STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

THIRTY FIRST CIRCUIT COURT (ST. CLAIR COUNTY)
Public Employer – Respondent,

Case No. C04 D-090

-and-

ST. CLAIR COUNTY FRIEND OF COURT EMPLOYEES,
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 516-M,
Labor Organization – Charging Party.
_____/

APPEARANCES:

Fletcher, Galica, Clark, Tomlinson & Fealko, P.C., by Gary A. Fletcher, Esq., for the Respondent

John B. McNamee, Esq., for the Charging Party

DECISION AND ORDER

On March 8, 2006, 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

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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John B. McNamee, 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 April 20 and June 20, 2005, 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 September 8, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The St. Clair County Friend of the Court Employees, Service Employees International Union, Local 516-M filed this charge against the 31st Circuit Court on April 22, 2004. Charging Party represents a bargaining unit of employees of Respondent employed in its Friend of the Court office. Charging Party alleges that on or about November 12, 2003, Respondent violated its duty to bargain in good faith under PERA when, through its agent St. Clair County, it unilaterally modified the parties' collective bargaining agreement during its term by changing the health care benefits available under the employees' retirement plan.

Facts:

The Collective Bargaining Agreement

Charging Party's bargaining unit was organized in the late 1980s. St. Clair County (the County) is the statutory funding agent for Respondent. However, Charging Party bargains with both representatives of Respondent and representatives of the County, and both Respondent and the County are parties to its collective bargaining agreement. Members of Charging Party's unit have participated in the St. Clair County Employees Retirement Plan (the Plan) since before the unit was organized. Article 21.1 of the parties' 2002-2005 contract states that all full-time regular employees in Charging Party's unit shall participate in the Plan upon their date of hire. Some aspects of the Plan, including employee contributions, termination of employment prior to vesting, and how final average compensation and base salary are calculated in determining pension payments, are covered within Article 21. Other aspects of the Plan, including survivor benefits, credits for military service, and provisions for disability retirement, are contained in the Plan document but not specifically addressed in the collective bargaining agreement.

Article 21.3 of the 2002-2005 contract states:

> A retiring employee shall be eligible to participate in the health care program established by the retirement plan upon attaining eleven (11) years of service. An employee with eleven (11) years of service but less than twenty (20) shall prepay the total premium cost established by the plan. Employees with twenty (20) or more years shall not be required to pay the premium for basic coverage.

Article 21.3 is the only section of the contract covering health care benefits for retirees. Health care benefits for active employees are set out in detail in Article 19 of the contract, but these benefits are not available to retirees.

The Retirement Plan and the 2003 Amendment

The Plan was created by an ordinance adopted by the St. Clair County Board of Commissioners (the Board) in 1964. Since that time, the Board has effected changes in the Plan by resolutions amending the ordinance/Plan document. In 1977, the Board added health care benefits to the Plan. In 1979, it amended the Plan to provide for coordination of benefits for retirees covered by Medicare. In 1992, shortly after Charging Party obtained its first collective bargaining agreement, the Plan document was completely revised.

Sections 10.1 through 10.4 of the 1992 Plan document addressed the medical insurance benefits available under the Plan. Section 10.3 provided:

> The medical insurance shall provide the levels of coverage stated in this section or their equivalents.
>
> (a) Blue Cross Blue Shield MVF.1

(b) A prescription drug rider with two dollar co-pay
(c) Dental insurance with a 50% co-pay and a $600 per person per contract year maximum. Coverage of orthodontic services shall not be provided.

Between 1992 and 2004, the only changes in health care benefits provided under the Plan were those dictated by Blue Cross' elimination of certain coverage options. The prescription drug co-pay remained at $2.

In late 2002 or early 2003, the County, experiencing large increases in health care costs, hired a consultant to identify health care alternatives for both active and retired employees that would offer comparable coverage but would cost less. In July 2003, the consultant, Mitch Singer, recommended that the County eliminate traditional coverage for active employees and retirees not covered by Medicare in favor of Community Blues, a preferred provider organization (PPO) plan administered by Blue Cross. Based on his study of participating providers in St. Clair County, Singer concluded that moving to the PPO would result in little or no disruption in health care services to employees and retirees. He presented the County with three coverage options. All three included a $10 co-pay for generic drugs, a $20 co-pay for non-generics and a 90-day supply for one co-pay option. All three options also included certain benefits, including office visits and preventive care, not covered by the County's current plan. Because the PPO network was not available to Medicare-eligible retirees, Singer recommended that this group retain traditional coverage with a "Medifil" rider that ensured that they would receive benefits identical to those offered to participants in the PPO. Singer also suggested a "hardship" option under which current retirees with smaller pensions would have a lower co-pay. Singer testified that the additional benefits offered under the three coverage options more than offset the increase in the drug co-pay.[1] He admitted that the drug co-pays taken alone were not equivalent to the drug co-pay under the old plan, although he testified that the 90-day option partially offset the increase in the per fill cost.

Singer's recommendations were reported in local newspapers, and the various unions representing employees covered by the Plan discussed the proposals amongst themselves before the issue appeared on the agenda at the Board meeting of November 12, 2003. Charging Party's chief steward Patrick Macy was present at this meeting, as were representatives of other unions representing employees affected by the proposed changes. Macy told the Board at the meeting that Charging Party's contract prohibited the Board from changing retiree health care benefits. After public comment, the Board adopted a resolution changing the health care plans available to active employees not represented by collective bargaining agents and amending the Plan to change health care benefits available for retirees effective January 1, 2004. The resolution did not draw a distinction between future retirees and those already retired, and the change was intended to and did apply to both categories. The Board voted to replace traditional coverage for active employees and retirees not eligible for Medicare with Community Blues 2, one of the options suggested by Singer. Like all three options, it had a $10 co-pay for generic drugs, a $20

[1] According to Singer, after the change was implemented he did a utilization study that showed that with the higher co-pay, the average additional cost of drugs for a retiree family was $163 per year. This was less than the average amount retirees covered by Medicare paid per year solely for office visits under the old Plan and substantially less than the amount formerly paid by retirees not covered by Medicare.

co-pay for non-generics, and a mail order supply option. Retirees who were Medicare-eligible retained traditional coverage, but with the same drug co-pays as those covered by the PPO.[2] The resolution also provided that all retirees with more than 20 years of service and a pension less than $20,000 per year would have only a flat $5 drug co-pay. The Board did not change the actual language of Section 10.3 of the Plan document.

On November 12, Charging Party filed a grievance alleging that Respondent had made a "unilateral change in the health insurance available upon retirement" in violation of Article 21 of the contract. Article 6 of the contract contains separate grievance procedures, both ending in binding arbitration, for economic and non-economic grievances. In accord with Article 6, Charging Party submitted its grievance to the County at step one as an economic grievance. On November 19, 2003, the County's Human Resources Director, Terry E. Pettee, returned the grievance to Charging Party with a letter stating that there was "no basis for entertaining the matter as a proper grievance." According to Pettee, since Article 21 clearly and unambiguously provided that that retiree health care was "left to the authority of the retirement plan," there was no dispute over the interpretation of the contract. Charging Party did not demand a step two hearing or notify the County and Respondent that it intended to advance the grievance to arbitration.

The changes set out in the November 12, 2003 ordinance amendment went into effect for retirees and prospective retirees in Charging Party's unit on January 1, 2004. In early 2004, Charging Party filed a lawsuit challenging the County's action on behalf of individuals who retired before the current collective bargaining agreement went into effect. In April 2004, it filed the instant unfair labor practice charge.

Discussion and Conclusions of Law:

Charging Party asserts that the Board's November 12, 2003 resolution unlawfully modified the parties' collective bargaining agreement. Section 8(d) of the National Labor Relations Act (NLRA), 29 USC 158(d), explicitly prohibits a party from modifying a collective bargaining agreement during its term without the agreement of the other party, and gives either party the right to refuse to discuss or agree to the modification until the contract expires. A "modification" is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining. *Allied Chemical and Alkali Workers v Pittsburgh Plate Glass Co,* 404 US 157, 185 (1971). Although PERA contains no explicit provision parallel to Section 8(d), the duty to bargain under Section 11 of PERA incorporates these principles. *St Clair Intermediate Sch Dist v MEA,* 458 Mich 540, 564-566 (1998). Under both the NLRA and PERA, the legal standards applicable to a midterm contract modification are different from those that apply to a "unilateral change." In a unilateral change case, the issue is whether a party fulfilled its obligation to bargain before changing wages, hours or terms and conditions of employment. Since neither party may alter or modify a contract in mid-term, defenses in unilateral change cases such as notice, opportunity to demand bargaining, and futility of demand are not applicable when the theory is midterm modification. If the change involves a mandatory subject of bargaining, the only issues are whether the contract was

[2] About seventy-five percent of retirees receiving benefits under the Plan are Medicare-eligible.

modified and whether Charging Party consented to the modification or waived its rights. *St Clair,* at 565, n 27. See also *Bath Iron Works Corp,* 345 NLRB No. 33 (2005). [3]

Respondent asserts that the Board's November 2003 action did not violate PERA because retiree health care benefits are not a mandatory subject of bargaining. In *Pittsburgh Plate Glass,* the Supreme Court held that retirees are not employees under the NLRA, that issues relating to nonemployees are not mandatory subjects of bargaining unless they "vitally affect" the terms and conditions of employment of bargaining unit members, and that health insurance benefits for retired workers do not meet this test. The Commission and the Court of Appeals have applied the holding and rationale of *Pittsburgh Plate Glass* to PERA. *West Ottawa Ed Ass'n v West Ottawa Pub Schs,* 126 Mich App 306, 327-330 (1983), *aff'g* 1982 MERC Lab Op 629; *Village of Holly,* 17 MPER 48 (2004) (no exceptions); *City of Grosse Pointe Park,* 2001 MERC Lab Op 195 (no exceptions). However, in *Pittsburgh,* the employer eliminated benefits only for individuals who had already retired. The Supreme Court explicitly stated in that case that the future retirement benefits of *active* workers are part of their overall compensation and, therefore, a mandatory subject of bargaining. Relying on *Pittsburgh,* the National Labor Relations Board (NLRB) has found the future health and other insurance benefits of active employees after their retirement, like their pension payments, to be mandatory subjects of bargaining. *Midwest Power Systems,* 323 NLRB 404, 406 (1997), *enforcement denied on other grounds,* 159 F2d 636 (DC Cir, 1998); *Mississippi Power Co,* 332 NLRB 530 (2000). I find that the November 2003 Board resolution was a mandatory subject of bargaining to the extent that it affected the future health insurance benefits of active employees.

Respondent also maintains that it did not modify the parties' collective bargaining agreement, and it asserts that the determination of whether there was a contract breach or modification should be left to the parties' contractual arbitration procedure. In *Port Huron EA v Port Huron Area SD,* 452 Mich 309, 321 (1996), the Supreme Court stated that when reviewing a collective bargaining agreement for any PERA violation, the Commission is to first determine whether the term or condition in dispute is "covered" by the agreement. If so, the details and enforceability of the provision are to be left to arbitration. In accord with this reasoning, the Commission has held that it will not find a violation of PERA based on the duty to bargain when the parties have a bona fide dispute over the interpretation of their contract. See, e.g., *Eastern Mich Univ,* 17 MPER 72 (2004); *Village of Romeo,* 2000 MERC Lab Op 296.

In *St Clair Intermediate Sch Dist,* the Court affirmed a Commission finding that the Michigan Education Association (MEA) violated PERA by unlawfully modifying its contract with the Employer during its term. In that case, the contract required the employer to provide employees with a package of health insurance benefits, referred to as MESSA Super Med II, offered through the MEA's agent the Michigan Education Special Services Association (MESSA). When MESSA increased the lifetime maximum benefit under Super Med II, the employer asserted that MESSA and the MEA had modified the contract without its agreement. The MEA admitted in that case that the terms of the contract between the employer and the MEA contained the specific health care coverage and benefits levels bargained for by the parties. *St Clair,* at 568, n 33. The Commission and the Court found that the Employer had not consented to

[3] Since an employer cannot make a mid-term modification in a contract term without the union's approval, the union does not have an obligation to demand to bargain over the modification.

MESSA making changes in the benefits offered or waived its rights under PERA. In another midterm modification case, *Gogebic Cmty College MESPA v Gogebic Cmty College*, 246 Mich App 342 (2001), the Commission and Court found that there was no midterm contract modification when the Employer changed dental insurance carriers. They concluded that contract language that specified the level of dental benefits, but not the insurance carrier, clearly and unambiguously left the Employer free to change carriers or become self-insured. In neither *St Clair* nor *Gogebic* did the Commission find a bona fide dispute over the interpretation of the contract language.

Here, the parties disagree over the meaning of the first sentence of Article 21.3 of the contract. Charging Party maintains that Article 21.3 of the contract incorporates Section 10.3 of the Plan document and prohibits Respondent from altering the health care benefits the Plan provided at the time the parties entered into the contract. Respondent asserts that while Charging Party could have negotiated language providing for a specific level of benefits, Article 21.3 as written requires only that Respondent provide bargaining unit members with the health benefits established by the Plan. According to Respondent, since the Board establishes the benefits under the Plan, it can legally change them. The parties also disagree about whether the Board's November 2003 resolution modified Section 10.3 of the Plan document. Charging Party points out that Section 10.3 refers to "levels of coverage" in the plural. Charging Party argues that the use of the plural clearly means that the Plan is to provide both major medical and hospitalization coverage equivalent to Blue Cross Blue Cross Blue Shield MVF.1 *and* a $2 drug co-pay. Respondent maintains that it has continued to provide "levels of coverage" equivalent to the benefits it offered prior to January 1, 2004 because retirees now have many non-drug benefits that were not covered before that date.

In my opinion, neither the language of Article 21.3 nor the language of Section 10.3 is clear and unambiguous. I find that the parties have a bona fide dispute over the interpretation of Article 21 of their contract. In these circumstances, precedent dictates that the dispute over the meaning of this language be resolved by the procedure agreed to by the parties, the grievance procedure ending in binding arbitration. In this case, Respondent, through the County, rejected Charging Party's grievance at the first step of the grievance procedure. However, as Respondent points out, the County's action did not preclude Charging Party from moving the grievance to the next step, and neither Respondent nor the County explicitly refused to arbitrate the grievance. I conclude that Charging Party did not establish that Respondent or its agent the County committed an unfair labor practice by unilaterally modifying their collective bargaining agreement during its term. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____