STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

TRUE COPY

In the Matter of:

CLARE COUNTY ROAD COMMISSION,
Public Employer-Respondent,

-and-

MERC Case No. C18 K-114

AFSCME COUNCIL 25, LOCAL 1855,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Michael R. Kluck and Associates, by Wendy S. Hardt, for the Respondent

Nicholas Caldwell, Staff Attorney AFSCME Council 25, for the Charging Party

DECISION AND ORDER

On April 18, 2019, Administrative Law Judge Julia C. Stern issued 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 22 2019

[1] MAHS Hearing Docket No. 18-021912

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CLARE COUNTY ROAD COMMISSION,
Public Employer-Respondent,

Case No. C18 K-114
-and- Docket No.18-021912-MERC

AFSCME COUNCIL 25, LOCAL 1855,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Michael R. Kluck and Associates, by Wendy S. Hardt, for the Respondent

Nicholas Caldwell, Staff Attorney AFSCME Council 25, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON
SUMMARY DISPOSITION

On November 21, 2018, AFSCME Council 25, Local 1855 filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Clare County Road Commission (Respondent or the Employer) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210 and MCL 423.216. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge with the Michigan Administrative Hearing System.

As set out below, the Charging Party alleges that Respondent violated its duty to bargain in good faith under Section 10(1)(a) and (c) of PERA by unilaterally altering existing terms and conditions of employment and by refusing to bargain over the change. On January 3, 2019, after holding a pre-hearing conference with the parties, I issued an order to Charging Party pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, 2014 AACS, R 423.165, to show cause why its charge should not be dismissed because there was no material dispute of fact and Respondent was entitled to judgment as a matter of law.

On February 4, 2019, Charging Party filed a response to my order. In its response, Charging Party alleged that in addition to violating its duty to bargain, Respondent had unlawfully threatened to fire Charging Party Steward Nate Hulliberger if he continued to complain about the unilateral change. On February 22, 2019, I wrote to Charging Party noting that this allegation was not in the original charge and asking Charging Party to clarify whether it intended to amend the charge to include the new allegation. I stated in my letter that if I did not hear from Charging Party on or before March 15, 2019, I would disregard the new allegation. Charging Party did not reply to my letter.

Based on facts as alleged by Charging Party, as recounted below, and not in dispute, 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 bargaining unit of employees of the Respondent. The charge alleges that Respondent violated its duty to bargain in good faith, first by unilaterally implementing a requirement that employees applying for a posted position pass a test in order to qualify for the position, and second, by refusing, on May 22, 2018, Charging Party's demand to bargain over the new requirement.

Facts:

The parties' current collective bargaining agreement contains a grievance procedure ending in binding arbitration. In addition, Article 19 of this agreement, entitled "Job Posting," reads as follows:

> When a job vacancy or newly created position occurs in a classification that the Employer desires to fill, the Employer will post a notice giving eligible employees an opportunity to make application for the job by signing the job posting notice. Said notice shall be posted for a period of three (3) work days after which time the posting will be taken down and no employee will be, except as provided for in this Article, permitted to thereafter sign the posting.
>
> The job posting notice will contain the minimum qualifications and any special conditions, the number of openings in the classification, the classification rate of pay and the equipment number currently assigned to the position, if any.
>
> Any employee interested in applying for the position must sign his/her name and write the date and time of his/her signature on the job posting notice in the Foreman's office. Any eligible employee who was absent on sick leave or vacation when the job was posted and who had no knowledge of the posting shall have the opportunity to sign and date the

> posting within three (3) days of their return to work. Employees are responsible for determining what jobs, if any, were posted during their absence. In no event may an employee who was absent on sick leave or vacation leave sign for a posted job beyond two (2) weeks after the original posting period expired.
>
> When considering promotions or transfers if all other considerations such as aptitude and ability are equal, then positions will be filled on the basis of seniority.
>
> Any employee from within the bargaining unit who has successfully bid on a position he/she has not previously held shall serve a trial period of not to exceed twenty days worked in the new position at the rate of pay of the job bid. If the employee does not prove satisfactory on the new job, he/she shall be returned to his/her former position. If an employee successfully bids on a position which he/she previously held, he/she will be required, unless excused or removed by the Employer prior thereto, to serve a forty (40) hour trial period. If not excused or removed by the Employer prior to the completion of the trial period the employee may immediately after the completion of said period revert back to his/her former position.

Heavy equipment operator has been an established position within Charging Party's bargaining unit for many years. In mid-March 2018, Hulliberger, a heavy equipment operator and a Charging Party steward, bid on a posted blade operator truck position. In early April 2018, Hulliberger was awarded the position. Respondent then posted the heavy equipment operator position Hulliberger had vacated. In this posting, however, Respondent added to its previous statement of qualifications the ability to operate a list of specific pieces of equipment. At least one of these was a piece of new equipment that Respondent's heavy equipment operators had not been required to operate in the past.

Sometime in early May 2018, unit employee Alfred Townsend bid on the heavy equipment operator posting. Before being awarded the position, Townsend was asked to demonstrate that he could in fact operate all the equipment listed in the posting. Townsend could not do so and was not awarded the position. Hulliberger also bid on the heavy equipment operator posting. The Employer approached Hulliberger and mentioned the fact that Hulliberger had just accepted the blade operator truck position. The Employer then told Hulliberger that he would have to demonstrate that he could operate all the equipment listed in the new heavy equipment operator posting in order to be awarded the heavy equipment operator position. Hulliberger then withdrew his bid. A third unit employee who had bid on the heavy equipment operator position succeeded in demonstrating that he could operate all the listed equipment and was awarded the position in May 2018 or soon thereafter.

On May 17, 2018, Charging Party Staff Representative Mike Neitzel, having learned of Townsend's and Hulliberger's experiences, sent a letter to Deepak Gupta,

Respondent's Engineer-Manager, demanding to bargain over a change in working conditions implemented by Respondent which Neitzel identified as testing to qualify for a posted position. On May 22, 2018, Gupta wrote in reply that there was no reason to meet because there had not been any change. Gupta also said that if Charging Party felt there had been a change, it should have filed a grievance within the five-day period required by the grievance procedure. Gupta attached a copy of Article 19 to his letter. He also told Neitzel that Townsend had quickly demonstrated that he could not satisfactorily run the equipment set out in the job posting, and that Townsend had acknowledged that fact.

Discussion and Conclusions of Law:

An employer may defend against a charge that it has unilaterally altered working conditions by arguing that it has fulfilled its duty to bargain by negotiating a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron EA v Port Huron Area Sch Dist,* 452 Mich 309, 318, (1996). In *Port Huron*, the Court noted that where the matter is "covered by" the agreement, the union has already exercised its bargaining rights. According to the Court, the Commission's initial charge is to determine whether the agreement "covers" the dispute. If it does, the enforceability of the provision is normally left to the parties' contractual grievance mechanism, *supra*, at 321. 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.

Doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. *Macomb Co v AFSCME Council 25, Locals 411 and 893,* 494 Mich 65, 82 (2013).

The Commission has recognized, however, 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.

According to Respondent, it complied with Article 19 when it filled the heavy equipment operator position in May or June 2018. First, it listed the minimum qualifications for the position in the job posting. Second, Townsend demonstrated that he

could not meet these qualifications. Third, Article 19 does not require that a position be filled based on seniority, and seniority is only considered when candidates' "aptitude and ability" are equal which was not the case here.

Charging Party notes that employees are required by Article 19 to serve a trial period, during which they are paid the normal rate of the new position, *after* being awarded the position. However, it points out that nothing in Article 19 explicitly requires applicants to take a test to demonstrate their ability to perform all the duties of the job *before* they are awarded it. Therefore, according to Charging Party, Respondent unilaterally altered a term or condition of employment when it began requiring applicants for the heavy equipment operator position to demonstrate their ability to operate several pieces of equipment before being awarded the position. Respondent, however, maintains that Article 19, read as a whole, allows Respondent to require that employees meet the qualifications listed in the posting, e.g. by demonstrating that they can operate the equipment listed in the posting, before they are awarded the position.

In this case, I find, the parties negotiated a provision, Article 19, covering the filling of vacant bargaining unit positions. Charging Party is correct that Article 19 does not specifically mention a testing process for candidates before they can be awarded a vacant position. However, a union may have already exercised its right to bargain over an issue by entering into a contract provision which does not explicitly address the issue in dispute, but which covers the subject. See, e.g., *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 (union already exercised its right to bargain over the identity of the dental insurance carrier by entering into a contract provision covering dental insurance that did not specify a carrier or restrict the employer's right to change carriers). I conclude that the parties' dispute over Respondent's right to require candidates to demonstrate their ability to meet the posted qualifications of a position before being awarded the position is "covered by" Article 19 of their contract.

I also find that the parties have a bona fide dispute over whether Article 19 allows Respondent to require candidates for a vacant position to demonstrate that they meet the qualifications for the position before they are awarded the position and begin their trial period. As this is a dispute over the interpretation of a collective bargaining agreement, it should be resolved through the grievance arbitration procedure contained in the contract. I recommend, therefore, 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 18, 2019