leaves of absence or filling administrative appointments (marginal paragraph 412).

During negotiations for the parties' 1996-2000 contract, Charging Party proposed an additional clause further limiting Respondent's ability to fill faculty positions with lecturers. This proposal would have required Respondent to fill at least of 80% of all faculty full-time equated positions (FTEs) with members of Charging Party's bargaining unit, university-wide, and required each department to fill at least 75% of FTEs with unit members. Charging Party's bargaining team came up with these figures after reviewing the data for the period 1989 through 1994, and calculating that during this period faculty members filled between 77% and 80% of all FTEs. Respondent did not dispute Charging Party's figures, but refused to agree to the proposal. The parties 1996-2000 contract did not contain any new language governing the employment of lecturers.

According to Charging Party Executive Director and bargaining team member Cheryll Conklin, by the time the parties began negotiating their 2000-2004 contract, the percentage of FTEs filled by lecturers had increased to about 40%.

Early in the negotiations for their 2000-2004 agreement, the parties agreed to delete marginal paragraphs 411 and 412. On August 28, 2000, Respondent presented Charging Party with a proposal to replace these provisions with the following language:

> It is recognized that tenured and tenure-track faculty form the core of the instructional faculty at EMU. It is further recognized that the responsibilities of faculty, which are outlined in Article IV, are fulfilled in major part by bargaining unit members. However, these responsibilities may also be fulfilled by non-unit members, in situations that include but are not limited to meeting institutional needs.

Charging Party's counterproposal replaced the last sentence of Respondent's proposed language with the following:

> . . . However, non-bargaining unit employees may not perform responsibilities performed by bargaining unit employees that result in an erosion of the unit or bargaining unit work.

The parties could not agree on language, and the issue was referred to a bargaining subcommittee consisting of representatives of both parties. In September 2000, the subcommittee suggested adding language to marginal paragraph 17. The subcommittee suggested that this paragraph state:

> It is the policy of EMU not to reduce the bargaining unit by arbitrary changes and titles, by the creation of new classifications, through negotiations with other bargaining units, or through systematic permanent reduction of bargaining unit positions through the use of non-bargained for lecturers, subject to the conditions of Article VIII (A).

Respondent's negotiating team rejected the subcommittee's suggestion.

Shortly thereafter, Charging Party went on strike. Respondent's provost, Ronald W. Collins, wrote a letter to Charging Party's bargaining team about the negotiations. In response, Denise Tanguay and John Boyless, members of Charging Party's bargaining team, went to Collins' home, where they had a late-night conversation about the negotiations. According to Boyless, they discussed the fact that Respondent's historical use of lecturers was about 30%. According to Tanguay, Collins told them that he believed that faculty were critical to the quality of the University's programs, and that Respondent had no intention of decreasing the size of Charging Party's bargaining unit. Collins asked them to call Respondent's President, and Charging Party discussed same issues with the President. At the end of their conversation, the President asked Charging Party to have Respondent's chief negotiator call him. Soon thereafter, the parties returned to the bargaining table.

Charging Party's negotiating team drafted the language which became the last two sentences of marginal paragraph 17 and presented it to Respondent's bargainers.3 According to Tanguay, Charging Party's bargaining team understood the term "historical usage" to mean that if enrollment was maintained at its current level, there would be no addition of part-time lecturers. If enrollment increased, Respondent could increase its use of part-time lecturers by the same percentage as the increase in student credit hours, and if enrollment decreased, the use of part-time lecturers would go down by that percentage. However, there was no discussion between Respondent's bargaining team and Charging Party's team about the meaning of the term. Respondent accepted Charging Party's proposal to amend the language of marginal paragraph 17, and the parties settled their contract shortly afterward.

According to Charging Party, since 2000 Respondent's replacement of faculty with lecturers has accelerated. Charging Party presented charts based on Respondent's data showing that the percentage of student credit hours taught by faculty as compared to lecturers fell steadily from 1994 until 2000, and since then has fallen more steeply. Charging Party points out that in May 2000 and May 2001, Respondent rejected many requests made by the deans of Respondent's colleges to hire replacements for departed faculty members. Charging Party's data indicate that after May 2000, the number of faculty employed dropped, the number of lecturers increased, and the percentage of student credit hours taught by faculty decreased significantly even though the percentage of faculty teaching extra classes on an overload basis increased.

Discussion and Conclusions of Law:

Where the mandatory subject of bargaining is "covered by" a collective bargaining agreement, the union has already exercised its right to bargain under PERA, and the enforceability of the provision is left to the parties' contractual grievance mechanism. *Port Huron EA v Port Huron Area S.D.,* 452 Mich 309, 321 (1996). During negotiations for their 2000-2004 contract, the parties bargained over the issue of the replacement of faculty by non-unit lecturers and reached agreement on contract language addressing that issue. Respondent, therefore, has no further obligation to bargain over this issue for the duration of the

3 Charging Party elected not to propose restrictions on Respondent's use of full-time lecturers because these lecturers were organized.

contract.

Charging Party argues that because it cannot grieve the gradual erosion of the bargaining unit under marginal paragraph 17, the Commission should find Respondent guilty of an unfair labor practice by its failure to comply with the spirit of that provision. However, as noted above, Respondent satisfied its legal obligation to bargain over this issue when it agreed to the language in marginal paragraph 17. It was Charging Party's responsibility to insist on contract language that it could enforce by contractual means.

The Commission has held that an employer violates its duty to bargain in good faith if it subsequently "repudiates" its obligations under the collective bargaining agreement. However, a mere breach of contract does not constitute "repudiation." The Commission has defined repudiation as an attempt by a party to rewrite the contract, or a disregard for the contract as written so complete as to indicate a renunciation of the principles of collective bargaining. *Jonesville Bd. of Ed.*, supra, at 900-901. More specifically, the Commission has held that for it to find repudiation, (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Central Michigan Univ.*, 1997 MERC Lab Op 501, 507; *Plymouth-Canton C.S.*, 1984 MERC Lab Op 894, 897.

Charging Party contends that when Respondent agreed in marginal paragraph 17 that it would not change its "historical uses of part-time lecturers," it agreed that the percentage of faculty FTEs filled by lecturers would not exceed 30%, or whatever the percentage was at the time the parties finalized their contract. Respondent denies there has been any substantial change since 2000 in the faculty headcount. It also maintains that there has been no change in the way it has historically used part-time lecturers, since it has historically hired lecturers to fill faculty positions on a temporary basis. Respondent also denies that it has permanently replaced faculty members, since, according to Respondent, the fact that it has not filled some faculty positions due to budget considerations does not mean that faculty have been permanently replaced. The parties here clearly have a bona fide dispute over the proper interpretation of marginal paragraph 17, including what constitutes permanent replacement and the meaning of the phrase "historical uses." I conclude that Charging Party has not shown that Respondent "repudiated" marginal paragraph 17.

For reasons set forth above, I conclude that Respondent did not violate its duty to bargain in good faith under Section 10(1)(e) of PERA. I recommend that the Commission grant Respondent's motion to dismiss and issue the following order:

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____

.