STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Public Employer-Respondent,

MERC Case No. 20-I-1436-CE

-and-

WAYNE COUNTY COMMUNITY COLLEGE PROESSIONAL AND ADMINISTRATIVE ASSOCIATION, AMERICAN FEDERATION OF TEACHERS MICHIGAN, LOCAL 4467,
Labor Organization-Charging Party.
_____/

APPEARANCES:

The Allen Law Group, by Sean P. Ayer, George K. Pitchford and Amy M. Robertson, for Respondent

Mark H. Cousens Law Office, by Mark H. Cousens, for Charging Party

DECISION AND ORDER

Due to concerns regarding the COVID-19 pandemic, Wayne County Community College Professional and Administrative Association, Local 4467 (Union or Charging Party) demanded that Wayne County Community College District (Employer or Respondent) bargain over employment-related health and safety conditions of the bargaining unit employees it represents. The Employer took the position that health and safety protections for employees were already covered by the parties' collective bargaining agreement and that it was not obligated to bargain further over such matters. The Union disagreed and filed an unfair labor practice charge.

In a Decision and Recommended Order[1] Administrative Law Judge (ALJ) Peltz determined that the subject matter of the dispute was covered by the terms of the parties' agreement and dismissed the charge.

In its exceptions, the Union contends that the ALJ erred in concluding that the Employer was not obligated to bargain further over specific health and safety concerns arising out of the pandemic because the matter was not sufficiently covered by the agreement to excuse the obligation to bargain.

[1] MOAHR Hearing Docket No. 20-017955

For the reasons set forth below, we agree with ALJ and affirm dismissal of the charge.

Procedural History:

The Union filed the instant unfair labor practice charge on September 8, 2020. The charge alleged that the Union submitted a demand to bargain to the Employer on June 10, 2020, and that it had not received a response from the Employer regarding the demand.

On September 29, 2020, the Employer filed a motion for summary disposition and the Union filed a response to the Employer's motion on October 15, 2020.

Oral argument was held on the summary disposition motion on October 21, 2021. At the start of the proceeding, the parties agreed to forgo an evidentiary hearing and have the matter decided based upon exhibits to which the parties stipulated.[2] Thereafter, the Employer and Union filed their "post-hearing" briefs on December 3, 2020, and December 8, 2020, respectively.

On July 27, 2021, the ALJ issued a Decision and Recommended Order on Summary Disposition in which he recommended that the charge be dismissed. The ALJ found that the subject matter of the dispute was "covered by" the terms of the parties' collective bargaining agreement and that the Employer therefore did not violate Section 10(1)(e) of PERA by failing or refusing to bargain over issues of employee health and safety relating to the COVID-19 pandemic.

On September 14, 2021, the Union filed exceptions to the ALJ's Decision and Recommended Order on Summary Disposition. On October 25, 2021, the Employer filed a response to the Union's exceptions.

Facts[3]:

Charging Party AFT Local 4467 represents a unit of full-time and regular part-time administrators and professional employees employed by the Respondent Wayne County Community College District. The Employer and Union are parties to a collective bargaining agreement covering 2019 through June 30, 2021.

[2] During oral argument, counsel for Charging Party indicated that the Union intended to present an additional claim asserting that the Employer acted unlawfully by refusing to bargain remotely via *Zoom*. The ALJ directed the Union to file an amended charge encompassing the additional allegation following the conclusion of the hearing (Tr. 20-21). However, no amended charge was ever filed and the Union did not raise the *Zoom* bargaining issue in its "post-hearing" brief. Consequently, the ALJ considered this claim to have been abandoned. The Union did not file exceptions to the ALJ's determination in its appeal to the Commission.

[3] We adopt any additional facts and findings set forth by the ALJ unless otherwise modified herein.

Article V of the contract contains a management rights provision that grants the Employer the authority to manage its affairs, including the right to direct the work force, introduce new equipment, assign work, and determine the number of employees assigned to operations.

Article XXV, Section D, Health and Safety, of the contract provides:

> The Employer shall make reasonable provisions for the health, safety, and first aid of its employees during hours of employment.

Article VIII of the agreement sets forth a grievance procedure that culminates in final and binding arbitration.

The contract also includes a waiver/zipper clause in Article XXXI.

In the Spring of 2020, the Employer shut down its operations due to the COVID-19 pandemic and required all work to be performed remotely. On June 10, 2020, prior to the start of the 2020-2021 academic year, the Union made a written demand that the Employer "bargain to impasse all mandatory subjects of bargaining regarding the health and safe working conditions of the entire membership of P&AA, on every campus and college site, during this ongoing pandemic and beyond."[4]

On June 29, 2020, the Union filed Grievance P001-20, asserting that the Employer violated Article XXV, Section D of the collective bargaining agreement by failing to provide adequate safety measures to essential staff who are needed on campus. Among the allegations set forth in the grievance, the Union asserted that students and visitors were not being properly screened upon entering buildings and that staff had not been provided adequate training, equipment and supplies to respond to the pandemic.

On September 1, 2020, the Union submitted a written demand for arbitration of the grievance, asserting that the Employer violated the collective bargaining agreement by forcing bargaining unit members to come to work without proper health and safety protocols required to work in a pandemic. Thereafter, the parties agreed to have the arbitration held in abeyance pending a decision by the Commission on this charge.

On September 17, 2020, the Employer's Labor Relations Manager sent the Union's President the following email:

> I am writing in response to your request to meet and discuss safety and health concerns of your membership. As you are already aware, the College has taken

[4] According to the Union, "[t]he communication between the parties went dark. There was no communication to speak of between June 10th and September 17th. This is not necessarily the fault of either party. It is simply a fact that the parties did not resolve this concern during the summer" (Tr. 23).

> many precautions to create a safer working environment, while ensuring we can continue to operate and serve our students and the community during these challenging times. This includes putting in place a number of processes such as promoting social distancing, implementing re-screening prior to entry into our facilities and providing personal protection equipment. All of this is being done in accordance with Governor Whitmer's Executive Orders and requirements of appropriate governmental agencies. As this is an evolving situation, the College is willing to further discuss our efforts. Accordingly, please forward your availability to meet so that we may directly address any questions that you may have.

Although the Union indicated it was willing to meet, the parties did not meet due to a disagreement over whether the meetings would be held via *Zoom* or face to face.

On October 19, 2020, the Employer's attorney sent the Union's attorney an email asserting that, although issues relating to safety and health were covered by the Agreement, the Employer was willing to meet with the Union to "discuss its concerns." There is no record evidence indicating that the parties ever met.

Discussion:

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).

Safety rules and safe work practices are conditions of employment, and therefore, are mandatory subjects of bargaining. See *Trenton v. Trenton Fire Fighters Union, Local 2701, International Ass'n of Fire Fighters,* 166 Mich. App. 285, 294–295 (1988); *City of Manistee v. Manistee Fire Fighters Ass'n, Loc. 645, I.A.F.F.*, 174 Mich. App. 118, 122 (1989); *NLRB v Gulf Power Co,* 384 F2d 822, 824-825, (CA 5, 1967); *City of Detroit (Fire Dep't.),* 1993 MERC Lab Op 529 (work situation on "violence runs" involved a clear issue of employee safety and, consequently, a mandatory subject of bargaining.)

An employer violates Section 10(1)(e) when it takes unilateral action on a mandatory subject of bargaining before the parties reach impasse. *Detroit Police Officers Ass'n v Detroit,* 61 Mich App 487, 490 (1975); *International Ass'n of Firefighters Local 1467, AFL-CIO v Portage*, 134 Mich App 466, 473 (1984). Impasse has been defined as the point at which the parties' positions have so solidified that further bargaining would be futile. *Redford Union School District*, 23 MPER 32 (2010), *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001); *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203.

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.

The Court went on to state:

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

The facts of the *Port Huron* case are instructive in determining the meaning given by the Court to the term "covered by." The issue in the case involved a question over the employer's proration of benefits for teachers hired for less than one year. The contract language provided that "continued coverage shall be provided to all contracted teachers on a twelve-month basis or a prorated portion of the year for teachers who work less than a full work year." *Id.* at 309. The contractual language was thus quite specific to the issue in dispute, and quite clearly defined the parties' rights and obligations. The union, however, asserted that the contract language had been modified by a past practice of providing benefits for the entire twelve-month period regardless of whether the teacher had worked the entire year. On that basis, the union maintained that the employer was obligated to bargain before unilaterally reinstituting the "proration" formula. The Court determined that the contract language "covered" the disputed issue, and that union had not met the higher burden of establishing that the asserted past practice had supplanted the existing contract provision.

It was under those factual circumstances that the Court stated that "[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. In other words, when the matter is covered by the agreement, further bargaining on that subject is no longer mandatory because the parties have fulfilled their statutory duty to bargain.

In the subsequent case of *Macomb County v. AFSCME Council 25, Locals 411 & 893*, 494 Mich 65 (2013), the Court again addressed the "covered by" doctrine in a case in which the employer modified the actuarial table used to calculate joint and survivor retirement benefits for employees retiring after July 1, 2007. The language in the parties' agreements (for 7 of the 8 involved unions) provided that "the Employer shall continue the benefits as provided by the presently constituted "Macomb County Retirement Ordinance. . .provided, that the provisions thereof may be amended by the Employer as provided by the statutes of the State of Michigan. . ." This language coupled with the applicable county ordinance, granted the employer discretion to make adjustments in order to ensure, per the ordinance's requirement, that the joint and survivor payment was the "actuarial equivalent" of the straight life retirement allowance. The unions however asserted that the employer was obligated to bargain prior to modifying an asserted past practice under which it had utilized a 100% female/0% male mortality table to calculate the joint and survivor payment, rather than the "blended" table it had proposed to implement.

The Court determined that although retirement benefits were a mandatory subject of bargaining, that the contracts covered the calculation of retirement benefits, and because they incorporated by reference the ordinance and also contained language concerning a retirement option whereby a surviving beneficiary could receive benefits, the issue was subsumed within the contracts' language, and any disagreement over the meaning or application of those provisions, was a matter properly before an arbitrator, and not MERC.[5]

See also *Cty. of Wayne v. Michigan AFSCME Council 25*, 28 MPER 23 (2014) (scope of Commission's authority in reviewing a claim of refusal-to-bargain when the parties have a separate grievance or arbitration process is limited to 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.

A subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement. *Port Huron*452 Mich at 323 n. 16; *Macomb County*, 494 Mich at 85; *City of Royal Oak*, 23 MPER 107 (2010). For example, where a management rights clause vests

[5] The Court also rejected the unions' "past practice" argument, finding that "unambiguous language in a collective bargaining agreement dictates the parties' rights and obligations even in the face of a conflicting past practice, "unless the practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract." Citing, *Port Huron*, 452 Mich at 329. Conversely, the Court stated that "when the collective bargaining agreement is ambiguous or silent on the subject, 'there need only be tacit agreement that the practice would continue'". *Id.*

an employer with the authority to unilaterally implement "work rules", a specific rule need not necessarily be mentioned in order to be "covered by" that contract language. 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." *Berrien County*, 33 MPER 30 (2019); *City of Bay City*, 34 MPER 1 (2020); *City of Royal Oak*, 23 MPER 107 (2010). In making such a determination, particularly where the language is of a broad management-rights nature, or otherwise ambiguous, an individual case may require the examination of additional facts, including, but not limited to, the parties' prior application of the language in question, or the existence and application of other contract language bearing on the term of employment at issue (for example in *Macomb*, the Court examined the retiree health care language to determine whether the county retirement ordinance was tacitly included in the agreement).

In fulfilling our obligation to follow precedent established by the Michigan Supreme Court in deciding cases involving the "covered by" doctrine, we are guided, in part, by the observation made by the Court in *Port Huron Educ. Ass' n*, that it had elected to "not address the outer limits of when a subject is 'covered by' an agreement." *Id.* at 323. This Commission has determined that the purposes and policies of PERA and its corollary mission to foster stability in labor relations are best served by ensuring that a matter is not deemed to be "covered by" a contract absent language in the agreement that is fairly specific to the matter in dispute, so that the parties rights and obligations have been clearly defined, or, in the event of ambiguity, there exists language ripe for interpretation by an arbitrator. We believe the application of the foregoing standard most closely comports with the Supreme Court's analysis and determination concerning the "covered by" doctrine.

In *University of Michigan Health System*, 34 MPER 37 (2021), the Commission found that although the parties' contract contained certain provisions under which employees could obtain free or valet parking, there was no contract language specific to paid parking passes and paid parking spaces available to employees. Further, there was no contract language vesting the employer with the unilateral exercise of control over employee parking matters, or the unilateral right to determine those terms of employment. Accordingly, the employer's changes to the number and location of paid parking spaces, which impacted the cost to employees and distance of parking from the worksite, were not matters covered by the existing language because the contract did not contain provisions upon which the employer could reasonably have relied to privilege its unilateral action in the absence of bargaining to a valid impasse.

Our decision in the *University of Michigan* case is consistent with the factual and legal analysis undertaken by the Court in *Port Huron.* Specifically, in *University of Michigan*, the facts demonstrated a lack of contractual language sufficiently addressing the matter in dispute (employee paid parking passes and paid parking locations) to support a determination that the parties had previously bargained over the matter so that each side's "rights and obligations" had been cemented.

Most recently, in a second case involving the same employer, *University of Michigan (Medical Center)*, 35 MPER 7 (2021), the Commission explained the rationale for the "covered by" doctrine further as follows:

> 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. . .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.

Where the dispute involves an alleged unilateral change by an employer, the doctrine of waiver is often conflated with that of "covered by." 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). As found by the Court in Port Huron, the question of waiver can also be implicated when a union argues that a "past practice" has superseded contract language supporting the employer's conduct. In that case, it must likewise be shown that the employer clearly and consciously relinquished its right to rely upon the language set forth in the parties' agreement.

Disputes involving unilateral changes often implicate contractual management rights provisions in which a union has ceded authority to the employer to solely and exclusively determine certain matters related to, or impacting, its operations, and in turn, affecting certain employee terms of employment. Because management rights provisions are frequently broad and unspecific, and because "waivers" of bargaining rights must be "clear and unmistakable," it is oftentimes the case that a management rights provision will not meet the higher standard of "waiver." Whether such language satisfies the level of specificity required to "cover" the disputed issue, as noted above, must be determined on a case-by-case basis.

Where the dispute does not involve an alleged unilateral change by an employer, but rather, an assertion that the employer is obligated to bargain over a mandatory subject that the union claims is not already "covered by" the contract, as is the case here, the inquiry, again, is whether the existing contract language sufficiently defines the respective rights and obligations of the parties so as to warrant a determination that the parties have already satisfied their respective statutory duty to bargain over the matter. If so, then the matter is subsumed within the contract language and any dispute over whether a party has lived up to its contractual obligations should be left to the determination of an arbitrator. If the contract language is not sufficiently specific so as to "cover" the matter, then the parties have a statutory duty to bargain, upon demand, to a valid impasse.

B. Respondent's Duty to Bargain in this Case

Here, the Employer does not dispute that employee health and safety is a mandatory subject of bargaining. According to the Employer, in compliance with its obligations under the agreement, it has taken many precautions to create a safer working environment in response to COVID-19. These include putting in place a number of processes such as promoting social distancing, implementing re-screening prior to entry into its facilities and providing personal protection equipment. The Employer notes that these measures were instituted in accordance with Governor Whitmer's Executive Orders and the requirements of other governmental agencies.

The Union does not contend that the Employer's response to COVID-19 was an improper unilateral change in conditions of employment. Rather, the Union asserts that the Employer violated Section 10(1)(e) because it refused the Union's demand to bargain over the mandatory subject of employee health and safety as impacted by the pandemic. In that regard, the Union maintains that the health and safety language set forth in Article XXV is insufficiently specific to the employee health and safety concerns arising out of the pandemic to warrant a determination that the parties have already bargained over the matter.

Conversely, the Employer contends that the subject matter of the instant dispute is "covered by" the terms of the parties' collective bargaining agreement and that the Union is demanding mid-contract bargaining on matters already negotiated. As found by the ALJ, we agree with the Employer's position that the matters over which the Union demanded bargaining are already covered by the agreement, such that the Employer has already satisfied its statutory duty to bargain.

The language of Article XXV requires that the Employer "make reasonable provisions for the health, safety, and first aid of its employees during hours of employment." The provision thus imposes a sweeping obligation on the Employer to provide its employees with reasonable health, safety, and first aid protections, regardless of the reason such protections are necessary. The only limitation on the Employer's obligation is that such health and safety provisions need only be "reasonable." Whether the Employer has met its obligations to provide "reasonable" health and safety measures would presumably be determined based on the facts of any given situation.

While Charging Party argues that because the contract does not specifically address COVID-19 it should not be deemed to cover the issue, the converse could also be true. The fact that the parties chose to negotiate broad language addressing all manner of health, safety, and first aid protections, for all manner of health and safety threats, could be interpreted as a conscious intent to obligate the Employer to address health and safety concerns in all circumstances, rather than only in the event of a specific safety threat, such as the annual flu; or air quality, potential toxic gases, and the like. Moreover, the language here, unlike management rights language, does not vest the Employer with the unilateral right to take action, or to refrain from action. Rather, it *obligates* the Employer to address health and safety matters of concern to its employees and their bargaining representative. While the language arguably affords the Employer the initial discretion to determine whether the safety measures it elects to implement are "reasonable," the Union has the ability to dispute that determination through the agreement's grievance/arbitration procedure.

The Union does not argue that the agreement is silent on the issue. As it relates to the COVID-19 pandemic, however, the Union variously refers to the contractual health and safety provision as "nothing of substance," "vague and general" and "rather pointless." It further notes that this language has been included in the parties' successive agreements for over a decade; that it has "never been used," that "no prior grievance has been filed and there are no interpretations of the clause."

Unlike the Union, we do not view the contractual language as either pointless or vacuous. As we noted above, rather than leaving health and safety measures to the Employer's sole discretion, or making the implementation of same optional, the language here *obligates* the Employer to address health and safety matters. Moreover, we find it hard to imagine that either party would elect to include "pointless," non-substantive language into an agreement, or, if they had initially done so, that such language would not have been deleted in subsequent agreements.

Contrary to the Union's assessment, in our view the language evidences the calculated decision by both parties not to leave health and safety matters affecting employees open to interpretation or possible future bargaining, but, rather, to cement each party's rights and obligations within the body of the contract. In that regard, we note that in the absence of such language, the Employer's duty to bargain would extend only to the point where the parties had reached valid impasse. In the event that agreement could not be reached on the health and safety measures to be implemented, the Employer would have satisfied its statutory duty to bargain and the Union and its membership would be left with only the safety measures the employer chose to implement, which could be substantially less than the "reasonable" measures required by the contract.

As regards the Union's assertion that the language had never been "used" and that no prior grievances have been filed, those facts, if true, could just as easily support the conclusion that the Employer, in instances requiring health, safety, and first aid provisions, has lived up to its contractual obligations such that no grievance was warranted.

Furthermore, the Union filed a grievance asserting that the Employer violated Article XXV, Section D of the collective bargaining agreement by failing to provide adequate safety measures to essential staff during the COVID-19 emergency. Among the allegations set forth in the grievance, the Union asserted that students and visitors were not being properly screened upon entering buildings and that staff had not been provided adequate training, equipment and supplies to respond to the pandemic. Ultimately, the Union submitted a written demand for arbitration of the grievance to the American Arbitration Association. Although the Union now claims that the language contained in Article XXV of the Agreement is so general that it has no meaning, it apparently believed the language was sufficiently specific and substantive to support its grievance. The Union's own actions thus support the conclusion that there exists contract language upon which a party could, and did, file a grievance.

Although the Union disagrees with the Employer's interpretation concerning the extent of its obligations under Article XXV, Section D, the Commission has held that it will not find a violation of the duty to bargain based on an alleged contract breach when the parties have a bona fide dispute over the interpretation of the agreement and there exists a mechanism by which to resolve that dispute. See also *City of Detroit (Law Department)*, 35 MPER 18 (2021); *Village of Romeo*, 2000 MERC Lab Op 296; *Central Michigan Univ*, 1997 MERC Lab Op 501; *City of Detroit (Wastewater Treatment Plant)*, 1993 MERC Lab Op 716.

Similarly, where a party relies on a contract provision in good faith, an issue implicating the application or interpretation of that provision presents a contract question which should properly be resolved through the grievance and arbitration machinery under the contract. *St. Clair County Road Comm'n*, 1992 MERC Lab Op 533, 537-539; *Genesee County Sheriff*, 1992 MERC Lab Op 295, 301-302. Consequently, as noted by the ALJ, it is for an arbitrator, not the Commission, to assess whether the actions taken by the Employer in response to the COVID-19 pandemic were, in fact, reasonable. What is reasonable in the face of a pandemic, of course, may be different from what is reasonable in the absence of a pandemic, but that is precisely the type of grist for which arbitration was intended. To find otherwise would effectively write Article XXV, Section D out of the agreement.

The Union also contends that the present dispute is not covered by the agreement because Article XXV(D) could not have been intended to apply to the COVID-19 pandemic since the Employer's sole obligation, under Article XXV(D), was to be "reasonable" in the face of a life-threatening health crisis. The Union further asserts that because neither party could have anticipated the COVID crisis, it belies logic to conclude that they intended the contractual language to apply to this situation. In rejecting this position, we agree with the ALJ that the Union's attempt to nullify the meaning of Article XXV is, for all practical purposes, no different than the many instances in which a public employer has sought to justify a contract violation by unilaterally reducing wages or altering hours of employment due to an allegedly unforeseen financial crisis—claims which the Commission has consistently and repeatedly rejected. See e.g., *City of Detroit*

(Law Department), 35 MPER 18 (2021); *Goodrich Area Sch*, 22 MPER 103 (2009); and other decisions cited by the ALJ.

The Union further argues that the ALJ erred when he failed "to require, as a condition of deferral, that the Respondent agree to waive any substantive or procedural objections to arbitration." Contrary to the Union's contention, we find that the ALJ did not "defer" to grievance arbitration as is the NLRB's practice in *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971). Indeed, any such "deferral" would run afoul of the Supreme Court's decision in *Detroit Fire Fighters Assn.*, 408 Mich 663 (1980), in which the Court determined that MERC was not statutorily privileged to implement a pre-arbitral deferral process as a corollary to that of the NLRB. Rather, the ALJ here found that the subject matter of the dispute was "covered by" the terms of the parties' collective bargaining agreement. Moreover, the parties mutually agreed to table the arbitration pending a determination by the Commission and it does not appear that the Employer has made any substantive or procedural objections to arbitration of the grievance.

Lastly, while the Union has raised certain substantive and procedural concerns over the Commission's implementation of the "covered by" doctrine, we do not find it necessary to address such concerns in the instant case since we have determined that the language here sufficiently cemented the parties' respective rights and obligations so as to warrant a conclusion that the matter at issue had already been bargained, and, as such, that no further bargaining was required.

For all of the foregoing reasons, we find that the Employer did not unlawfully refuse to bargain with the Union over specific health and safety matters arising from the COVID-19 pandemic. 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 unfair labor practice charge is dismissed in its entirety and that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Tinamarie Pappas, Commission Chair

William F. Young, Commission Member

Issued: December 17, 2021

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

In the Matter of:

WAYNE COUNTY COMMUNITY COLLEGE DISTRICT,
Respondent-Public Employer,

Case No. 20-I-1436-CE
-and- Docket No. 20-017955-MERC

WAYNE COUNTY COMMUNITY COLLEGE PROFESSIONAL AND ADMINISTRATIVE ASSOCIATION, AMERICAN FEDERATION OF TEACHERS MICHIGAN, LOCAL 4467,
Charging Party-Labor Organization.

_____/

APPEARANCES:

The Allen Law Group, by Sean P. Ayer, George K. Pitchford and Amy M. Robertson, for Respondent

Mark H. Cousens, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed by the Wayne County Community College Professional and Administrative Association (P&AA), American Federation of Teachers (AFT) Michigan, Local 4467 against Wayne County Community College District (WCCCD). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge for the Michigan Office of Administrative Hearings and Rules (MOAHR), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charge and Procedural History:

Charging Party is the exclusive bargaining representative of all full-time and regular part-time administrators and professional employees of WCCCD. The charge, which was filed on September 8, 2020, alleges that Respondent breached its duty to bargain in good faith in violation

of Section 10(1)(e) of PERA by failing or refusing to negotiate over health and safety issues relating to the COVID-19 pandemic.

On September 29, 2020, the WCCCD filed a motion for summary disposition in which it argues that the charge should be dismissed without a hearing because the health and safety of bargaining unit members is a matter covered by the collective bargaining agreement in effect at the time this dispute arose. Charging Party filed a response to the Employer's motion on October 16, 2020. Oral argument was held on the motion on October 21, 2021. At the start of the proceeding, the parties agreed to forgo an evidentiary hearing and have this matter decided based upon exhibits stipulated to by the parties.[1] Thereafter, Respondent and Charging Party filed "post-hearing" briefs on December 3, 2020, and December 8, 2020, respectively.

Facts:

The Employer and the Union are parties to a collective bargaining agreement covering the period 2019 through June 30, 2021. The contract contains a broadly worded management rights provision, Article V, granting the Employer the authority to manage its affairs, including the right to direct the work force, assign work, and determine the number of employees assigned to operations. The contract also includes a waiver provision, Article XXXI, which states:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the ultimate right and opportunity to make demands and proposals with respect to any subject matter not removed by law from the area of collective bargaining, and that understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this Agreement.

Article XXV of the contract covers miscellaneous matters including union meetings, employee rest area, teaching loads and retirement. Article XXV, Section D, which is labelled Health and Safety, provides, "The Employer shall make reasonable provisions of the health, safety, and first aid of its employees during hours of employment." The agreement also contains a multi-step grievance procedure culminating in final and binding arbitration.

Due to the COVID-19 public health crisis, WCCCD shut down its operations in the Spring of 2020 and required all work to be performed remotely. Prior to the start of the 2020-2021

[1] During oral argument, counsel for Charging Party indicated that the Union intended to present an additional claim asserting that the WCCCD acted unlawfully by refusing to bargain remotely via *Zoom*. Although Respondent did not oppose the amendment, I directed the Union to submit a written amended charge encompassing this allegation following the conclusion of the hearing. However, no amended charge was ever filed and the Union did not raise the Zoom issue in its "post-hearing" brief. Accordingly, I consider this claim to have been abandoned.

academic year, the Union made a written demand that Respondent bargain over issues relating to the "health and safe working conditions of the entire membership of P&AA, on every campus and college site, during this ongoing pandemic and beyond." When the WCCCD did not respond to the Union's demand to bargain, the Union filed a grievance asserting that Respondent breached Article XXV, Section D of the collective bargaining agreement by failing to provide adequate safety measures to essential staff during the COVID-19 emergency. Among the allegations set forth in the grievance, which was dated June 29, 2020, the Union asserted that students and visitors were not being properly screened upon entering buildings and that staff had not been provided adequate training, equipment and supplies to respond to the pandemic. On or about September 4, 2020, the Union submitted a written demand for arbitration of the grievance to the American Arbitration Association (AAA). Four days later, the Union filed this unfair labor practice charge. Thereafter, the parties agreed to have the arbitration held in abeyance pending a decision by the Commission in the instant case.

After the charge was filed, Respondent sent a letter to the Union asserting that it had no duty to bargain issues related to health and safety because such matters were covered by the contract. Nevertheless, the WCCCD indicated that it would be willing to meet with the Union to "discuss its concerns." At some point, the Union submitted a proposal to Respondent which provided:

> Mandatory subjects to bargain must include:
>
> Desk shields for all service areas. Tall desk shields are needed for all welcome desks, reception areas, workstations and open labs. They may be portable or permanent, but must be supplied by the employer.
>
> Portable and stationary Sneeze Guards are needed when servicing students in the open areas that include the Learning Center, Learning Resource Center, Accuplacer Testing, Academic Advising and all Self-Service and Computer Labs.
>
> Hand sanitizing stations in all office areas. Hand washing is not enough, especially in high traffic areas. Touchless hand sanitizing stations are needed for the prevention of spreading the virus when traveling around campus.
>
> Allow members to "Telework" virtually from home to slow the spread. Many functions that have been outlined can be completed virtually from home. Please see separate list of recommended telework union positions.
>
> At a minimum, Flexible Scheduling should continue for all campuses: Employees should be scheduled to work 2 or 3 days from home, and 2 or 3 days from their assigned campus (as Downtown continues to utilize), or telework 100% from home as discussed above.
>
> Employees working remotely will not be charged sick days or FMLA during their remote days.

> Provide proper COVID-19 screenings at all building entrances for both staff and students. Students, faculty and staff should be asked proper questions about their exposure to the virus. Mandatory temperature checks, masks, and hand sanitizer should be provided.
>
> Inspect and repair all bathrooms for proper functioning including hot water availability and touchless faucets. Some bathrooms across the District do not have hot water, functioning sinks or proper touchless faucets.
>
> Clean ventilation and maintain proper airflow of all HVAC systems. Properly clean vents and replace filters monthly. Maintain proper air flow and temperature throughout the District. Provide air cleaners in areas of major concern that lack proper functions by outdated design.
>
> Provide proper and timely communication of confirmed cases of the students, faculty, guests, and staff to ALL staff across the district so that immediate testing and actual 14-day-quarantining occurs. One too many cases have occurred that lack proper reporting to all who may have come in contact with the confirmed case. Supervisors have told staff that testing is voluntary not mandatory after possible exposure; supervisors have said 5 days of quarantine is enough.... Both these directives violate guidelines and orders.
>
> Lastly, going forward, the parties must agree to meet and bargain the impact of any decision to return to work during this pandemic three (3) weeks prior to the re-start date.

There is no indication in the record that the parties ever engaged in any substantive discussion of the issues raised by the Union in its proposal.

Discussion and Conclusions of Law:

Charging Party argues that the WCCCD violated Section 10(1)(e) of PERA by failing or refusing to bargain over issues of employee health and safety relating to the COVID-19 pandemic. Under Section 15 of the Act, public employers and labor organizations have a duty to bargain in good faith over "wages, hours and other terms and conditions of employment." Such issues are mandatory subjects of bargaining. MCL 423.215(1); *Detroit Police Officers Ass' n v Detroit*, 391 Mich 44, 54-55 (1974). A party violates PERA if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless that party has fulfilled its statutory obligation or has been freed from it. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377.

A party can fulfill its obligation under Section 15 of PERA by bargaining about a subject and memorializing the resolution of that subject in the collective bargaining agreement. Under such circumstances, the matter is "covered by" the agreement and further bargaining on that subject is foreclosed because the parties have fulfilled their obligation to bargain. *Port Huron* at 318; *St Clair Co ISD*, 2005 MERC Lab Op 55, 61-62; *Macomb Co v AFSCME Council 25*, 494

Mich 65, 79 (2013). As the Michigan Supreme Court stated in *Port Huron* at 327, "Once the employer has fulfilled its duty to bargain, it has a right to rely on the agreement as the statement of its obligations on any topic 'covered by' the agreement." At the same time, bargaining unit members have a right to rely upon the terms and conditions in the contract and to expect that they will continue unchanged. *Detroit Bd of Ed*. See also *Wayne Co Community Coll*, 20 MPER 59 (2007).

The Commission has held that it will not find a violation of the duty to bargain based on an alleged contract breach when the parties have a bona fide dispute over the interpretation of their contract. *Village of Romeo*, 2000 MERC Lab Op 296; *Central Michigan Univ*, 1997 MERC Lab Op 501; *City of Detroit (Wastewater Treatment Plant)*, 1993 MERC Lab Op 716. However, in cases in which statutory and contractual issues overlap, the Commission is often required to review the language of the collective bargaining agreement to determine whether there is a statutory violation. *Port Huron* at 321-322. In reviewing an agreement for a PERA violation, the Commission's initial charge is to determine whether the agreement "covers" the dispute. Where there is a contract covering the subject matter of a dispute, the agreement has a grievance procedure with final and binding arbitration and a repudiation has not been established, the contract controls and no PERA issue is presented. *Id*.; *St Clair Co Rd Comm v Local 516M Service Employees Int'l Union*, 1992 MERC Lab Op 533, 538. Because arbitration has come to be the favored procedure for resolving grievances, the Supreme Court has held that any doubt about whether a subject matter is covered by a collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute. *Macomb County* at 82.

The relevant inquiry in determining whether a collective bargaining agreement "covers" an issue is whether "the agreement contains provisions that can reasonably be relied on for the actions in dispute." *Macomb Co*, *supra*; *Berrien County*, 33 MPER 30 (2019). Both the Commission and the Courts have repeatedly cited *Dept of Navy v Federal Labor Relations Authority*, 692 F2d 48, 61 (1992) for the proposition that a subject need not be explicitly mentioned by an agreement in order for it to be "covered by" the contract. See e.g. *Macomb County* at 88; *Port Huron* at 332 n 16; *City of Flint*, 25 MPER 12; *City of Bay City*, 34 MPER 2 (2020); *City of Royal Oak*, 23 MPER 107) (2010). Recently, however, the Commission has clarified the "covered by" doctrine, specifying that something more than even 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 agreement. *University of Michigan Health System*, 34 MPER 37 (2021). According to the Commission, a contract must contain language "fairly specific to the disputed subject matter" in order to relieve a party of the duty to bargain over changes to terms or conditions of employment. *University of Michigan Health System*, 34 MPER 37 (2021).

For example, in *City of Detroit (Fire Dept)*, 34 MPMER 17 (2020), the employer purchased new equipment which allowed EMS technicians to monitor certain aspects of patients' conditions and to administer electric shocks to normalize the patients' heart rhythms. The union filed an unfair labor practice charge asserting that the employer had a duty to bargain over the use of data derived from that equipment to discipline employees. The employer asserted that the subject matter of the dispute was "covered by" language in the management rights clause of the collective bargaining agreement giving the employer the authority to select and purchase new equipment and to establish procedures and protocols for its technicians to follow in treating patients. Based upon that

language, the Commission held that the employer had no duty to bargain with the union over its decision to purchase the equipment, the requirement that technicians use the equipment in the manner prescribed, or the requirement that they perform CPR in accordance with standards established by the fire department. However, the Commission determined that the contract did not permit the employer to utilize the data derived from that equipment for disciplinary purposes because there was no language in the agreement giving the employer such authority or otherwise addressing the manner in which novel data from new equipment could be used.

A more recent case involving the "covered by" doctrine involved an employer's decision to remove and relocate employee parking spaces. The collective bargaining agreement at issue in *University of Michigan (Medical Center)*, ___ MPER __, Case Nos. 19-D-0876-CE & 19-I-1855-CE, issued July 16, 2021, included a memorandum of understanding (MOU) entitled, "Parking." The MOU required the employer to maintain a regular, dependable and free shuttle service to offsite University parking lots, mandated that parking lots be sheltered, physically lit and well maintained, specified that certain employees would be permitted to park on-site and addressed disciplinary consequences for employees who are tardy as a result of an inability to access parking. The agreement also allowed the Union to appoint a bargaining unit member as a representative to a parking advisory committee charged with addressing employee concerns and improving parking and communications. I granted summary disposition in favor of the employer, finding that the University's unilateral relocation of employee parking spots was a matter "covered by" the contract.

On exception, the Commission held that my decision to dismiss the charge based solely upon the MOU was erroneous. Characterizing the language of the MOU as addressing "only extraneous parking matters," the Commission concluded that the parties had not agreed to any contractual language giving the employer the authority 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." The Commission explained that such a result was consistent with the underlying rationale of the "covered by" doctrine:

> 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. . . 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.[2]

In contrast, the Commission in *Berrien County*, 33 MPER 30 (2019) dismissed an unfair labor practice charge alleging that the employer unlawfully refused to bargain over the impact of

[2] The Commission remanded the case so that evidence could be taken concerning the materiality of the change and the parties' bargaining history. The case remains pending at this time.

its new policy requiring body-worn cameras for bargaining unit members, finding that the collective bargaining agreement contained language that could reasonably support the employer's actions. The contract in that case contained a provision giving the employer the right to determine the work to be performed, the equipment and facilities to be used and allowed it to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions. Because the agreement vested the employer with rights concerning the use of "equipment", the Commission concluded that the dispute was "covered by" the agreement.

Even under the more rigorous analysis as expressed by the Commission in its recent decisions, I find that the subject matter of the instant dispute is inarguably "covered by" the terms of the parties' collective bargaining agreement. Like the contract language at issue in *Berrien County*, the provision relied upon by the Employer in the instant case explicitly vests Respondent with the authority to make decisions regarding the "health, safety and first aid" of members of Charging Party's unit in the absence of bargaining, provided that such decisions are "reasonable." Based on such language, it is for an arbitrator, not the Commission, to assess whether the actions taken by the WCCCD in response to the COVID-19 pandemic were, in fact, reasonable. To find otherwise would effectively write Article XXV, Section D out of the agreement. In so holding, I explicitly reject the Union's assertion that strict adherence to its contractual promise should be excused because the parties could not have possibly contemplated the pandemic when they negotiated the contract provision in dispute. Charging Party's attempt to avoid its contractual obligation in this manner is, for all practical purposes, no different than the many instances in which a public employer has sought to justify a unilateral reduction in wages or hours of employment due to an allegedly unforeseen financial crisis -- claims which the Commission has consistently and repeatedly rejected. See e.g. *Goodrich Area Sch,* 22 MPER 103 (2009); *Wayne County Bd of Commissioners*, 1985 MERC Lab Op 1037; *Wayne Co*, 1985 MERC Lab Op 833; *Wayne Co*, 1985 MERC Lab Op 168; *Detroit Fire Dept*, 1985 MERC Lab Op 208. See also *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Taylor Bd of Ed*, 1983 MERC Lab Op 77; *Jonesville Bd of Ed*, 1980 MERC Lab Op 891; *Howard Brissette, d/b/a The Golden Key*, 1967 MERC Lab Op 664.

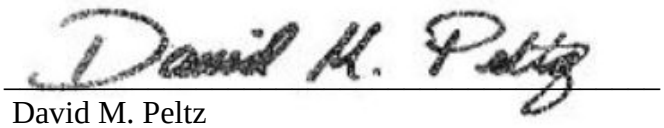
Lastly, the Union contends that the "covered by" doctrine should be abandoned "as it is contrary to controlling law and has evolved to the extent that it has improperly restricted the impact of Section 10(1)(e) of PERA." Regardless of the merits of such an argument, the continued viability of this well-established doctrine is a matter for the Commission, not an ALJ, to assess.

Despite having been given a fair and full opportunity to do so, Charging Party has failed to set forth any factually supported allegations which would establish a violation of PERA. For this reason, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by Wayne County Community College Professional and Administrative Association (P&AA), American Federation of Teachers (AFT) Michigan, Local 4467 in Case No. 20-I-1436-CE; Docket No. 20-017955-MERC, is hereby dismissed in its entirety on summary disposition.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



David M. Peltz
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: July 27, 2021