STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING
Public Employer - Respondent,

Case No. C09 E-074

- and -

TEAMSTERS LOCAL 580,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Dennis B. DuBay, for the Respondent

Michael Parker, Business Agent, for the Charging Party

DECISION AND ORDER

On May 11, 2011, Administrative Law Judge David M. Peltz issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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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: June 15, 2011

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF LANSING,
Respondent-Public Employer,

Case No. C09 E-074

-and-

TEAMSTERS LOCAL 580,
Charging Party-Labor Organization.
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APPEARANCES:

Keller Thoma, P.C., by Dennis D. Dubay, for Respondent

Mike Parker, Business Agent, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On May 26, 2009, Teamsters Local 580 filed an unfair labor practice charge alleging that the City of Lansing violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by unilaterally changing prescription drug benefits for its members. Pursuant to Sections 10 and 16 of PERA, this case was assigned to David M. Peltz, Administrative Law Judge of the Michigan Administrative Hearing System, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact:

Teamsters Local 580 represents two bargaining units of employees of the City of Lansing. One bargaining unit consists of supervisory employees, the other is a nonsupervisory unit referred to by the parties as the Clerical, Technical and Professional unit. The most recent collective bargaining agreements covering both units expired on January 31, 2007, but the parties agreed to extend them on a day-to-day basis during negotiations for successor agreements.

Both contracts require the City to provide Blue Cross/Blue Shield (BCBS) Community Blue PPO 1, Option 2 as the base health care plan for all active employees. With respect to prescription drug coverage, the agreements provide:

> Effective February 20, 2004. The City shall provide through Blue Cross/Blue Shield a prescription drug plan with a ten dollar ($10) generic/twenty dollar ($20) brand name preferred Rx co-pay and a MOPD2 (mail order prescription service-2) and PDCM (prescription drug contraceptive medicine) to employees with Blue Cross/Blue Shield Community Blue PPO medical insurance.

In accordance with the terms of the collective bargaining agreements, Respondent purchased the Preferred Rx Plan Certificate from BCBS with the MOP2 and PDCM riders. The rider description provided to Respondent by BCBS states that prescription benefits are payable at 100 percent of the amount approved by BCBS, less the member's co-pay, when obtained from a preferred network pharmacy, and 75 percent of the approved amount, less the member's co-pay, when purchased from a non-network pharmacy.

On or about June 5, 2007, BCBS notified Respondent that it was implementing a new initiative to combat the rising costs of prescription drug care. The Member Education Therapeutic Interchange (METI) is intended to encourage members to switch from certain brand name prescription drugs to lower cost generic medication. Under the METI initiative, physicians must obtain BCBS approval to continue prescribing specific certain brand name drugs for members beyond an initial 90-day period whenever a comparable generic drug is available. In order to obtain BCBS approval, the physician must demonstrate that the brand name drug is medically necessary. Absent BCBS approval, members must pay the full cost of the brand name drug after expiration of the 90-day period.

On May 6, 2008, Diane Lee, a City appraiser and a steward for Local 580, filed a grievance after BCBS denied her prescription coverage for a brand name drug. Lee, who was not called to testify at the hearing in this matter, attached the following statement to the grievance:

> On Saturday, April 26, I turned in my prescription written by my doctor for [redacted]. This was a continuation of the drug as my past prescription refills had expired. The Pharmacist stated they could not fill the prescription as directed by Blue Cross Blue Shield. They stated they would need to get in touch with the Doctor on Monday to tell him he needed to write a different prescription. I explained that I have been on this prescription and our prescription coverage is also for brand name drugs. They stated if they gave me the prescription there would be no coverage and I would need to pay 100 % of the drug cost.
>
> Monday (4/28/08) I stopped back at the pharmacy after work (approximately 5:30 p.m.) but they said the Doctor has not contacted them and they still could not fill the prescription. I asked for a copy of a BC/BS denial

> of my benefit which is attached. This order by BC/BS is in violation of the Teamster 580 contract. I contacted the benefits coordinator in the Personnel Office. She checked into my complaint and gave me the attached communications from BC/BS and stated BS contacted employees with the changes in prescription coverage.
>
> We currently do not have mandatory generic or a managed prescription drug plan in our contact. We currently have $10 generic/$20 brand name Rx co-pay coverage in the contract. This change is a violation of the contract.

The grievance proceeded through the first three steps of the contractual grievance procedure. Susan Graham, the City's labor relations manager, conducted an investigation into the grievance pursuant to which she contacted the City's BCBS representative to obtain information regarding the METI initiative. Based upon that investigation, Graham concluded that there had been no violation of the contract by Respondent. Graham testified credibly and without contradiction that she conveyed Respondent's position concerning the grievance to Mike Parker and that she hand-delivered to Parker documentation from BCBS regarding the METI initiative on June 11, 2008. On July 17, 2008, Graham faxed additional information to Parker which further detailed the METI initiative and described why BCBS had denied Lee's prescription for a brand named drug.[1]

Sometime during the summer of 2008, Lee retired from employment with the City and her grievance was not advanced to arbitration. At hearing, Graham explained that Charging Party effectively abandoned the grievance by the operation of "time and silence." The instant charge was filed on May 26, 2009, after a member of Charging Party's bargaining unit unsuccessfully attempted to fill a prescription for Clarinex, a named brand medication, on or about March 6, 2009.

Discussion and Conclusions of Law:

Charging Party contends that the City violated PERA by unilaterally making changes to the prescription drug plan negotiated by the parties in the most recent collective bargaining agreements. The Union asserts that it did not learn of the change until March of 2009, when one of its members was unable to fill a prescription for Clarinex. Respondent argues that this matter should be dismissed as untimely because Charging Party was aware of the implementation of the METI initiative more than six months prior to the filing of the charge. The Employer further contends that there was no violation of the Act because the

[1] In its brief, Charging Party asserts that Parker never received any of the information described by Graham. However, the Union did not introduce any evidence at the hearing to rebut Graham's testimony. Although Parker made various statements on the record concerning the documents, he was not a sworn witness at the time and, in fact, was never called to testify in connection with this matter. Moreover, Respondent introduced into evidence a fax confirmation sheet corroborating Graham's testimony regarding the documents faxed to Parker by the City on July 17, 2008. The recipient's fax number listed on the confirmation sheet is the same phone number from which the instant charge was faxed to MERC by Parker.

City continues to provide Charging Party's members with exactly what it is required to provide under the contracts. The Employer argues that BCBS was responsible for the implementation of the METI initiative and that the change did not result in any increase in the copay amounts paid by members. According to the Employer, the only thing that has changed is the process by which BCBS approves prescriptions.

Having carefully reviewed the transcript and exhibits introduced into the record in this matter, I find that the charge was not timely filed in accordance with the requirements of Section 16(a) of PERA. Pursuant to Section 16(a) of the Act, no complaint shall issue based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period under Section 16(a) commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). It is well established that the statute of limitations is not tolled by the attempts of an employee or a union to seek a remedy elsewhere, including the filing of a grievance, or while another proceeding involving the dispute is pending. See e.g. *Troy Sch Dist*, 16 MPER 34 (2003); *Wayne County*, 1998 MERC Lab Op 560. The Commission has also steadfastly rejected attempts by charging parties to revive otherwise untimely claims based upon a continuing violation theory. See e.g. *City of Adrian*, 1970 MERC Lab Op 579, 581, adopting the U.S. Supreme Court ruling in *Local Lodge 1424, Machinists v NLRB (Bryan Mfg Co)*, 362 US 411 (1960). See also *County of Lapeer*, 19 MPER 45 (2006); *Detroit Bd of Ed*, 16 MPER 29 (2003); *City of Flint*, 1996 MERC Lab Op 1, 9-11.

In the instant case, the record establishes that Charging Party had knowledge of the implementation of the METI initiative on or around May 6, 2008, when one of its stewards, Diane Lee, filed a grievance asserting that a member of the bargaining unit was denied coverage for a brand name prescription. This was precisely the same allegation made by the Union in the instant charge concerning the denial of a prescription for Clarinex. In the grievance statement, Lee admits that she was provided paperwork from BCBS by the Employer's personnel department. Moreover, the record establishes that Susan Graham, the City's labor relations manager, provided documentation concerning the METI initiative to Charging Party's business agent on June 11, 2008 and July 17, 2008. Yet, the charge was not filed by the Union until May 26, 2009, well over six months later. Under such circumstances, I conclude that any allegation concerning the implementation of the METI initiative, as well as the impact of that initiative on bargaining unit members, is not timely under Section 16(a) of the Act and that the charge must be dismissed on that basis. Given this conclusion, it is not necessary that I address whether the implementation of the METI initiative itself constituted a unilateral change in terms and conditions of employment or a repudiation of the parties' collective bargaining agreements.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the reasons stated above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 11, 2011