STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ARENAC COUNTY ROAD COMMISSION,
Public Employer-Respondent,

Case No. C07 H-171

-and-

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

APPEARANCES:

Braun Kendrick Finkbeiner, P.L.C., by Robert A. Kendrick, Esq., for Respondent

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

DECISION AND ORDER

On April 30, 2009, 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

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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Braun Kendrick Finkbeiner, P.L.C., by Robert A. Kendrick, Esq., for Respondent

Rudell & O'Neill, by Wayne A. Rudell, Esq., for 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 Lansing and Detroit, Michigan on January 8 and June 9, 2008 respectively, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Respondent on September 2, 2008, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge on August 1, 2007. The charge was amended at the hearing on January 8, 2008 and again on February 25, 2008. Charging Party represents a bargaining unit of hourly-paid employees of the Arenac County Road Commission. On August 20, 2007, Charging Party and Respondent entered into a collective bargaining agreement covering the term February 10, 2006 through February 10, 2009. Between February 28, 2007 and August 20, 2007, there was no contract in effect covering this unit. The charge, as amended, alleges that Respondent violated its duty to bargain in good faith by: (1) on or about April 3, 2007, unilaterally altering existing terms and conditions of employment with respect to the employment of temporary employees to do bargaining unit work; (2) on or about August 1, 2007, unilaterally altering employees' existing health care benefits; and (3) in December 2007,

unilaterally implementing new work rules and disciplinary policies after refusing Charging Party's demands to bargain over this issue.

Findings of Fact:

Temporary Employees

The parties' 2002-2006 collective bargaining agreement included the following provision:

> Article 6.2 Temporary Employees
>
> Temporary employee(s) are employed at an hourly rate for seasonal or temporary work with the understanding that they are not eligible for regular status until they have been reclassified as probationary employee(s) and complete the applicable probationary period. A temporary employee may be employed for a period of five (5) calendar months or for the duration of a leave of absence of a regular employee, whichever is greater. The rate of pay for a temporary employee shall not be less than the rate of the laborer classification. A temporary employee shall not be eligible to receive any benefits as provided under this Agreement. [Emphasis added].

During the winter of 2005-2006, Respondent hired temporary employees to perform unit work even though no permanent employee was on leave. Charging Party filed a grievance asserting that Respondent could not use temporary employees to perform unit work except when a permanent employee was on leave, or during the summer months to paint and mow grass in accord with the parties' past practice. Respondent responded that Article 6.2 allowed it to use temporary employees in any season of the year as long as they were not employed for more than five months. An arbitration hearing was scheduled for September 2006.

In December 2005, the parties began negotiating a successor to their 2002-2006 agreement. Charging Party's chief negotiator was business representative Les Barrett, and Respondent's was labor consultant William Borushko. At the bargaining table, Charging Party proposed to replace Article 6.2 with language that clearly stated that temporary employees could be employed only to replace bargaining unit members on leaves of absence. Its proposal also permitted Respondent to employ seasonal employees between the months of April and September to paint and mow grass. Respondent took the position that the language of Article 6.2 should remain the same as in the existing contract. The 2002-2006 collective bargaining agreement had an expiration date of February 10, 2006, but the parties agreed to extend it on a day-to-day basis while they continued negotiating.

The parties had gone through fact finding,but had not yet reached agreement on a new contract on December 3, 2006, when the arbitrator issued his award on Charging Party's temporary employee grievance. The arbitrator agreed with Respondent that the language of Article 6.2 clearly and unambiguously allowed Respondent to hire temporary employees even when no permanent employee was on leave. However, he concluded that the parties, through a

twenty year past practice of hiring temporary employees only during the summer and only to do certain tasks, had agreed to a different interpretation. The arbitrator noted that Respondent's interpretation of Article 6.2 allowed it to employ temporary employees to do bargaining unit work whenever it wanted, something to which the arbitrator felt no responsible union official would have agreed. He concluded that Article 6.2, as modified by the parties, permitted Respondent to hire temporary employees only to do seasonal work during the summer months and to do the work of permanent employees on leaves of absence.

On December 13, 2006, after receiving the arbitrator's award, Respondent presented Charging Party with a new proposed Article 6.2. Respondent's proposal allowed it to employ up to four temporary employees at any time to do bargaining unit work in addition to those performing work in the absence of a regular employee. Charging Party maintained its position that Article 6.2 should be modified as it had earlier proposed. The parties continued to discuss this and other contract terms.

At the end of January 2007, Respondent terminated a temporary employee it had hired to replace a permanent employee after the permanent employee returned from medical leave. Respondent told the temporary employee that its collective bargaining agreement did not permit him to continue to work.

On February 20, 2007, Respondent notified Charging Party that it was terminating the 2002-2006 contract effective February 27, 2007. On February 28, Borushko wrote to Barrett that the parties had reached impasse on health care benefits and on the language of Article 6.2. He said that Respondent planned to implement its proposals on both of these issues effective April 1, 2007. Borushko also told Charging Party that since there was no longer a contract in effect, Respondent was terminating dues checkoff and would refuse to arbitrate any grievance filed after February 28.

On March 20, 2007, the parties met with a mediator. While the mediator was present, the parties spoke only to and through the mediator. During this meeting, the mediator prepared a document entitled "Mediator's Written Recommendation for Settlement" that addressed all the major issues remaining in dispute. The document apparently reflected what the mediator believed the parties had agreed to in their private discussions with him. The document stated that Article 6.2 would remain the same as in the previous contract. The parties did not initial the recommendation for settlement as a tentative agreement, but it is clear from their subsequent behavior that they considered it to be one.

After the mediator had left the meeting on March 20, Borushko said to Barrett that Respondent did not agree with the arbitrator's interpretation of Article 6.2 and that its proposal included its interpretation of that language. Barrett replied that Respondent could not take this position after agreeing to keep the old contract language in place.

On March 22, Borushko sent Barrett a letter which said:

> It is the position of the Road Commission that any practices inconsistent with the provisions of the [2002-2006] agreement were also terminated with the agreement.
>
> Notwithstanding that, we have agreed to continue current contract language in Section 6.2 regarding temporary employees with the understanding that the language will be enforced in the clear and unambiguous manner in which it is written.

On March 27, 2007, Charging Party filed a grievance asserting that Respondent had improperly continued to employ a temporary employee after the regular employee he was replacing had returned to work. Respondent's April 3 answer to the grievance, prepared by Respondent's superintendent, read as follows:

> The grievance filed on March 27, 2007 alleges a violation of Section 6.2 (but not limited to) of the Labor Agreement. As you are aware, the agreement was terminated by the Road Commission on February 28, 2007.
>
> Be advised that, in the future, any grievance must contain specific reference to the contract provisions that you believe have been violated. Any inclusion of phraseology such as "but not limited to" is not acceptable.
>
> Your allegation of a contract violation is without merit. We believe that the Road Commission has the right to employ temporary employees as set forth in Section 6.2. Accordingly, the grievance is denied.

If there was any conversation between the parties regarding the grievance at this stage of the grievance procedure, it does not appear in the record. Charging Party advanced the grievance to the next step.

On May 1, Barrett sent Borushko a long letter addressing Respondent's position on Article 6.2. Barrett asserted that Respondent had agreed to the arbitrator's interpretation of that provision when it agreed on March 20 to carry over Article 6.2 into the new contract without change. Barrett told Borushko that any statements he had made about Article 6.2 at the end of the March 20 meeting were irrelevant because the parties had already reached a tentative agreement by that point. On May 2 or 3, Charging Party presented the mediator's March 20 recommendation for settlement, along with documents that purported to summarize tentative agreements previously reached by the parties, to its membership for ratification. On May 5, 2007, Barrett mailed these documents to Respondent with a letter stating that the agreement had been ratified. Borushko responded that the documents he received did not accurately represent the parties' agreements. He identified several issues as requiring further discussion, although Article 6.2 was not among them. On June 20, 2007, the parties met again with a mediator and reached agreement on additional issues. Between June 20 and August 7, 2007, Barrett and Borushko exchanged e-mails with draft contract language and hammered out the details of the

agreement. Insofar as the record discloses, the parties did not discuss Article 6.2 at the June 20 meeting or in their subsequent emails.

On June 22, the parties held a second step meeting on the March 27 grievance. Barrett told Respondent that Article 6.2 did not allow it to keep a temporary employee after the permanent employee he was replacing had returned, that the arbitration award did not allow this, and that Respondent had done again what the arbitrator said was not permitted to do. He asked Respondent if it was willing to arbitrate this grievance. Barrett testified that Respondent allowed him to state Charging Party's position on the grievance but said almost nothing itself during the meeting; Barrett's notes from the meeting confirm this. On July 6, Respondent gave Charging Party a second step answer which read in its entirety as follows:

> After careful consideration, it is the position of the Board of Road Commissioners for Arenac County [that] the above referenced grievance is not arbitrable. Notwithstanding this position, the grievance would otherwise have been denied.

On August 7, 2007, the parties finally reached agreement on language for a new contract covering the term February 10, 2006 through February 10, 2009. Charging Party signed the agreement on August 9. On August 20, Respondent's board approved the agreement and on that same date Respondent signed it. In the 2006-2009 contract, the language of Article 6.2 was the same as it had been in the parties' 2002-2006 contract.

Health Care Benefits

Article 23 of the 2002-2006 collective bargaining agreement stated that members of Charging Party's unit and their dependents were to be provided with Blue Cross/Blue Shield PPO 1 health insurance with no deductibles, a $10 co-pay for doctor's visits, and a $10 brand name/$5 generic co-pay for prescription drugs. Article 23.5 of this contract read as follows:

> The employer shall have the right to change the type of health insurance plan provided herein or [sic] any other health care plan deemed to give cost savings to the employer including changes in the prescription drug co-pay. If the change is made, [Respondent] will reimburse the employee for any of the employee's "out of-pocket" costs incurred over and above that provided herein by reason of the plan's annual deductible requirement under the comprehensive portion of the plan for individuals and families, and/or co-payment requirements under the comprehensive coverage or prescription drug portion of the plan, as applicable. There will be no loss in coverage resulting from the change to different plans unless the changes are agreed to by the employees. Reimbursement to employees for "out-of-pocket" costs under this agreement will be monthly for any amounts up to one hundred dollars ($100.00) and semi-monthly for amounts exceeding one hundred dollars ($100.00) or more.

When negotiations for a successor agreement began in December 2005, both parties' contract proposals included Blue Cross PPO plans with co-pays and relatively low deductibles.

Neither party proposed to change or eliminate Article 23.5. In October 2006, a fact finder recommended that the parties adopt a plan that combined aspects of both parties' proposals. Respondent did not accept the fact finder's recommendation and maintained its previous position on the health care plan. Charging Party then presented Respondent with a proposal for a different type of Blue Cross plan with high deductibles and no co-pays. Switching to this type of plan would save a substantial amount of money in premiums. Charging Party proposed that Respondent fund a health savings account for each employee that would cover the high deductible and give employees a debit card to access their accounts so that they would not have to pay the deductible out of pocket.

As discussed above, on February 28, 2007, Respondent sent a letter to Charging Party stating that the parties were at impasse on health care and that it planned to implement its health care proposal effective April 1. On March 20, the parties met with a mediator, and the mediator gave the parties a written recommendation for settlement stating what he believed was the parties' agreement on that date. The written recommendation included a high deductible health care plan as Charging Party had proposed, but with a health reimbursement account rather than health savings accounts. With the health reimbursement account, Respondent would cover the cost of the employees' high deductibles but unused deductible amounts would revert back to Respondent at the end of the year. The mediator's written recommendation did not address how the deductible would be paid, i.e. it did not provide, as Charging Party's proposal had, for a debit card rather than reimbursement by Respondent of out of pocket costs. After the mediator had left the meeting, Borushko asked Barrett if Charging Party wanted Respondent to reimburse employees for the deductible or if it wanted a debit card the employees could use to pay it. Barrett said that Charging Party wanted a debit card as it had previously proposed, and Borushko agreed.

As discussed above, at the beginning of May, Charging Party's membership ratified a tentative agreement consisting of the mediator's recommendation for settlement and a summary of previous tentative agreements. No agreement was presented to Respondent's board. Between March 20 and August 7, Barrett and Borushko discussed by e-mail the terms of and language for their new agreement. During these discussions, Barrett proposed to include a reference to the debit card in Article 23. Borushko refused. However, he confirmed that Respondent intended to provide employees with debit cards as it had previously agreed.

Meanwhile, Respondent made arrangements with Blue Cross to implement the new high deductible health care plan on August 1, 2007. There is no indication that Respondent discussed with Charging Party its intention to implement the new plan on that date. On July 26, Respondent distributed new Blue Cross cards to its employees and told them that the new plan would be implemented effective August 1. It also told employees that after the collective bargaining agreement was signed by both parties, a third party hired by Respondent would issue debit cards that employees could use to pay eligible claims. It told employees that between August 1 and whatever date the debit cards were issued, employees were to pay all medical bills and submit claims to Respondent for reimbursement. Barrett contacted Borushko and complained about the debit cards not being available. Borushko responded that Respondent did not want to activate the debit cards until "everything was signed."

On August 2, Respondent sent employees copies of reimbursement claim forms to be submitted to Wells Fargo Bank, the entity administering the debit cards. It also notified employees that they should be receiving their debit cards within the next few days, but that they were not to activate them until the collective bargaining agreement was finalized.

On August 7, 2007, the parties' reached final agreement on contract language. On August 7, Barrett sent Borushko an e-mail asking that the debit cards be activated that day and that the retroactive wage increase be processed for immediate payment. On August 9, Charging Party signed its copy of the contract. Respondent executed the collective bargaining agreement on August 20, 2007. After Respondent signed the contract, it told employees that they could begin to use their debit cards.

Several unit employees filled prescriptions between August 1 and August 20, 2007. Instead of paying a small co-pay as they had under their old plan, these employees had to pay the full cost of these prescriptions and submit claims for reimbursement to Wells Fargo. The record did not indicate that any employee or his family had any other type of medical treatment between August 1 and August 20, although one employee testified that he cancelled his daughter's annual appointment with a pediatric cardiologist because he feared that he would have to pay the doctor's entire fee out of his pocket. The appointment was later rescheduled for September and the doctor accepted his debit card. In December 2007, two or three employees still had outstanding claims for prescriptions for the period between August 1 and 20. Employees were also having trouble using the debit card in conjunction with their Blue Cross card. Charging Party arranged a meeting in December between the employees and representatives of Blue Cross and Wells Fargo. According to the record, by the time of the hearing in this case in January 2008, Wells Fargo had paid most or all of the outstanding claims arising from the period between August 1 and August 20.

Work Rules

Until 2007, Respondent maintained a set of written work rules entitled "Rules and Regulations," which included disciplinary penalties. The document included the following prefatory language:

> These rules do not supersede any provision of the Union contract and any employee who believes that a penalty has been improperly or unfairly imposed may file a grievance under the grievance procedure in the contract. However, the Union believes that these are reasonable rules. The Road Commission, upon notice to the Union, may revise these Rules and Regulations at any time.

The document on its face stated that it was last revised in 1980. Neither party could recall any changes ever being made to these rules. During negotiations for the parties' 1997-2002 contract, Respondent proposed certain modifications to the rules and also proposed to make them part of the collective bargaining agreement. When the parties could not agree to the changes, Respondent withdrew its proposal. Negotiations for subsequent contracts, including the 2006-2009 contract, did not include any discussion of the work rules.

The 2006-2009 contract includes the same management rights language that has been in the parties' contracts for many years. The management rights clause gives Respondent the right to "promulgate rules and regulations governing the conduct of employees and to require their observance thereof." The 2006-2009 contract, like previous contracts, also includes the following maintenance of standards language:

> The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement except as specifically provided for elsewhere in this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date the error is called to the Employer's attention in writing by the Union.

As discussed above, the 2006-2009 contract was signed by Charging Party on August 9 and by Respondent on August 20, 2007. On September 4, 2007, Respondent's board adopted a set of "employee rules of conduct" to take effect on October 1, 2007. The document, which did not include the prefatory language in the "Rules and Regulations," stated that it superseded all previous policies and procedures. The "rules of conduct" significantly altered the disciplinary penalties set out in the "rules and regulations." The "rules and regulations" provided a specific penalty for a first, second or subsequent violation of each work rule. Only ten rules provided for discharge for a single violation of the rule. The "employee rules of conduct" tripled the number of specific offenses and separated them into two groups. For any violation of the twenty-three rules in the first group, employees were "subject to disciplinary action up to and including discharge."

On September 5, Respondent sent Charging Party a copy of the new rules and asked it to "review and comment" before October 1, 2007. On September 17, Charging Party made a written demand to bargain over the new rules and asked Respondent to delay implementing them until negotiations were complete. The parties met on September 26, 2007. Respondent listened to Charging Party's objections to the rules, but stated that it did not have an obligation to bargain because of the management right's clause and that it did not intend to negotiate the rules. At the end of the meeting, Respondent told Charging Party it would review its objections and suggestions and would set up another meeting if it thought it was necessary.

At its October 1, 2007 meeting, the board adopted a revised set of rules of conduct incorporating some, but not all, of Charging Party's suggestions. On October 4, Respondent sent Charging Party a copy of the revised rules, stating that they were to take effect immediately. In its letter, Respondent reiterated its position that because of the management rights clause Respondent had no duty to bargain over the rules. On October 5, Charging Party made another demand to bargain and asked that the rules be held in abeyance until the parties completed negotiations. Respondent did not delay implementation, but agreed to meet with Charging Party

again. The parties met on January 10, 2008. By this time, two employees had been disciplined under the new rules. At the January 10 meeting, Respondent repeated that it did not have a duty to bargain over the work rules. The parties again discussed Charging Party's remaining objections to the work rules, but could not agree. At the end of the meeting Charging Party asked to meet again. Respondent said that there was no need.

Discussion and Conclusions of Law:

Alleged Unilateral Change - Temporary Employment Policy

It is well established that an employer cannot unilaterally alter existing terms and conditions of employment after the expiration of its collective bargaining agreement until the parties have reached a good faith impasse or agreement. *Local 1467, Intern Ass'n of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472 (1984). Charging Party asserts that Article 6.2 of the parties' expired contract, as interpreted by the arbitrator, constituted an existing term or condition of employment which Respondent was required to maintain in effect after the contract expired in February 2007. It argues that Respondent unilaterally changed conditions of employment by insisting, on and after April 3, 2007, that it had the right to employ temporary employees to do bargaining unit work in circumstances which the arbitrator had explicitly found were prohibited by Article 6.2.

Although an employer must maintain existing conditions of employment after the contract expires, a single departure from past practice does not always indicate that the employer has altered working conditions. In *Wayne Co Cmty College*, 16 MPER 33 (2003), a union filed a charge alleging that the discharge of an employee without just cause after the expiration of the collective bargaining agreement constituted an unlawful unilateral change in terms and conditions of employment. The Commission found that even if the employee had been discharged without good cause, the evidence did not show that Respondent had unilaterally altered terms or conditions of employment because there was no indication that it had intended to renounce its just cause disciplinary policy or implement a change that would affect the bargaining unit as a whole. The Commission cited *Grass Lake Cmty Schs*, 1978 MERC Lab Op 1186, in which it had refused to find an unfair labor practice based on the involuntary transfer of a single employee contrary to the terms of the expired collective bargaining agreement when there was no evidence that the employer had changed its transfer policy. Quoting *Grass Lake*, the Commission in *Wayne Co Cmty College* stated, "What is actionable only as an individual grievance cannot be elevated by the expiration of the contract to a general repudiation of the bargaining obligation."

On March 27, 2007, after Respondent had terminated the contract, Charging Party filed a grievance asserting that Respondent was not complying with Article 6.2. Charging Party asserts that after the contract was terminated, or in any case before late March 2007, Respondent adopted a policy of employing temporary employees that was inconsistent with the arbitrator's award. However, the mere fact that Respondent retained one temporary employee in March 2007 after the permanent employee he was replacing had returned does not demonstrate that Respondent had altered its policy with respect to the employment of temporary employees. Here, Respondent made it clear to Charging Party that it disagreed with the December 2006 arbitration

award. However, in January 2007, Respondent terminated a temporary employee under circumstances that indicated that it recognized its obligation to comply with the arbitrator's interpretation of Article 6.2. On April 3, Respondent denied Charging Party's March 27 grievance. Charging Party interprets the grievance response as an indication that Respondent had ceased to recognize the arbitrator's award as binding. However, the grievance response says only, cryptically, that Respondent had "the right to employ temporary employees as set forth in Section 6.2." Respondent's response to the grievance at the next step, dated July 6, was equally brief and unenlightening.

Charging Party spent a considerable amount of time at the hearing on an account of the parties' negotiations over temporary employee language for their 2006-2009 contract. During these negotiations, both parties at different times proposed new language for Article 6.2 to expand or restrict Respondent's ability to hire temporary employees to do unit work. On March 20, 2007, they agreed that the language of Article 6.2 would carry over without change from their 2002-2006 contract to their new agreement. Before that day was over, they discovered that they disagreed about the effect of retaining the old language. However, this was a dispute over the new contract. Respondent never told Charging Party that it did not regard the arbitrator's award as governing the employment of temporary employees during the period between the two contracts. Moreover, Respondent did not hire temporary employees to work alongside permanent employees between the two contracts as it had done in 2005, and nothing in its conduct indicates that the retention of the temporary employee in late March 2007 was anything other than an isolated incident. Charging Party may be right that Respondent had decided not to adhere to the arbitrator's interpretation of Article 6.2 after the contract had been terminated. However, I find the evidence insufficient to support finding this to be the case. I conclude that Respondent did not unilaterally alter its policy with respect to the employment of temporary employees after the 2002-2006 contract was terminated in February 2007.

Alleged Unilateral Change - Health Care Benefits

An employer violates its duty to bargain in good faith when it unilaterally changes a term or condition of employment while the parties are engaged in negotiating a new contract, even when the change benefits rather than harms employees. *NLRB v Katz,* 369 US 736 (1962). Thus, a unilateral change in employees' health care benefits violates an employer's duty to bargain even if the change saves the employees money. *Detroit Transportation Corporation*, 20 MPER 112 (2007) (no exceptions). On August 1, 2007, Respondent altered terms and conditions of employment when it implemented a new health insurance plan that, among other things, substituted high deductibles covered by Respondent for the much smaller co-pays employees were required to pay under their previous plan. The parties were not at impasse on this issue when Respondent put the new plan into effect, and Respondent has not asserted that there was a business necessity requiring it to implement that plan on this date.

In its brief, Respondent asserts that it should not be found to have committed an unfair labor practice because "in a day and age when many employees are losing their health care or are being made responsible to pay for a significant portion of their health care," the impact on employees of Respondent's change was minor. However, as the Supreme Court noted in *Katz,* a unilateral change in terms and conditions of employment is an unfair labor practice, even when it

operates to the employees' benefit, because it constitutes a circumvention of the employer's duty to negotiate with the union.

Respondent asserts that Article 23.5 of the collective bargaining agreement gave it the right to change health care plans unilaterally.[1] On August 1, 2007, however, the parties had no collective bargaining agreement. A past practice of allowing unilateral action by an employer on a mandatory subject may develop into term or condition of employment which survives the expiration of the contract. However, the Commission has repeatedly held that waivers based solely on contract language do not survive contract expiration. *Eighth Judicial Circuit Court*, 18 MPER 21 (2005); *City of Lansing*, 1989 MERC Lab Op 1055, 1059; *Capac Cmty Schs*, 1984 MERC Lab Op 1195.[2]

I also find that Charging Party neither agreed to nor acquiesced in the change. On August 1, 2007, the parties had reached a tentative contract agreement that included a change to a high deductible health insurance plan, but had not reached agreement on an entire contract. Insofar as the record discloses, they had not discussed an implementation date for the new plan. There is no indication that Charging Party knew that Respondent planned to put the new plan into effect before they reached agreement on the entire contract. Respondent may have assumed that Charging Party would not object to the plans early implementation since the plan eliminated the prescription and other co-pays employees paid under their former plan. In fact, when Respondent announced on July 26 that it was implementing the high deductible plan, Charging Party objected only to Respondent's refusal to also supply the debit card which was to keep employees from having to front the costs of their high deductibles. This debit card, however, was clearly an important part of the agreement. I find that Charging Party never agreed, either explicitly or implicitly, to allow Respondent to implement the new high deductible health care plan without simultaneously providing employees with a debit card to cover the cost of the deductible. I conclude, therefore, that by implementing the new health care plan on August 1, 2007 without Charging Party's agreement, Respondent unilaterally altered existing terms and conditions of employment in violation of its duty to bargain in good faith.

Alleged Unilateral Change – Work Rules

Shortly after the parties entered into their 2006-2009 contract in the fall of 2007, Respondent unilaterally implemented "employee rules of conduct" that altered existing disciplinary policies. Respondent asserts that the management rights clause of the contract and the prefatory language to the 1980 version of the work rules establish that Charging Party waived its right to bargain over rules.

A union may enter into a contractual waiver of its right to bargain over a mandatory topic of bargaining, although this waiver must be "clear and unmistakable" *Amalgamated Transit Union v SEMTA*, 437 Mich 441, 460,461 (1991); *Southfield Police Officers Ass'n v Southfield*,

[1] Article 23.5 also ensured that if Respondent exercised this right, employees would be quickly reimbursed for any out-of-pocket costs they incurred as a result of the change. Under this article, employees were to be reimbursed for their out-of-pocket costs at least monthly. If their out-of pocket costs exceeded $100, Article 23.5 required that they be reimbursed twice per month.

162 Mich App 729, 736 (1987); *Lansing Fire Fighters v Lansing*, 133 Mich App 56, 66 (1984). For example, in *City of Detroit*, 1985 MERC Lab Op 606, the Commission found that language giving the employer "the right to establish hours and schedules of work" constituted a clear and explicit waiver of the union's right to bargain over a change in the work schedule which lengthened the work day. In *City of Romulus*, 1988 MERC Lab Op 504, the Commission found language giving the employer the right "to establish and direct the location and methods of work, job assignments, work schedules and . . . the length of work week" to constitute a clear and unmistakable waiver of any right the union had to bargain over the work schedule. See also *Comstock Park Public Schools*, 1987 MERC Lab Op 267, *Michigan State Uni*versity, 1987 MERC Lab Op 939; *Kent Intermediate Sch Dist,* 1993 MERC Lab Op 588 (no exceptions)

However, the Commission has been reluctant to find a clear and explicit waiver of the right to bargain over disciplinary rules or policies based solely on management rights language giving an employer the right to establish or change rules. In *City of Rochester*, 1982 MERC Lab Op 324, the Commission held that management rights language that gave the employer the right to "establish and require employees to observe the City's rules and regulations" did not, standing alone, waive the union's right to bargain over any change in terms and conditions of employment issued as a "rule." *Rochester* did not specifically involve disciplinary rules. However, in *Oakland Co Road Comm.*, 1983 MERC Lab Op 1, the Commission refused to find a clear and explicit waiver of the union's right to bargain over the promulgation of a written absence control policy based on language in a management rights clause that gave the employer the right "to publish and enforce from time to time new work rules, policies and regulations not in conflict with this agreement." The Commission noted that the absence control policy replaced an unwritten policy giving supervisors discretion over most disciplinary decisions, that there was at least a serious question of whether the absence control policy violated a sick leave provision in the contract, and that the parties' contract included a maintenance of conditions clause. In *City of Garden City*, 1986 MERC Lab Op 901, the Commission held that management rights language giving the employer "the right to make such reasonable rules and regulation not in conflict with this agreement as it may from time to time deem best" did not constitute a clear and explicit waiver of the union's right to bargain over a written absenteeism policy that, the union alleged, conflicted with other provisions of the agreement. More recently, in *Clinton-Ingham Cmty Health Dept*, 19 MPER 1 (2005) (no exceptions), a Commission administrative law judge held that management rights language providing that the employer could "amend, supplement or add to its official departmental rules and regulations," did not constitute a clear and explicit waiver of the union's right to bargain over substantial changes in break time policies, a new no-solicitation policy, and a new list of "unacceptable behaviors" that might lead to discipline.

In 2007, Respondent had a set of written rules and regulations that had been in effect for more than twenty-five years. This document not only set standards of employee conduct, it specifically prescribed what the discipline would be for first and subsequent violations of each rule. The document stated that Respondent had the right to revise the rules at any time after notice to Charging Party, but the preface to the rules suggest that Charging Party in fact agreed to them when they were last revised in 1980. Insofar as any witness was aware, between 1980 and 2007 Respondent never unilaterally modified these rules. In fact, in the mid-1990s Respondent abandoned a proposal to change the rules after it could not reach agreement with Charging Party on the changes.

In 2007, the parties entered into a contract which, like their previous agreements, had management rights language stating that Respondent had the right to "promulgate rules and regulations governing the conduct of employees and to require their observance thereof." It also had a maintenance of conditions clause requiring Respondent to maintain "general working conditions" at "not less than the highest minimum standards in effect at the signing of this Agreement." The contract did not include any specific reference to discipline or disciplinary policies. Shortly after the contract was signed, Respondent promulgated a new document, entitled "employee standards of conduct," that replaced the old rules and regulations. The new rules not only altered the discipline that was to be imposed for certain types of misconduct, it gave Respondent complete discretion to determine the level of discipline for many offenses. Although Respondent agreed to listen to Charging Party's objections to the new standards of conduct, it refused to bargain over them.

As discussed above, the Commission has not found management right's language that merely gives an employer the right to establish or change rules to constitute a clear and explicit waiver of the union's right to bargain over disciplinary policies. In this case, there was a maintenance of conditions clause in the parties' contract that required Respondent to maintain general working conditions at not less than the highest minimum standards in effect at the time of signing of the agreement. There was no past practice of permitting Respondent to unilaterally change the discipline it imposed for rule violations, and no other evidence outside the contract that Charging Party intentionally ceded its right to bargain over this issue. I find that the record does not establish that Charging Party waived its right to bargain over the substantial change in disciplinary policy effected by the "employee rules of conduct." I conclude, therefore, that Respondent violated its duty to bargain when it implemented these new disciplinary policies on October 1, 2007 without giving Charging Party an opportunity to negotiate over them.

Based on the findings of fact and discussion above, I conclude that Respondent violated its duty to bargain in good faith by unilaterally implementing changes to the health care benefits of employees represented by Charging Party on August 1, 2007, and by unilaterally implementing new disciplinary policies on October 1, 2007. I find that the evidence did not establish that Respondent unilaterally altered its policy with respect to the employment of temporary employees after the termination of the parties' 2002-2006 agreement. In accord with these conclusions, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Arenac County Road Commission, its officers and agents, is hereby ordered to:

1. Cease and desist from refusing to bargain in good faith with Teamsters Local 214 by:

a. Implementing changes to employee health care benefits without the Union's consent at a time when the parties had not yet reached agreement on the terms of their 2006-2009 contract.

b. Implementing new disciplinary policies without giving the Union an opportunity to bargain over these policies.

2. Take the following affirmative action to effectuate the purpose of the Act:

a. To the extent it has not already done so, make employees whole for monetary losses they suffered as a result of Respondent's implementation of changes to their health benefits, including interest on these sums at the statutory rate of five percent annum, computed quarterly, for the period between the date employees paid for health care services that would have been covered by their former plan and the date Respondent reimbursed them for these services.

b. Rescind the "employee rules of conduct" implemented on October 1, 2007 and, upon demand, bargain with Teamsters Local 214 over disciplinary rules and policies.

c. Remove from employee files all disciplinary actions issued after October 1, 2007 that impose discipline more severe than the employee would have received for the same offense under the rules and regulations in effect prior to October 1, 2007 and make employees whole for monetary losses suffered as a result of these disciplinary actions, including interest on these sums at the statutory rate of five percent per annum, computed quarterly.

d. Disclose to the Union the methods used to calculate the amounts due to employees under paragraph 2(a) and 2(c) above and, upon request, meet and confer with the Union regarding compliance with the make whole portions of this order.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated:_____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **ARENAC COUNTY ROAD COMMISSION** 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 refuse to bargain in good faith with Teamsters Local 214 by implementing changes to employee health care benefits without the union's consent at a time when the parties had not yet reached agreement on the terms of a new contract.

WE WILL NOT implement new disciplinary policies without satisfying our obligation to bargain in good faith with the union over these policies.

WE WILL, to the extent we have not already done so, make employees whole for monetary losses they suffered as a result of our implementation of these changes, including interest on these sums at the statutory rate of five percent annum, computed quarterly, for the period between the date employees paid for health care services that would have been covered by their former plan and the date we reimbursed them for these services.

WE WILL rescind the "employee rules of conduct" implemented on October 1, 2007 and, upon demand, bargain with Teamsters Local 214 over disciplinary rules and policies.

WE WILL remove from employee files all disciplinary actions issued after October 1, 2007 that impose discipline more severe than the employee would have received for the same offense under the rules and regulations in effect prior to October 1, 2007, and make employees whole for monetary losses suffered as a result of these disciplinary actions, including interest on these sums at the statutory rate of five percent per annum, computed quarterly.

WE WILL disclose to the Union the methods used to calculate the amounts due to employees under paragraphs 2(a) and 2(c) above and, upon request, meet and confer with the Union regarding compliance with the make whole portions of this order.

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.

ARENAC COUNTY ROAD COMMISSION

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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