STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT TRANSPORTATION CORPORATION,
Public Employer-Respondent,

Case No. C06 I-221

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
____/

APPEARANCES:

Parnell Williams, Manager, Human Resources Division, Detroit Transportation Corporation, for the Respondent

Rudell & O'Neill, P.C., by Wayne A. Rudell, Esq., for the Charging Party

DECISION AND ORDER

On October 30, 2007, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, 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 Detroit, Michigan on February 26, 2007, 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 April 11, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against the Detroit Transportation Corporation on September 21, 2006. The charge alleges that on March 21, 2006, Respondent violated its duty to bargain in good faith with Charging Party under Section 10(1) (e) of PERA when it announced a change in employees' health care benefits without giving Charging Party an opportunity to bargain over this change.

Findings of Fact:

Charging Party represents a bargaining unit of technicians, storekeepers, schedulers and utility workers employed by Respondent. Three other unions also represent units of Respondent's employees. Respondent purchases health care insurance for all its employees

through Blue Cross/Blue Shield. Articles 19(D) and (F) of the most recent collective bargaining agreement between Charging Party and Respondent, which expired on June 30, 2005, read as follows:

> D. Health/Medical and Dental Coverage
>
> The DTC shall provide Health/Medical and Dental coverage to bargaining unit members as provide [sic] in the Health/Medical Employees Benefit Plan that is in effect at the signing of this agreement.
>
> Current company/employee co-pay policy for the payment of health insurance premiums shall be maintained at the current percentage of cost sharing relationships (80/20). Health Care premium cost increases and decreases will be shared based on the 80/20 co-pay principal. In the event management elects to change insurance carriers or adds optional insurance carriers or plans, employees of the bargaining unit will be eligible to participate. The Union reserves the right to submit alternative carriers for consideration by management.
>
> * * *
>
> F. Modifications and Termination of Coverage
>
> The parties understand and agree that the level of benefits provided for under the provisions of this Section are intended to serve as a basic outline of the level of coverage that is to be provided by the DTC. More specific provisions of each coverage indicated above will be as otherwise provided for in the applicable DTC Employees Benefit Plan that is in effect at the signing of this agreement. The parties further agree that the DTC cannot be held to the provision of some incidental benefits that may cease to be offered by a carrier, may not be available with a subsequent carrier, or can only be provided at a prohibited cost during the life of this agreement. The DTC shall be required to provide the union with specific notice of any such provision that may need to be modified or amended and the DTC shall make a good faith effort to continue to provide such benefits that bargaining unit members have been privileged to receive or bargain such changes. If the DTC determined [sic] that there is a management necessity to modify such provisions and the bargaining unit fails to agree with the changes, the Union shall have the right to seek out and offer the DTC an alternated [sic] carrier of [sic] alternative coverage.

Respondent's collective bargaining agreements with all of its unions have traditionally required Respondent to pay eighty percent of the Blue Cross premium, with employees paying the remaining twenty percent through payroll deduction. Until August 1, 2006, Respondent offered its employees the choice of Blue Cross traditional, preferred provider (PPO) or health maintenance (HMO) plans. Each July, Respondent held an open enrollment period during which employees could switch plans before Respondent signed new contracts with Blue Cross effective August 1. The benefits provided under each of these plans, including prescription drug coverage,

were set out in a document entitled Employees Benefit Plan. All three plans included a $3.00 prescription drug co-pay.

In the summer of 2004, a private health care consultant recommended changes in Respondent's disability, life and dental insurance that duplicated existing benefits but saved Respondent money. In March 2005, Respondent hired the consultant to review its medical insurance. The consultant told Respondent that its premiums were extremely high and stated that Respondent should be able to obtain nearly comparable benefits for much less. In late 2004 and early 2005, during the parties' negotiations for their 2002-2005 collective bargaining agreement, Respondent told Charging Party that it was "exploring" changes in its current health care plans, including the prescription drug co-payment, that would reduce Respondent's costs and the employees' monthly contributions. However, Respondent did not present Charging Party with a specific proposal. The parties executed their 2002-2005 agreement on July 1, 2005, one day after its expiration date.

On August 1, 2005, Respondent signed contracts with Blue Cross continuing its existing plans and benefits for another year. Later that month, Respondent's health care consultant presented Respondent with its recommendations. The consultant recommended that Respondent replace its three Blue Cross plans with a Blue Cross PPO plan called Flexible Blue. It also recommended setting up employer-funded health reimbursement accounts to reimburse employees for expenditures not covered by the Flexible Blue plan. The consultant told Respondent that Blue Cross no longer offered a $3.00 prescription drug co-pay to its new customers, and recommended that Respondent switch to a $10.00 generic/$20.00 name brand drug co-pay.

Parnell Williams, Respondent's human resources manager, testified that after Respondent received these recommendations, he met with Charging Party's bargaining team and informed it that Respondent was planning to make changes to employee health care benefits, including a change in the prescription drug co-pay. According to Williams, this meeting was attended by Charging Party president Joseph Valenti, Sr., and included employees Calvin Lowe, Carl Leroy, and Ricky Blair. None of these individuals were called to testify at the hearing. Williams testified that his meeting with Charging Party's bargaining team took place sometime between July 1, 2005 and March 1, 2006. Williams testified that at this meeting, he explained that the changes would reduce both Respondent's costs and employees' bi-weekly health insurance premiums. He testified that he did not tell Charging Party when these changes would go into effect because this issue was "still under discussion." Williams was not sure whether he specifically said to Charging Party that the prescription co-pay would be increased from $3.00 to $10.00 generic/$20.00 name brand.

Charging Party representative Joseph Valenti, Jr., testified that he has been the business representative assigned to this bargaining unit since 1995. He testified that he had no knowledge of the meeting about which Williams testified and that Charging Party's files did not contain any reference to any such meeting or any mention of a specific proposal to change the drug co-pay. Valenti Jr. did not believe that this meeting occurred. In support of this claim, Valenti Jr. testified that in the fall of 2005, Respondent was refusing to meet with Charging Party

representatives to begin negotiations for a new contract. According to Valenti Jr., until sometime in early March 2006, Respondent refused to agree to any meeting dates.

In late February or early March, Charging Party steward Jeffrey Swinken attended a meeting of Respondent's board of directors at which Williams told the board that he was considering changes in employees' prescription drug coverage. Swinken passed along this information to Valenti Sr. On March 1, 2006, Respondent entered into an agreement with Blue Cross to change the prescription co-pay for its employees to $10.00 generic /$20.00 name brand effective April 1, 2006.

On March 21, 2006, the parties held their first bargaining session for a new contract. Swinken, Valenti Sr. and Valenti Jr. represented Charging Party. Williams and Respondent general manager Barbara Hansen attended the meeting for Respondent. The parties reached agreement on ground rules and agreed to exchange proposals at the next session, scheduled for April 11. Valenti Jr. testified that Valenti Sr. asked Respondent whether it was "entertaining the thought of changing the prescription drug coverage and/or the healthcare coverage." Valenti Jr. and Williams agree that Respondent said that it was putting together a package to present to all its unions, and that it had scheduled an informational meeting for all the unions for March 29. Valenti Jr. and Swinken testified that this was all Respondent said about healthcare benefits at this meeting.

The next day, March 22, Williams distributed a memo to all Respondent's employees, including members of Charging Party's bargaining unit. The memo read as follows:

> Every week the news is filed with stories of rising healthcare costs particularly the cost of prescription drugs. Our company is not immune to these costs. Our prescription drug premium represents a significant portion of our total healthcare premiums. The card we currently offer has not been offered to new customers of BCBSM for many years.
>
> *Effective April 1, 2006,* the prescription drug coverage will change from a $3 co-pay to a $10 generic/$20 name brand. The mail order feature of the program will still be available and is a cost effective method for purchasing your maintenance medications. You can obtain a 90-day supply of medication through the mail order for the same co-pay you will pay at the pharmacy for a 30-day supply of medication.
>
> This change is necessary to combat the rising cost of health care insurance. The change *will not* affect your current medical plan benefits. Only the prescription co-pays are changing. All the underlying benefits of the medical and prescription drug programs will remain the same. The change will result in a reduction in our overall healthcare premiums and your bi-weekly deduction will be reduced to reflect the savings.
>
> Example: If you take 7 monthly maintenance medications at $3 per prescription:

7 prescriptions x $3 = $21 a month x 12 months = $252
7 prescriptions (mail order 90 day supply) x $10 = $70 a month x 4 quarters = $280
Thus resulting in a slight increase of $28 annually. However, this increase will be offset by the reduction in monthly premiums.

For example, DTC employees' monthly cost will be reduced from anywhere between $9 to $34 per month for an annual savings of $108 -$432 depending on which plan you are currently enrolled in.

If you have any questions, please contact me.
[Emphases in original]

Charging Party's members were angered by this memo and surprised by the announcement of a change in health insurance benefits during the benefit year. Several members assumed that Charging Party and Respondent had agreed to the drug co-pay change at their one bargaining session, and telephoned Charging Party to complain that members had not been allowed input into the decision. The change in the prescription co-pay was implemented as announced on April 1, 2006, along with a reduction in employees' bi-weekly premium contribution. The record does not indicate how much employees' premiums were decreased.

Representatives of all four of Respondent's unions, including Valenti Jr., attended Respondent's March 29 meeting. Respondent's health care consultant was on hand, along with Williams and Hanson. At that meeting, Respondent distributed documents explaining how Flexible Blue worked and showing the amounts of money that Respondent might save by switching to different Flexible Blue plans with different benefit levels, and with Respondent contributing different amounts to the health care reimbursement accounts. The cost estimates assumed that the changes would take effect on August 1, 2006. Respondent's base costs for comparison purposes incorporated the change in the prescription co-pay. The union representatives all told Respondent that they needed to look more closely at these plans.

Respondent held a second meeting for union representatives on June 29. Sometime between June 29 and August 1, Charging Party's health care expert advised Charging Party that the plan Respondent was then proposing, which included a prescription drug co-pay of $10.00 for generic drugs and $20.00 for name brand drugs, was an excellent plan. Charging Party decided not to object to the implementation of the plan, and it went into effect on August 1, 2006.

Discussion and Conclusions of Law:

Health care benefits provided by employers are mandatory subjects of bargaining under PERA. *St Clair Intermediate Sch Dist v MEA/MESSA,* 458 Mich 540, 551 (1998); *Houghton Lake Ed Ass'n v Houghton Lake Bd of Ed,* 109 Mich App 1, 7 (1981). Once a subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject and neither party may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ,* 404 Mich 268, 277

(1978). Moreover, an employer is prohibited from unilaterally implementing changes in existing terms and conditions of employment even when these changes clearly benefit employees. Indeed, the seminal case on an employer's duty to avoid unilateral action under the National Labor Relations Act (NLRA), *NLRB v Katz*, 369 US 736 (1962), involved an employer's grant of a unilateral wage increase. As the Supreme Court said in *Katz,* at 743, a unilateral change in conditions of employment is "a circumvention of the duty to negotiate which frustrates the objectives of [the NLRA] much as does a flat refusal to bargain." In March 2006, employees' existing health care benefits included prescription drug coverage with a $3.00 co-pay. Respondent did not have the right to unilaterally alter the existing prescription benefit even if, as Respondent claims, many members of the unit actually saved money from the change because their bi-weekly premium contribution decreased along with Respondent's premium costs.

An employer satisfies its obligation to bargain over a mandatory subject by negotiating for a provision in a collective bargaining agreement which fixes the parties' rights. *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist,* 452 Mich 309, 318 (1996). If a term of condition of employment in dispute is "covered by" a provision in collective bargaining agreement containing an arbitration clause, and the parties have a dispute over the interpretation of this provision, the details and enforceability of this provision are properly left to arbitration. *Port Huron,* at 321. In its post-hearing brief, Respondent asserts for the first time that Articles 19(D) and (F) of the parties' expired agreement gave it the right to change the prescription drug co-pay. Respondent's brief quotes Articles 19(D) and (F), but does not explain why the instant dispute is "covered by" these provisions. When Respondent changed the prescription drug co-pay, the collective bargaining agreement had expired. Moreover, Article 19(F) appears to require Respondent to provide Charging Party with specific notice of any proposed modification of benefits during the contract term and to bargain with Charging Party over the change. I conclude that this dispute is not a contract interpretation dispute and that the refusal to bargain charge should not be dismissed on this basis.

At the hearing, Respondent argued that it provided Charging Party with advance notice that it intended to change the prescription co-pay, but that Charging Party failed to object or demand to bargain. Respondent human resources manager Williams testified that sometime between July 1, 2005 and March 1, 2006, he met with Charging Party representatives to inform them that Respondent planned to change the prescription co-pay. The Charging Party representatives at the alleged meeting were not present at the hearing, and Charging Party maintained that this meeting did not take place. I find that even if Williams' testimony regarding the meeting is credited, Charging Party did not waive its right to bargain by failing to make a demand to bargain over the change in the prescription co-pay. Williams had informed Charging Party as early as late 2004 that Respondent was "exploring" changes to its health care plan, including the prescription drug co-pay. According to Williams' testimony, when he met with Charging Party representatives sometime after July 1, 2005, he told them that Respondent was "planning" changes to its health care plans but did not tell them when Respondent planned to implement any of these changes. Williams could not recall whether he told them that Respondent planned to change the drug co-pay to $10.00 generic/$20.00 name brand. Charging Party knew that Respondent traditionally entered into new contracts with Blue Cross each year on August 1. Under these circumstances, it was reasonable for Charging Party to assume that Respondent would present it with an actual proposal encompassing all the proposed changes before it

implemented any of them. I conclude that Charging Party did not waive its right to bargain by failing to make a demand to bargain over the change to the prescription drug co-pay before Respondent announced this change on March 21, 2006.

The Commission has long held that an employer seeking to make a change in a mandatory subject of bargaining must first notify the union and give the union an opportunity to bargain before implementing the change. An employer who notifies the union of its decision only after the decision becomes a fact accomplished (fait accompli) violates its obligation to bargain in good faith. *St Clair Intermediate Sch Dist,* 17 MPER 77 (2004). See also *Allendale Pub Schs*, 1997 MERC Lab Op 183, 189; *City of Westland,* 1987 MERC Lab Op 793, 797; *Wayne Co,* 1985 MERC Lab Op 833, 839. The obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fait accompli when notification was received. *Intermediate Ed Ass'n/Michigan Ed Ass/N (IEA/MEA),* 1993 MERC Lab Op 101, 106. On March 1, 2006, Respondent entered into an agreement with Blue Cross to change its employees' prescription drug co-pay effective April 1. I find that Respondent unilaterally changed terms and conditions of employment on March 21 when it announced a change in the prescription drug co-pay as an accomplished fact. I also find that Charging Party had no obligation to make a demand to bargain between March 21 and April 1, 2006 because Respondent's March 21 memo indicated that such a demand would have been futile.

Charging Party seeks both a cease-and-desist and a make whole remedy in this case. As the record indicates, Charging Party tacitly agreed to Respondent's implementation of a new health insurance plan on August 1, 2006, and this new plan included the higher drug co-pay. I find, therefore, that any order requiring Respondent to make employees whole should be limited to monetary losses suffered by unit employees between April 1 and August 1, 2006. I also recommend that the order specifically limit Respondent's obligation to net losses suffered by employees from the change, since the record indicates that some employees may have experienced a net decrease in their health care costs as a result of the decrease in their bi-weekly premium that accompanied the change in co-pay. I will, therefore, recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Detroit Transportation Authority, its officers and agents, are hereby ordered to:

1. Cease and desist from making unilateral changes in terms and conditions of employment, including changes in prescription drug benefits under its employees' health care plans.

2. Make employees in the bargaining unit of technicians, storekeepers, schedulers and utility workers represented by Teamsters Local 214 whole for monetary losses suffered by them between April 1, 2006 and August 1, 2006 as a result of Respondent's unlawful unilateral increase in the prescription

drug co-pay, including interest on these sums at the statutory rate of five percent per annum, computed quarterly. [1]

3. Within sixty days of the date of this order, present Charging Party with Respondent's calculation of the sums owed to individual employees under paragraph two.

4. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Julia C. Stern
Administrative Law Judge

Dated: _______________

[1] Losses are limited to additional amounts paid by individual employees for prescription drug co-pays between April 1 and August 1, 2006, minus the actual reduction in the employee's bi-weekly health insurance premium during the period April 1 through August 1.

NOTICE TO EMPLOYEES

After a public hearing, the Michigan Employment Relations Commission has found the **Detroit Transportation Corporation** to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT change terms and conditions of employment, including prescription drug benefits under our employees' health care plans, without giving their bargaining agent an opportunity to bargain over the change.

WE WILL make employees in the bargaining unit of technicians, storekeepers, schedulers and utility workers represented by Teamsters Local 214 whole for monetary losses suffered by them between April 1, 2006 and August 1, 2006 as a result of our unlawful unilateral increase in the prescription drug co-pay, plus interest on these sums at the statutory rate of five percent per annum, computed quarterly. Losses are limited to additional amounts paid by individual employees for prescription drug co-pays between April 1 and August 1, 2006, minus the reduction in the employee's bi-weekly health insurance premium.

WE WILL present Teamsters Local 214 with a calculation of the sums owed to individual employees.

We acknowledge that as a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment. All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

DETROIT TRANSPORTATION CORPORATION

By:____

Title:____

Date:________________

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

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