STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN (MEDICAL CENTER),
Public Employer-Respondent,

MERC Case Nos. 19-D-0876-CE-2
& 19-I-1855-CE

-and-

MICHIGAN NURSES ASSOCIATION
Labor Organization-Charging Party.

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APPEARANCES:

David J. Masson, University of Michigan, Senior Associate General Counsel, for Respondent

Nickelhoff & Widick PLLC, John Runyan, for Charging Party

DECISION AND ORDER

In March 2019, the University of Michigan Medical Center (University, Respondent, or Employer) announced a decision to expand the patient-guest parking accommodations at one of its parking structures near the main hospital campus. It notified the Michigan Nurses Association (MNA, Union, or Charging Party) that several hundred parking spaces in various parking locations utilized by University employees, including MNA bargaining unit members, would be re-classified. The MNA demanded to bargain over the parking changes and their impact. The University refused to bargain, asserting that the matter was already covered by the parties' collective bargaining agreement through a Memorandum of Understanding (MOU), and was further a permissive subject of bargaining over which it had no duty to bargain. It thereafter implemented the changes unilaterally on August 12, 2019. The MNA filed the charge in Case 19-I-1855-CE alleging that Respondent unlawfully refused to bargain over the parking changes.[1]

Thereafter, on September 23 and 24, 2019, the Employer held focus group meetings to discuss employee parking issues with a cross section of various classifications of employees, including some employees from the MNA bargaining unit. The MNA filed the charge in Case 19-D-0876-CE alleging, *inter alia*, that Respondent unlawfully bypassed the Union and engaged in direct dealing with employees over terms of employment concerning parking.[2]

[1] MOAHR Hearing Docket No. 19-018701

[2] MOAHR Hearing Docket No. 19-025314. The Charge filed by MNA also included an allegation that Respondent had violated PERA by refusing to provide the Union with requested relevant and necessary information concerning parking-related matters. Following the ALJ's dismissal of the unilateral change allegation, MNA agreed to sever the refusal to provide information portion of the charge and have that held in abeyance. Upon agreement of the parties,

Upon a motion by Respondent and following oral argument, Administrative Law Judge (ALJ) David M. Peltz dismissed the charge in Case 19-1855-CE prior to taking any record testimony, based on his conclusion that Respondent had no duty to bargain over the parking-related changes because those matters were covered by the parties' collective bargaining agreement.[3]

In a Decision and Recommended Order issued on August 21, 2020, ALJ Peltz reduced to writing his verbal dismissal of the charge in Case 19-I-1855-CE, and further recommended dismissal of the direct dealing allegation in Case 19-D-0876-CE-2.

On February 5, 2021, the Commission issued its Decision and Order in *University of Michigan Health System*, 34 MPER 37(2021). In that matter, we adopted the Decision and Recommended Order of ALJ Travis Calderwood finding that the University had violated Sections 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by making the identical parking-related changes as those involved in the instant case. There, we concluded based on existing case law issued by MERC and the Michigan Courts, that although the collective bargaining agreement between the University and charging party House Officers Association contained language addressing certain parking-related matters, the parking changes made unilaterally by the University were not covered by the parties' agreement.

In its exceptions, MNA argues that the ALJ erred in dismissing the unilateral change allegation because the parking changes were not covered by the parties' collective bargaining agreement, and since such changes were material and had a significant impact on bargaining unit employees, Respondent had a duty to bargain over them. It further argues that the ALJ erred in finding that the discussions with employees during the focus groups did not rise to the level of unlawful bypassing of the Union and direct dealing with bargaining unit employees.

For the reasons set forth below, we adopt the ALJ's recommended dismissal of the direct dealing allegation in Case 19-D-0876-CE-2. With respect to the unilateral change allegation in Case 19-I-1855-CE however, we believe the factual similarities between this case and our prior decision in *University of Michigan Health System* warrant affording Charging Party and Respondent the opportunity to present additional relevant record testimony as more specifically discussed below. Accordingly, we reverse the ALJ's summary dismissal of that allegation and remand the matter to him for the purposes of adducing record testimony and/or other evidence bearing on Respondent's unilateral changes.

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that portion of the charge designated as Case 19-D-0876-CE-1 was dismissed by the ALJ on August 13, 2020. The direct dealing allegation, designed as Case 19-D-0876-CE-2 proceeded to hearing.

[3] Although no record testimony was adduced from witnesses for either Charging Party or Respondent on the refusal to bargain charge, the parties offered, and the ALJ admitted into evidence, a total of 26 exhibits, many of which contained evidence relating to the changes made by Respondent to parking.

Procedural History:

On April 26, 2019, Charging Party filed the unfair labor practice charge in Case No. 19-D-0876-CE alleging that Respondent violated Sections 10(1)(a) and (e) of PERA by failing or refusing to provide the MNA with information relating to proposed parking changes affecting members of Charging Party's bargaining unit. The charge was originally assigned to ALJ Travis Calderwood. Charging Party amended the charge on May 1, 2019, to add the allegation that Respondent engaged in unlawful direct dealing by convening focus group meetings with members of the Union to discuss employee parking issues.

Charging Party filed a second unfair labor practice charge in Case No. 19-I-1855-CE on September 17, 2019, alleging that Respondent violated its duty to bargain under Sections 10(1)(a) and (e) of PERA by unilaterally implementing changes to certain parking facilities utilized by members of the Union's bargaining unit. That charge was assigned to ALJ Peltz. At the request of the parties, Case No. 19-D-0876-CE was transferred from ALJ Calderwood to ALJ Peltz and the matters were consolidated pursuant to Rule 164, R 423.164 of the General Rules and Regulations of the Employment Relations Commission.

A hearing before ALJ Peltz was held on December 16, 2019. At the outset of the hearing, Respondent moved for dismissal of both charges. After hearing oral argument, the ALJ granted Respondent's motion with respect to the refusal to bargain charge and denied the motion with respect to the allegations in the other charge concerning the refusal to provide information and direct dealing, finding that questions of fact existed which warranted an evidentiary hearing. Thereafter, the parties agreed to hold the information request allegation in abeyance and proceed to hearing on the direct dealing claim only.

On August 21, 2020, ALJ Peltz issued his Decision and Recommended Order. Charging Party filed exceptions and a supporting brief on October 14, 2020, and Respondent filed a Brief in Support of the ALJ's Decision and Recommended Order on November 24, 2020.

Facts:

Respondent's Changes to Parking[4]

The most recent collective bargaining agreement between the Union and Respondent is effective from October 10, 2018, through June 20, 2021. Attached to the contract, among other agreements, is a memorandum of understanding (MOU) between the parties entitled "Parking." The MOU states:

[4] The facts concerning the changes to parking are derived from the exhibits received into evidence during the hearing in this matter. Assertions made by the parties during oral argument and in briefs on exception have not been considered as they do not constitute record evidence.

700. The University shall maintain a regular, dependable and free shuttle service to offsite University parking sites. A map of all available on and offsite University parking options will be available electronically for all staff. A security escort will be provided upon bargaining unit employee request. The parking lot and sheltered area will be physically lit and well maintained, including snow and ice removal, to the best of their ability. The University will continue, in good faith, to assess the possibility of adding sheltered areas to those lots where they currently do not exist. Employees who are on-call will be able to use the On-Call/Stay Over program. Employees register for carpooling/vanpooling will be permitted to park on-site, subject to availability and the University's carpooling/vanpooling policy.

701. The Association will continue to appoint a bargaining unit member as representative to the Parking Advisory Committee. The committee will continue to address concerns and seek potential opportunities to improve parking and ensure communications with employees.

702. An employee who can substantiate the inability to access parking will not be disciplined for tardiness related to that claim.

The agreement also contains a waiver clause at Article 55, which provides:

> The University and the Association acknowledge that during 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 understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore the University and the Association, except as provided in Article 56, TERM OF AGREEMENT, each voluntarily and unqualifiedly waives the right, and agrees the other shall not be obliged to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

Respondent operates four parking structures (P1, P2, P3 and P4) and two surface lots (M71 and M29) near the University's main medical campus which are utilized by both bargaining unit and non-bargaining unit employees, depending on the level of parking permit offered to, and held by, the employee. Gold, the highest level permit, costs $1,845 per year and is accessible only to non-bargaining unit employees, including physicians and executive officers. Holders of a Gold

pass may park in any Gold, Blue, Yellow or Orange parking spot. The next level of permit is Blue, which costs $751 per year and allows its holders to park in Blue, Yellow or Orange parking spots. A Yellow permit costs $164 a year and entitles its holders to park in Yellow and Orange spots, while an Orange permit, which costs $82 a year, allows for parking only in Orange spots.

In July 2018, the University's Parking and Transportation Advisory Committee (PTAC) issued a "Final Report" regarding parking and transportation issues on the main medical campus. The PTAC concluded that inadequate peak parking availability had created "delayed appointment, missed care and sub-optimal experiences" and recommended that the balance between patient and employee parking in the structures be adjusted to provide additional space for patients. Specifically, the report recommended shifting employee parking spaces within various structures and surface lots to create an initial increase of 280 patient/visitor parking spaces on the medical campus. In addition, the PTAC made several recommendations regarding communications with employees, including a suggestion that the University change its "management, engagement and communication plan" and that it "engage leadership in change management & cascade communication strategy."

On March 19, 2019, Respondent announced that it was making changes to parking for employees and visitors. The changes included the conversion of 280 Gold parking spaces in the P3 structure to patient/visitor spaces. The changes were scheduled to take effect sometime between April 26, 2019, and May 6, 2019. At the same time, the University announced that it would be conducting several employee open houses to "explain the changes and what employees can expect as they are implemented." The University indicated that additional information regarding the upcoming parking changes would be rolled out "in the coming weeks."

In a March 20, 2019 letter addressed to the Michigan Medicine Leadership team, Charging Party demanded that the University bargain over the proposed changes to employee parking, and that it "immediately cease and desist from making unilateral changes and refrain from hosting town halls to announce the changes." That same day, Michelle Sullivan, the University's director of labor relations, acknowledged receipt of the bargaining demand and indicated her intention to "arrange for a time, at your earliest convenience, to meet so that we can hear your specific concerns about parking changes." The following day, MNA labor relations representative Benjamin Curl contacted Sullivan and repeated the Union's request that the "town halls" be cancelled and that the parking changes be put on hold so that the parties could have time to meaningfully discuss the issues.

On March 22, 2019, Sullivan sent a letter to Charging Party describing the PTAC recommendations and explaining the changes to parking. While asserting that the University was not required to bargain the changes, Sullivan once again expressed interest in meeting with the Union to "learn more about [its] specific concerns over parking" so that the University could address those issues. Sullivan further indicated that implementation of the parking changes, as well as the open house meetings, would be postponed "in order to allow for a period of additional

review of other ideas that could be part of the change process." The postponement of the open houses and delay in implementation of the changes was formally announced by Respondent in an email that same day.

On July 29, 2019, the University announced via email communication, a plan to increase patient/visitor parking by approximately 600 spaces over the course of the following year for the purpose of accommodating "current and future needs." The new plan, which was scheduled to take effect on August 12, 2019, included converting 280 Gold spaces in the P3 structure to patient/visitor parking spots; converting 280 Blue spaces in the P4 structure to Gold parking spots; converting 250 spaces in the M71 surface lot from Yellow to Blue; and converting 48 valet spaces in the M29 surface lot to Blue parking spaces.

Respondent's Focus Group Meetings:

In March of 2019, Sullivan informed Union President Katie Oppenheim that Respondent was considering holding focus group meetings to discuss the anticipated parking changes. Sullivan mentioned the topic of focus groups again during a meeting with Oppenheim and Curl which occurred sometime prior to August 12, 2019. Sullivan indicated that Respondent intended to use the focus groups to collect information from employees pertaining to issues such as their commutes, which parking spots they were utilizing, and what hardships they were facing with respect to parking. Neither Curl nor Oppenheim objected to the focus groups, either during the meeting, or in the weeks immediately following it.

Thereafter, via email dated September 9, 2019, Respondent invited certain University employees to attend one of several focus group meetings addressing the issue of parking. The communication provided, in relevant part:

> With the most recent parking changes, we have enhanced parking for our patients and have received feedback about their improved patient experience and access. At the same time, the parking and transportation team is very aware of the fact that, in some cases, the changes also presented challenges for our employees. We are conducting several focus groups to learn about our employees' experiences and would like to invite you to participate.
>
> We will only have an hour together, but in that time we have three main goals:
>
> - Understand your use of parking lots and transportation and what could be done to improve the current state.
>
> - Discuss new or proposed ideas to improve parking and transportation and obtain feedback.

- Seek input on communication about parking and transportation and what is the best way to reach you.

In accordance with the email, the focus group meetings were scheduled for September 23, 2019, from 12 p.m. to 1 p.m.; September 24, 2019, from 12 p.m. to 1 p.m.; and September 24, 2019, from 9 p.m. to 10 p.m. Employees were asked to RSVP for the meetings by email.

The University did not seek Charging Party's input with respect to which employees would be invited to attend a focus group meeting, rather invitations were sent to employees based upon recommendations from the managers of various departments, with the goal of selecting a representative cross section of employees. According to Rose Glenn, Chief Communication and Marketing Officer for Michigan Medicine, Respondent deliberately sent out more invitations than necessary because management assumed that some invitees would be unable to attend. Ultimately, a total of 30 employees from a variety of different job classifications and departments across Michigan Medicine RSVP'd to attend one of the three focus group meetings. Among the employees who were invited to participate in the focus groups were three members of Charging Party's bargaining unit: MNA district and grievance representative Laura Jirasek, Karla Jackson-Terry, an RN assigned to the General Surgery department, and Tara Tolbert, an RN in Internal Medicine.

In response to a request from the Union, Sullivan also sent a document via email to Curl and Union dispute chair Becky Mammel that listed the names of the nurses who were invited to participate in the focus groups and identified each of their supervisors. In the email, which was also copied to Oppenheim, Sullivan invited the Union representatives to share their "thoughts on other areas/units of the hospital where nurses should be sought for input on future focus groups." Sullivan also notified Oppenheim by email that the nurses invited to participate in the focus groups had been selected by managers.

At approximately 12:08 p.m. on September 23, 2019, Curl emailed Sullivan regarding the focus groups, writing:

> When you mentioned this to Katie and me on a phone call a while ago, you had said this would be for information-gathering, not for soliciting recommendations or proposals. I believe when you spoke with Becky and me you confirmed that the purpose had not changed.
>
> Can you confirm what exactly is supposed to happen with these focus groups? What are the roles of the participants? Is there a formal description?

Contemporaneous with the email, Curl called Sullivan and asked her to cancel the focus groups because he believed such conversations should occur within the course of bargaining between Charging Party and the University. Sullivan denied Curl's request.

Thereafter, John Karebian, Executive Director of the MNA, sent an email to Respondent objecting to the focus group meetings and complaining that the University had chosen to engage directly with bargaining unit members rather than meeting with Union leadership. Karebian asserted that Respondent's action constituted a "clear effort to undermine the MNA and try to draw a wedge between our members." Karebian characterized Respondent's conduct as "unacceptable" and requested that the focus group meeting scheduled for the following day be cancelled.

The three focus group meetings were held as scheduled on September 23 and 24, 2019, and a total of 28 employees attended, including MNA unit members Jirasek, Jackson-Terry and Tolbert. Rose Glenn was the facilitator of the focus groups meetings and was the only attendee called to testify at the hearing in this matter. Glenn, who has no labor relations responsibilities, testified that her role as facilitator of the focus group meetings was to ask questions of the participants and serve as an "effective listener." According to Glenn, participants were asked to provide feedback and ideas regarding the parking situation, including identifying the "pain points" of parking. Participants were also asked to comment on whether the University was doing a good job communicating about parking and "what other ways [management] could communicate to make sure the message was getting to them." Glenn did not respond specifically to any of the ideas offered by employees during the meetings, and there was never any discussion from management about what actions Respondent might take regarding parking in the future.

Following the meetings, Glenn prepared a document summarizing the feedback provided by the focus group participants. The document lists four areas of discussion: (1) communication; (2) concerns about parking remotely; (3) suggestions; and (4) quality of life considerations. The suggestions offered by participants include the following: have employee-only buses to serve remote lots; increase lighting maintenance in the Fuller lot; build a pedestrian bridge; open Gold spots to all during weekends and at night; open cancer center garage to all during weekends; encourage managers to promote telecommuting for eligible staff; expand hours of operation for shuttle; use vans for the families of patients to reduce traffic; create computer match functionality for van pools; and open the remote parking office during lunch hour.

Discussion:

1. The Unilateral Changes to Parking

A. Legal Standards

Section 15 of the Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions with respect to those matters which constitute "mandatory subjects of bargaining." MCL 423.215; *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 on "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 District*, 28 MPER 45 (2014). What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n*, at 178. The Commission has taken a broad view of the phrase "other terms and conditions of employment" for purposes of determining whether an issue involves a mandatory subject of bargaining. *Central Michigan Univ. Faculty Ass'n v. Central Michigan Univ.*, 404 Mich. 268, 279-290, 273 NW 2d 21, 25-31(1978).

If a collective bargaining agreement covers a mandatory subject of bargaining, the parties are deemed to have fulfilled their statutory duty to bargain regarding the matter. 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) . . . 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 short, "[o]nce 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." *Id.* at 327. 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); *Berrien County*, 33 MPER 30 (2019). The relevant question in determining whether a collective bargaining agreement covers an issue is whether "the agreement contains provisions that can be reasonably relied on for the actions in dispute." *Id*.

The "covered by" doctrine is separate and distinct from the doctrine of "waiver." As explained by the Court in *Port Huron*:

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

Id. at 319, *citing Dept. of Navy v. Fed. Labor Rel. Auth.*, 962 F.2d 48 (DC Cir.1992). The Michigan Courts have continued to ascribe to the rule that a waiver must be "clear and unmistakable" in order to obviate the necessity for bargaining. *Amalgamated Transit Union Local 1564 v. Southeastern Mich. Transp. Auth.*, 437 Mich. 441, 460-461, 473 N.W. 2d 249 (1991); *Lansing Fire Fighters v. Lansing*, 133 Mich. App. 56, 349 N.W. 2d 253 (1984); *Kent Co. Ed. Ass'n v. Cedar Springs*, 157 Mich. App 59, 66; 403 N.W. 2d 494 (1987).

B. The Applicability of the "Covered by" Doctrine to Respondent's Duty to Bargain

The Union asserts that the ALJ erroneously concluded that the parties' collective bargaining agreement covered the unilateral parking changes made by Respondent. Conversely, the Employer asserts that the ALJ's decision is supported by the Michigan Supreme Court's decision in *Port Huron Education Assoc. v. Port Huron School District*, 452 Mich. 309, 550 NW 2d 228 (1996), and the Court of Appeals' decision in *Gogebic Comm. College Michigan Educ. Support Personnel Assoc. v. Gogebic Comm. College*, 245 Mich. App. 342, 632 NW 2d 517 (2001). In that regard, it contends that because the parties' contract contained certain limited provisions concerning employee parking, it cannot be obligated to bargain over unrelated parking changes that the MNA failed to negotiate into the agreement. The Employer submits that *Port Huron* and *Gogebic* support that result. We disagree with Respondent's assertions. Neither *Port Huron* nor *Gogebic* warrant the sweeping interpretation urged by the Employer. The facts of both cases were decidedly different than those here, and the basis for the courts' findings and conclusions are readily distinguishable.

In *Port Huron*, the employer's unilateral action involved the proration of insurance benefits for employees. Unlike here, the proration applied by the employer was specifically provided for, and allowed by, the terms of the parties' collective bargaining agreement. Indeed, the union did not dispute that the contract covered the issue. It argued however, that a contrary existing "past practice" modified the terms of the agreement, and the employer's unilateral modification to that past practice in the absence of bargaining was a violation of PERA.

While acknowledging that a "past practice" could create a term or condition of employment that cannot be unilaterally altered absent bargaining, the Court found that "the unambiguous contract language controlled unless the past practice was so widely acknowledged and mutually accepted that it amended the contract." *Id.* at 312. It further ruled that "the party seeking to supplant the contract language must show the parties had a meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract." *Id.* The Court neither stated nor implied that where a collective bargaining agreement contained provisions regarding a particular subject, then the contract should be deemed to cover *all* disputes concerning that subject, whether or not reasonably subsumed within the negotiated language, and regardless of whether the contract language even arguably vested the employer with the right to take the unilateral action at issue.

The Employer relies on the Court's citation to *Dept. of Navy* in which the D.C. Circuit noted that "a subject need not be explicitly mentioned in an agreement in order for the subject to be covered" by the agreement. *Id.* at fn. 16. However, despite that reference, the *Port Huron* Court was careful *not* to reach the conclusion advocated for by the Employer here. It stated:

> We do not address the outer limits of when a subject is "covered by" an agreement. The language granting the district the right to prorate benefits in PQ of the agreement, and the additional language in PH identifying the method by which benefits will be prorated, does not implicate that question. The association does not dispute that prorationing of benefits is addressed in the agreement. Thus, under any reasonable definition of the term "covered by", we conclude the prorationing of insurance benefits is "covered by" the agreement. *Id.* at 324.

Notably, the *Port Huron* Court also distinguished *Amalgamated Transit Union Local 1564 v. Southeastern Mich. Transp. Auth.,* 437 Mich. 441 (1991), in which the collective bargaining agreement contained several provisions regarding probationary employees, including giving the employer sole discretion to discharge those employees. The contract did not, however, specifically address the *discipline* of probationary employees. The Court determined that *Amalgamated* was distinguishable from the case before it because, unlike the proration of benefits, "disciplinary procedures for probationary employees were not covered by the agreement." *Id.* at 325, fn. 19.

It is clear from the Court's analysis in *Port Huron* that something more than the mere reference to a subject in a collective bargaining agreement is required to warrant the conclusion that all manner of disputes concerning that subject are covered by the contract. The fact that the Court found *Amalgamated* to be distinguishable strongly suggests that a contract must contain language fairly specific to the matter in dispute in order to "cover" it and thereby relieve a party of the duty to bargain over changes to terms of employment. At a minimum, there must be a reasonable basis upon which to conclude both that the matter is subsumed within the existing language, and that it arguably gives the employer the right to take the actions in dispute.

The issue in *Gogebic* involved the employer's unilateral decision to self-insure the dental benefits provided to employees. The contract language identified the insurance carriers for health and vision benefits, but not for dental benefits. Rather, the negotiated language provided only that the employer would maintain a specific level of coverage. The Court of Appeals determined, based on the health and vision provisions, that the parties had bargained over the issue of carriers. It therefore concluded that the contract covered the carrier issue regarding dental benefits, and the employer had no obligation to bargain before making the change to a self-insured plan. Under those facts and circumstances, the lack of any explicit mention in the parties' contract concerning the carrier for dental insurance did not foreclose a determination that the matter was covered by the contract.

Unlike in the instant case however, the precise issue to which the unilateral change was made in *Gogebic*, specifically, the insurance carrier, had indisputably been bargained by the parties regarding two other forms of insurance: health and vision. The Court reasonably concluded, based on this history of the parties' negotiations, that because the contract was silent concerning the carrier for dental insurance, the parties had agreed not to obligate the employer to a specific dental insurance carrier.

Conversely, here, while the unilateral changes all involve various aspects of employee-paid parking passes and on-site parking locations available to bargaining unit employees who purchase such passes, paragraphs 700 and 702 of the contractual MOU address only extraneous parking matters such as shuttle services for off-site parking, lighting, security escorts, sheltering of parking lots, snow and ice removal, parking for employees who carpool, and disciplinary consequences for employees who are tardy as a result of an inability to access parking.

Absent from the contract is any mention of either employee-paid parking passes, or the cost or location of available on-site parking for employees who purchase those passes. The contract is also devoid of any reference to the location of parking spaces consistent with each level of parking pass. In addition, the contract contains no provisions related to parking lots P3, P4, M29 or M71, the parking lots in which the changes were effectuated, nor does it contain language giving Respondent authority to either make changes to employee parking in general, or to parking in any of the aforementioned parking lots.

As we stated in *Berrien County*, 33 MPER 30 (2019), "the germane question in determining whether the contract covers an issue is if the agreement contains provisions that can *reasonably relied on* for the actions in dispute" (citing, *City of Royal Oak*, 23 MPER 107 (2010)). Here, as the record currently stands, there is scant basis upon which to conclude that the contract covered the parking issues involved in this case. Respondent argues that broad language in the parties' contractual management rights clause set forth in Article 2 concerning the Employer's right to "control the management of the University", including "the control of property", and the "right to change or introduce new operations, methods, processes, means or facilities", evidences the parties' agreement to allow the University to unilaterally implement the parking changes involved here. We disagree and conclude that these broad management rights provisions do not reasonably contemplate the Employer's right to take unilateral action implicating terms and conditions of employment of the bargaining unit employees as they relate to the fairly specific paid parking issues in dispute.

Our recent decisions are consistent with this determination. For example, in *City of Detroit Fire Department*, 34 MPER 17 (2020), we ruled that although the contract allowed the employer to determine the equipment to be used by employees, it did not cover the employer's unilateral utilization of new data derived from such equipment for the purpose of investigating and disciplining employees. There was no language in the agreement either giving the employer such authority, or otherwise addressing the manner in which novel data from new equipment could be utilized, and discipline was mandatory subject of bargaining.

Conversely, in *Berrien County*, 33 MPER 30 (2019), the management rights language in the contract vested the employer with the authority to "determine the equipment. . .to be used", and the union had not objected to existing practices or work rules requiring the use of mobile recording systems and surveillance equipment. As such, we concluded that the contract covered

a new policy requiring body-worn cameras. Because the contract vested the employer with rights concerning the use of "equipment", it was for an arbitrator, not the Commission, to determine whether the parties intended that language to cover the body-worn cameras at issue. Here, the management rights language concerning "control of operations" and "property" is much broader and vaguer than the management rights language in *Berrien* which specifically referenced the use of "equipment," which was, in fact, the exact subject of the parties' dispute. Here, there is no contract language vesting the Employer with rights concerning employee parking, parking lots, or parking in general.

The basis for the "covered by" doctrine underscores this premise. The doctrine exists to require parties who bring disputes involving contract language to the Commission, to resolve those disputes utilizing the grievance and arbitration machinery they negotiated for that purpose. MERC does not settle disputes over contract language. ("The MERC does not involve itself with contract interpretation when the agreement provides a grievance process that culminates in arbitration." *Port* Huron, 452 Mich. at 321). A necessary component of the "covered by" doctrine is the existence of contract language upon which a party could file a grievance over a unilateral change. There must also be some language which the employer could reasonably assert privileged it to take the unilateral action at issue, or, at a minimum, a bargaining history reflecting that the specific issue was taken up during negotiations and ultimately abandoned by the union. In short, there must exist some contract language for an arbitrator to interpret. Here, there is no contract language addressing the parking issues in dispute.

The remaining MOU provision in the parties' agreement does not militate in favor of a different result. While Paragraph 701 allows the MNA to "appoint a bargaining unit member as representative to the Parking Advisory Committee", and further provides that "[t]he committee will continue to address concerns and seek potential opportunities to improve parking and ensure communications with employees", it does not vest the Employer with the right to effectuate changes in the absence of bargaining. Even if paragraph 701 were interpreted as addressing potential changes to parking provisions beyond those contained in the MOU, it does not contemplate that such changes could be made unilaterally by the Employer.

Lastly, although Respondent initially asserted during oral argument that it was not claiming a waiver by the Union over the parking changes made by the University, it later appeared to change its position. In its brief to the Commission on exceptions it argues that the contractual waiver clause is evidence supporting a finding of contract coverage. It further argues that because the Union failed to negotiate specific language into the parties' contract that would have addressed the paid parking issues in dispute and defined the parties' rights and responsibilities in that regard, the Commission should conclude that any unaddressed issues were left within management's control, ostensibly because they were waived by the Union during negotiations.

We reject these arguments as well. The Employer has conflated the issue of "waiver" with that of "contract coverage." In *Gogebic,* while the Court found the language in the waiver clause

constituted an additional basis for finding the matter to be covered by the contract, it had already first determined that the contract language concerning dental insurance covered the disputed issue. There is nothing in *Gogebic*, or any other Court decision, suggesting that absent contract language covering the subject in dispute, a broad waiver clause would nevertheless support a finding of contract coverage. Indeed, such a determination would directly conflict with the decisions of the Courts that waivers of bargaining rights must be "clear and unmistakable" and are to be construed narrowly. *Port Huron*, 452 Mich. at 319-320.

C. The Lack of Record Evidence Concerning the Materiality of the Changes and Impact on Employees Warrants a Remand to the Administrative Law Judge.

Were we to decide this matter solely based on the existing contract language, we would be inclined to find, consistent with our decision in *University of Michigan (Medical Center)*, that the parties' agreement did not cover the parking changes unilaterally implemented by Respondent and, as such, that Respondent violated PERA by refusing to bargain over those changes. However, there are other facts we considered in *University of Michigan (Medical Center)* which could bear on our determination in this matter regarding the University's obligation to bargain with the MNA, but over which the parties were not afforded the opportunity to present record evidence. One of these factual issues involves the materiality of the changes and their impact on bargaining unit employees. In that regard, in oral argument and briefs on exception, the Employer asserts that the parking changes were *de minimus* and had no material impact on employees, while the MNA takes the opposite position.

Although prior to our decision in *University of Michigan (Medical Center)*, the Commission had yet to consider whether employee parking is a mandatory subject of bargaining, the Commission and Michigan's Courts have often looked to federal precedent on analogous provisions of the National Labor Relations Act ("NLRA") for guidance in interpreting PERA. *Interurban Transit Partnership*, 30 MPER 56 (2017). Under the NLRA, a change in an employer's parking policy is a mandatory subject of bargaining where the change significantly affects employees' terms and conditions of employment. See *Success Vill. Apartments, Inc.*, 348 NLRB 579, 580 (2006); *Berkshire Nursing Home, LLC*, 345 NLRB 220 (2005); *United Parcel Serv.*, 336 NLRB 1134, 1136 (2001); *Dynatron/Bondo Corp.* 324 NLRB 572, 578 (1997), enf. denied 176 F.3d 1310 (11th Cir. 1999); *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1193 (1986). In cases involving unilateral changes to other terms of employment, the Commission has likewise considered the materiality of the change and its impact on employees in deciding whether the employer had a duty to bargain prior to implementing the change. In *University of Michigan (Medical Center)* we adopted the standard articulated by the National Labor Relations Board and determined that the parking changes were material and had a significant impact on the affected employees, such that employee parking was a mandatory subject of bargaining.

In *Berrien County Intermediate School District*, the Commission found that the employer did not violate its duty to bargain when it replaced a fully funded health insurance program with a self-funded one for bargaining unit members. In dismissing the charge, we noted that there had been no substantive changes made to healthcare coverage or benefits and that no change was made to the claim forms or procedures. Although the employer assumed responsibility for the cost of healthcare claims, it also purchased excess loss insurance and designated reserve funds to cover those costs. Consequently, we held that there was no duty to bargain over the *de minimus* changes in working conditions involved in the case. See also *City of Southfield (Police Department)*, 6 MPER 24024 (1993) (no exceptions).

In *Berrien County*, 21 MPER 22 (2008), we determined that the employer did not violate its duty to bargain by changing to a self-funded health insurance plan, because the contract contained provisions for the types of coverage and benefits, but not for a particular insurer. Significantly, the employer made no substantive changes to the level of coverage or benefits provided, or to procedures or claim forms. In other words, the changes were not material and had no significant impact on employees. As such, it was for an arbitrator to determine whether the employer violated the agreement merely by changing to a self-funded plan where employees' coverage and level of benefits remained unchanged.

In *City of Bay City*, 34 MPER 1 (2020), we found that the employer's elimination of paper pay stubs in the absence of bargaining did not constitute a violation of its duty to bargain under PERA. Our ruling rested in large part on the determination that the change was neither material, nor did it impact employees' terms of employment because the information remained accessible to them, albeit through an electronic, versus paper, format. Employee wages and benefits were unaffected by the change.

Because the materiality of the changes and their impact on employees could be dispositive concerning Respondent's duty to bargain, we find that a remand to the ALJ for purposes of allowing the parties to adduce relevant evidence on these matters is appropriate.

D. The Lack of Record Evidence Concerning the Bargaining History Warrants a Remand to the Administrative Law Judge.

The degree to which the parties discussed or negotiated over the parking issues involved in this case, or any other matters concerning parking, during their 2019 contract negotiations, is likewise relevant to a determination of whether the negotiated contract language should be deemed to have covered the dispute over the instant parking changes.

In that regard, if the parties discussed those issues during bargaining but failed to reach agreement, and the Union willingly entered into an agreement that cemented neither the employees' rights nor the Employer's obligations as it concerned employee parking permits and the location and number of parking spaces for such permits, it may be difficult to conclude that the

matter had not been consciously explored, and that the Union had not ceded authority to the Employer concerning those issues. Alternatively, if there was little or no discussion concerning parking related issues during bargaining, beyond those set forth in the parties' MOU, such evidence would tend to support a determination that the parking issues in this case were not subsumed within the terms of the parties' agreement.

Although the parties made various assertions during oral argument concerning the extent, if any, to which parking-related issues were discussed or negotiated over during their 2019 contract negotiations, no record testimony was adduced in that regard. Because the parties' bargaining history regarding parking-related issues could likewise be dispositive with regard to Respondent's duty to bargain, we find that a remand to the ALJ for purposes of allowing the parties to adduce relevant evidence on these matters is appropriate.

Accordingly, we reverse the ALJ's dismissal of the Charge in Case No. 19-I-1855-CE and remand the matter for further hearing and the taking of additional relevant record testimony and other evidence consistent with our decision.

2. Respondent's Focus Group Meetings with Employees.

A. Legal Standards

Once a union is designated or selected for the purposes of collective bargaining by a majority of public employees in a unit appropriate for such purposes, that union is the exclusive representative of these employees for purposes of collective bargaining in respect to rates of pay, wages, hours or other conditions of employment. *Huron Sch Dist*, 1990 MERC Lab Op 628, 634; *Pontiac Sch Dist*, 22 MPER 51 (2009). An employer violates the duty to bargain and unlawfully bypasses the union when it confers a benefit upon employees or otherwise changes conditions of employment without going through the employees' exclusive bargaining representative. *Pontiac Sch Bd of Ed*, 1994 MERC Lab Op 366, 374; *Birmingham Bd of Ed*, 1985 MERC Lab Op 755.

Not all communications between an employer and its employees are unlawful. An employer may communicate factual information regarding the status of negotiations or its position at the bargaining table, provided that it does so in a non-coercive manner and without disparaging the bargaining agent. *MEA v North Dearborn Hts Sch Dist, 169 Mich App 39, 45-46 (1988)*; *Watersmeet Township School District*, 28 MPER 36 (2014); *Jackson Co*, 18 MPER 22 (2005). A union fails to meet its burden of proof regarding direct dealing where the employer communicates with employees for the purpose of providing information relating to planned or actual changes in operations or procedures, but the employees are offered nothing, and are not requested to negotiate terms with the employer. *Interurban Transit Partnership*, 30 MPER 56 (2017); *City of Grand Rapids*, 1994 MERC Lab Op 1159; *North Ottawa Comm Hosp*, 1982 MERC Lab Op 555. For example, the Commission has refused to find a direct dealing violation where the employer distributed information to employees describing its plan to reorganize city services and solicited

questions from them concerning the planned changes. *City of Madison Hts,* 1980 MERC Lab Op 146.

B. Application to Focus Group Meetings with Employees

The Union asserts that the ALJ erred when he concluded that Respondent did not violate its duty to bargain under PERA by holding focus group meetings which included members of the Union's bargaining unit in attendance. We disagree. At the time of the meetings, the parties were not in the process of bargaining a new contract or preparing to enter into contract negotiations. Consequently, the University was not using the meetings to gain an advantage over Charging Party at the bargaining table. Although the Union was not initially informed that the meetings would include a discussion of ideas to improve parking, Sullivan told Curl and Oppenheim in August of 2019 that Respondent intended to use the focus groups to solicit input regarding issues such as employees' commutes, which parking spots they were utilizing, and what hardships they were facing with respect to parking. During the meetings, the participants did in fact provide ideas on improving parking at the medical center. There is no evidence, however, that Glenn, the facilitator, ever attempted to refine, refute, negotiate over, or otherwise respond to those comments and suggestions. In fact, Glenn testified that she has no labor relations responsibilities.

Additionally, there is no assertion that Glenn, Sullivan or any other management representative ever promised the meeting participants that the University would implement any of their suggestions, nor is there any evidence that the ideas discussed during the meetings have since been acted upon by Respondent. Finally, Charging Party has not alleged that management made any disparaging comments about the Union or that Respondent suggested during the meetings that the University would unilaterally implement parking changes beyond its authority under its collective bargaining agreements with Charging Party and the other unions representing Michigan Medicine employees. For these reasons, we find that the focus group meetings were not likely to erode the Union's position as exclusive bargaining representative and that the ALJ did not err when he concluded that Respondent did not violate its duty to bargain under PERA by holding the focus group meetings. Consequently, we agree with the Order of dismissal recommended by the Administrative Law Judge in Case No. 19-D-0876-CE-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

IT IS HEREBY ORDERED that the Order of dismissal recommended by the Administrative Law Judge in Case No. 19-D-0876-CE-2 is adopted and shall become the Order of the Commission.

IT IS HEREBY FURTHER ORDERED that the summary dismissal by the Administrative Law Judge of the Charge in Case No. 19-I-1855-CE is reversed, and the matter is remanded to the Administrative Law Judge for further hearing and the development of relevant record testimony and other evidence consistent with this Decision.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: July 16, 2021