STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VAN BUREN/CASS CO DIST PUBLIC HEALTH DEP'T,
Public Employer-Respondent in Case No. C04 E-135
Charging Party in Case No. CU04 G-035,

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Respondent in Case No. CU04 G-035
Charging Party in Case No. C04 E-135.
_____/

APPEARANCES:

Howard L. Shifman, Esq., and Kastner Westman and Wilkins, LLC, by Ted N. Kazaglis, Esq., for the Public Employer

Pinsky, Smith, Fayette and Kennedy, LLP, by Michael L. Fayette, Esq., for the Labor Organization

DECISION AND ORDER

On June 16, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were 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

_____
Nino E. Green, Commission Member

Dated: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

VAN BUREN/CASS CO DIST PUBLIC HEALTH DEP'T,
Public Employer-Respondent in Case No. C04 E-135
Charging Party in Case No. CU04 G-035,

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Respondent in Case No. CU04 G-035
Charging Party in Case No. C04 E-135.
_____/

APPEARANCES:

Howard L. Shifman, Esq., and Kastner Westman and Wilkins, LLC, by Ted N. Kazaglis, Esq., for the Public Employer

Pinsky, Smith, Fayette and Kennedy, LLP, by Michael L. Fayette, Esq., for the Labor Organization

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, this case was heard at Lansing, Michigan on November 12, 2004, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before February 25, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On May 24, 2004, Teamsters Local 214 (the Union) filed the charge in Case No. C04 E-135 against the Van Buren/Cass County District Public Health Department (the Employer). On July 9, 2004, the Employer filed the charge in Case No. CU04 G-035 against the Union. Both parties allege that the other violated its duty to bargain in good faith by refusing to execute a collective bargaining agreement accurately reflecting a contract offer made by the Employer on March 3, 2004 and accepted by the Union by vote of its membership on March 9, 2004. The

parties disagree over whether the Employer's offer included an existing benefit, reimbursement of health care deductibles.

Facts:

Health care benefits for members of the Union's bargaining unit were set out in Appendix B of the parties' contract covering the term January 1, 2001 through December 31, 2003. Pursuant to Appendix B, the Employer provided unit employees with Blue Cross point-of-service health insurance. Employees paid monthly premium co-pays that varied by the type of coverage, single to family with continuation. The Blue Cross plan at the time this contract was signed had no deductibles. In early 2002, the parties agreed to let the Employer switch to a Blue Cross plan with a $500 annual deductible for single employee coverage and a $1,000 annual deductible for family coverage. The Employer agreed to reimburse employees for the entire deductible in 2002. Because the Blue Cross premium was lower, the Employer realized a net savings from this arrangement. The parties did not put this agreement in writing.

In early 2003, the parties entered into a memorandum of understanding (MOU) raising the premium co-pays. The MOU also stated that the Employer had established a "qualified medical reimbursement plan" under which the Employer would reimburse an employee with single coverage for the amount of his deductible between $250 and $500, and an employee with family coverage for the amount of his deductible between $500 and $1,000.

The parties began negotiations for a successor collective bargaining agreement in November 2003. The Employer's bargaining team for the parties' successor agreement consisted of Howard Shifman, the Employer's chief negotiator, and Jeff Elliott, the Employer's administrative director. Shifman testified at the hearing, but Elliot did not. Union business representative Fred Bennett headed the Union's bargaining team. Also on the Union's bargaining team were Union steward Anna Marie McCoy and unit employees Dixane Kean, Edythe Reynolds and Mike McGuire. All except McGuire testified.

On November 3, 2003, the Union faxed the Employer its first proposal. The Union proposed that the premium co-pays remain the same throughout the term of the contract. The Union did not propose any language on deductibles, but its proposal included the notation "discuss health insurance deductible reimbursement options."

The parties conducted three face-to-face bargaining sessions. The first session occurred on November 25, 2003. The session began with a written proposal by the Employer. The Employer proposed a two-year agreement with several minor language changes. Items four and five of the proposal were:

> 4. Appendix A – Issue 3 and 4 are a package proposal. Wages are contingent upon Health Insurance Agreement.
>
> 5. Appendix B

A. IBA health Plan (see attached).[1]

i. Co-pays on premiums in 2004 go to $100.00 per month
ii. Employee's shares [sic] 50% of all premium increases in 2005

Attached to the Employer's written proposal were charts comparing the costs to employees of their current Blue Cross plan and the proposed IBA plan. There were differences between the two plans in the percentages the plans would pay for services, but both plans had upfront deductibles of $500 and $1,000. The November 23 proposal did not specifically mention reimbursement of deductibles or the "qualified medical reimbursement plan."

Shifman testified that the parties discussed both proposals at this meeting, and that the Employer went over its proposal with the Union's negotiating team. He testified:

> We had indicated that the health insurance and the wages were a package proposal. We had attached a copy of the health insurance provisions, both the old and the proposed, which would be IBA-4 … the proposal that we presented at that time to the Union, we indicated that we were facing a loss of revenue because of the state's financial crisis . . . [we also pointed out that] we had also experienced an extremely large increase in health insurance, that the Union had wanted an upgrade in wages for a number of people . . . Our proposal was for a minimum wage increase for – I think we had some 60 employees in the bargaining unit, would be 2% and the maximum was 15. The only way we could afford that is to put the IBA plan as a comprehensive health insurance proposal, that it was the entire package on health insurance. I pointed out to them that there wasn't going to be any reimbursement on any of the deductibles under the program, that that wasn't an issue that we were interested in maintaining at all. [Emphasis added]

Bennett did not testify in detail about the November 23 meeting. In his testimony, Bennett referred to the qualified medical reimbursement program as the "gap program." Bennett testified that the Employer never specifically told the Union, at the November 2003 meeting or at any time during negotiations, that it was proposing to eliminate the gap program. He also testified that the Employer never said, in response to the Union's proposals to improve the gap program, that the Employer would not agree to any gap benefit. Union bargaining team members Kean, McCoy and Reynolds testified that they were present at all three negotiation sessions and that they did not hear the Employer make any proposal to eliminate the gap benefit.

The parties met again on January 7, 2004, and the Union presented the Employer with a written counterproposal. The Union stated that it would agree to the IBA plan, but with current co-pays and current cost sharing. The Union also proposed that the Employer reimburse employees for the full cost of their deductibles as it had in 2002. Shifman testified:

> Well, we [the Employer] had caucused, and then we came back out, and I made several comments. I indicated to them that they had to take the IBA health plan as

[1] IBA is a health insurance carrier. It was not identified by full name in the record.

is. And I explained to them that it was a comprehensive proposal; that there were going to be no wage increases unless they agreed to the IBA health plan; that, in fact if they didn't agree to the IBA health plan as is, that it would be a wage freeze . . . I indicated to them that their proposal regarding this current cost sharing and the deductibles was totally unacceptable. It is not included within the proposal we made, and would not be included in the proposal that was made. [Emphasis added].

* * *

Most of [Shifman and Bennett's] conversation after that was pertaining to [the Union's wage proposal]. Now, Fred did tell me there was no way they were going to agree to the IBA with our – the way we proposed it and in terms of the way I presented [it] to them in terms of the co-pays and eliminating the - we didn't use the term "gap coverage" there. I don't – we talked about reimbursement of deductibles. We never called it … gap. We talked of reimbursement and deductibles.

Bennett testified only that after the Union presented its proposal, Shifman said that the proposal was "not acceptable."

On February 11, 2004, the Union faxed the Employer a detailed wage proposal. The parties did not meet again until March 3, 2004. On that date, the Employer presented the Union with another written proposal. Item four read, in its entirety:

A. IBA Health Plan: (See Attached)

Section 2.1 Co-Pay Premiums - 2004[2]

a)	Single coverage	$40.00 Monthly
b)	Two-person coverage	$55.00 Monthly
c)	Family coverage	$55.00 Monthly
d)	Family coverage w/continuation	$75.00 Monthly

Co-Pay Premiums – 2005

a)	Single coverage	$40.00 Monthly
b)	Two-person coverage	$55.00 Monthly
c)	Family coverage	$55.00 Monthly
d)	Family coverage w/continuation	$75.00 Monthly

Section 2.2

Effective January 1, an employee who does not need health insurance may elect to have the Employer apply the sum of Two Hundred Twenty-five ($225.00) per month to the employee's deferred compensation/thrift plan.

[2] The premium co-pays in the Employer's proposal were the co-pays the employees were currently paying.

The chart listing the costs to employees of the IBA plan that had been attached to the Employer's November 23 proposal was also attached to the March 3 proposal.

Shifman testified that at the March 3 meeting the parties discussed the Union's February 11 wage proposal and the Employer's proposal for about twenty minutes, with Shifman doing most of the talking. Shifman told Bennett that the Union's February 11 proposal was too expensive. According to Shifman:

> And I also again reiterated to [Bennett] that, in fact, you've got to take the IBA proposal, because they had not agreed to the IBA proposal, you've got to take it as is, comprehensive. And that includes the fact –and I specifically said, that includes the fact that there is no reimbursement of deductibles. [Emphasis added]

According to Shifman's testimony, after a Union caucus that lasted several hours, Bennett came into the office where Elliott and Shifman were waiting and handed Shifman a written proposal. The Union made a wage proposal. It also agreed to accept the IBA plan with no change in the current monthly premium co-pay for the life of the contract, as the Employer had proposed. However, the Union proposed to change the "gap coverage" so that the Employer would pay the first half of the deductible rather than the second. According to Shifman, he looked briefly at the proposal, and told Bennett, "This is totally unacceptable. It is not our health insurance program. There's no way we're going to pay these wages . . . It's just dead on arrival." Shifman suggested that the parties contact a mediator, and Bennett agreed. Shifman packed up his things and got ready to leave the building. According to Shifman, Bennett stopped him as he was walking down the hall to the door. Shifman testified:

> [Bennett] said, "Look. I need to take this back. I've got a split in my bargaining team." He says, "I've got to cover my ass. Let the membership make the decision as to what they want to do with this. I'm going to take it back to the members and then if it gets turned down, then we can go to mediation." [Bennett] also told me that he wasn't going to recommend it, but he would do whatever the membership decided. He also asked me if we would make two changes in the proposal.

According to Shifman, the Employer agreed to make the wage increases retroactive and to drop the requirement that employees partially cover the cost of health insurance premium increases in 2005. The parties corrected the Employer's March 3 proposal to reflect these changes. According to Shifman, Bennett said again that he was not endorsing the proposal, that he didn't think the proposed wage increases were fair and that he did not like the health insurance.

Bennett testified that after the Union presented its counterproposal, Shifman caucused with Elliott. According to Bennett, Shifman came out of his caucus and, in the hallway outside the negotiating room, told Bennett that the Employer did not want to "change the gap coverage at this time." According to Bennett, only he and Shifman were present at the time Shifman made this remark.

Bennett presented the Employer's March 3 written offer to the Union's membership at a March 9 meeting. Before the vote, a member asked if the gap program would remain in effect. The Union's bargaining team said that the program was still in effect and would not change. Bennett spoke against accepting the offer; the other members of the bargaining team took no position. The Union membership voted to accept the Employer's offer, and the Union notified the Employer of this fact. Later that day, the Employer's Board ratified the agreement.

Before the end of April, the Employer prepared a draft collective bargaining agreement and sent it to the Union for signature. The Employer's draft included a page outlining the coverage and benefits of the IBA plan. The draft made no reference to reimbursement of deductibles. According to a letter dated April 29, 2004 from Bennett to the unit members, the bargaining team reviewed the draft and, with the exception of McGuire agreed that it had not agreed to delete the qualified medical reimbursement plan from the new agreement. According to the letter, Bennett contacted Elliott, who stated that it was never the Employer's intention to continue reimbursing deductibles after switching to the new health insurance plan. On May 7, the Union prepared its own draft and sent it to Elliott. The Union's draft included the "qualified medical reimbursement plan" language contained in the 2003 MOU. The Employer refused to sign this draft.

Discussion and Conclusions of Law:

The Commission has held that a party cannot be required to execute or implement a contract where there has been no actual meeting of the minds. *Genesee Co (Seventh Judicial Circuit Court),* 1982 MERC Lab Op 84, 87. If a tentative agreement is ambiguous, the parties later discover that they have differing interpretations of the agreement, and there is no evidence of bad faith, the fact that one or both parties have ratified the agreement is irrelevant. *Buena Vista Schs,* 16 MPER 65 (2003); *City of Grandville,* 1999 MERC Lab Op 513; *City of Fraser,* 1977 MERC Lab Op 838. 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 Schs,* 1990 MERC Lab Op 56, 59, citing *Goldman v Century Ins Co,* 354 Mich 528 (1958).

The Union maintains that it accepted the Employer's March 3, 2004 offer by vote of its membership, and that the parties had a binding agreement. The Union denies that the Employer's March 3, 2004 offer eliminated reimbursement of deductibles. It points out, correctly, that the Employer's written proposals listed only those portions of the previous contract that the Employer wished to change. The Union maintains that both parties bargained under the assumption that terms of the contract that the parties did not agree to change would carry over into the new agreement. In response to the Employer's claim that its proposal was to replace the Blue Cross plan its in its entirety, the Union points out, again correctly, that although the Blue Cross plan contained deductibles, it did not require the Employer to reimburse employees. Rather, the parties agreed to this arrangement after the Employer switched from a Blue Cross plan without deductibles to a cheaper Blue Cross plan that included them. The Employer's November 23 and March 3 proposals did not mention the qualified medical reimbursement plan or deductible reimbursement. The Union asserts, reasonably, that it could not have known from

the Employer's written proposals that the Employer's offer did not include the deductible reimbursement plan. I agree.

The Employer maintains that it never proposed to continue reimbursing deductibles, and that the Union is now simply seeking to obtain a benefit that it could not obtain in negotiations. It asserts that both its health care proposals were comprehensive proposals under which the employees' current benefits would be replaced by the benefits contained in the IBA plan under the terms set out in the offer. According to the Employer, there was no reason for it to list the elimination of the reimbursement benefit as a separate proposal. Clearly, it would have been better for the Employer to state explicitly in its proposal that it was eliminating the reimbursement benefit. However, I find the Employer's explanation both reasonable and credible. I conclude that the written proposals, by themselves, were ambiguous. That is, the Employer's proposals neither clearly included nor clearly eliminated the reimbursement benefit.

Both parties presented testimony about their discussions of the Employer's health care proposals during negotiations. Shifman's testimony was very detailed. According to Shifman, he explicitly told the Union's bargaining team on November 23, and again on January 7, that the Employer's offer did not include reimbursement of deductibles. On March 3, according to Shifman's testimony, he said this to Bennett twice – both before and after the Union presented its counteroffer. Shifman also testified that on January 7, Bennett demonstrated that he understood the Employer's offer when he said that there was no way that the Union would agree to the IBA plan as it had been proposed, including the elimination of reimbursement for deductibles.

I do not credit Shifman's testimony in full. Specifically, I do not believe that he clearly conveyed to either Bennett or the Union's bargaining team that the Employer was proposing to eliminate the reimbursement benefit. My conclusion is based on two factors. First, the Employer failed to call Elliott as a witness to support Shifman's testimony. Elliott appears to have been present during all the critical discussions and should have been able to confirm what Shifman said. An adverse inference may be drawn regarding any factual question for which a witness is likely to have knowledge when a party fails to call that witness, and the witness may reasonably assumed to be favorably disposed to the party. *Ionia Co,* 1999 MERC Lab Op 523, 526; *Northpointe Behavioral Healthcare Systems,* 1997 MERC Lab Op 530, 540. From the Employer's failure to call Elliott as a witness, I infer that he would have testified that he did not recall the explicit statements regarding the reimbursement benefits that Shifman claims that he made at the bargaining table.

I also find no indication in the Union's behavior that it understood that the Employer was proposing to eliminate the benefit. If Shifman's testimony is credited, the Union should have known after the November 23 meeting that the Employer was proposing to eliminate the reimbursement benefit. Yet in its January 7 counterproposal, the Union proposed that the Employer improve the benefit by reimbursing employees for the full cost of their deductibles as it had before the 2003 MOU. If Shifman's testimony is credited, the Union unquestionably knew before it made its March 3 written counterproposal that the Employer was proposing to eliminate the deductible reimbursement. In that proposal, the Union agreed to accept the IBA plan, although not the Employer's wage offer. The fact that its offer included yet another proposal

regarding deductible reimbursement strongly suggests that it believed that this issue was still on the table.

Bennett testified that on January 7, after the Union presented its proposal to return to full reimbursement of the deductible, Shifman told him in the hallway that the Employer did not want to "change the gap coverage at this time." I do not credit Bennett's testimony on this point. I note that this is the only testimony, by any witness, suggesting that the Employer intended the deductible reimbursement to carry over into the new contract.

In sum, I find that the Employer's November 23 and March 3 contract offers neither clearly included nor clearly eliminated the deductible reimbursement benefit. I find that the parties had not yet discovered the ambiguity in the Employer's offer when, without the bargaining teams reaching tentative agreement, the Union agreed on March 3 to present the Employer's offer to its membership. As a result, the Union membership and the Employer's governing body ratified different agreements. When the parties attempted to prepare a contract with language embodying their agreement, they discovered that they had no meeting of the minds and no agreement on the deductible reimbursement issue. I find no evidence of bad faith by either party during their negotiations or thereafter. I conclude that neither party has sustained its burden of demonstrating that the other violated its duty to bargain in good faith by refusing to sign the contract drafted by the other. The parties must return to the bargaining table. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges in Case No. C04 E-135 and Case No. CU04 G-035 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____