STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

TRUE COPY

In the Matter of:

UNIVERSITY OF MICHIGAN,
Respondent-Public Employer,

MERC Case No. C18 G-072

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

David Masson, University of Michigan Office of the Vice-President and General Counsel, for Respondent

Nacht and Roumel, PC, by Adam M. Taub, for Charging Party

DECISION AND ORDER

On April 9, 2019, Administrative Law Judge Julia Stern her Decision and Recommended Order[1] 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

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: MAY 29 2019

[1] MAHS Hearing Docket No. 18-015073

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Respondent-Public Employer,

Case No. C18 G-072
Docket No. 18-015073-MERC

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

David Masson, University of Michigan Office of the Vice-President and General Counsel, for Respondent

Nacht and Roumel, PC, by Adam M. Taub, for Charging Party

DECISION AND RECOMMENDED ORDER ON MOTION FOR SUMMARY DISPOSITION

On July 25, 2018, the University of Michigan Skilled Trades Union filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the University of Michigan pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210, MCL 423.216. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) with the Michigan Administrative Hearing System.

On August 28, 2018, Respondent filed a motion for summary disposition. On September 18, 2018, Charging Party filed a response to Respondent's motion, together with an amended charge. Respondent filed a supplemental motion for summary disposition addressing the allegation contained in the amended charge on October 3, 2018, and Charging Party filed a response to the supplemental motion on November 2, 2018. Oral argument on the motion was held before me on December 6, 2018. At the close of oral argument, I indicated on the record my intention to recommend that the charge be dismissed in its entirety.

Based on undisputed facts set forth in the charge and pleadings and as recounted below, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a University-wide bargaining unit of employees of Respondent employed in a variety of trades, including, but not limited to, air conditioner and refrigeration mechanics, carpenters, painters, HVAC control specialists, and plumbers. Employees in Charging Party's bargaining unit work at locations that include health care facilities operated by Respondent, including the University of Michigan Medical Center in Ann Arbor, Michigan. The Respondent, through its health care division Michigan Medicine, also operates many primary and specialty care centers located throughout the State of Michigan.

In or around June 2018, Respondent opened a new facility, the Brighton Center for Specialty Care, approximately twenty miles from Ann Arbor. On or about May 8, 2018, Charging Party learned that Respondent planned to contract with a private entity, CBRE, Inc. (CBRE), to provide property management services at the Brighton Center. These services were to include janitorial, snow removal, grounds maintenance and parking services as well as maintenance work of the type normally performed by Charging Party's members at other Respondent facilities. In its original charge, Charging Party alleged that Respondent violated Section 10(1)(a) and (e) of PERA by outsourcing bargaining unit work to a private entity without giving Charging Party an opportunity to bargain over the contract. As noted above, Respondent filed a motion for summary dismissal of the original charge. The motion asserts that that Respondent satisfied its duty to bargain by entering into the parties' current collective bargaining agreement which covers the subject of outsourcing and waives Charging Party's right to bargain further over this subject during the term of the agreement. In its September 28, 2018, amended charge, Charging Party alleges, as an alternative theory, that Respondent's contract with CBRE violated its duty to bargain in good faith because it constituted an unlawful repudiation of the parties' collective bargaining agreement.[1]

Facts:

The Collective Bargaining Agreement

Respondent and Charging Party are parties to a collective bargaining agreement covering the term October 11, 2015, through May 31, 2019. Articles 1-2 through 1-4 of this agreement address the use of individuals outside the bargaining unit to perform bargaining unit work, as follows:

> 1-2. The term "employee" and "employees" as used in this agreement (except where the agreement clearly indicates otherwise) shall mean only an employee or employees within the bargaining unit described in Section A.

[1] Charging Party also alleged that Respondent unlawfully refused to bargain over the effects of the subcontracting. However, it withdrew this allegation on October 1, 2018.

1-3. The term "temporary help" shall mean *any individual or individuals hired by the University* whose employment is limited in duration, unless otherwise agreed to by the Union, to not more than (100) work days, within the same department or seniority group, during the consecutive twelve (12) month period beginning with the individual's date of hire, except that the employment of any such individual hired during the months of April or May shall not exceed 150 work days or October 31, whichever occurs first. Temporary help is intended to be used for (1) a specific project, (2) the purpose of relieving employees who are absent due to sickness or injury, leave of absence, or vacation, or (3) augmenting the regular work force of employees to meet the requirements of the University that may be occasioned by termination, dismissal, increased workloads, or other conditions that may create short-term staffing shortages. It is understood that "temporary help" will not be utilized to the extent an employee is displaced. [Emphasis added].

1-4. *Contract Vendor Labor are third party contractors utilized by the University to augment the regular and temporary workforce, and they are not subject to the work duration limitations stated in paragraph 1-3 above. It is the parties' intent that typical bargaining unit work be performed by employees within the bargaining unit whenever practicable.* [Emphasis added].

When an individual employee of contract vendor labor has worked 200 days in a seniority group, continuously or in aggregate, he/she will be released for a minimum of 70 calendar days before he/she can be reassigned to the seniority group as an employee of contract vendor labor. The individual employee of contract vendor labor shall not be hired as temporary help during the 70-calendar day period. An increment of time worked in a day will be considered a day worked. If an individual employee of contact vendor labor has not ben assigned to a seniority group in 70 or more calendar days, the 200 workday counter will start/reset upon their assignment to a seniority group. The 200/70 rule will take effect six weeks after ratification of a new Agreement.

In a departmental unit, if the number of employees of contract vendor labor in a classification does not drop below two for at least 35 continuous calendar days during the period August 1st through July 31st, upon request of the Union, a Special Conference shall be held to discuss if there is a need to increase the number of employees in that classification. It is understood that the University determines the size of the workforce. This paragraph is subject to the grievance and arbitration procedure. However, a grievance under this paragraph is limited to a claim that an individual employee of contract vendor labor exceeded 200 workdays in a seniority group without a 70-calendar day break, and the remedy is limited to the

removal of the individual employee of contract vendor labor from the seniority group for a minimum of 70 calendar days.

Article 2-1, contains a managements rights clause that includes the following language:

> The University retains... all its inherent rights, function, duties and responsibilities with the unqualified and unrestricted right to determine and make decisions on all terms and conditions of employment and the manner in which the operations of the University will be conducted except where those rights may be clearly, expressly, and specifically limited in this agreement. It is expressly recognized, merely by way of illustration and not by way of limitation, that such rights, functions, duties and responsibilities which are solely and exclusively the responsibility of the University include, but are not limited to: (1) full and exclusive control of the management of the University, the supervision of all operations, methods, processes, means, and personnel by which any and all work will be performed, the control of property and *the composition, assignment, direction, and determination of the size and type of its working forces*; (2) the right to determine the work to be done and the standards to be met by employees covered by this agreement; (3) *the right to change or introduce new operations, methods, processes, means, or facilities, and the right to determine whether and to what extent work shall be performed by employees*; ...[Emphasis added]

The collective bargaining agreement, at Article 21-1, also provides that work regularly and customarily performed by an employee within a seniority group shall not be performed by "temporary help" or contract vendor labor if this results in the layoff of an employee or if an employee is eligible for recall.

Finally, the agreement contains, in Articles 42 and 43, a grievance procedure ending in binding arbitration and, in Article 45-1 a "zipper" clause stating that both parties unqualifiedly waive the right, during the term of the agreement, to bargain collectively with respect to any "subject of matter referred to or covered in the agreement."

The CBRE Contract

On or about May 11, 2018, Respondent and CBRE entered into a contract under which CBRE is to perform property management services at the Brighton facility. The term of the contract is June 1, 2018, through May 31, 2021, with an option to extend the agreement for an additional two years. The CBRE contract requires that CBRE assign five employees to work full-time at the site, including a "nonexempt" lead building engineer, a "nonexempt" building engineer, and a "nonexempt" maintenance technician. The contract states that an additional maintenance technician may be employed, and a specified amount added to the contract, if either party determines this is necessary for

proper maintenance of the facility. The "scope of services" clause states that CBRE employees will provide the following services:

> Heating, ventilating and air conditioning (HVAC) maintenance, inclusive of quarterly audits and reporting of pressurized environments ... The parties acknowledge that some of these services may be outsourced by [CBRE] based on the complexity and criticality of the maintenance.
>
> Supplier shall contract for elevator maintenance service and entrapment response.
>
> Plumbing, including any backflow preventers to local and state plumbing codes.
>
> Electrical including lamps, outlets, repairs and maintenance.

The CBRE contract does not contain any provision requiring CBRE to lay off employees for at least seventy calendar days after they have worked 200 days, and Respondent did not seek to have CBRE adhere to this practice for the employees it assigns to the Brighton Center.

On June 20, 2018, Charging Party filed a grievance asserting that Respondent's contract with CBRE violated Article 1 of the collective bargaining agreement.

Discussion and Conclusions of Law:

It is well established that if a term or condition of employment is "covered by" a provision in a current collective bargaining agreement, and the parties have agreed to a grievance resolution procedure ending in binding arbitration, the details and enforceability of the provision are generally left to arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich 309, 317-321 (1996). As the Commission stated in *St Clair Co Rd Comm,* 1992 MERC Labor Op 533, 538:

> Where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is presented.

Moreover, as the Court said in *Macomb Co v AFSCME Council 25, Locals 411 and 893,* 494 Mich 65, 82 (2013), because "arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations," doubt about whether a subject matter is covered should generally be resolved in favor of having the parties arbitrate the dispute.

The Commission has held that a party's repudiation of a provision or provisions of its collective bargaining agreement may be tantamount to a rejection of its duty to bargain. The Commission has defined "repudiation" as an attempt to rewrite the parties'

contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written. *36th District Court,* 21 MPER 19 (2008) *Central Michigan Univ*, 1997 MERC Lab Op 501; *Redford Twp Bd of Ed*, 1992 MERC Lab Op 894. For the Commission to find an unlawful repudiation, the contract breach must be substantial and have a significant impact on the bargaining unit, and there must be no bona fide dispute over interpretation of the contract language. *Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

If the subject matter of a dispute is not "covered by" the contract, an employer may nevertheless be freed from its duty to bargain if the union has waived its right to demand bargaining. As the Court said in *Port Huron,* at 318-319, "The procedure for determining whether an employer must bargain before altering a mandatory subject of bargaining involves a two-step analysis: is the issue the "union seeks to negotiate ... 'covered by' or 'contained in' the collective bargaining agreement; and, if not, [did] the union ... somehow relinquish its right to bargain[?]" Quoting *Dep't of Navy v Federal Labor Relations Authority,* 295 US App DC 239, 247, (1992), on the difference between "covered by" and waiver, the Court stated:

> A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant.

In this case, Respondent argues that the parties bargained over the outsourcing of bargaining unit work and memorialized their agreement in Article 1 of the collective bargaining agreement. Therefore, according to Respondent, the Commission should find that the subject of outsourcing, including the type represented by the CBRE contract, is "covered by" the collective bargaining agreement and that Respondent had no duty to bargain over the CBRE contract. Respondent also asserts that, assuming for the sake of argument that outsourcing is not "covered by" the collective bargaining agreement, Charging Party nevertheless waived its right to bargain over outsourcing because the agreement's management rights clause explicitly gives Respondent the right to determine the "composition, assignment, direction, and determination of the size and type of its working forces," and to determine "whether and to what extent the work shall be performed by employees."

Charging Party's primary argument is that the CBRE contract is not "covered by" the collective bargaining agreement because Article 1-4 does not cover all instances of subcontracting. According to Charging Party, Article 1-4 is not applicable to full-time contract labor with a permanent placement. According to Charging Party, because the Brighton Center is not a temporary worksite and CBRE employees are not merely helping bargaining unit employees complete their work at that site, it cannot reasonably be argued that CBRE employees are "augmenting" the work of bargaining unit employees. Charging Party maintains that, instead, CBRE employees are "subsuming" the work of the unit. Charging Party asserts that taken to its logical conclusion, Respondent's argument would allow Respondent to subcontract the work of Charging Party's entire bargaining unit without giving Charging Party an opportunity to demand

bargaining, an absurd proposition contrary to both law and the collective bargaining agreement. In its amended charge, Charging Party presents an alternative argument. That is, it argues in its amended charge that if Article 1-4 covers the type of subcontracting represented by the CBRE contract, Respondent repudiated the collective bargaining agreement by entering into a contract of this nature which did not require the contractor to lay off individual employees after they have worked at a Respondent facility for 200 days.

Respondent agrees with Charging Party to the extent that it contends that the restrictions on the use of "contract vendor labor" set out in Article 1-4 do not apply to the CBRE contract. Respondent argues that CBRE employees are not "contract vendor labor" within the meaning of Article 1-4 because CBRE, and not Respondent, directly manages their work at the Brighton Center. Respondent attached to its motion a copy of a previous arbitration award interpreting Article 4-1 which Respondent maintains supports its interpretation of Article 1-4. However, as indicated above, Respondent maintains that the dispute over the CBRE contract is covered by the collective bargaining agreement because the subject of outsourcing is addressed in Article 1-4.

In support of its argument that the CBRE contract was "covered by" but not prohibited by, the parties' collective bargaining agreement, Respondent cites *City of Westland,* 26 MPER 26 (2012) (no exceptions). In that case, I, as the ALJ, held that the employer's contract with a private company to perform building inspections formerly performed by members of the union's bargaining unit was "covered by" the parties collective bargaining agreement. The collective bargaining agreement contained a provision requiring the employer to notify the union before entering into a subcontract for bargaining unit work in excess of $750, and to meet with the local union bargaining committee before entering into a subcontract for an annual amount more than $5,000. This same provision, however, explicitly affirmed the employer's right to subcontract unit work under the contract's management rights clause. I cited in my decision two pre-*Port Huron* Commission cases, *Central Michigan Univ,* 1995 MERC Lab Op 112 and *Village of Constantine,* 1991 MERC Lab Op 457, holding that an employer satisfies its obligation to bargain over a decision to subcontract by agreeing to a contract provision specifying the conditions under which an employer may subcontract bargaining unit work. I also cited a post-*Port Huron* Commission case, *Village of Romeo.* 2000 MERC Lab Op 296, in which the Commission found that an employer's unilateral decision to subcontract work did not violate its duty to bargain because the parties had a bona fide dispute over whether that subcontract violated a contract clause giving the employer the right to subcontract certain work only after first making it available to the unit.

Respondent also relies on *Gogebic Cmty College Support Personnel Assn v Gogebic Cmty College,* 246 Mich App 342 (2000,) aff'g *Gogebic Cmty College,* 1999 MERC Lab Op 28. In *Gogebic,* the collective bargaining agreement provided that the employer would pay the full premium for dental insurance benefits as set out in the contract. It did not specify the insurance carrier. The collective bargaining agreement also included a zipper clause stating that the agreement represented the full agreement of the parties and that the parties waived their right to "further bargaining over matters covered

by the agreement or not specifically referred to therein." When the employer switched from purchasing insurance from a carrier to being self-funded, the union filed a charge alleging that this constituted an unlawful unilateral change in terms and conditions of employment. The Commission held, first, that because the subject of dental insurance was "covered by" the collective bargaining, the union had already exercised its bargaining right. In response to the union's alternative argument, that the employer had made a mid-term modification in the contract, the Commission held that because the contract was silent regarding an insurance carrier, the contract unambiguously gave the employer the right to unilaterally select a carrier. It noted that for a past practice to overcome unambiguous contract language, a party must show that the parties had a meeting of the minds on the issue of whether the past practice would continue and concluded that the union in that case had failed to meet its burden.

The Court of Appeals agreed with the Commission that the issue of dental coverage was clearly and unambiguously "covered by" the collective bargaining agreement and that the union had exercised its right to bargain over the matter. It noted, as did the Commission, that the union could have negotiated for more specific terms if it wished to do so. It also agreed with the Commission that the union had not shown that the parties had mutually understood, accepted, and agreed that, despite the contract language, the employer would continue to use the same carrier.

I find that the performance of bargaining unit work by individuals outside the bargaining unit, or "the erosion of the bargaining unit" as Charging Party refers to it, is covered by the parties' current collective bargaining agreement. In Article 1-3 of this agreement, the parties agreed to allow Respondent to use temporary employees to perform bargaining unit work under certain circumstances but with restrictions that keep Respondent from replacing its permanent workforce with temporary employees. In Article 1-4, the parties agreed to restrictions on Respondent's right to use employees of third-party contractors to perform bargaining unit work. I agree with Respondent that Charging Party exercised its right to bargain over the subject of subcontracting, and that by entering into Article 1-4, Article 2-1 and Article 45-1 of the agreement, Respondent satisfied its obligation to bargain over this issue during the term of the 2015-2019 contract. Given this conclusion, I find it unnecessary to address Respondent's waiver argument.

I also find that Respondent did not repudiate the parties' collective bargaining agreement by entering into the CBRE contract. I note that Article 1-4 does not draw a distinction between "temporary" and "permanent" worksites or between contract employees supervised by Respondent's supervisors and contract employees supervised by the contract. I find that that the meaning of the term "augment," in this context, is ambiguous.[2] I conclude that the parties' have a bona fide dispute over whether the restrictions on the use of employees of third-party contractors in Article 1-4 extend to the

[2] "Augment," is defined in the Merriam-Webster dictionary as "to make greater, more numerous, larger or more intense." See www.merriam-webster.com/dictionary. Under this broad definition, any work performed by a contractor's employees arguably "augments" Respondent's workforce.

CBRE contract and, therefore, Charging Party should be left to its contractual remedy in this case.

Based on the facts and conclusions of law as set forth above, I conclude that Respondent did not violate Section 10(1)(a) and (e) of PERA by entering into a contract with CBRE to perform bargaining unit work at Respondent's Brighton Center for Specialty Care. I recommend that Respondent's motion for summary dismissal of the charges be granted and that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 9, 2019