STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BUENA VISTA SCHOOLS,
Public Employer-Respondent,

Case No. C02 B-050

-and-

BUENA VISTA EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Masud, Patterson & Schutter, P.C., by Gary D. Patterson, Esq., for the Respondent

White, Schneider, Young and Chiodini, P.C., by William F. Young, Esq., for the Charging Party

DECISION AND ORDER

On January 16, 2003, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Buena Vista Schools, did not violate its duty to bargain in good faith when it refused to provide a mail order prescription drug program with a zero co-pay for the 2001-2002 school year. The ALJ found that Respondent had not violated Section 10(1)(a) or (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) or (e), as alleged in the charges, and recommended that the charges be dismissed. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. On February 10, 2003, Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions. After filing a timely request, Respondent was granted an extension until March 17, 2003, to file a response to the exceptions. On March 17, 2003, Respondent filed a timely brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends the ALJ erred in finding that the co-pay language for mail order prescriptions was ambiguous and in finding that there was no meeting of the minds with respect to the meaning of that language. We have carefully and thoroughly reviewed the record and have decided to affirm the findings and conclusions of the ALJ and to adopt the recommended order.

Factual Summary:

The facts in this case were set forth fully in the Decision and Recommended Order and need not be repeated in detail here. Briefly, Charging Party Buena Vista Education Association, MEA/NEA (Union) and Respondent Buena Vista Schools (Employer), were parties to a collective bargaining agreement for the term 1996 through June 30, 2001. For traditional Blue Cross/Blue Shield coverage, the 1996-2001 agreement provided in relevant part:

> 1. Blue Cross-Blue Shield Program: . . . prescription drug benefits $2.00 co-pay (mail order prescription will be subject to $0 co-pay. . . .)

Because the Employer was unable to obtain a mail order provider, during the last year of this contract the Employer began reimbursing employees for co-pays paid for prescriptions that could have been ordered through a mail order program.

Before the expiration of the 1996-2001 agreement, the parties began negotiations for the 2001-2006 contract. The Union's chief negotiator was Ronald Starland; the Employer was represented by Robert Dwan and Merle Grover. The parties reached a tentative agreement in June 2000 and initialed a document that reflected the changes that were made to the 1996-2001 agreement. With respect to medical prescription coverage for the 2001-2006 contract, the negotiators agreed not to strike the language from the previous agreement providing a zero co-pay for mail order prescriptions and added the following language to the tentative agreement:

ARTICLE XVIII. A.1. p. 20

Change	Traditional BC/BS
	. . . .
	RX at $7 generic/ $14 brand name
	Mail order RX up to 90-day supply per co-pay
	PPO
	. . . .
	RX at $5 generic/ $10 brand name
	Mail order RX up to 90-day supply per co-pay

The language providing "mail order RX up to 90 day supply per co-pay" was drafted by the Union's negotiator, Starland. It was agreed by the negotiators that any language that was not carried over from the 1996-2001 agreement was rewritten in the tentative agreement with a line through it. The co-pay language from the 1996-2001 contract was not rewritten with a line through it in the tentative agreement.

The Employer continued to provide reimbursement for mail order co-pays through August of 2001, two months into the term of the 2001-2006 contract, but refused to do so after

that time. The Employer prepared a final draft of the collective bargaining agreement for 2001-2006, using the language in the tentative agreement "mail order prescription drugs up to 90-day supply per co-pay" but did not refer to a zero co-pay. Starland refused to sign the agreement because it deleted the language providing for a zero co-pay for mail order prescription drugs. The Union then filed the charge in this matter.

Discussion and Conclusions of Law:

We agree with the ALJ that the parties failed to reach a meeting of the minds on contract language for the mail order provision. Comparison of the language of the expired contract and the tentative agreement clearly shows the ambiguity. The fact that the co-pay language from the expired agreement was not expressly deleted in the tentative agreement is inconsistent with the addition of the new co-pays. It appears that the $7/$14, and $5/$10 co-pays were to replace the $2 co-pay despite the fact that the tentative agreement does not expressly delete the $2 co-pay language. Except for the testimony of Starland and Dwan indicating that the zero co-pay for mail order prescriptions was to remain in the agreement, the tentative agreement could be read to mean that both the $2 co-pay and the $0 co-pay were replaced by the new $7/$14, and $5/$10 co-pays. The new language "mail order RX up to 90-day supply per co-pay" immediately following the language increasing the co-pays reinforces this interpretation and further confuses the matter.

Although both Starland and Dwan agreed that the language providing for a zero co-pay for mail order prescriptions was to remain in the agreement, their testimony makes it clear that they disagreed on the meaning of that language. Starland maintained that the new language was to clarify that a ninety-day supply could be obtained by mail order with a zero co-pay. Dwan, on the other hand, asserted that they had agreed that the only insurer/administrator for medical insurance benefits would be Blue Cross/Blue Shield (BC/BS) and BC/BS did not offer a mail order plan with a zero co-pay. Therefore, according to Dwan, the zero co-pay for mail order prescriptions would *only* apply if, at some future date, BC/BS did offer such a plan. It is clear that although both parties ratified the tentative agreement, the parties had different understandings of what was agreed to.

As noted by the ALJ, there is no evidence of fraud or bad faith by Respondent. Unlike *Lakeville Community Schools*, 1990 MERC Lab Op 56, on which Charging Party relies, this is not a case of the Respondent attempting to withdraw its consent to written language that clearly and unambiguously conveys the parties' verbal agreement. In this case, the ambiguity in the co-pay language in the tentative agreement combined with the parties' differing views as to the meaning of that language establish that there was no meeting of the minds with respect to the co-pay for mail order prescriptions. Respondent cannot be required to implement a mail order prescription plan on which there was no actual meeting of the minds. See *City of Grandville*, 1999 MERC Lab Op 513, 517.

For the reasons set forth above, we adopt the Administrative Law Judge's findings of fact and conclusions of law. Accordingly we find that Respondent did not violate Section 10(1)(a) or (e) of PERA.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry Bishop, Commission Member

_____
Maris Stella Swift, Commission Member

Dated: _____

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

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 Lansing, Michigan on April 30 and June 6, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before July 23, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Buena Vista Education Association, MEA/NEA, filed this charge against the Buena Vista Schools on February 20, 2002. Charging Party represents a unit of certified teachers and other professional employees of the Respondent. Charging Party asserts that during the summer of 2000, the parties ratified a tentative agreement on a new contract to take effect after the parties' existing agreement expired on June 30, 2001. Charging Party asserts that this agreement required Respondent to provide a mail order prescription plan with a zero co-pay. It alleges that Respondent violated its duty to bargain in good faith when it refused, at the beginning of the 2001-2002 school year, to implement this part of the agreement.

Facts:

Charging Party and Respondent were parties to a collective bargaining agreement for the term 1996 through June 30, 2001. The contract gave employees two options for health care coverage, Preferred Provider (PPO) or traditional Blue Cross. Employees electing PPO coverage paid no co-pay for prescription drugs. For traditional Blue Cross coverage, the regular co-pay was $2. The contract also stated, "mail order prescriptions will be subject to $0 co-pay." Respondent, however, never entered into a contract with a provider for mail order service. No bargaining unit employee asked to order prescriptions by mail.

The parties began bargaining a successor agreement in the spring of 2000. Richard Starland was Charging Party's chief negotiator. Respondent's bargaining team consisted of its chief negotiator, Merle Grover, and Assistant Superintendent Robert Dwan. Respondent proposed that both the traditional Blue Cross and PPO plans include an employee deductible and higher prescription co-pays. The parties reached an oral tentative agreement on June 9, 2000; on June 12, they initialed a written agreement in the form of a list of changes to the old contract. The parties agreed that the new contract would take effect after the expiration of their current agreement. They agreed to deductibles and increased co-pays for pharmacy prescriptions. They also agreed that the new deductibles and co-pays would not go into effect until August 31, 2001. Both Starland and Dwan (Grover did not testify) testified that the parties also reached agreement on a mail order prescription plan. However, they disagreed on when this issue was discussed, what was said, and what agreement was reached.

Starland testified as follows. The parties did not discuss the mail order option at all until after June 9. On June 9, the parties agreed that Starland would put their oral tentative agreement into written form. Sometime between June 9 and June 12, Starland went to Dwan and told him that he was worried that Charging Party was going to have difficulty selling such large prescription co-pay increases to its membership. Starland told Dwan that the zero co-pay mail order language could be used to "leverage this situation." That is, Starland wanted the document presented to the membership for ratification to indicate that members could avoid co-pays by ordering a 90-day supply of pills by mail. To that end, Starland suggested to Dwan that the tentative agreement include the language "mail order RX up to 90-day supply per co-pay." Dwan did not understand what Starland was talking about until Starland showed him the zero co-pay language in the contract. Dwan left their meeting and called Respondent's Blue Cross representative. When Dwan returned, he told Starland that Blue Cross did not offer a zero co-pay. Dwan said that he did not know what to do. Starland told Dwan that he did not care whether Dwan went with Blue Cross or another provider, but that they were going to stick with the zero co-pay because this was the agreement. Dwan did not raise any objection. Dwan agreed to add the language Starland had proposed to the tentative agreement. Dwan also agreed to reimburse employees for the co-pays they paid at pharmacies for maintenance drugs, i.e., drugs they could have obtained by mail, starting with the 2000-2001 school year. Finally, Starland and Dwan agreed that there would be no change from the mail order language in the previous contract. To Starland, this meant that the co-pay in the language they had agreed to, "mail order RX up to 90-day supply per co-pay," was a zero co-pay.

Dwan testified as follows. The parties reviewed the contract's health insurance provisions in a negotiation session in the spring of 2000. This was the first time that Dwan, who did not work for Respondent in 1996, became aware of the mail order language in the 1996-2001 contract. Upon investigation, Dwan discovered that Respondent had never contracted with a mail order provider. Charging Party told Dwan that in 1996 the parties had discussed using a provider in Colorado. When Dwan tried to get in touch with this company, he discovered that it had gone out of business. In a subsequent meeting, Respondent acknowledged that it was obligated under the 1996-2001 contract to provide employees with a zero co-pay option for "maintenance drugs," i.e., drugs employees could have obtained by mail if Respondent had a mail order provider. Since Respondent did not have a mail order provider, Respondent agreed that for the last year of the contract it would reimburse employees for the $2 co-pay they paid at pharmacies for maintenance drugs. The parties returned to the mail order prescription plan issue on June 9. During negotiations on that date, Dwan left the room and called Respondent's Blue Cross representative. He told her about the language in the parties' collective bargaining agreement. The representative told him that Blue Cross did not offer a mail order prescription option with a zero co-pay and had not offered one in 1996. The Blue Cross representative offered Dwan two options.[1] Charging Party's bargaining team was not happy with either option. They suggested contracting with another provider to administer the mail order benefit. However, Dwan argued strenuously that the parties should stick with one provider. Dwan told Charging Party that Respondent would work with Blue Cross on either of the options available, but that Respondent wanted to stay with one provider. After Dwan made this statement, Charging Party's team said only that it did not want the zero co-pay language struck from the agreement. Dwan replied that Respondent couldn't honor it with the current offering from Blue Cross. Charging Party's team said nothing. Dwan couldn't recall which party proposed the language "mail order RX up to a 90-day supply per co-pay." However, the parties agreed to this language before wrapping up their negotiations on June 9. The parties also agreed that the mail order language in the 1996-2001 contract would not be removed from the new agreement. Rather, they agreed to leave the zero co-pay option in the contract for "the future."

Dwan testified that he believed that he had convinced Charging Party to agree to the Blue Cross plan under which employees paid one "regular," i.e. the co-pay they paid at a pharmacy for a 30-day supply of pills, for a 90-day supply of medicine. To Dwan, the co-pay in the language "mail order RX up to a 90-day supply" meant one regular co-pay. Dwan also testified that he believed that when the parties agreed to leave the current language in the contract, they had agreed that the zero co-pay option would be available to Charging Party's members only if Blue Cross began offering this benefit.

On the document initialed by the parties on June 12, 2000, the phrase "mail order RX up to 90 day-supply per co-pay" appears after the new co-pays. Charging Party's membership and

[1] Dwan recalled the Blue Cross representative suggesting one co-pay for a 90-day supply, or possibly one-half co-pay for the same amount. According to the Blue Cross representative, the first option was a mail order plan with one regular co-pay for a 90-day supply of pills. The second was the same plan with a doubled co-pay for the same supply. She confirmed that she told Dwan that Blue Cross did not offer a zero co-pay option.

Respondent's Board ratified this document during the summer of 2000. The parties did not attempt to put their agreement into contract form.

Respondent implemented the terms of the new agreement on July 1, 2001. At that time, the parties still had not drafted a final contract for signature. Dwan left Respondent's employment in August 2001. After the new deductibles and co-pays went into effect on August 31, 2001, Respondent stopped reimbursing employees for co-pays for maintenance drugs. Charging Party asserted that that the parties had agreed that the zero co-pay language would be carried over into the new contract. It demanded that Respondent provide employees with some type of zero co-pay option for maintenance drugs, or continue to reimburse employees for their co-pays for these drugs. Respondent's superintendent, Henry McQueen, told Starland that he did not read the tentative agreement as requiring Respondent to provide a zero co-pay.

In November 2001, Respondent prepared a draft of a final contract, and presented it to Charging Party for signature. The draft contract used the language in the tentative agreement: "mail order prescription drugs up to 90-day supply per co-pay." The draft made no reference to a zero co-pay. Charging Party refused to sign the draft on the grounds that it did not reflect the parties' tentative agreement.

Discussion and Conclusions of Law:

Charging Party asserts that the parties agreed that a mail order prescription option with a zero co-pay would be part of their 2001-2006 contract. It relies on Starland's testimony regarding his discussion with Dwan, on the fact that the June 12 tentative agreement did not list elimination of the zero co-pay as a change from the prior agreement, and on Dwan's admission that parties agreed that the zero co-pay language would remain in the contract. Respondent argues that the parties agreed to a mail order plan with one regular co-pay per 90-day supply. Respondent maintains that this is the plain meaning of the language in the tentative agreement. Alternatively, Respondent argues that the parties did not have a meeting of the minds on the co-pay for the mail order prescription option. Respondent asserts that even if Starland's testimony is credited, the record discloses that Dwan and Starland each had a different understanding of the meaning of the language to which they had agreed.

According to Starland, Dwan and he met sometime between June 9 and June 12 and Dwan agreed to include a mail order prescription option with a zero co-pay in the new contract. I do not credit Starland's testimony regarding this meeting. According to Starland, Starland proposed that the tentative agreement include the language, "mail order RX up to 90-day supply per co-pay." The purpose of putting this language into the tentative agreement, according to Starland, was to remind members who were unhappy with the co-pays and deductibles in the new contract that they could receive a 90-day supply of pills, and avoid the co-pay, by using the mail order plan. I find it unlikely that Starland would have proposed language for this purpose that did not state that the mail order co-pay was zero. Moreover, I do not find Starland's account of Dwan's actions during the alleged meeting to be credible. According to Starland, Dwan did not realize that the old contract contained mail order language until Starland pointed it out to him in this meeting. Dwan called Blue Cross, according to Starland, and was told that it could not provide a zero co-pay option. Immediately after receiving what would have been distressing

news in light of Respondent's objective of reducing health care costs, Dwan, according to Starland, agreed without hesitation or protest to include the zero co-pay option in the new contract. Dwan agreed to this, according to Starland, even though the parties had not agreed to any contract language and had not even initialed a tentative agreement. I find it highly unlikely that Dwan would have behaved in this manner.

Dwan's testimony, however, does not establish that the parties mutually agreed to a mail order plan with one regular co-pay for a 90-day supply. According to Dwan, after he insisted that the parties stay with Blue Cross, Charging Party said that it did not want the zero co-pay language removed from the contract. When Dwan said that Respondent couldn't honor the language, Charging Party remained silent. After that exchange, the parties somehow came to agreement on the language "mail order RX up to 90-day supply per co-pay." They also agreed that the zero co-pay language would remain in the new contract "for the future," although they did not discuss how to translate this idea into contract language. These facts do not demonstrate that Charging Party agreed to the Blue Cross plan.

In determining whether there has been a meeting of the minds on a contract provision, the Commission looks to the expressed words of the parties and their actions. *Lakeville Community Schools,* 1990 MERC Lab Op 56, 59, citing *Goldman v Century Ins. Co.,* 354 Mich 528 (1958). The Commission has consistently found no meeting of the minds where: (1) the parties reach a tentative agreement which contains ambiguous language, (2) the evidence indicates that the parties did not specifically agree on the meaning of this language during negotiations; (3) before the final contract is executed, a dispute arises between the parties about the meaning of the ambiguous language. *City of Grandville,* 1990 MERC Lab Op 513; *Genesee County, Seventh Judicial Circuit Court,* 1982 MERC Lab Op 84; *City of Fraser,* 1977 MERC Lab Op 838. See also, *City of Mason,* 1988 MERC Lab Op 823. In these circumstances, the Commission holds, neither party can be required to execute or implement a contract containing the ambiguous provision, even if the parties have already ratified the tentative agreement. *City of Grandville, supra,* at 517. On the other hand, where a party has ratified a contract containing an unambiguous provision, and there is no evidence of fraud or bad faith, the party cannot later repudiate that provision by claiming that it did not intend to agree to the provision and/or failed to read the tentative agreement carefully before ratifying it. *Lakeville Community Schools, supra.*

The facts in this case are similar to the cases cited above where the parties were held to have failed to reach a meeting of the minds on a term of their contract. The record indicates that the parties agreed to the language "mail order RX up to 90-day supply per co-pay." They also agreed to include in the new contract the language from the old agreement, "mail order prescriptions will be subject to $0 co-pay." I find these two provisions, when read together, to be ambiguous. I also conclude that neither party has established, by credible evidence, that the parties agreed on what the two provisions together meant. I find that the parties failed to reach a meeting of the minds on contract language for the mail order provision. I also find that the parties lacked a meeting of the minds on the substantive issue, i.e., whether Respondent would provide a zero co-pay mail order option, or the one co-pay per 90-day supply option which Blue Cross offered. I conclude that Respondent acted in good faith and that its refusal to implement a zero co-pay option in September 2001 did not constitute a repudiation of its obligation to bargain. Under these circumstances, Charging Party must seek a contractual remedy or attempt

to resolve this matter through further negotiations. *Ann Arbor Public Schools*, 1996 MERC Lab Op 234. I therefore recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____