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 I-091

-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 Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent violated Section 10(1)(a) and (e) of PERA by installing cameras in its sanitation trucks which focus on the driver without first giving Charging Party an opportunity to bargain. The ALJ also found that Respondent violated Section 10(1)(a) and (e) by refusing Charging Party's subsequent demand to bargain over the installation of surveillance cameras.

On September 10, 2019, Respondent filed exceptions to the ALJ's Decision and Recommended Order, and, on October 20, 2019, Charging Party filed a response to Respondent's exceptions.

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

[1] MOAHR Hearing Docket No. 18-018539

customer service clerks, park maintenance employees, refuse collection workers, wastewater treatment plant employees, water distribution employees, sewer maintenance employees, street maintenance employees, and mechanics who repair and maintain trucks and heavy equipment.

The parties entered into a collective bargaining agreement covering the period July 1, 2014, to December 31, 2017.

B. The Installation of Cameras in Sanitation Trucks

Respondent has several types of sanitation trucks. The type used for regular trash collection is equipped with a claw, or two claws, mounted to the outside of the vehicle. The claw attaches to a trash container, provided by the City, and lifts and empties the container into a hopper at the rear of the truck. The driver operates the claw or claws from the truck cab, and normally works alone. The Department of Public Works (DPW) also picks up recyclables, yard waste, and brush. The trucks used to pick up recyclables and yard waste, called rear loaders, do not have a mechanical claw. On these types of trucks, the crew consists of the driver and one or two sanitation workers who pick up items and throw them into the rear of the truck. Sanitation workers rotate assignments, and all sanitation workers are at some time assigned to drive. If assigned to drive, a sanitation worker normally spends his entire workday, with the exception of breaks, in the cab of the truck.

All of Respondent's sanitation trucks come from the manufacturer with a camera in the hopper and a rear-facing camera that is intended to help prevent the driver from accidentally backing up into something. Those trucks equipped with a mechanical claw also have a side camera, installed at curb level on the truck, that allows the driver to view the claw. These cameras are designed to assist the driver and crew.

DPW managers regularly drive through the City to check on the sanitation trucks as they complete their routes. Prior to the present dispute, the DPW installed Global Positioning System (GPS) equipment in all its trucks, including the sanitation vehicles. The system allows Respondent to track the movements of each truck. The DPW's administrative assistant regularly monitors the trucks' progress on their assigned routes. If a resident calls to complain that his or her trash has not been picked up, the administrative assistant can see if the truck has reached that point on its route. According to DPW Director Robert Dion, on one occasion Respondent used the GPS to investigate possible employee misconduct by a sanitation worker, but no formal discipline was issued. Dion testified, however, that there was no rule prohibiting Respondent from using GPS data as a basis for discipline. Charging Party did not demand to bargain over the GPS equipment when it was installed.

Respondent regularly receives complaints from citizens about property damage allegedly caused by the sanitation trucks and about missed pickups. To help address these types of complaints, Respondent purchased a new camera system for all its trucks in 2018. The system was installed by its vendor in all eleven of the DPW's sanitation trucks on or about June 5, 2018. In addition to the rear-facing, hopper, and curb side cameras, the trucks now have cameras installed at cab level on both sides of the truck that capture passing traffic and surrounding objects. Respondent refers to these cameras as "alley cameras." There are also two cameras mounted inside

the truck. One captures the driver's view through the windshield. The second, the only camera at issue in this case, is mounted to focus on the driver as he or she sits in the driver's seat.

The system engages, and all the cameras automatically turn on, when the truck's ignition is engaged. The system shuts down when the engine is shut off. The new system includes a screen permanently mounted in the cab. On the screen, drivers can shift their view from one camera to another or view more than one camera feed at the same time. They can also take still pictures from any of the cameras and use the screen to log in each day and to complete an inspection sheet before they leave the vehicle.

Unlike the previous factory-installed cameras, all the cameras on the trucks now record (video recordings only). Each truck has a certain amount of memory, and the when its capacity is reached, the video begins recording over itself. The camera feeds can also be viewed in real time in the DPW's fleet maintenance office.

On June 19, 2018, during a bargaining session for the parties' successor collective bargaining agreement, Charging Party complained that Respondent had not notified it that Respondent was about to install the new camera system, said that the camera focused on the driver was surveilling employees, and demanded to bargain about the installation of that camera and its effects on employees. Respondent told Charging Party that the cameras were installed as a safety measure and therefore were a management right and not a mandatory subject of bargaining. Respondent also asserted that there was no impact on employees since the contract allowed Respondent to discipline only for just cause.

At the next contract negotiation session, held on July 3, 2018, Charging Party again demanded to bargain over Respondent's decision to install the cameras in the cab focused on the driver and the effects of the decision. Charging Party told Respondent that it did not understand the safety issue involved. Respondent repeated what it had said at the previous meeting. Charging Party also asked a series of questions, some of which Respondent answered, about the cameras and whether they were or were not going to be installed on other City vehicles. Additionally, Charging Party requested a copy of the specifications and operating manual for the cameras.

According to Respondent, at the next bargaining session, held sometime later in July 2018, Respondent gave Charging Party a copy of its contract with the cameras' vendor that included specifications for the equipment. According to Respondent, this was all the written material relative to the cameras that it had been provided by the vendor.

Sometime after the June meeting, the position of the inside cameras was changed on the trucks, either by the drivers or by mechanics in the sanitation garage, so that they focused on the floor or somewhere else other than on the driver. Respondent did not authorize these actions but did not try to determine who had been responsible or order the cameras to be repositioned. At the time of the hearing before the ALJ, the cameras that previously focused on the driver on all the trucks were pointing away from the driver. There is no dispute that the City took no disciplinary action against any employee nor did it insist that the cameras be repositioned to their original, appropriate position while this matter is pending.

The DPW has trucks other than sanitation trucks, including street maintenance trucks and snowplows. All DPW trucks have GPS but none of them, except the sanitation trucks, have inside cameras. Respondent does, however, have surveillance cameras with recording capabilities at various locations on its premises, including approximately 40 surveillance cameras at its City Hall. Most cameras there monitor hallways and entrances. There are, however, cameras which focus on the service counters in the City Clerk's office and the Treasurer's office, including the counter where citizens come to pay their utility bills. Cameras are also installed in the accounts receivable area of the Treasurer's Office where money is handled and stored. Clerks in both the City Clerk's and the Treasurer's offices are members of the bargaining unit. There have also been surveillance cameras, including cameras focused at the outside of the building, at Respondent's wastewater treatment plant since about 2002. One of these cameras is installed inside the tool crib and another, apparently installed in a hallway, points through a glass door into the plant's pump room. The tool crib is kept locked and only certain employees have access to it. Members of Charging Party's bargaining unit with access check tools in and out; there is no tool crib attendant. Members of Charging Party's bargaining unit also work in various areas within the pump room.

C. The Unfair Labor Practice Charge

On September 10, 2018, the Utility Workers of American AFL-CIO, Local 542, filed the instant unfair labor practice charge alleging that Respondent violated its duty to bargain in good faith, and Section 10(1)(e) of PERA, by (1) installing video cameras, permanently focused on the drivers, inside its sanitation vehicles, without giving Charging Party an opportunity to bargain; and (2) refusing to bargain over the decision to install the cameras or its effects on unit employees.

An evidentiary hearing was held on March 5, 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.

The Commission has also recognized that certain types of employer decisions fall within the scope of its inherent managerial prerogative and are permissive subjects of bargaining. See e.g., *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501 (1986). Nonetheless, even where there is no bargaining obligation with respect to a particular decision, an employer may have a duty to give the union an opportunity for meaningful bargaining over the effects of that decision. *Center Line*, at 661-662; *Ishpeming*, at 508.

If a collective bargaining agreement covers a mandatory or permissive subject of bargaining, however, the parties have fulfilled their statutory duty to bargain and further bargaining regarding the decision or its effects is not required. As the Michigan Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996):

> When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v. Detroit,* 408 Mich. 663, 293 N.W.2d 278 (1980); Edwards, *Deferral to arbitration and waiver of the duty to bargain: A possible way out of everlasting confusion at the NLRB,* 46 Ohio St. L.J. 23, 24 (1985) (describing a similar requirement for the NLRB). In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

In *Port Huron Ed Ass ' n*, the Court further noted that the procedure for determining whether an employer must bargain before altering a mandatory subject of bargaining involves a two-step analysis: Is the issue the union seeks to negotiate covered by the collective bargaining agreement? If not, did the union somehow waive or relinquish its right to bargain? *Id.* at 322; *Org of School Administrators and Supervisors v Detroit Bd of Ed, 229 Mich App 54, 65* (1998).

See also *Macomb Cty v. AFSCME Council 25*, 494 Mich. 65, 81 (2013) (Commission's review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim); *Gogebic Cmty Coll Michigan Educ Support Pers Ass'n v. Gogebic Cmty. Coll.*, 246 Mich. App. 342 (2001); *St. Clair Co Rd Comm,* 1992 MERC Lab Op 533; *Berrien County and Berrien County Sheriff*, 33 MPER 30 (2019) (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). A subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement. *Port Huron Educ. Ass'n*, 452 Mich at 323 n 16; *City of Royal Oak*, 23 MPER 107 (2010).

In the present case, the parties continued with negotiations for a new Collective Bargaining Agreement (CBA) after the ALJ's decision. On December 16, 2019, the City Commission approved and adopted by general resolution a CBA between the City of Bay City and the Utility Workers Union of America, Local #542. The term of the Collective Bargaining Agreement runs from December 20, 2019 through December 31, 2022.

The 2019 CBA contains a management rights provision, Article 2, Section 1, which reserves to the Employer rights not limited elsewhere by the express provisions of the CBA. Section 1 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..."

Additionally, Article 24, Section 24:1, Working Conditions, provides:

> The City (the City Manager and his designated representatives) will make every effort to make working in the City of Bay City a safe and accident free environment. To that objective, the City commits to its employees a safe place to work and will see that all employees make working safely a top priority. <u>All employees will be held accountable for the daily safety performance on the job and for using prescribed safety equipment</u>. (emphasis added)

Finally, Article 18 of the 2019 CBA governs discipline and Article 4 provides for binding arbitration.

In view of these provisions, we believe that the 2019 Collective Bargaining Agreement contains provisions that can be reasonably relied on to support the Employer's actions. The matter involved in this dispute is, therefore, now "covered by" the agreement and the Employer cannot be required to bargain further regarding the matter involved herein. We further believe that, given the language of these provisions, the Union gave up any right it would otherwise have to further pursue the instant charge alleging that the Employer violated its duty to bargain by unilaterally installing video cameras inside its sanitation vehicles in 2018. We note that the cameras were installed in the sanitation trucks as a safety measure and that Article 24 of the 2019 CBA requires bargaining unit employees to use prescribed safety equipment. Given that the parties entered into a subsequent agreement that did not alter the Employer's ability to install or utilize cameras inside sanitation trucks, we believe that the parties have included language in their CBA that sets forth their resolution of the particular subject involved in the present dispute. See *Macomb Cty v. AFSCME Council 25*, 494 Mich 65, 79 (where the parties include language in their CBA that recites their resolution of a particular subject, they have satisfied their duty to bargain); *Wayne Cty. v. Michigan AFSCME Council 25, AFL-CIO*, 30 MPER 47, at 2, 6, n 4 (Mich. Ct. App. Jan. 24, 2017), affirming our decision in *Wayne County*, 29 MPER 1 (2015). Consequently, we must dismiss the unfair labor practice charge involved in this dispute in its entirety.[2]

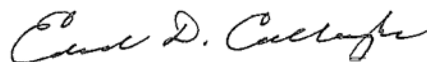
We have also considered all other arguments submitted by the Parties and conclude that they would not change the result in this case.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Samuel R. Bagenstos, Commission Chair



Edward D. Callaghan, Commission Member

Dated: June 19, 2020

Robert S. LaBrant, Commission Member

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[2] In reaching our decision, we did not find it necessary to determine whether the installation of the cameras in Respondent's sanitation trucks was a mandatory or permissive subject of bargaining.

Samuel R. Bagenstos, Commission Chair, concurring.

This case involves the same employer, bargaining unit, and contract negotiations as our decision last month in Case Number No. C18 G-067. I continue to adhere to the views I expressed in my dissenting opinion there. In that light, I thought I should explain why I join my colleagues' disposition here.

There is no doubt that the employer here, as in last month's *Bay City* case, implemented a change unilaterally without first bargaining over it. Last month, we considered whether the employer had violated PERA by unilaterally implementing a change in the mechanism by which workers could check whether they were receiving the correct amount of pay. Because I believed that such a change was a mandatory subject of bargaining under the statute, I concluded that the employer had committed an unfair labor practice.

The case before us today involves the question whether the employer violated PERA by unilaterally installing cameras in the cabs of its sanitation trucks. Judge Stern concluded that the installation of such cameras was a mandatory subject of bargaining under the statute. She accordingly concluded that the employer committed an unfair labor practice.

Here, unlike in the pay-stub matter we addressed last month, I do not believe we need to reach the mandatory-versus-permissive question. Because here I conclude, in accord with the view of my colleagues, that the 2019 collective bargaining agreement waives any unfair labor practice claim relating to the prior installation of cameras.

As I noted in our prior case, Article 22 of the CBA waives any claim that the parties failed to bargain over matters that were covered by that agreement. And here, the agreement specifically provides, in Section 24:1, that "[a]ll employees will be held accountable for . . . using prescribed safety equipment." Throughout the negotiations that led to the 2019 agreement, the employer described the cameras as safety equipment. I thus believe that the agreement covers the matter in dispute here and accordingly waives the unfair labor practice claim. The installation of cameras is thus very different than the pay-stub issue we addressed last month. The collective bargaining agreement does not contain any terms that even plausibly refer to the discontinuation of paper pay stubs, at any level of abstraction. For that reason, I believed my colleagues were incorrect to find a waiver there. But I believe they are correct to find one here.

Robert S. LaBrant, Commissioner, and Edward D. Callaghan, Commissioner, concurring.

We agree with the Commission Chair that in the case before us today (Case No. C 18 I-091) it is not necessary to determine whether the installation of cameras in Respondent's sanitation trucks is a mandatory or permissive subject of bargaining before dismissing the unfair labor practice charge in its entirety.

However, the Commission Chair has felt compelled to write a separate concurrence returning to the May 14, 2020 Bay City Case (No. C18 G-067), where he dissented from the majority opinion, to explain why he is now joining his colleagues' in the disposition of the second Bay City case. He claimed, that in "any level of abstraction", the installation of truck cameras significantly differs from the pay-stub issue.

In his dissent in the May 14, 2020 Bay City case, the Commission Chair stressed that an electronic receipt sent to an employee's email of a direct payroll deposit in lieu of a paper receipt had a "material or significant impact" on the "wages" paid to an employee thereby making it a mandatory subject of collective bargaining. In doing so, he ignored Commission precedent which has long held it is a prerogative of management to apply technology advances in the public sector workplace and such application is not a mandatory subject of collective bargaining.

Let us examine the "level of abstraction" we applied to the facts we had before us. Whether the receipt for a paycheck deposit is done over the internet to an employee's email address or is printed out, folded and sent to an employee by interoffice mail, we maintained that the receipt had "no material or significant impact" on the "wages" paid an employee. Either way the employees' pay-check is the same. Not one penny more or one penny less in wages is deposited in the employee's bank account.

Although there is a long line of case law regarding camera use as a permissive subject of collective bargaining[3], there is no need to relitigate the mandatory-versus-permissive subject of collective bargaining question between the Commissioners, if in the end, all the Commissioners are prepared to reverse the ALJ and dismiss the unfair labor practice charge in its entirety for the reasons explained in today's opinion.

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[3] See, for example, *Berrien County,* 33 MPER 30 (2019); *University of Michigan*, 25 MPER 64 (2012); *City of Portage (Police Dep't),* 1995 MERC Lab Op 251 (no exceptions); and *Van Buren County,* 14 MPER 32004 (2000); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177; 455 NW2d 98 (1989); *Port Huron Area School District*, 28 MPER 45 (2014).

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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 I-091
Docket No. 18-018539-MERC

-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 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 March 5, 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 April 30, 2019, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On September 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, among other classifications, clerical employees and clerks, mechanics, street maintenance and wastewater treatment plant employees, and sanitation workers in Respondent's Department of Public Works (DPW). The charge alleges that Respondent violated its duty to bargain in good faith, and Section 10(1)(e) of PERA, by (1) installing video cameras, permanently focused on the drivers, inside its sanitation vehicles, without

giving Charging Party an opportunity to bargain; and (2) refusing to bargain over the decision to install the cameras or its effects on unit employees.[1]

Findings of Fact:

The Expired Collective Bargaining Agreement

The most recent collective bargaining agreement between Charging Party and Respondent expired in December 2017. At the time of the hearing in this case in March 2019, the parties were still attempting to negotiate a successor contract.

Article 2 of the expired contract, the management rights clause, gives Respondent the right to direct the work force, create reasonable work rules, and require employees to observe departmental rules and regulations. Article 4 contains a grievance procedure ending in binding arbitration. Article 18:1 provides that no employee shall be disciplined or discharged without just cause.

Article 24:1 reads:

> The City (the City Manager and his designated representatives) will make every effort to make working in the City of Bay City a safe and accident free environment. To that objective, the City commits to employees a safe place to work and will see that all employees make working safely a top priority.
>
> All employee will be held accountable for the daily safety performance on the job and for using prescribed safety equipment. Any employee involved in any accident shall immediately report said accident to his superior and any physical injury sustained therein in accordance with the existing department work rules.

The expired contract does not mention surveillance cameras or their use for discipline.

Installation of Cameras on Sanitation Trucks

Respondent has several types of sanitation trucks. The type used for regular trash collection is equipped with a claw, or two claws, mounted to the outside of the vehicle. The claw attaches to

[1] The charge also alleged that Respondent unlawfully failed or refused to provide information about the cameras which Charging Party requested orally on and after June 19, 2018. According to Charging Party, at a contract bargaining session held on that date, it asked Respondent a series of question including how the decision to install the cameras was made and approved, what information the system collected, and how it was stored. At the next bargaining session, it requested a copy of the specifications and operating manual for the new camera system. At the hearing on the charge, Respondent submitted into evidence a copy of its contract with the system's vendor. Its witnesses maintained that Respondent gave Charging Party a copy of that document at the parties' next bargaining session, sometime in mid-July 2018, and told Charging Party that what was in that document was all the written material it had received from the vendor; Charging Party's witnesses denied that they had been given this document. However, in its post-hearing brief, Charging Party states that Respondent has now satisfactorily answered all its question about the new cameras, except for how Respondent intends to use the information provided by them.

a trash container, provided by the City, and lifts and empties the container into the hopper at the rear of the truck. The driver operates the claw from the truck cab, and normally works alone. The DPW also picks up recyclables, yard waste, and brush. The trucks used to pick up recyclables and yard waste, called rear loaders, do not have a mechanical claw. On these types of runs, the crew consists of the driver and one or two sanitation workers who pick up items and throw them into the rear of the truck. Sanitation workers rotate assignments, and all sanitation workers are at some time assigned to drive. If assigned to drive, a sanitation worker normally spends his entire workday, minus breaks, in the truck cab.

All Respondent's sanitation trucks come from the manufacturer with a camera in the hopper and a rear-facing camera that prevents the driver from accidentally backing up into something. Those with a mechanical claw also have a side camera, installed at curb level on the driver's side, that allows the driver to view the claw. These cameras are designed to assist the driver and crew. As installed in the factory, these cameras do not record.

DPW managers drive through the City daily checking on the sanitation trucks as they complete their routes. At some point prior to the instant dispute, the DPW installed Global Positioning System (GPS) equipment in all its trucks, including but not limited to the sanitation vehicles. The system allows Respondent to track the movements of each truck. The DPW's administrative assistant regularly monitors the trucks' progress on their assigned routes so, for example, if a citizen calls to complain that his or her trash has not been picked up, the administrative assistant can see if the truck has reached that point on its route. According to DPW Director Robert Dion, on one occasion Respondent used the GPS to investigate possible employee misconduct by a sanitation worker, but no formal discipline was issued. Dion testified, however, that there was no rule prohibiting Respondent from using GPS data as a basis for discipline. Charging Party did not demand to bargain over the GPS equipment when it was installed.

Respondent regularly receives complaints from citizens about property damage allegedly caused by the sanitation trucks and about missed pickups. To help address these types of complaints, in 2018 Respondent purchased a new camera system for all its trucks. The system was installed by its vendor in all eleven of the DPW's sanitation trucks on or around June 5, 2018. In addition to the rear-facing, hopper, and curb side cameras, the trucks now have cameras installed at cab level on both sides of the truck that capture passing traffic and surrounding objects. Respondent refers to these cameras as "alley cameras." There are also two cameras mounted inside the truck. One captures the driver's view through the windshield. The second, the only camera at issue here, is mounted to focus on the driver as he or she sits in the driver's seat.

The system engages, and all the cameras automatically turn on, when the truck's ignition is engaged. The system shuts down when the engine is shut off. The new system includes a screen permanently mounted in the cab. On the screen, drivers can shift their view from one camera to another or view more than one camera feed at the same time. They can also take still pictures from any of the cameras. Drivers also use the screen to log in each day and to complete an inspection sheet before they leave the vehicle.

Unlike the previous factory-installed cameras, all the cameras on the trucks now record (video only). Each truck has a certain amount of memory, and the when its capacity is reached, the

video begins recording over itself. The camera feeds can also be viewed in real time in the DPW's fleet maintenance office.

On June 19, 2018, during a bargaining session for the parties' new collective bargaining agreement, Charging Party complained that Respondent had not notified it that Respondent was about to install the new camera system, said that the camera focused on the driver was surveilling employees, and demanded to bargain about the installation of that camera and its effects on employees. Respondent told Charging Party that the cameras were installed as a safety measure and therefore were a management right and not a mandatory subject of bargaining. Respondent also asserted that there was no impact on employees since the contract allowed Respondent to discipline only for just cause.

At the next contract negotiation session, held on July 3, 2018, Charging Party again demanded to bargain over Respondent's decision to install the camera in the cab focused on the driver and the effects of the decision. Charging Party told Respondent that it did not understand the safety issue involved. Respondent repeated what it had said at the previous meeting. Charging Party asked a series of questions, some of which Respondent answered, about the cameras and whether they were or were going to be installed on other City vehicles. Charging Party also requested a copy of the specifications and operating manual for the cameras.

According to Respondent, at the next bargaining session, held sometime in July 2018, Respondent gave Charging Party a copy of its contract with the cameras' vendor that included specifications for the equipment. According to Respondent, this was all the written material relative to the cameras that it had been provided by the vendor. As noted in fn 1, Charging Party denies that it received this document.

At the hearing on the unfair labor practice charge, Respondent testified that the cameras were installed for the purpose of resolving customer complaints, employee safety, operational efficiency, and reducing Respondent's liability. Respondent cited the cameras' role in the resolution of disputes over whether citizens' trash had been picked up and where citizens claimed that the trucks had damaged their property. Respondent's witnesses also testified that it does not intend to review the images from any of the cameras on a regular basis for disciplinary purposes. However, Parks and Environmental Services Manager Timothy Botzau testified that the DPW's administrative assistant and another DPW manager, William Parrish, do frequently look at the recordings in response to residents' complaints. Botzau admitted that the camera focused on the driver could potentially provide evidence that a driver was acting improperly and might be used for discipline. For example, he testified that when the claw on a truck is not retracted and hits a parked vehicle, which sometimes occurs, Respondent could use the driver camera to see if the driver tried to pull in the claw or if he was on his phone, smoking, or otherwise distracted at the time of the accident. Respondent's written policies prohibit both smoking cigarettes and using a cell phone while operating a sanitation vehicle, and commercial drivers' license requirements forbid the use of drugs.

Sometime after the June meeting, the position of the inside cameras was changed on some of the trucks, either by the drivers or by mechanics in the sanitation garage, so that they focused on the floor or somewhere else other than on the driver. Respondent did not authorize these actions

but did not try to determine who had been responsible or order the cameras to be repositioned. At the time of the hearing in March 2018, the cameras previously focused on the driver on all the trucks were pointing away from the driver.

The DPW has trucks other than sanitation trucks, including street maintenance trucks and snowplows. All DPW trucks have GPS but none of them, except the sanitation trucks, have inside cameras. Respondent does, however, have surveillance cameras with recording capabilities at various locations on its premises, including approximately 40 surveillance cameras at its City Hall. Most cameras there monitor hallways and entrances. There are, however, cameras which focus on the service counters in the City Clerk's office and the Treasurer's office, including the counter where citizens come to pay their utility bills. Cameras are also installed in the accounts receivable area of the Treasurer's Office where money is handled and stored. Clerks in both the City Clerk's and the Treasurer's offices are members of Charging Party's bargaining unit. There have also been surveillance cameras, including cameras focused at the outside of the building, at Respondent's wastewater treatment plant since about 2002. One of these cameras is installed inside the tool crib and another, apparently installed in a hallway, points through a glass door into the plant's pump room. The tool crib is kept locked and only certain employees have access to it. Members of Charging Party's bargaining unit with access check tools in and out; there is no tool crib attendant. Members of Charging Party's bargaining unit work in various areas within the pump room.

Discussion and Conclusions of Law:

Respondent asserts that it had no duty to bargain over the installation of cameras in the truck cab because this is a permissive, not a mandatory, subject of bargaining. According to Respondent, installing cameras is a decision that is fundamental to Respondent's delivery of services to its citizens, and thus within the scope of its inherent managerial prerogative. It also asserts that even if the installation of the particular cameras at issue was a mandatory subject of bargaining, Charging Party waived its right to bargain by acquiescing to Respondent's installation, over the years, of cameras and other devices which provide information on bargaining unit employees similar to the information provided by these cameras. Respondent also denies that it violated PERA by refusing to further negotiate the effects of the cameras on unit employees. Respondent argues that the parties have already negotiated the possible effects of the camera on discipline by entering into a collective bargaining agreement that requires that discipline be for "just cause" and that provides for a grievance procedure ending in binding arbitration.

Duty to Bargain over Installation of Surveillance Cameras

There appears to be only one Commission case involving the duty to bargain over the installation of surveillance cameras. In *University of Michigan,* 25 MPER 64 (2012), a university employee discovered that a room had been constructed, without the university's approval, within one of its buildings. The room had a lock and contained a table, chairs, refrigerator, microwave and television. Without notifying the union, the employer installed a hidden surveillance camera and recorded two employees spending several hours per day sleeping and watching movies in the room. After the employees were discharged, the union filed an unfair labor practice charge alleging that the employer had a duty to bargain prior to installing the hidden cameras.

In support of its position, the union cited two cases decided by the National Labor Relations Board (NLRB or Board) under the National Labor Relations Act (NLRA), 29 USC 15, *Colgate-Palmolive Co,* 323 NLRB 515 (1997), and *Anheuser Busch, Inc,* 342 NLRB 560 (2004). In the seminal case, *Colgate,* the union complained to the employer after discovering cameras hidden in air vents in the men's restroom and in an exercise room on the employer's premises. At the time, the employer had a total of seventeen exterior and interior cameras including cameras located off plant property in plain view that surveyed the outside of the plant, cameras in plain view located on plant property outside the plant that surveyed the exterior of the property, and cameras in plain view in the interior of the building. The latter included cameras monitoring work areas, the maintenance office and the storeroom. As the union subsequently discovered, the employer also had other hidden cameras within its building. The employer removed the camera from the restroom but, when challenged by the union about the installation of the cameras, told the union that its position was that it had absolute right to install internal surveillance cameras whenever it suspected theft or impairment of its property. The NLRB affirmed the finding of its ALJ that the installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining and that the union had a right to bargain over the installation and continued use of these cameras. The Board found that like drug and alcohol testing, physical examinations, and polygraph testing, the surveillance cameras were germane to the working environment as "investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct." It also stated that it agreed with the ALJ that the restroom and fitness center were "part of the work environment and that the use of hidden cameras in these areas raises privacy concerns which impinge upon the employees' working conditions." In addition, the Board agreed with the ALJ that the decision to install hidden surveillance cameras was not a matter of managerial prerogative but "a change in [the employer's] methods used to reduce workplace theft or detect other suspected employee misconduct with serious implications for its employees' job security which in no way touches on the discretionary core of entrepreneurial control." 323 NLRB at 516.

Citing *Colgate-Palmolive* and a similar subsequent decision, *National Steel Corp,* 335 NLRB 747 (2001), the Board held in *Anheuser-Busch Inc,* 342 NLRB 560 (2004), that the employer violated its duty to bargain by failing to give notice to and bargain with the union prior to the installation and use of hidden surveillance cameras in a stairwell, on a rooftop, and in an elevator motors room. The employer monitored these cameras for six weeks, after which it disciplined employees for a variety of offenses which included spending too much time away from their work sites, sleeping on the job, and smoking marijuana. The employer attempted to distinguish *Colgate-Palmolive* by arguing that the three locations were neither work areas nor designated break areas, but the Board agreed with its ALJ that the cameras were trained on work and break areas where employees regularly performed their assigned duties and had been permitted to take breaks. The Board noted, in a footnote, that it was not suggesting the employer had to inform the union of the location of hidden cameras and the times of their use, but that it was required to inform the union of its proposal to use the cameras and the general purpose of their use.

The ALJ in *University of Michigan* disagreed with the Board's conclusion in the above cases that an employer has no inherent managerial right to install hidden surveillance cameras. As he saw it, the use of hidden cameras, at least in areas where employees have no reasonable expectation of privacy, is merely an extension of an employer's inherent right to supervise its

property and its employees. The ALJ stated that he saw no material difference between a hidden camera and a supervisor standing at an employee's shoulder when he or she was supposed to be working. He recommended, therefore, that the union's allegation be dismissed. The Commission adopted his recommendation but distinguished, rather than disagreed with, the Board cases discussed by the ALJ. It found that because the employees in the case before it were neither assigned nor authorized to be in the room where the camera was located, the room was not "part of the work environment" as were the locations surveilled in *Colgate-Palmolive, National Steel,* and *Anheuser Busch.* It concluded that an employer's use of a hidden camera in an area that is not part of the working environment is within management's right to supervise its employees and its property. It held, therefore, that the university did not violate its duty to bargain by installing the hidden camera in that case.

In this case, the cameras at issue clearly record the movements of the sanitation truck drivers where the driver's work, i.e., in the cab of their truck. However, unlike the cameras in *University of Michigan* and in the Board cases discussed above, these cameras are in plain view.

The NLRB does not appear to have either explicitly extended or refused to extend its holdings regarding hidden cameras to cameras in plain view. However, several Board ALJs have interpreted *Colgate-Palmolive* to require a finding that an employer has a duty to bargain over even clearly visible surveillance cameras. In *Chemical Solvents, Inc.* 362 NLRB 1469 (2015), the employer had had visible surveillance cameras in its parking lots for seven or eight years when, on a consultant's recommendation, it installed nine new cameras at its two locations. All were mounted on telephone poles and were clearly visible, were video only, had a fixed focus, and could not be zoomed. Some of the new cameras faced areas where unit employees worked, including warehouses, dock areas, and entryways. Although the union alleged that, based on their placement, the cameras were being utilized to monitor employees' work performance and not for security, the ALJ found no evidence that this was the case. However, the ALJ did not find this relevant. Although the employer attempted to distinguish its cameras from those in *Colgate-Palmolive* on the grounds that its cameras were openly visible rather than hidden and focused on access areas to the plant, the ALJ noted that the placement of at least some of the cameras resulted in their viewing areas of the plant used by employees. The ALJ also stated, "It is difficult to accept the proposition that cameras clearly visible to employees are of less concern to employees than hidden ones or would have less potential impact on their working environment." Citing *Colgate-Palmolive* for the proposition that "the installation of surveillance cameras is both germane to the working environment and outside of the scope of managerial decisions laying at the core of entrepreneurial control," the ALJ concluded that the employer violated its duty to bargain by unilaterally installing the new cameras without giving the union prior notice and an opportunity to bargain.

Other cases in which Board ALJs have found the installation of visible surveillance cameras to constitute unlawful unilateral changes, and no exceptions were filed by the employers to these findings, include *Nortech Waste,* 336 NLRB 554 (2001); *Southern Bakeries LLC,* 364 NLRB No. 64 (2016); and *Springfield Day Nursery,* 362 NLRB 261 (2015). In *Nortech,* the employer installed eight cameras that videotaped bargaining unit employees while they worked. The cameras were all connected to monitors in a manager's office. The employer asserted that their purpose was to review accidents and safe work practices but acknowledged that they could be used to scrutinize employee performance, theft, or personal misconduct. Citing *Colgate-Palmolive* and stating that there was "no doubt that the installation of this equipment without first

giving the union an opportunity to bargain over its usage violated Section 8(a)(5) of the Act," the ALJ found that the employer had violated its duty to bargain. In *Southern Bakeries,* the ALJ found a violation when the employer unilaterally installed a visible camera in its breakroom, allegedly to deter theft. In *Springfield,* the ALJ concluded that the employer unlawfully unilaterally changed working conditions by installing visible surveillance cameras in vans in which its drivers transported children without giving the union an opportunity to bargain. The ALJ rejected the employer's argument that it had no duty to bargain because it was entitled to observe and monitor employee performance, and because the cameras facilitated the safety of the children as well as the drivers. He also rejected the employer's attempt to draw a distinction between hidden and visible surveillance cameras.

In this case, the only cameras in dispute are the cameras in the cabs of the sanitation trucks focused on the drivers. Whether or not Respondent regularly monitors the footage from these cameras, their purpose is clearly to capture driver misconduct in the form of distracted driving or other violation of Respondent's rules. While the camera may serve to deter unsafe driving habits, the camera is neither a safety rule nor a safety practice. Rather, as was the case with the hidden surveillance cameras in *Colgate-Palmolive,* it is a new tool to determine whether a driver has engaged in misconduct. I agree with the Board in that case that a camera used for that purpose is "germane to the working environment." I note that Commission has held that alcohol testing, drug testing, and compulsory physical examinations are mandatory subjects of bargaining under PERA because they may "effect the employment relationship," i.e., employees may be disciplined or barred from working because of these tests. *City of Royal Oak (Police Dept),* 1988 MERC Lab Op 605 (breathalyzer tests); *City of Detroit,* 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1990) (drug testing of current employees); *Allegan Co,* 1992 MERC Lab Op 144 (compulsory psychological exams). This is clearly also true of the cameras in dispute here. I also find that although drivers do not have the same expectation of privacy in the cabs of their trucks as they would in a rest room, the placement of the cameras in dispute nevertheless raises privacy concerns that impact their working conditions. I conclude, therefore, that the installation of the cameras in the sanitation trucks focused on the drivers has a direct impact on the drivers' working conditions and on their relationship with their employer.

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 under PERA, except for management decisions which are fundamental to the basic direction of the enterprise or which impinge only indirectly upon employment security. *Houghton Lake Ed Ass'n v Houghton Lake Cmty Sch,* 109 Mich App 1 (1981)*; Detroit Police Officers Ass'n v Detroit,* 61 Mich App 492 (1975). The core functions of public employers include the effective delivery of services and the protection of public safety, and the Commission has recognized that employers have an inherent managerial right to supervise and direct the work of their employees toward those ends. However, I find that an employer's inherent managerial right to supervise its employees and their work does not extend to the installation of permanent surveillance cameras. I disagree that there is no meaningful distinction between human and video oversight over employees' work. Because there are limits to how many supervisors an employer can feasibly employ, few employees are subject to the same degree of scrutiny by their human supervisors that a camera can provide. Second, human supervisors normally focus their attention on one or two aspects of an employee's behavior while cameras are less discriminating. I also find that requiring an employer to bargain over its decision to add cameras to the methods it uses to oversee its employees would not seriously affect

the employer's ability to effectively serve the public. For the reasons set forth above, therefore, I conclude that the installation of the cameras focused on the drivers in Respondent's sanitation trucks was a mandatory subject of bargaining and that Respondent violated Section 10(1)(e) of PERA when it refused to bargain over this issue.

As noted above, Respondent argues that even if the installation of the camera at issue was a mandatory subject of bargaining, Charging Party waived its right to bargain. While the management rights clause in the parties' expired agreement gave it the explicit right to direct its workforce and enforce work rules, the agreement had already expired when Respondent installed the new cameras in its sanitation trucks. A bargaining waiver contained within a collective bargaining agreement is presumed to expire with the collective bargaining agreement. *Capac Community Schools,* 1984 MERC Lab Op 1195; *Wayne County,* 1985 MERC Lab Op 168.

Respondent asserts, however, that Charging Party waived its right to bargain over the cameras focusing on the sanitation truck drivers by acquiescing to Respondent's installation, over the years, of cameras and other devices which provide information on bargaining unit employees similar to the information provided by this camera. It is well established that a waiver of bargaining rights under PERA must be clear, unmistakable and explicit. *Southfield Police Officers Ass ' n v Southfield*, 152 Mich App 729 (1987); *Lansing Fire Fighters v Lansing*, 133 Mich App 56 (1984). On the other hand, when an employer's action does not change existing conditions, i.e. does not alter the status quo, the employer does not violate its duty to bargain. That is, if there is an established past practice of permitting an employer to make unilateral decisions on a particular subject, the employer does not violate its duty to bargain simply by continuing to act as it has in the past. However, the employer continues to have an obligation to bargain about the subject if the union demands that it do so after the contract has expired. See *Raytheon Network Centric Systems,* 365 NLRB No. 161(2017), in which the Board announced a return to the rule first stated in *Shell Oil Co,* 149 NLRB 283 (1964).

In this case, I conclude that the record does not establish that Respondent acted in accord with past practice in deciding to install the cameras focused at the drivers, or that the Charging Party clearly and unmistakably waived its right to bargain over the installation of these cameras. The evidence indicates that Respondent has installed cameras at many locations on its premises without objection from Charging Party. Most cameras, including the ones located inside the wastewater treatment plant, only incidentally film employees as they go about their daily duties. There are other cameras, located in areas where unit employees handle payments for taxes and utility bills, that focus more directly on employees. However, these cameras both monitor the exchange and handling of money as well as provide security for the clerks in their interactions with the public. By contrast, the sole purpose of the camera at issue here is to scrutinize the drivers for possible misconduct. Moreover, as far as I can determine from the record, none of Respondent's other cameras are positioned to record employees' every movement. I find that Charging Party's acquiescence to the installation of other cameras that record unit employees as they work did not create a past practice that allowed Respondent to unilaterally install the cameras at issue here. I conclude, therefore, that Respondent violated its duty to bargain when it installed the cameras inside its sanitation trucks focused on the driver without first giving Charging Party an opportunity to demand bargaining.

As I have concluded that Respondent had a duty to bargain over the decision to install the cameras focused on the drivers, it is unnecessary to address Respondent's argument that it had already satisfied its duty to bargain over the effects of the decision. However, I note that bargaining over the decision to install the camera focused on the driver would presumably include discussion of the circumstances under which Respondent would use footage from that camera to discipline unit employees.

Based on the findings of fact and conclusions of law as set forth above, I conclude that Respondent violated Section 10(1)(a) and (e) of PERA by installing cameras in its sanitation trucks which focus on the driver without first giving Charging Party an opportunity to bargain. I also conclude that Respondent violated Section 10(1)(a) and (e) by refusing Charging Party's demand to bargain over the installation of surveillance cameras as part of contract negotiations. 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 installing cameras inside its sanitation trucks that focus on the drivers without first giving the Union the opportunity to bargain;

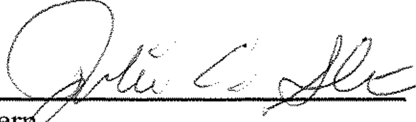
   b. Refusing the Union's demand to bargain over the installation of surveillance cameras in the parties' negotiations for a successor collective bargaining agreement.

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

   a. Remove or disable the surveillance cameras that focus on the drivers which it installed inside its sanitation trucks

   b. Upon demand, bargain with the Utility Workers Union of America, AFL-CIO, Local 542 over the installation of surveillance cameras in the workplace, including how and under what circumstances footage from these cameras will be used to discipline employees.

c. Post the attached Notice of 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 installing cameras inside our sanitation trucks that focus on the drivers without first giving the Union to the opportunity to bargain.

WE WILL NOT refuse to bargain with the Utility Workers Union of America, AFL-CIO, Local 542 over the installation of surveillance cameras as part of our negotiations over a successor collective bargaining agreement.

WE WILL remove or disable the surveillance cameras that focus on the drivers which we installed inside our sanitation trucks.

WE WILL, upon demand, bargain with the Utility Workers Union of America, AFL-CIO, Local 542 over the installation of surveillance cameras in the workplace, including how and under what circumstances footage from these cameras will be used to discipline 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 I-091/18-018539-MERC