STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

EASTERN MICHIGAN UNIVERSITY,
Public Employer - Respondent,

Case No. C02 G-162

-and-

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

_____/

APPEARANCES:

Dykema Gossett PLLC, by James P. Greene, Esq., and Debra M. McCulloch, for the Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by James M. Moore, Esq., for the Charging Party

DECISION AND ORDER

On December 23, 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: _____

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APPEARANCES:

Dykema Gossett PLLC, by James P. Greene, Esq., and Debra M. McCulloch, for the Respondent

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by James M. Moore, Esq., for the Charging Party

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 Detroit, Michigan on November 5, 2002, and January 27, 2003, 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 April 7, 2003, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Association of University Professors, Eastern Michigan University Chapter filed this charge against Eastern Michigan University on July 15, 2002. Charging Party represents a bargaining unit of tenured and tenure-track faculty members employed by Respondent. The charge alleges that Respondent violated its duty to bargain under Section 10(1)(e) of PERA by reneging on an agreement reached by the parties on May 29, 2002 with respect to the contemplated termination of a faculty member, Michael Schroeder. Charging Party asserts that by reneging on this agreement, Respondent repudiated a provision of the parties' collective bargaining agreement stating that such agreements shall be final and binding. Charging Party also maintains that Respondent violated its obligation under Section 15 of PERA to meet and confer in good faith and to execute a written agreement.

Facts:

The parties' current collective bargaining agreement expires on August 31, 2004. Article VII of this agreement contains a four-step grievance procedure ending in binding arbitration. At the third step of the grievance procedure, a Review Board consisting of an equal number of representatives of both parties attempts to settle the grievance before arbitration. Article VII (G) defines the composition of the Review Board and describes its role under that article. Article VII (G) requires the Review Board to meet and discuss the grievance, provides that if the grievance is "adjusted to the mutual satisfaction" of the parties, the adjustment shall be reduced to writing and signed by both parties within 15 days of the completion of the discussion, and states that said adjustment shall be final and binding upon all parties.

The parties' contract also sets out procedures which Respondent must follow before it can terminate a faculty member. Article XVI (D)(2) states:

> a. [A faculty member shall] be provided with a written statement of reasons for the contemplated action, a copy of which shall also be provided to the Association. Said statement shall be framed with reasonable particularity.
>
> b. Prior to the imposition of a termination, the Assistant Vice President for Academic Affairs shall request a meeting of the Review Board (see Article VII) to discuss the basis for the contemplated action and to permit the Association's Grievance Officer, the Faculty Member and other Association representatives serving on the Review Board, to provide information which they believe may merit consideration by EMU. The Review Board shall meet and conclude its discussion of the matter within five (5) working days of the Assistant Vice President's request for a meeting.
>
> c. [A faculty member shall] be given an opportunity to discuss the contemplated action with the President, or his/her designee, looking for mutual settlement.

If the meeting between the faculty member and the President or his designee does not result in a mutual settlement, Respondent may terminate the faculty member. After the faculty member is terminated, he or she may file a grievance under Article VII. The grievance goes straight to step three, and the parties convene another Review Board, usually consisting of different members.

Review Board meetings under Article XVI (D)(2) are infrequent. Benjamin Palmer, who has been Charging Party's grievance officer or assistant grievance officer since 1984, could recall only two such meetings during the 1990s. However, both Palmer and Cheryll Conklin, Charging Party's Executive Director, testified that the parties' representatives discuss settlement whether the Review Board is meeting pursuant to Article VII or Article XVI. Palmer testified regarding the usual procedure followed by the Review Board. According to Palmer, the parties attempt at the Review Board meeting to reach agreement

on the substance of a resolution. The Review Board then adjourns, and one side volunteers to draft a memorandum incorporating the substantive agreements that were reached. The other side then makes proposals and amendments, and the document goes back and forth between the parties until an agreement is reached. According to Palmer, the parties almost never agree to the first draft. However, he could not recall any case, other than the one that is the subject of this charge, where the parties reached agreement on the substantive issues but were unable to agree on a final settlement document.

On May 15, 2002, Respondent held a meeting to present Professor Michael Schroeder with a written statement of charges against him, as required by Article XVI (D)(a). Schroeder was informed that a student had filed a sexual harassment complaint against him. On May 23, 2002, Respondent Provost Paul Schollaert sent a letter to Schroeder outlining the findings of Respondent's investigation, and notifying him that Respondent was contemplating his termination. On this same date, Christine Gerdes, Interim Assistant Vice President for Academic Affairs, sent a letter to Conklin enclosing a copy of Schollaert's letter and requesting a meeting of the Review Board pursuant to Article XVI (D)(2)(b).

The Review Board convened on May 29. Respondent was represented by Gerdes; Ken McKanders, Respondent's General Counsel; Nina Contis, Interim Dean of the College of Arts and Sciences; and Dennis Beagan, head of the Communication and Theater Arts Department. Charging Party's representatives were Conklin, Charging Party President John Boyless, Denise Tanguay, and Philip Arrington. Palmer, Schroeder, and his attorney were also present for the first part of the meeting. In accord with the usual practice, Gerdes began by explaining the process and how the procedure worked, i.e. that the purpose of the meeting was to discuss the basis for Schroeder's contemplated termination and to give him an opportunity to present information he believed merited consideration. Palmer then made a presentation to the Board on Schroeder's behalf. Members of the Review Board asked Palmer and Schroeder questions. Schroeder told the Review Board that he had begun seeing a therapist after the incident that was the subject of the complaint. Palmer, Schroeder, and his attorney then departed so that the Review Board members could discuss the case.

After Palmer, Schroeder and his attorney left the room, Boyless asked Gerdes if Respondent's representatives had the authority to reach a settlement agreement. According to Conklin and her notes, Gerdes said yes. According to Gerdes, she replied that although the final decision rested with the Provost, she was not a "straw man." Gerdes also said that Respondent wanted to make a decision quickly. She told Charging Party representatives that she wanted to get a sense from them of what they thought the appropriate level of discipline should be. Tanguay suggested that Schroeder continue his therapy. She also said that she thought that Respondent should consider the fact that there was no indication that Schroeder had ever engaged in this type of conduct before. Boyless suggested that a letter be placed in Schroeder's file for a certain amount of time. Gerdes said that if Charging Party was proposing that the discipline be confined to a letter in Schroeder's file, it was wasting its time. The parties then discussed at length whether Schroeder's conduct violated Respondent's written sexual harassment policy, but could not reach agreement.

According to Gerdes, and Conklin's testimony on direct examination, after the parties finished discussing whether Schroeder had violated the sexual harassment policy, Respondent's representatives

caucused. Conklin testified that when they returned to the room, McKanders said, "Termination is off the table."1 Gerdes could not recall McKanders' exact words, but agreed that he said something like this. The parties then began discussing the terms of a possible settlement that would preserve Schroeder's job.

According to both Conklin and Gerdes, the parties first agreed that although Schroeder's application for tenure was awaiting approval by Respondent's Board of Regents, his tenure should be held in abeyance for two years. They also agreed that simply withholding tenure would not be enough, and there needed to be some monetary punishment. The parties then discussed whether Schroeder was eligible for promotion. Gerdes said that Schroeder's department had recently approved his application for promotion from assistant to associate professor, but Conklin did not believe that Schroeder was eligible for promotion. Although Contis testified that the whole promotion issue was left "up in the air" because of this dispute, Gerdes and Conklin agree that the parties decided that if Schroeder was eligible for promotion, his promotion should also be held in abeyance.

The parties next discussed whether at the end of the two years Schroeder should have to reapply for promotion and be reevaluated by his peers and his department. Charging Party argued that Schroeder should not have to reapply, since he had already met the standards, and that it would be unfair to the departmental personnel committee to require it to go through all the work of evaluating him again, while Respondent argued that circumstances might change. Conklin testified that the parties finally agreed that losing the pay increase that came with the promotion for two years would be sufficient. According to Gerdes, the parties did not resolve their disagreement over whether Schroeder would have to reapply. As noted above, Contis' recollection was that the parties reached no agreement regarding any aspect of Schroeder's promotion.

The parties agreed that Schroeder should be required to continue therapy for 18 months or until the therapist believed that the therapy was complete, whichever was later. According to Conklin, Respondent said that it wanted to be able to confirm that Schroeder attended his sessions with his therapist. According to Gerdes, the parties agreed that Respondent "would have some access to information from the counselor." Contis, Gerdes and Conklin agree that the parties did not otherwise discuss what type of information the therapist would have to provide.

The parties agreed that Schroeder would be given a "last chance" agreement. According to Conklin, the parties agreed that Schroeder would be terminated if he committed a subsequent act of sexual harassment, and Charging Party would be restricted to challenging the factual accuracy of the complaint. Gerdes testified that Respondent's position was that Schroeder would be terminated if he engaged again in "this type of behavior with a student," but that the parties did not reach agreement on what would trigger the last chance agreement. Contis agreed with Gerdes that the parties did not reach agreement on this issue.

The parties agreed that the last chance agreement would not be placed in Schroeder's personnel

1 Conklin's testimony on cross-examination contradicted her testimony on direct. On cross, Conklin claimed that McKanders said that termination was off the table after the parties had worked out the details of the settlement, and that this remark confirmed Respondent's assent to the terms of the settlement.

file, but that something would have to be placed in Schroeder's personnel file to explain why Respondent had not acted on Schroeder's applications for tenure and promotion. According to Conklin, she did not want a letter in Schroeder's departmental personnel file that would affect his ability to obtain future promotions. It is not clear from the record whether Conklin actually said this at the Review Board meeting. According to Gerdes, Charging Party did not object when Respondent said that a statement would have to be placed in Schroeder's file, but, according to Gerdes, the parties did not discuss what this statement should say.

After approximately three hours of discussion, Gerdes said she would write up the agreement and give it to Charging Party to sign. According to Conklin, before leaving the meeting, the parties shook hands and congratulated each other on reaching a reasonable agreement. Gerdes did not recall whether the parties shook hands; she testified that the parties believed they had had a productive discussion and reached agreement on the essential terms of a settlement, even though there were issues that remained open. According to Contis, the parties were relieved to finish discussing an issue that was so stressful for everyone. Contis testified that she believed that the essential terms of a settlement had been achieved, and that Gerdes and Conklin would continue exchanging draft memorandums until the details were worked out.

On June 5, Gerdes sent Conklin an e-mail with a lengthy memorandum of understanding (MOU) attached. In her e-mail, Gerdes said, "There were a few issues we either hadn't reached full agreement on, or hadn't discussed at all." Gerdes told Conklin that she had written what she believed was fair language to cover these items, and asked Conklin to let her know if Conklin had concerns.

Gerdes' MOU set out the basic facts of the charges against Schroeder and the actions Respondent had taken in response to these charges. It stated that Respondent would not terminate Schroeder under the following conditions: (1) Schroeder would not be granted indeterminate tenure immediately, but if he complied with the other terms of the agreement he would be granted tenure effective September 1, 2004; (2) Schroeder would not be eligible for promotion to associate professor during the 2002-2003 or 2003-2004 academic years, but could apply for promotion to be effective September 1, 2005 in the fall of the 2004-2005 academic year; (3) Schroeder's promotion to associate professor would not be guaranteed; (4) Schroeder would continue to seek therapy at least once per week for a period of not less than 19 months, and would authorize the therapist to respond fully and with candor to all questions Respondent might direct to the therapist, and to provide written reports at Respondent's request; (5) Schroeder would be terminated if he engaged in "any subsequent acts or behavior of the nature pertaining to that stated in the complaint," and Charging Party and Schroeder would have the right only to challenge "the factual question of whether such behavior or violation did in fact occur"; (6) a memorandum would be placed in Schroeder's official personnel file stating that Respondent and the Union had agreed that, as a resolution to an allegation of sexual harassment, Schroeder's application for tenure would be held in abeyance, and Schroeder would not be eligible to apply for promotion until the fall of 2004. Attached to the MOU was a document for Schroeder to sign that authorized his psychiatrist or psychologist to respond fully to Respondent's questions, including providing written reports upon Respondent's request.

On June 5, Conklin sent the proposed MOU back to Gerdes with handwritten modifications. In her e-mail, Conklin told Gerdes that the agreement "looks pretty good." Conklin identified only one item –

the MOU's requirement that Schroeder reapply for promotion – as explicitly contradicting the parties' May 29 agreement. Conklin modified the paragraph covering information to be provided by Schroeder's therapist, and the release form, so that the therapist would only be required to reply to questions posed by the Respondent relating to the incident involving the complainant, whether Schroeder was attending treatment sessions, whether his treatment was progressing, and whether he had completed the needed treatment. Conklin testified that she did not want the personnel file to make reference to an allegation of sexual harassment, because this would be as bad as putting the last chance agreement in his personnel file. She suggested that the statement in Schroeder's personnel file say only that his tenure and promotion would be held in abeyance pursuant to the parties' agreement resolving a "serious personnel matter."

Conklin also sent copies of the MOU with her handwritten notes to the other Union representatives on the Review Board, and asked them to get any further corrections back to her as soon as possible. Conklin's note to her fellow Review Board representatives did not say that Respondent was reneging on their agreement. According to Conklin, Boyless, the other Union representatives all "came up with the same issues and concerns." On June 10, Conklin sent Gerdes another copy of the MOU, with suggested changes from all the Charging Party representatives.

Conklin telephoned Gerdes on June 13. Conklin reviewed her objections to Gerdes' proposed MOU, and told Gerdes that she "wanted the agreement the way it had been reached at the step three review board hearing." Gerdes told her that she would review the draft.

On June 27, Conklin e-mailed Gerdes stating that she was concerned that Charging Party had not received a signed Review Board agreement. Conklin mentioned the requirement in Article VII that the settlement be reduced to writing and signed within 15 days. Conklin asked Gerdes if there was an issue that they needed to address as a group.

On June 28, Schollaert sent Schroeder a letter stating that since the Review Board was not able to reach a final resolution, Schollaert was proceeding with the next step in the contractual procedure for termination for reasonable and just cause. That is, Schroeder was to meet with Schollaert in hopes of reaching a mutual settlement, as provided by Article XVI (D)(2)(c). On this same date, Gerdes wrote to Conklin that she had discussed the situation with the Provost and the other members of the Review Board, and had concluded that while the Review Board discussed elements of a settlement, it had not reached consensus on the gravity of the misconduct or on the final terms of a resolution.

On July 1, Charging Party's representatives on the Review Board wrote to Gerdes stating their belief that the parties had reached agreement on May 29. The letter accused Respondent of a breach of trust. Gerdes replied on July 2, again insisting that the Review Board had not reached agreement on May 29. Gerdes also stated that since the parties were unable to agree on the full terms of a settlement, and, therefore, had never entered into a MOU, there was no binding agreement between the parties regarding Schroeder's termination.

Shortly thereafter, Schroeder was terminated. Charging Party filed a grievance under Article VII challenging his termination.

Discussion and Conclusions of Law:

Charging Party's first argument is that Respondent repudiated the parties' collective bargaining agreement by reneging on the Review Board's agreement not to terminate Schroeder. An alleged breach of contract is not an unfair labor practice unless a party has "repudiated" the collective bargaining agreement. *Gibraltar S.D.*, 2003 MERC Lab Op ____ (Case No. CU01 I-052, decided 6/30/03); *Jonesville Bd. of Ed.*, 1980 MERC Lab Op 891 *County of Wayne,* 1988 MERC Lab Op 73, 76. 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, in order 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.

Article VII (G) of the parties contract provides that if a grievance is adjusted to the mutual satisfaction of the parties in a Review Board meeting, the adjustment shall be reduced to writing and signed by both parties. It also provides that said adjustment shall be final and binding upon all parties. The May 29 2002 Review Board meeting was convened pursuant to Article XVI to discuss Schroeder's proposed termination, not to discuss a grievance. Charging Party maintains, however, that a Review Board convened under Article XVI has the same responsibilities as a Review Board convened under Article VII. According to Charging Party's brief, "the contract could not be clearer with respect to the interplay" between Article XVI and Article VII. Therefore, Charging Party argues, Respondent repudiated its obligations under Article XIV of the contract by refusing to recognize the agreement/adjustment reached in the Review Board as final and binding, reducing it to writing, and signing it.

Respondent denies that the Review Board reached agreement on the terms of a complete settlement in Schroeder's case. It also argues that even if the parties had reached agreement, Respondent would not have breached the contract had it later rejected its terms, since Article XVI (D)(2)(b) states only that a Review Board under that article shall allow various parties to provide information which they believe may merit consideration, and shall "discuss the basis for the contemplated action." At most, according to Respondent, the parties have a bona fide dispute over the parties' obligations under Article XVI (D)(2).

Even though the record indicates that the parties generally discuss settlement in Review Board meetings held under Article XVI (D)(2)(b), this article does not on its face require them to do so. Nor does Article XVI(D)(2)(b) clearly state that an agreement reached in a Review Board meeting will be final and binding. Article XVI (D)(2)(b) makes only a brief reference to Article VII. Charging Party argues that Respondent's obligations under Article XVI (D)(2)(b) and Article VII (G) are essentially the same; Respondent maintains that they are not. I find that the parties have a bona fide dispute over the interpretation of Article XVI (D)(2)(b) that should be resolved by an arbitrator, or by the parties in subsequent contract negotiations. For this reason, I conclude that Respondent did not repudiate the collective bargaining agreement.

Charging Party also argues that by reneging on the agreement reached in the Review Board meeting on May 29, 2002, Respondent violated its duty to bargain in good faith. For reasons discussed below, I conclude that the parties did not reach complete agreement on the terms of a settlement on that date.

The record indicates that in the Review Board meeting of May 29, the parties agreed on certain terms that would be included in the settlement. They agreed that Schroeder's tenure would be held in abeyance for two years. They agreed that if Schroeder was eligible for promotion, his promotion would also be held in abeyance for that period. They agreed that Schroeder would have to continue seeing a therapist, and that Schroeder would have to authorize some communication between his therapist and Respondent. They agreed that Schroeder would be given a "last chance" agreement. They agreed that the last chance agreement would not be placed in Schroeder's personnel file, but that a statement would be placed in his file explaining why he had not been granted or denied tenure or promotion.

The record also indicates that at the May 29 meeting, the parties did not discuss in detail, and did not agree upon, what type of information from Schroeder's therapist Respondent would be entitled to receive. They did not discuss in detail, and did not agree upon, what the statement in Schroeder's personnel file would say. I find that the parties also did not agree on the language of the last chance agreement. Conklin testified that the parties agreed that Schroeder would be terminated if he engaged in an act of sexual harassment. However, the parties had disagreed as to whether Schroeder's conduct constituted sexual harassment under Respondent's policy. Given that disagreement, the last chance agreement had to define what type of conduct would trigger Schroeder's termination.

Charging Party argues that when McKanders said at the May 29 meeting, "termination is off the table," he meant that Respondent had agreed not to terminate Schroeder. However, I find that McKanders made this statement before, and not after, the parties began working on the terms of a settlement. Clearly, McKanders was not expressing Respondent's assent to the terms of an agreement which the parties had not yet even discussed. Moreover, I do not interpret McKanders' statement as a promise that Respondent would not terminate Schroeder even if the parties were unable to reach agreement.

Charging Party also argues that the fact that the parties congratulated each other at the end of the meeting indicated that they believed they had reached agreement. Even Gerdes admitted, however, that the parties had reached agreement on the essential terms of an agreement, although not a complete agreement.

Charging Party asserts, in addition, that the only legitimate explanation for the fact that Respondent's Board of Trustees failed to act on Schroeder's application for tenure after the May 29 meeting is that Respondent knew that the parties had reached agreement on holding his tenure in abeyance. While there was no testimony about why the Board failed to act, it seems likely that the Board postponed action on Schroeder's tenure application because Respondent was considering terminating him.

I find that at the end of the meeting on May 29, 2002, even Conklin expected that Gerdes and Conklin would engage in further discussions before a final agreement was reached. Gerdes' draft MOU was, in part, a proposal on Respondent's behalf with respect to unresolved issues. That Conklin's June 5 response was essentially a counterproposal on these issues is reflected in her comment that Gerdes' draft

looked "pretty good." The only part of the MOU that Conklin at that time said contradicted the parties' May 29 agreement was the provision requiring Schroeder to reapply for promotion after two years. I find that Conklin expected a response to her counterproposal, and some movement on Respondent's part. However, Respondent did not respond to Conklin's June 5 proposal. Instead, it proceeded with the next step of the pre-termination procedure set out in Article XVI (2)(D), effectively rejecting Charging Party's counterproposal. This was not what Charging Party expected. Charging Party was dismayed and angered. It accused Respondent of changing its mind. The fact remains, however, that the parties had not fully agreed on the precise terms of the settlement. At one point in its post-hearing brief, Charging Party argues that Respondent acted in bad faith by failing to continue to negotiate the terms of the settlement agreement. However, I find no basis for concluding that Respondent had an obligation under Section 15 or Section 10(1)(e) of PERA to engage in further discussion over the terms of a pre-termination settlement.

In summary, I find that on May 29, 2002, Respondent and Charging Party did not reach complete agreement on the terms of a settlement under which Michael Schroeder would retain his faculty position. I conclude that Respondent was not guilty of repudiating the parties' collective bargaining agreement because the parties had not reached agreement, and because the parties had a bona fide dispute over Respondent's obligations under Article XVI (2)(D)(b) of their contract. I also conclude that Respondent did not violate its obligation to bargain in good faith by failing to respond to Charging Party's June 5, 2002 counter settlement proposal and proceeding instead to terminate Schroeder under the provisions of Article XVI. In accord with these conclusions, and the findings of fact set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____