STATE OF MICHIGAN
BUREAU OF EMPLOYMENT RELATIONS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF BAY CITY,
Public Employer-Respondent, MERC Case No. C18 G-067

-and-

UTILITY WORKERS UNION OF AMERICA, AFL-CIO,
LOCAL 542,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Steven H. Schwartz, for Respondent

James C. Harrison, Utility Workers Union of America, AFL-CIO, for Charging Party

DECISION AND ORDER

Procedural History:

On August 19, 2019, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order[1] in the above matter finding that Respondent violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent violated § 10(1)(a) and (e) of PERA by refusing to bargain with Charging Party over its decision to eliminate the delivery of paper pay statements to members of Charging Party's bargaining unit and also found that Respondent violated § 10(1)(a) and (e) by unilaterally eliminating the delivery of paper pay statements to unit members on payday without bargaining. On September 10, 2019, Respondent filed exceptions to the ALJ's Decision and Recommended Order, and, on October 21, 2019, Charging Party filed a brief in support of the ALJ's Decision and Recommended Order.

Factual Summary:

A. Background

Charging Party Utility Workers of America, AFL-CIO, Local 542 (Union) represents certain employees of Respondent City of Bay City (Employer), including clerical employees and customer service clerks, park maintenance employees, refuse collection workers, wastewater

[1] MOAHR Hearing Docket No. 18-018539

treatment plant employees, water distribution employees, sewer maintenance employees, street maintenance employees, and mechanics who repair and maintain trucks and heavy equipment.

The parties' most recent collective bargaining agreement covered the period July 1, 2014, to December 31, 2017. The 2014 agreement required employees to utilize direct deposit to have their paychecks directly deposited at their financial institutions. To confirm the direct deposit of paychecks prior to July 2018, Respondent delivered paper pay statements to employees' work locations through its interoffice mail system.

B. The Elimination of Paper Pay Statements

On March 6, 2017, Respondent notified employees that it had created an electronic portal, known as "e-Suite," that allowed employees to view certain information related to their employment and to make certain changes electronically through the "employee portal." More specifically, e-Suite allowed employees to view their accrued leave balances, current benefit selections, and position and pay rate information. Employees could also use e-Suite to view and print copies of their pay statements and W-2 forms and to edit their address and phone number information on file with Respondent. When e-Suite was initially created, there were alternate means for unit employees to accomplish all these tasks without accessing e-Suite. Additionally, although employees could view their pay statements using e-Suite and could use the portal to opt out of receiving a paper statement, Respondent continued to deliver paper pay statements to employees at their workplaces.

Charging Party did not object to the implementation of the employee portal or demand to bargain over its implementation.

In June 2018, Charging Party President Ross Dean discovered that Respondent planned to cease providing paper pay statements. During a contract negotiating session held on June 19, 2018, Respondent confirmed that it would stop distributing paper pay statements and that employees would need to log in to e-Suite to view the information which was previously furnished to them on their paper statements. Charging Party demanded to bargain over the decision to stop distributing paper pay statements and the effects of the decision on unit members and asserted that the decision to stop distributing paper pay statements was a mandatory subject of bargaining. Respondent disagreed and refused to discuss the issue.

On June 28, 2018, Respondent's Human Resources (HR)/Payroll Department sent a memo to bargaining unit members informing them that Respondent had implemented software that, among other things, had the "ability to create an online employee portal for the paperless delivery of paystubs, W2s, etc." The memo stated that employees would be able to view their pay statements through the employee portal, which they could access from any internet connected device and from the computer kiosks located at all City locations and in the Payroll Department in City Hall, as well as from their personal computers or other internet-connected devices. Respondent informed employees that, as of the July 26, 2018 payroll, it would no longer print paper pay stubs, and noted that this would be a cost and time-saving measure for the Payroll Department. The memo also instructed employees to set up their e-Suite accounts as soon as possible and included an attachment to guide employees through the setup process.

C. The Unfair Labor Practice Charge

On July 10, 2018, the Union filed the instant charge alleging that Respondent violated its duty to bargain in good faith, and Section 10(1)(e) of PERA, by unilaterally eliminating paper pay statements and by refusing the Union's demand that it bargain over that action and its effects on employees.

On July 17, 2018, Respondent filed a motion for summary disposition of the charge, asserting that the change in its method of delivering pay statements was a permissive subject of bargaining. After hearing oral argument on the motion, the ALJ issued an interim order, on November 16, 2018, denying the motion and scheduling the charge for hearing. When the parties appeared before the ALJ for oral argument, she strongly urged them to attempt to reach a settlement of the dispute independent of their contract negotiations.

D. Settlement Discussions

On February 12, 2019, Charging Party wrote Respondent's HR Director, Mikki Manion, and requested to meet to discuss the issue of employee access to paper pay statements. Charging Party stated that, while not waiving its position that Respondent had a duty to bargain over the discontinuance of paper pay statements, it would not object to the issuance of pay information to its members in electronic format provided there were viable means for employees who wanted a paper statement to obtain it. Charging Party told Respondent that it wished to discuss: (1) the location of and employee access to computer terminals and printers for viewing and printing pay statements; (2) employee access to the City's HR Portal for electronic access to pay statements; (3) employee access to the Payroll/Human Resources Department at City Hall and hours of access for pay information and printing.

On February 19, 2019, Respondent presented Charging Party with a proposal to settle the unfair labor practice charge via a Memorandum of Agreement (MOA). The proposed MOA stated that Respondent would provide up to three bargaining unit members with regular printed pay statements. These employees could arrange to have their pay statements delivered to them by interdepartmental mail or could pick them up at Respondent's HR Department office during their designated breaks or after their regular working hours. The MOA also stated that unit employees would have ten days after the signing of the MOA to indicate whether they wanted to receive a printed pay statement. If more than three employees expressed a desire for a printed statement, the three employees with the highest bargaining unit seniority would receive printed statements. No employee who failed to sign up within the ten-day period would be eligible to receive a printed statement. After the three employees allowed to receive a printed statement separated from City employment, no other unit employees would be eligible to receive a printed statement. Charging Party rejected the MOA and indicated that it would make a counterproposal.

The parties agreed to meet on March 6 to review a new settlement proposal from Charging Party. At their meeting on March 6, 2019, Charging Party presented Respondent with two proposed alternate MOAs. Neither of Charging Party's proposals put a limit on the number of unit employees who could elect to receive paper pay statements, although both required unit members to elect either to receive a paper pay statement or to receive their pay information electronically within ten

days after the MOA was signed. Employees who failed to fill out an election form within ten days, and all employees hired after the signing of the MOA, defaulted to the electronic method. An employee's election to receive pay information electronically would be nonrevocable. The second Charging Party proposal also stated that employees who elected to access their pay information electronically would be eligible to receive assistance from the HR Department for problems that might arise in accessing the information. Respondent rejected both proposals and, at the conclusion of the meeting, the parties agreed that the matter should proceed to a hearing.

An evidentiary hearing was held on April 16, 2019 and the ALJ issued a Decision and Recommended Order on August 19, 2019.

Subsequent to this, the parties entered into a successor collective bargaining agreement covering the period December 20, 2019, to December 31, 2022.

Discussion and Conclusions of Law:

The Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions only with respect to those matters which constitute "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact upon "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield*, 433 Mich. 168, 177; 445 NW2d 98 (1989); *Port Huron Area School Distric*t, 28 MPER 45 (2014). Issues falling outside mandatory subjects of bargaining are classified as either permissive or illegal. *Southfield Police Officers Ass'n* at 178. What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n*, at 178. In *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line*, 414 Mich 642, 660 (1982), the Michigan Supreme Court held that matters that impinge upon a city's fundamental right to make decisions regarding the size and scope of municipal services based on factors such as need, available revenues, and the public interest are permissive, not mandatory, subjects of bargaining.

In its exceptions, Respondent argues that the ALJ erred when she concluded that the elimination of paper pay statements had an impact on unit employees sufficient to give rise to a duty to bargain. We agree and find that the evidence does not establish that the elimination of paper pay statements had an impact on unit employees sufficient to give rise to a duty on Respondent's part to bargain over the elimination or its effects on employees.

In the present case, all clerical and code enforcement bargaining unit employees have computers and printers at their work sites (Tr. 95-96). Employees in the Waste Water Treatment Plant have a computer terminal and printer in their facility that allows them access to and the ability to print their pay statements (Tr. 99-100). Employees at the Department of Public Works (DPW), if they do not have home computers, tablets or smart phones, may view their pay statements on a computer terminal at their employee breakroom in the DPW, a supervisor's computer at the DPW or at two locations at City Hall (Tr. 95-100, 134). City Hall is less than a half mile away from the

DPW building and is open for at least two hours after DPW employees get off work (Tr. 53, 78, 130).

Additionally the testimony of Julie Chatfield, April Key and Mikki Manion established that only one bargaining unit employee visits the Human Resources office regularly to print out an electronic pay statement (Tr. 101, 131, 154-155). Most of the requests for assistance from DPW employees involve requests to reset a password, a process that takes about one to five minutes (Tr. 102, 154-156). In addition, Ms. Manion's and Ms. Chatfield's testimony established that bargaining unit employees had numerous opportunities to receive training, while under pay and at each individual's own pace, to learn how to access the portal (Tr. 103-105, 150-156). Nonetheless, no employee requested further training (Tr. 105, 154). On this basis, we do not believe it is possible for us to conclude that the transition to electronic pay statements had a "significant impact" on bargaining unit employees. To the contrary, the implementation of electronic pay statements resulted, at most, in only minor inconvenience to a small number of employees. Consequently, there was no "significant impact" on the bargaining unit.

Furthermore, we believe the ALJ ignored longstanding Commission precedent which has held that it is a prerogative of management to apply technological advances in the public sector workplace and that such application is not a mandatory subject of collective bargaining. In *City of Portage (Police Dep ' t),* 1995 MERC Lab Op 251 (no exceptions), for example, the City installed video recording equipment with remote audio recording microphones in its patrol cars, and issued a new work rule requiring officers to video and audio record their activities during the normal work day. As a result, the Union filed a charge alleging that these actions constituted unilateral changes in working conditions in violation of the Employer's duty to bargain under Section 10(1)(e) of PERA. In dismissing the charge, the ALJ determined that the City's decision to purchase and install cameras in its patrol cars was not a mandatory subject of bargaining. The ALJ found it significant that "the decision to buy MVR systems for patrol cars is similar to the decision of an employer to utilize any equipment in its various operations, such as the decision to use patrol cars in the first place, and that such decisions are matters of management prerogative. See in addition to *Clinton, supra,* (decision to have an employee evaluation system), *Swartz Creek Comm. Schools,* 1994 MERC Lab Op 223, 225-226, 231-232 (decision to reduce size of work force); and *Ingham County and Sheriff,* 1988 MERC Lab Op 170, 172, 176 (decision of sheriff as to who will be permitted to carry weapons)."

In *Charlotte School District, Board of Education,* 1996 MERC Lab Op 193, 9 MPER 27059 (no exceptions), the Union alleged that the Employer violated its duty to bargain when it unilaterally changed the jobs of two employees by adding substantial new duties with regard to the computer system. The Union argued that the computer duties that the Employer was assigning to unit employees were beyond "the kind of work and services normally performed by high school-educated secretaries." In dismissing the charge, the ALJ noted that the decision to utilize new equipment is a managerial prerogative and not a mandatory bargaining subject: "Aside from the fact that it is not the function of this Commission to decide what kind of 'work' or 'services' may or may not be assigned to employees by their employers, I find the Union's argument in this

'computer age' to be without merit. The fact that employees, as well as employers, must adapt to the relentless computerization taking place in our society needs no demonstration or citation. The added work in this case was merely to become more familiar with the software being used by the employees and to be a resource for facilitating the resolution of any software or hardware problems. Regarding the introduction of new technology, the undersigned recently noted in *Portage Police Dep't,* 1995 MERC Lab Op 251, 256, that the decision to utilize new equipment is a management prerogative, and that an employer is obligated only to bargain the impact of such decision on the represented employees if an appropriate request is made by their bargaining agent. In this case the technology had been in effect since 1991, and the Employer was only seeking to have selected employees in each building become more familiar with the computer system and its software. Such duties are not a drastic or substantial alteration in the duties of office clerical employees in this day and age, which would give rise to a duty to give the Union advance notice and an opportunity to bargain before implementation."

In *City of Grand Rapids (Fire Department)*, 1997 MERC Lab Op 69, 10 MPER 28021 (no exceptions), the Union alleged that the Fire Department unilaterally implemented a fire service policy with respect to the personnel, training, and duties associated with confined space rescues (CSR). According to the Union, the duties involved constituted a substantial change in terms and conditions of employment that was implemented without negotiations. In dismissing the charge, the ALJ held that the "Union's argument that CSR constitutes a substantial change in job duties that must first be bargained misses the point in this case. Rescuing has always been part of a fire fighter's job, and the issuance of state and federal regulations relative thereto cannot negate that fact. The issue of the type of work, rescuing, should not be confused with the question of how that work is to be performed. The latter is merely a work assignment that the Employer can change without first notifying and bargaining with the Union. New technology and techniques are constantly being introduced and affect the performance of jobs connected therewith. As found by the undersigned in *Charlotte School Dist.*, 1996 MERC Lab Op 193, 201-203, the introduction of computers and word processing did not remove work from an office clerical unit, even if prior skills, such as shorthand., are rendered obsolete; see also *Portage Police Dep't,* 1995 MERC Lab Op 251, 255-257. The new equipment and safety measures mandated by the regulations in this case have no bearing on the fact that the underlying work has always been performed by fire fighters."

In *City of Lansing (Police Department)*, 1999 MERC Lab Op 340, 12 MPER 30054, the Commission found that the City did not commit an unfair labor practice when it negotiated and implemented an agreement with its firefighter dispatchers' union (IAFF) that preserved the union's representation rights until the current bargaining unit members vacated their positions in connection with the consolidation of the City's emergency dispatch functions. The Commission also found that the additional relief duties assigned to certain dispatchers did not violate PERA because "the addition of relief duties in this case constitutes nothing more than a change in work

assignment which is a matter of management prerogative. See *Charlotte School District,* 1996 MERC Lab Op 193, 201-202."

In *Van Buren County,* 14 MPER 32004 (2000), the Commission granted the County's request to clarify a bargaining unit of supervisory employees by excluding from the unit the position of information services director as a confidential labor relations employee. In granting the petition for unit clarification, the Commission commented on a number of its prior decisions involving the effects of technology and cited *City of Portage (Police Dep ' t)* and *Charlotte School District, Board of Education* with approval. We noted that "[t]he Commission and its ALJ's have had to confront, in a number of recent cases, the effects of technology on the work force. See e.g. *Johannesburg-Lewiston Area Schools,* 2000 MERC Lab Op --- (Case No. UC98 J-42, issued 8/29/00), motion for reconsideration pending (reorganization caused in part by new technology in the library/media centers); *Brimley Area Schools,* 2000 MERC Lab Op --- (Case Nos. UC99 F-20 and UC99 G-21, issued 5-24-00) (technology coordinator, rather than bookkeeper, excluded as confidential); *Muskegon County Sheriff,* 2000 MERC Lab Op 88, 92-93 (computer work assigned to deputy on light duty held not to be exclusive bargaining unit work); *Charlotte School Dist,* 1996 MERC Lab Op 193, 202-203 (added computer duties did not require advance bargaining); *Portage Police Dept,* 1995 MERC Lab Op 251, 256 (bargaining not required prior to adding cameras to patrol cars); *Washtenaw Comm College,* 1993 MERC Lab Op 781,789 (use of computer did not substantially alter the duties and responsibilities of position). All of these cases recognize the fact that bargaining units and job descriptions are fluid in nature, and that unit descriptions and work responsibilities and duties are constantly changing and evolving."

In the present case, as in the cases cited above, the Employer's decision to implement software that, among other things, has the ability to create an online employee portal for the paperless delivery of paystubs was a managerial prerogative and not a mandatory bargaining subject. The implementation did not result in a material or significant impact on the duties of bargaining unit employees. The fact that employees, as well as employers, must adapt to the relentless computerization taking place in our society needs no demonstration or citation and we find any argument made to the contrary in this 'computer age' to be without merit.

In connection with the foregoing and without waivering from the foregoing, it is significant to note that, after the ALJ's decision, the parties continued with negotiations for a new Collective Bargaining Agreement (CBA) and that the City Commission approved and adopted by general resolution a CBA between the City of Bay City, Michigan and Utility Workers Union of America Local #542 on December 16, 2019. The term of the collective bargaining agreement runs from December 20, 2019 through December 31, 2022.

It is well established that, where a collective bargaining agreement covers the subject matter in dispute, the parties have fulfilled their statutory duty to bargain. As the Michigan

Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 327 (1996): "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377. See also *Wayne Co Cmty Coll*, 20 MPER 59 (2007). When the matter is covered by the agreement, further bargaining on that subject is foreclosed because the parties have fulfilled their statutory duty to bargain. *Macomb Co v AFSCME Council 25*, 494 Mich 65, 79 (2013); *Pontiac Sch Dist*, 2002 MERC Lab Op 20.

In this case, Article 15, Section 14 of the 2019 CBA requires all employees to utilize direct payroll deposit. The provision, in its entirety, provides that "[e]ffective with the first payroll of January, 2015, all employees will be required to utilize direct deposit." No language was included in this section that requires paper receipts for direct deposits despite the fact that the Employer ceased providing paper pay statements more than a year prior to the effective date of the 2019 CBA. The 2019 CBA also contains a management rights provision, Article 2, Section 1, which provides that:

> Except when limited by the express provisions elsewhere in the Agreement, nothing in this Agreement shall restrict the City in the exercise of its functions of management under which it shall have, among others, the right to hire new employees and to direct the working force; to discipline, suspend, and discharge for cause; transfer or layoff employees; to create reasonable work rules; and to require employees to observe departmental rules and regulations. It is agreed that these enumerations of management prerogatives shall not be deemed to exclude other rights not enumerated.

Article 2, Section 3, Continuation of Working Conditions (a provision not found in the prior CBA), further provides:

> The City and the Union subscribe to the principle that this contract should be the complete Agreement between the parties. The parties, however, recognize that it is most difficult to enumerate in an Agreement practices inherent in a relationship of many years duration. If any claim, understanding, agreement, past practice, or condition of employment comes to the attention of either party during the term of this Agreement, which is not covered by this Agreement, the parties shall meet within five (5) work days' notice of such to discuss the understanding, agreement, condition of employment, or past practice, and negotiate a mutually satisfactory settlement. If the parties are unable to reach agreement within thirty (30) work days of their initial meeting, the dispute may be submitted to arbitration under Article 4–Grievance Procedure.

Furthermore Article 22, Waiver, states the that parties "...acknowledge that during negotiations each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. Therefore, the City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement..." See *Gogebic Cmty. Coll. Michigan Educ. Support Pers. Ass'n v. Gogebic Cmty. Coll.*, 246 Mich. App. 342, 351, 632 N.W.2d 517, 523 (2001) (Waiver provision of CBA supported the proposition that the CBA "covered" the matter in dispute).

In view of these provisions, we believe that the collective bargaining agreement covers the subject matter involved in this dispute and that the Employer cannot be required to bargain further regarding the matter involved herein. Although we recognize that the 2019 CBA does not provide a specific reference to paperless delivery of paystubs, we further recognize that, in *Berrien County and Berrien County Sheriff*, 33 MPER 30 (2019), the Union filed a charge alleging that Employer violated its duty to bargain under PERA when it refused to bargain over its implementation of a technological change involving body cameras. The Employer argued that it had no duty to bargain over its decision to require employees to utilize body cameras or the effects of its decision because the matter was covered by the collective bargaining agreement. In dismissing the charge, we noted:

> ...to be covered by the collective bargaining agreement a topic need not be specifically mentioned. See *Port Huron Ed Ass ' n v. Port Huron Area Sch. Dist.*, 452 Mich. 309, 322 (1996); citing *Dep ' t of Navy v. Fed. Labor Relations Authority*, 962 F2d 48, 58 (CADC 1998). As mentioned above, the germane question in determining whether the contract covers an issue is if the agreement contains provisions that can be reasonably relied on for the actions in dispute.

See also *City of Royal Oak*, 23 MPER 107 (2010) (a topic need not be specifically mentioned in order to be "covered by" the collective bargaining agreement—if a topic is "covered by" the collective bargaining agreement, there is no need to determine if there is clear and unmistakable evidence of a waiver); *Pontiac Sch Dist* , 2002 MERC Lab Op 20; *Houghton Lake Community Schools*, 1997 Lab Op 42; *Wayne County*, 29 MPER 1, p. 6 (2015); *City of Pontiac (Police Dep ' t)*, 1997 MERC Lab Op 201 (no exceptions); *St. Clair County Road Commission*, 1992 Lab Op 533; *Wayne State University*, 1997 Lab Op 484; and *City of Pontiac*, 26 MPER 30 (2012).

In the present case, the agreement contains provisions that can be reasonably relied on to support the Employer's actions. The matter involved in this dispute is, therefore, "covered by" the agreement. Consequently, we believe the remedy recommended by the ALJ is without basis and cannot be affirmed.

We have also considered all other arguments submitted by the Parties and conclude that they would not change the result in this case.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Member

Robert S. LaBrant, Commission Member

Dated: May 14, 2020

Samuel R. Bagenstos, Commission Chair, Dissenting.

I respectfully dissent. I do not believe that the 2019 collective bargaining agreement in any way "covers" the matter at hand or obviates the controversy regarding the employer's unilateral move to electronic pay stubs in 2018. And I would conclude that the electronic pay stubs were a mandatory subject of bargaining, because they relate directly to the employees' wages—one of the core subjects of collective bargaining under the statute. In holding to the contrary, my colleagues rely heavily on inapposite decisions—many of which are ALJ decisions from which no appeal was taken. The majority opinion contains broad *dicta* that might be unduly read to suggest that the introduction of new workplace technology is never a mandatory subject of bargaining. Because that reading is unwarranted—and I do not believe the Commission will or should adhere to such a broad principle in future cases—I believe the majority's *dicta* is unwise.

The issue in this case is straightforward. Under the collective bargaining agreement in place from 2014 through 2017, Bay City (whom I will call the "employer") required its workers to use direct deposit. Accordingly, pay was sent directly to employees' banks, though the workers continued to receive paper pay stubs to confirm that they were receiving the correct wages and that the correct deductions for benefits were being taken. After the collective bargaining agreement expired, the employer continued to require the use of direct deposit. But in June 2018, without first bargaining over the matter, the employer stopped providing paper pay stubs. It instead required workers to consult its computerized "e-Suite" if they wanted to confirm that their wages and deductions were correct.

Our law is clear that "[b]efore an impasse in the bargaining process is reached, neither party may take unilateral action with respect to a mandatory subject of bargaining." *AFSCME Local 25 v. Wayne Cty.*, 297 Mich App 489, 495; 824 NW2d 271, 274 (2012) (internal quotation marks omitted). It is undisputed that the employer unilaterally implemented the electronic pay stubs in June 2018, without first bargaining over the question—let alone bargaining to impasse.

So the dispute turns on the question whether the move to electronic pay stubs was a mandatory subject of bargaining. If it was, the employer's unilateral imposition of that change in 2018 violated Section 10(1)(e) of the Public Employment Relations Act, MCL 423.210(1)(e). See *Jackson Cmty. Coll. Classified & Tech. Ass'n, Michigan Educ. Support Pers. Ass'n v. Jackson Cmty. Coll.*, 187 Mich App 708, 712; 468 NW2d 61, 63 (1991) ("An employer who takes unilateral action on a mandatory subject of bargaining before an impasse has committed an unfair labor practice under the PERA."). Any *subsequent* bargaining between the parties might affect the *remedy* we could or should order. But it would not vitiate the unfair labor practice that occurred in 2018.

1. My colleagues conclude that the collective bargaining agreement entered into by the parties in 2019 obviates the claim that the employer committed an unfair labor practice a year earlier when it refused to bargain over the pay-stub issue. I disagree.

As my colleagues note, the law on this issue comes from the Michigan Supreme Court's decision in *Port Huron Education Association, MEA/NEA v. Port Huron Area School District*, 452 Mich 309; 550 NW2d 228 (1996). But this case is decisively unlike that one. If anything, *Port Huron* demonstrates that the 2019 collective bargaining agreement does *not* obviate the 2018 dispute that is the basis of the unfair labor practice charge here.

In *Port Huron*, the parties entered into a collective bargaining agreement in 1978 that explicitly addressed the matter at hand (whether the employer would pay for a full year's health premiums for employees hired mid-year, or whether the employer's payments would be prorated). See *id. a*t 312-313; 550 NW2d at 232. Subsequently, *during the term of the contract*, the employer sought to enforce the contract's proration provision. See *id.* at 313-314; 550 NW2d at 232-233. The union then demanded that the employer bargain over it. See *id.* The Court held, quite appropriately, that the employer could rely on the CBA provision it had negotiated, a provision that by its terms covered the dispute. See *id.* at 322-324; 550 NW2d at 236-237. In a careful and scholarly discussion, the Court explicitly distinguished between cases in which a matter is "covered by" a collective bargaining agreement—in which the union has exercised its bargaining right, so there could not have been a failure to bargain—and cases in which a union has waived the claim that the employer refused to bargain. See *id.* at 319-320; 550 NW2d at 235.

There is an obvious and crucial difference between this case and *Port Huron*: There, the union sought, *during the contract term*, to *re*-negotiate an unambiguous provision that was included in the collective bargaining agreement that governed the employer's conduct. Of course the employer had a "right to rely" on the provision in that context—it had already "fulfilled its duty to bargain" over the issue. *Id.* at 327; 550 NW2d at 238. Here, by contrast, at the time it refused to bargain, the employer could not have been relying on any contract term it had negotiated, because *no collective bargaining agreement was in place*. *Port Huron* is simply inapposite.

Even if the 2019 collective bargaining agreement did "cover" the issue, that would justify only the use of electronic pay stubs after the contract's adoption. It would not reach back in time and eliminate the alleged unfair labor practice that occurred a year earlier when the employer unilaterally imposed the new "e-Suite" requirement. And there is compelling reason to conclude that the 2019 agreement did not "cover" the pay-stub issue. The contract, of course, contains no language expressly referring to electronic pay stubs. And the employer consistently took the position that it was not required to, and would not, negotiate about the initial decision to impose electronic pay stubs.

The employer asserts that it did bargain to impasse on the question. See Br. In Support of Exceptions 22-25. Judge Stern reached the contrary conclusion. And she was correct. The employer agreed to bargain over the issue only after the filing of the unfair labor practice charge—and well after it unilaterally implemented the electronic pay-stub mandate. It never reversed or suspended that mandate during the brief negotiations. And it is apparent from its own brief to the Commission that the employer viewed these negotiating sessions as limited to bargaining over the *effects* of the decision rather than over the basic decision whether to require use of the "e-Suite." See *id.* at 23 ("An employer is not required to maintain the status quo, until either impasse or an agreement is reached, on a non-mandatory subject of bargaining. An employer may

implement its decision on a permissive subject of bargaining when a collective bargaining agreement expires.") (citation omitted); *id.* at 24 ("If an employer is not required to bargain the effects of layoffs before they are implemented, the City was under no obligation to bargain the effects of electronic pay statements before that process was implemented.").

But the issue here is not whether the employer violated a duty to bargain over the effects of the pay-stub decision—a duty it would have even if the matter were a permissive subject. The issue is whether the issue was a mandatory subject, and thus whether the employer had a duty to bargain over the initial decision—a duty it plainly did not discharge before it implemented the change. The distinction between the primary bargaining obligation and the obligation to engage in "effects" bargaining is well established in our law. See, e.g., *Metro. Council No. 23 & Local 1277, of Am. Fed'n of State, Cty. & Mun. Employees (AFSCME) AFL-CIO v. City of Center Line*, 414 Mich 642, 661; 327 NW2d 822, 830 (1982) ("While the initial decision to lay off is not a mandatory subject of bargaining, the impact of that decision is an issue for bargaining.").

My colleagues point to some cases that generally say that a topic need not be *specifically mentioned* to be covered by a collective bargaining agreement. But this case goes well beyond a mere failure to specifically mention the decision to impose electronic pay stubs. The parties plainly *did not* bargain over the basic issue, because the employer consistently refused to bargain over it.

So the 2019 collective bargaining agreement did not "cover" the matter at hand—and even if it did that would not be enough to bless an unfair labor practice committed in 2018. But the 2019 contract might nonetheless be relevant if it contained a term that waives any challenge to the failure to bargain over the pay-stub issue. Parties may well decide, in the interests of maintaining good relations in the future, to wipe the slate clean of past disputes when they adopt a new collective bargaining agreement. But we cannot simply assume that a new contract closes the books on all pending unfair labor practices. Our law requires us to assure ourselves that the parties in fact agreed to waive their rights to pursue pending charges. And implied waivers of statutory rights are not favored.

Did the union, by entering into the CBA in 2019, waive its claims that the employer violated its duty to bargain over mandatory subjects in 2018 by unilaterally implementing electronic pay stubs? On that question, *Port Huron* sets up a very demanding standard. The Court "require[s] unmistakable evidence to support a claim that the union has waived the statutory right." *Port Huron*, 452 Mich at 320; 550 NW2d at 235.

The "Waiver" provision of the 2019 collective bargaining agreement appears in Article 22. Applying the *Port Huron* standard, I cannot read that provision as a waiver of the duty-to-bargain claim. Article 22 sets forth the following mutual acknowledgment (emphasis added):

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter ***not removed by law from the area of collective bargaining***, and that the understandings and agreements arrived at by the parties after the exercise of the right and opportunity are set forth in this Agreement. Therefore, the City and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each

> agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge and contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

The highlighted language is absolutely crucial to interpreting the waiver provision under the *Port Huron* standard. That language is most naturally read to say that the parties agree that they have negotiated fully with regard to all of the issues that they agree are mandatory subjects of bargaining—but that they have not negotiated, and do not waive any claims, with respect to any other issues. Because the parties persistently disagreed about whether the pay-stub issue was a mandatory subject of bargaining, the waiver language does not encompass that issue. And even if there are other plausible interpretations of that language, it is certainly not "unmistakable evidence . . . that the union has waived the statutory right" as required by *Port Huron*. I therefore dissent from the majority's conclusion that the 2019 collective bargaining agreement obviates the charge of failure to bargain in 2018.

2. The majority's conclusion that the 2019 collective bargaining agreement obviated the 2018 duty-to-bargain dispute—erroneous though I believe it to be—means that my colleagues' extensive discussion of the mandatory-subject issue is pure *dicta*. And it is particularly unfortunate *dicta* at that. I believe that the use of electronic pay stubs is properly understood as a mandatory subject of bargaining under our statute. More important, I reject my colleagues' broad suggestion that the adoption of new technology is generally a matter of managerial prerogative not subject to bargaining obligations. Indeed, I doubt that the Commission will follow that broad suggestion in other cases.

On the specific issue before the Commission, my dispute with my colleagues is narrow. I agree that the mandatory-subject question here is a close one. Unlike the majority, I agree with Judge Stern that the decision to implement electronic pay stubs was a mandatory subject of bargaining.

Section 15 of the Public Employment Relations Act imposes a duty to bargain over "wages, hours, and other terms and conditions of employment." MCL 423.215. The test for determining whether an issue fits within this language—or, in the words of our doctrine, is a "mandatory" subject—is whether it "has a *significant* impact on wages, hours, or other terms and conditions of employment." *Oak Park Pub. Safety Officers Ass'n v. City of Oak Park*, 277 Mich App 317, 325; 745 NW2d 527, 533 (2007) (emphasis in original).

Judge Stern concluded that the switch to electronic pay stubs had a significant impact on employees' wages. I see no reason to disturb that conclusion. Pay stubs have a direct relationship to wages—one of the terms and conditions specifically singled out in our statute. Where wages are deposited directly in a worker's bank account—as is the case in this bargaining unit—the pay stub is the key means by which employees can ensure that they are receiving the correct amount of money, and that the correct amounts are deducted for benefits, each pay period. And as Judge Stern found after a hearing, many bargaining-unit employees lack ready access to computers and

printers. The effects of the switch on their ability to ensure that they were collecting the correct wages were thus significant.

This case is very different than the cases on which the majority relies, which did not involve the process of paying wages. And there is no plausible argument that the decision to substitute electronic for paper pay stubs is one of the "management decisions which are fundamental to the basic direction of a corporate enterprise" that lies within the employer's sole managerial prerogative. *Houghton Lake Ed. Ass'n v. Houghton Lake Cmty. Sch., Bd. of Ed.*, 109 Mich App 1, 6; 310 NW2d 888, 890 (1981). The paradigm cases of such decisions are "product-market"-type decisions involving what sorts of services to offer the public (analogous to a private company's decision about what lines of business to enter), which are quite removed from the labor-relations focus of the statute. Internal human resources practices like the one at issue here are much less "fundamental" to an enterprise's "basic direction," and they relate directly to labor relations.

Although I believe, contrary to the view of my colleagues, that the employer's decision to abandon paper pay stubs was a mandatory subject of bargaining, I am less concerned about the majority opinion's narrow holding than about its broad *dicta*. The majority says that "the ALJ ignored longstanding Commission precedent which has held that it is a prerogative of management to apply technological advances in the public sector workplace and that such application is not a mandatory subject of collective bargaining." *Ante*, p. 5. That broad statement is not necessary to decide the pay-stub issue, it is not supported by the cases on which the majority relies, and it is flatly inconsistent with the statute. The Commission should not rely on that statement as resolving future cases, and I trust that it will not do so.

Start with the statute. The Public Employment Relations Act, as I have said, specifically provides that "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. MCL 423.215. Imagine an employer decides to "apply technological advances" by adopting a new computerized system to set workers' schedules or to calculate overtime pay. Such a system will have a direct and significant effect on employees' wages and hours. There is no basis for treating it as outside of the scope of the bargaining obligation simply because it represents an application of a new technology. Indeed, given the likelihood that such computerized systems will make consequential errors, workers may have a particular reason to seek to bargain over their adoption.[2]

Now turn to the cases on which the majority relies. None of them involved technology with a particularly direct relationship to wages or hours. See *City of Portage (Police Dep't),* 1995 MERC Lab Op 251 (no exceptions) (installation of recording devices in patrol cars); *Charlotte Sch. Dist., Bd. of Educ.*, 1996 MERC Lab Op 193, 9 MPER 27059 (no exceptions) (giving

[2] Our state—and the very Department in which this Commission is housed—has recent, unfortunate experience with such computerized systems. See, *e.g.*, Jonathan Oosting, *Michigan Refunds $21M in False Jobless Fraud Claims*, Det. News, Aug. 11, 2017, https://www.detroitnews.com/story/news/politics/2017/08/11/michigan-unemployment-fraud/104501978/ ("All told, the state has now reversed 85 percent of the 40,195 fraud determinations made by an automated computer system without any human review. Another 22,589 fraud complaints were initiated by the computer program but referred to a human investigator. The state reversed 44 percent of those cases during its latest review.").

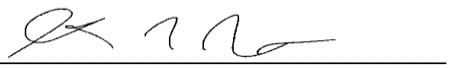
secretaries new duties to use computerized word processors rather than taking shorthand).[3] Many of them involved technology, but only as it relates to other statutory questions, such as the composition of an appropriate bargaining unit. See, for example, *Van Buren County*, 14 MPER 32004 (2000), and cases cited therein. And some refer in *dicta* to technology but do not themselves resolve any especially technological question. See *City of Grand Rapids (Fire Department)*, 1997 MERC Lab Op 69, 10 MPER 28021 (no exceptions) (imposing new procedures for firefighters to carry out confined-space rescues); *City of Lansing (Police Department)*, 1999 MERC Lab Op 340, 12 MPER 30054 (adding new relief duties to certain police dispatchers).

Most important, the majority's broad statement is not necessary to resolve this case—and it would not be necessary even if the majority did believe the pay-stub dispute was properly before us. This case can be resolved on the narrow ground that "the implementation of electronic pay statements resulted, at most, in only minor inconvenience to a small number of employees." *Ante*, p. 5. Although, as I said, I disagree with that conclusion, I have been outvoted. And that point is all that is necessary to resolve the dispute.

The Michigan Supreme Court has squarely instructed that "[t]he determination of what constitutes a mandatory subject of bargaining under the PERA is to be decided case by case." *Southfield Police Officers Ass'n v. City of Southfield*, 433 Mich 168, 178; 445 NW2d 98, 102 (1989). Accordingly, despite its apparently broad *dicta*, the majority's decision should not be read as resolving anything more than the precise question of whether a switch to electronic pay stubs is a mandatory subject. Today's decision should not be read to adopt a rule excluding all employer impositions of new technology from the obligation to bargain. As the *Southfield* decision makes clear, we would not have the power to adopt such a broad rule in any event. Rather, I trust that the Commission will approach the mandatory-subject question in the future based on the facts of the case before us, as the Supreme Court demands.

I respectfully dissent.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Samuel R. Bagenstos, Commission Chair

Dated: May 14, 2020

[3] When, as in the *Portage* and *Charlotte* cases, the parties do not file exceptions to the administrative law judge's decision and recommended order, that order becomes binding on the parties. It is also persuasive authority for the Commission and other ALJs. But an unappealed-from order by a single ALJ does not carry the weight of *stare decisis* before the Commission itself.

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

In the Matter of:

CITY OF BAY CITY,
Public Employer-Respondent,

Case No. C18 G-067
-and- Docket No. 18-014481-MERC

UTILITY WORKERS UNION OF AMERICA, AFL-CIO,
LOCAL 542,
Labor-Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Steven H. Schwartz, for Respondent

James C. Harrison, Utility Workers Union of America, AFL-CIO, 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 on April 16, 2019, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Office of Administrative Hearings and Rules (formerly the Michigan Administrative Hearing System) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by both parties on May 28, 2019, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and History of the Proceeding:

On July 10, 2018, the Utility Workers of American AFL-CIO, Local 542, filed this unfair labor practice charge against the City of Bay City. Charging Party represents a bargaining unit of Respondent's employees which includes clerical employees and customer service clerks, park maintenance employees, refuse collection workers, wastewater treatment plant employees, water distribution employees who maintain water lines and handle connections and shutoffs, sewer maintenance employees, street maintenance employees who do pavement repairs and sweep streets, and mechanics who repair and maintain trucks and heavy equipment. All unit employees are paid by direct deposit. However, until about August 1, 2018, employees received paper pay statements delivered to their work locations. In about the second week of June, 2018, Charging Party learned that Respondent planned to eliminate paper pay statements and provide employees

instead with online access to their statements through an employee portal. Charging Party made a demand to bargain over the change, which Respondent refused. Charging Party alleges that Respondent violated its duty to bargain in good faith, and Section 10(1)(e) of PERA, by unilaterally eliminating paper pay statements and by refusing Charging Party's demand that it bargain over that action and its effects on employees.

On July 17, 2018, Respondent filed a motion for summary disposition of the charge, asserting that the change in its method of delivering pay statements was a permissive, not a mandatory, subject of bargaining. After hearing oral argument on the motion on October 11, 2018, I indicated my intent to deny the motion. On November 16, 2018, I issued an interim order in which I concluded that Respondent's decision to implement this change was not fundamental to the basic direction of its enterprise and that requiring it to bargain over this decision would not impinge on its right to make decisions regarding the size or scope of municipal services. However, I also concluded that whether the change had a significant impact on the employees' terms and conditions of employment depended on facts that were either in dispute or not contained in the parties' pleadings. Denying Respondent's motion for summary disposition, I scheduled a hearing for January 3, 2019.

Findings of Fact:

Background

The parties' most recent collective bargaining agreement covered the period July 1, 2014, to December 31, 2017. At the time of the hearing on this charge in April 2019, the parties were still engaged in bargaining a successor agreement.

The parties have bargained over the issue of direct deposit of employee paychecks since the mid-2000s. Their 2006-2009 agreement stated, "Direct deposit is available for those employees who wish to have their paycheck directly deposited to their financial institutions. Employees hired after May 1, 2003, will be required to utilize direct deposit." In the 2014-2017 agreement, utilizing direct deposit became mandatory.

On March 6, 2017, Respondent notified employees that it had created an electronic portal, "e-Suite," which allowed employees to view certain information and make certain changes electronically through an "employee portal." In order to access the portal, employees must have access to a computer or other internet-connected device and, if using a Respondent computer, log in with the user ID and password they use to access their employer email accounts, or someone else's user ID and password. Employees then use the computer's browser, or an icon on the screen, to navigate to the portal's web address. They must then set up an e-Suite account and create another user ID and password for that site. As part of the process, a message is automatically sent to the employee's work email address, so employees must access their email accounts in order to register for an e-Suite account. After that employees can then use their user IDs and password to log in to e-Suite.

Employees can use e-Suite to view their accrued leave balances, current benefit selections, and position and pay rate information. They can also view and print copies of their pay statements

and W-2 forms. In addition, employees could use e-Suite to edit their address and phone number, emergency contact, and direct deposit information on file with Respondent and add and delete dependents on their health insurance, although these changes are listed as pending until approved by Respondent in a separate process. However, when the employee portal was initially created, there were alternate means for unit employees to accomplish all these tasks without accessing e-Suite. In addition. although employees could view their pay statements using e-Suite and could also opt out of receiving a paper statement, Respondent continued to deliver paper pay statements to employees at their workplaces. Charging Party did not object to the creation of the employee portal or demand to bargain over its implementation.

The Elimination of Paper Pay Statements

Until the present dispute, it was Respondent's practice to deliver paper pay statements to employees' work locations through the interoffice mail system and have supervisors distribute them to employees sometime during the workday. Usually employees got their statements on payday, but sometimes they received them either the day before or the day after. In addition to the deductions and gross and net amount of their wages, employees' pay statements list the amount of their accrued vacation and sick time.

Sometime around the second week of June 2018, Charging Party President Ross Dean heard that Respondent planned to cease providing paper pay statements. During a contract negotiating session held on June 19, 2018, Respondent confirmed that it would stop distributing paper pay statements and employees would need to log in to e-Suite to view the information which had been on their paper statements. Charging Party demanded to bargain over the decision to stop distributing paper pay statements and the effects of the decision on unit members and asserted that the decision to stop distributing paper pay statements was a mandatory subject of bargaining. Respondent disagreed and refused to discuss the issue.

On June 28, 2018, Respondent's Human Resources (HR)/Payroll Department printed out a memo and distributed it with employees' pay statements. The memo was sent to every employee who had not previously opted through e-Suite to forego paper statements; all Charging Party members received the memo. The memo informed employees that Respondent had implemented software which, among other features, had the "ability to create an online employee portal for the paperless delivery of paystubs, W2s, etc." The memo stated that employees would be able to view their pay statements through the employee portal, which they could access from any internet connected device and from the computer kiosks located at all City locations and in the Payroll Department in City Hall, as well as from their personal computers or other internet-connected devices. Respondent informed employees that as of the July 26, 2018, payroll, Respondent would no longer print paper pay stubs, and noted that this would be a cost and time-saving measure for the Payroll Department. [1] The memo instructed employees to set up their e-Suite accounts as soon as possible and included an attachment to guide employees through the setup process. Employees

[1] Respondent's witnesses testified that prior to the implementation of the new system, an employee of the Payroll Department spent approximately two hours every pay period printing pay statements, folding them, and putting them into envelopes. The envelopes were then picked up by employees or sent by interdepartmental mail to employee work areas where they were distributed by supervisors or administrative assistants.

with questions or experiencing difficulties were to contact either the Human Resources or Payroll Departments.

Employees who had not previously activated their email accounts, or who had forgotten their email passwords, had to contact Respondent's information technology department for help with their email accounts before they could set up their e-Suite accounts. In July 2018, Respondent scheduled a series of training sessions for employees on setting up e-Suite accounts and resetting passwords for accounts that employees had already set up. Information technology staff were at these sessions to help employees who had never accessed their work email accounts. Laptops were set up so that employees could practice accessing their email and e-Suite accounts. Employees attending the training were also given copies of the instructions attached to the June 28, 2018, memo on how to access the employee portal and set up an e-Suite account. Training sessions were held at the wastewater treatment plant and at various other locations; some were held during employees' normal working hours and some after. According to sign-in sheets, approximately forty of Respondent's 275 employees attended one of these training sessions. Employees were told at these training sessions that if they wanted help accessing the portal or wanted their statements printed, they could come to the HR/Payroll Department at lunch or on their breaks or after the end of their shifts.

As noted above, the unfair labor practice charge was filed on July 10, 2018, and Respondent filed a motion for summary disposition on July 17, 2018. Attached to the motion was an affidavit from Mikki Manion, Respondent' HR Director, stating that in addition to being able to view their pay statement on City computers, employees could obtain printed copies of their statement by going to the HR Department in City Hall on their break times or after work. During the entire period between the filing of the charge in July 2018 and the hearing in April 2019, the parties continued to meet and bargain over the terms of a new contract.

Settlement Discussions

When the parties appeared before me for oral argument on the motion, I strongly urged them to attempt to reach a settlement of this dispute independent of their contract negotiations. On February 12, 2019, Charging Party delivered a letter to Manion asking to meet to discuss the issue of employee access to paper pay statements. Charging Party stated that, while not waiving its position that Respondent had a duty to bargain over the discontinuance of paper pay statements, it would not object to the issuance of pay information to its members in electronic format as long as there were viable means for employees who wanted a paper statement to obtain it. Charging Party told Respondent that it wished to discuss: (1) the location of and employee access to computer terminals and printers for viewing and printing pay statements; (2) employee access to the City's HR Portal for electronic access to pay statements; (3) employee access to the Payroll/Human Resources Department at City Hall and hours of access for pay information and printing.

At the parties' next scheduled contract negotiating session on February 19, 2019, Respondent presented Charging Party with a proposal to settle the unfair labor practice charge in the form of a memorandum of agreement (MOA). The MOA stated that Respondent would provide up to three bargaining unit members with regular printed pay statements. These employees could arrange to have their pay statements delivered to them by interdepartmental mail or could pick

them up at Respondent's HR Department office during their designated breaks or after their regular working hours. The MOA also stated that unit employees would have ten days after the signing of the MOA to indicate whether they wanted to receive a printed pay statement. If more than three unit employees expressed a desire for a printed statement, the three employees with the highest bargaining unit seniority would receive printed statements. No employee who did not sign up within the ten-day period would be eligible to receive a printed statement. After the three employees allowed to receive a printed statement separated from City employment, no other unit employees would be eligible to receive a printed statement. Charging Party rejected the MOA but indicated its intent to make a counterproposal. There was no other testimony regarding the discussions taking place between the parties over the MOA at this meeting.

The unfair labor practice charge was scheduled to be heard on March 5, 2019. However, the parties agreed to adjourn the hearing on the pay statement charge again and to meet on March 6 to review a new settlement proposal from Charging Party. At their meeting on March 6, 2019, Charging Party presented Respondent with two proposed alternate MOAs. Neither of Charging Party's proposals put a limit on the number of unit employees who could elect to receive paper pay statements, although both required unit members to elect either to receive a paper pay statement or to receive their pay information electronically within ten days after the MOA was signed. Employees who failed to fill out an election form within ten days, and all employees hired after the signing of the MOA, defaulted to the electronic method. An employee's election to receive pay information electronically would be nonrevocable. The second Charging Party proposal also stated that employees who elected to access their pay information electronically would have access to assistance from the HR Department for problems that might arise in accessing the information. Respondent rejected both proposals. Again, there was no testimony about the parties' actual discussion of the proposals. After the meeting, the parties agreed that the matter should proceed to hearing.

Impact of the Change on Unit Employees.

According to Charging Party, most unit employees lack convenient access at work to a computer on which to access the employee portal and view their pay statements. Moreover, even those who own internet-connected devices may not have a printer that connects to their device.

There are approximately seventy-two employees in Charging Party's bargaining unit. Nineteen of them work in offices where they have free access to a computer and printer to view and print their pay statements. These include clerks and clerical employees at City Hall, and clerical employees who work in places other than City Hall, such as the police department, or the wastewater treatment plant.

Other than those who work in City Hall, most unit employees work all or part of their time in the field. These include employees in the wastewater treatment plant, which is slightly less than two miles away from City Hall. Sewer maintenance employees work out of this building, although they work mainly in the field. Most of the remaining unit employees are employed by the Department of Public Works (DPW) and work in or out of a block of Respondent buildings located less than one-half mile from City Hall. A substantial number of DPW employees spend most of their day out in the field. For example, Charging Party Vice-President Howard Fahndrich, a streets

maintenance employee, testified that his crew usually returns to a DPW building for lunch, but takes its breaks out in the field before returning to the facility at the end of their shift. Shifts for field employees start at different times, with most of them beginning at 7 am, an hour before City Hall opens, and ending at 3:30 pm, with a half hour lunch period.

As indicated above, after Charging Party objected to the elimination of paper pay statements, Respondent informed employees that they could view and print their pay statements by visiting the HR/Payroll Department offices in City Hall on their breaks or after their shifts. Respondent's June 28, 2018, memo referenced "computer kiosks" located at various City locations. At the time the memo was issued there were two computers at City Hall which could be used by employees working elsewhere. One was the computer and printer in the HR/Payroll Department, which employees could visit during lunch, breaks, and after work. The other was a computer in the City Hall employee break room. There was also a computer in the street/sanitation/fleet maintenance breakroom located in a DPW building. Neither of the breakroom computers are connected to printers.

After the charge was filed, Respondent designated one computer and printer in each of three locations outside City Hall for use by employees at those locations who wished to view and access their pay statements. One is in an area of the wastewater treatment plant, another is in the sewer maintenance areas of the plant, and the third is in the building where water employees work. These three computers are all assigned to supervisors and located on the supervisors' desks. In order to use these computers, employees must first obtain permission from these supervisors. Then, unless the supervisor is willing to give employees access to the supervisor's documents, the supervisor must log off or have the employee use the "switch user" function on the supervisor's screen. The employees then log in first to the computer using their email user ID and password, and then to their e-Suite portal to log in with their e-Suite ID and password.

Unit employees who have home personal computers, tablets, or smart phones can also access the employee portal from these devices and print their statements if their devices are connected to printers or can use a public device such as a library computer.

Except for clerical employees, few if any of the unit employees in the DPW and at the wastewater treatment plant have any duties that require working with computers. Although all employees have assigned work email addresses, they are not required to check their emails unless their specific job duties require them to do so. Charging Party President Dean testified without contradiction that many field employees, including himself, have minimal computer skills. As noted above, when Respondent ceased providing employees with paper statements, many unit employees had not set up their email accounts.

On March 15, 2019, Respondent notified Charging Party that unit employees could sign up to receive emails, at their employer email addresses, each payday showing the amount of money being deposited to their bank account. Each email would also include a link to the employee portal.

Charging Party President Dean testified that at the time of the hearing, he had received complaints from approximately twenty unit members that they had not been able to access e-Suite. He also testified that he himself was not sufficiently comfortable with computers to try and access

it. According to Dean, he once went to Human Resources to obtain his statement but the staff member there could not access his account; he did not go a second time. Manion testified, however, that she had not received reports from employees that the new system was not operating properly, and, to her knowledge, Respondent's information technology department had not received any such complaints either. Other Human Resources staff testified that during the period immediately after the elimination of paper pay statements, employees visited the Department for assistance in accessing their accounts, but these visits tapered off. One employee has come regularly every pay day since the paper statements were eliminated to view and print his pay statement; this employee needs no assistance to perform these tasks. The Human Resources staff testified that employees also frequently call or visit the Human Resources Department to have their e-Suite passwords reset when they forget them, but not to complain or ask for other assistance. At the time of the hearing neither Respondent nor Charging Party had apparently tried to determine exactly how many unit employees owned personal devices that connected to the internet, had printers that connected to their devices, or were comfortable accessing and navigating internet sites that require user identification.

Discussion and Conclusions of Law:

Any matter which has a significant impact on wages, hours or working conditions or settles an aspect of the relationship between employer and employee is a mandatory subject of bargaining under PERA, except for management decisions which are fundamental to the basic direction of the enterprise or which impinge only indirectly upon the employment security. *Houghton Lake Ed Ass'n v Houghton Lake Cmty Sch,* 109 Mich App 1, 6 (1981); *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 492 (1975). As the Michigan Supreme Court held in *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line,* 414 Mich 642, 660 (1982), matters that impinge upon a city's fundamental right to make decisions regarding the size and scope of municipal services based on factors such as need, available revenues, and the public interest are permissive, not mandatory, subjects of bargaining. Decisions about the number of employees to employ in which positions, and the decision to lay off employees, fall into this category.

Respondent maintains that its decision to streamline its payroll process by converting from paper to electronic pay statements was within its managerial prerogative and that the elimination of paper pay statements had no significant impact on employees. Therefore, it asserts, this change in its methods of delivering pay statements was a permissive, not a mandatory, subject of bargaining and it had no duty to bargain over the effects of this decision on employees because there were none. Respondent also maintains that regardless of whether it had a duty to bargain, the parties did bargain to impasse over both the implementation of the change and its impact on employees.

While public employers' obligations to the public include improving the efficiency of their operations, a management decision is not fundamental to the basic direction of the employer's enterprise merely because it saves the employer money. Management decisions not fundamental to the basic direction of the enterprise are mandatory subjects of bargaining if they have a significant impact on wage, hours, or working conditions or directly affect employment security. The Commission has held in several cases that employers had no duty to bargain over paycheck-related changes, either because it found no significant impact from the change or because the change did not involve an established working condition. In *West Ottawa Pub Schs,* 1985 MERC

Lab Op 477, the employer had provided employees who had accounts in the same bank as the employer the option of directly depositing their paychecks. The Commission held that direct deposit in these circumstances was a "mere convenience," not a term or condition of employment, and therefore the employer had no duty to bargain over its elimination. In *City of Westland,* 1988 MERC Lab Op 853, the Commission held that the employer did not have to bargain over the elimination of its practice of posting payroll information in advance of payday as this change had no significant impact on employees since they continued to receive a pay stub with all this information on their payday. The Commission has found changes in the pay schedule or length of the pay period to be mandatory subjects of bargaining. *Children's Aid Society,* 1994 MERC Lab Op 323, 327 (change in the length of "lag time," i.e., length of time employees had to wait between earning their wages and receiving their paychecks); *Detroit Bd of Ed,* 2000 MERC Lab Op 375 (change from paying longevity in bi-weekly payments to lump sum annual bonus); *City of DeWitt,* 16 MPER 38 (2003) (no exceptions)(change in pay period from weekly to bi-weekly). The National Labor Relations Board (NLRB) has also held that employers have a duty to bargain over the length of the pay period or schedule and over certain paycheck-related issues. See, e.g. *American Ambulance*, 255 NLRB 417, 418 (1981), enf'd 692 F2d 762 (CA 9 1982); *Abernathy Excavating,* 313 NLRB 68, fn 1(1993) and cases cited therein. In *Appel Corp,* 302 NLRB 425 (1992), an NLRB ALJ held that Respondent had a duty to bargain over the elimination of an established practice of permitting employees, upon request, to receive their paychecks earlier on payday than the established hour.

The Commission has not addressed whether the substitution of electronic access to pay information for paper pay statements is a mandatory subject and the NLRB does not appear to have done so either. However, the issue in the cases above, like the instant case, is whether the change had a significant impact on employees to give rise to a duty to bargain.

Besides being more efficient for an employer, employee portals like the one implemented by Respondent in this case can significantly benefit employees. For example, employees can access their benefit information when they need it, without going through an employer's human resource or benefits office. Employees can also access current and past pay statements when they need them, e.g., when required to provide proof of income for a loan. For this reason, some employees may elect not to keep files of their pay statements. These benefits, however, are available only to employees who have convenient access to an internet-connected device and a printer when needed, and to those employees who have the computer skills to access and navigate through the portal. As set out in the facts above, after the unfair labor practice charge was filed, Respondent arranged to allow more unit employees who do not work with computers to have access to a computer closer to their workplaces. To ensure that employees had the skills they needed, Respondent provided employees with written instructions on how to set up their e-Suite accounts when it announced that it was eliminating paper pay statements. Although these sessions were not mandatory, Respondent also held training sessions for those employees who felt they needed help in setting up their employer email and/or their e-Suite accounts. Respondent points out that although Charging Party President Dean testified that a number of unit employees had complained to him about not having paper pay statements or being unable to access the employee portal, Respondent's Human Resources staff testified that they were not receiving complaints about or requests for assistance with e-Suite.

As noted above, Respondent asserts that the elimination of paper pay statements had no significant impact on employees. Charging Party claims, however, that there were, and still are unresolved issues about access for employees who do not have their own internet-connected devices, including but not limited to where the computers and printers on Respondent's premises should be located and how many there should be, when employees will be allowed to use these computers, and what the protocol should be if a computer or printer is out of order or if no one is available in the Human Resources Department to assist. According to Charging Party, there are also unresolved issues around training, including how many training sessions should be scheduled, when they should be held, and whether these training sessions should be during employees' working time or off the clock. In my view, it is not the Commission's role to determine whether employees have reasonably convenient access to devices needed to use the employee portal, how much training and/or assistance is necessary for employees whose day- to- day jobs don't require them to work with computers to access their pay statements through the employee portal, or when or under what terms this training and assistance should be provided. These are, I conclude, issues that the parties should attempt to resolve at the bargaining table. I find that Charging Party has established in this case that the elimination of paper pay statements had an impact on unit employees sufficient to give rise to a duty on Respondent's part to bargain over the elimination and its effects on employees.

Respondent also argues that even if it was obligated to bargain over the elimination of paper pay statements, it satisfied this obligation by bargaining to impasse over both the elimination of the paper statements and its impact on employees. The Commission defines a bargaining impasse as the point at which the parties' positions have solidified and further bargaining would be useless. *Oakland Cmty College,* 2001 MERC Lab Op 272, 277; *Wayne County (Attorney Unit),* 1995 MERC Lab Op 199, 203; *City of Saginaw,* 1982 MERC Lab Op 727. A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. *Royal Motor Sales*, 329 NLRB 760, 762 (1999).

The determination of whether an impasse exists is made on a case-by-case basis, considering the totality of the circumstances and the entire conduct of the parties. *Flint Twp,* 1974 MERC Lab Op 152, 157. In determining whether the parties have reached a good faith impasse, the Commission looks at several factors. These include whether there has been a reasonable term of bargaining, whether the positions of the parties have become fixed, and whether both parties are aware of where their positions have solidified. The party asserting impasse bears the burden of establishing that impasse was reached. *Oakland Cmty College,* at 277. In this case, Respondent rejected Charging Party's initial demand to bargain over the decision to eliminate paper paychecks and its effects on employees. Much later, after I had denied Respondent's motion for summary dismissal but urged the parties to try to resolve the matter, the parties met twice to discuss settling the charge. During a contract negotiating session on February 19, 2019, Respondent presented Charging Party with a proposed MOA which would have allowed up to three current employees to sign up to receive paper pay statements delivered by interdepartmental mail for as long as they continued to work for Respondent. At the second, Charging Party gave Respondent two counterproposals that were like Respondent's proposal in many respects but contained no limit on the number of unit employees who could initially sign up to receive paper statements. As noted above, these were settlement discussions and not part of the parties' ongoing contract negotiations. Moreover, Respondent did not introduce any evidence about what was said during those two

meetings that would support a finding that by the end of the second meeting the parties' positions had become fixed so that further bargaining had become useless. Nor is there any evidence that the parties even discussed at those meetings the issues of access and training about which Charging Party asked to bargain in its February 12, 2019, email. I conclude that the evidence on the record does not support a finding that after these two meetings the parties' positions had solidified on the issue of paper statements vs electronic access or that they had exhausted the possibility of reaching agreement on this issue and/or the impact on employees of the elimination of paper statements. I find, therefore, that at the time of the hearing on this charge the parties had not reached a good faith impasse and that Respondent was not, therefore, relieved of further responsibility to bargain over the issue on that count.

In accord with the discussion above, I find, first, that Respondent violated Section 10(1)(a) and (e) of PERA by refusing to bargain with Charging Party over Respondent's decision to eliminate the delivery of paper pay statements to members of Charging Party's bargaining unit and the effects of that decision when Charging Party demanded that it do so on June 19, 2018, and thereafter. Second, I find that Respondent violated Section 10(1)(a) and (e) by unilaterally eliminating the delivery of paper pay statements to unit members on payday without bargaining.

The standard remedy for an unlawful unilateral change is restoration of the status quo pending satisfaction of the employer's obligation to bargain. In this case, I find that it would make no sense to require Respondent to provide paper statements to employees who neither need nor want them. Accordingly, I recommend that Respondent be allowed, before recommencing the delivery of paper pay statements, to survey unit members to determine which of them desire to receive paper pay statements, and to reinstatement delivery only to those unit employees who want them. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Bay City, its officers and agents, are hereby ordered to:

1. Cease and desist from:

    a. Unilaterally altering existing terms and conditions of employment for employees represented by the Utility Workers Union of America, AFL-CIO, Local 542 (the Union), by ceasing to provide unit employees with paper copies of pay statements delivered to their workplaces without giving the Union the opportunity to bargain over this action or its effects on employees.

    b. Refusing the Union's demand to bargain over the elimination of paper pay statements and its effects on unit employees.

2. Take the following actions to effectuate the purposes of the Act:

    a. Deliver paper copies of their pay statements to the workplaces of unit employees who have indicated their desire to receive such statements,

pending satisfaction of its duty to bargain in good faith with the Union over the elimination of paper pay statements and its effect on unit employees.

b. Upon demand, bargain with the Utility Workers Union of America, AFL-CIO, Local 542 over the elimination of paper pay statements and its effect on employees.

c. Post the attached Notice to Employees in all locations where notices to members of the Union's bargaining unit are customarily posted for a period of thirty (30) consecutive days.

Julia C. Stern
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: August 19, 2019

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF BAY CITY** TO HAVE COMMITTED UNFAIR LABOR PRACTICES 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 unilaterally alter existing terms and conditions of employment for employees represented by the Utility Workers Union of America, AFL-CIO, Local 542 (the Union), by ceasing to provide unit employees with paper copies of pay statements delivered to their workplaces without giving the Union the opportunity to bargain over this action or its effect on employees.

WE WILL NOT refuse to bargain with the Union over the elimination of paper pay statements and its effects on unit employees.

WE WILL deliver paper copies of their pay statements to the workplaces of unit employees who have indicated their desire to receive such statements, pending satisfaction of our duty to bargain in good faith with the Union over the elimination of paper pay statements and its effect on unit employees.

WE WILL, upon demand, bargain with the Utility Workers Union of America, AFL-CIO, Local 542 over the elimination of paper pay statements and its effect on employees.

CITY OF BAY CITY

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. Case No. C18 G-067/18-014481-MERC