STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent,

Case No. C14 A-005
-and- Docket No. 14-000815-MERC

UNIVERSITY OF MICHIGAN
SKILLED TRADES UNION,
Labor Organization-Charging Party
_____/

APPEARANCES:

Office of the Vice President & General Counsel, by David J. Masson, for Respondent

Nacht, Roumel, Salvatore, Blanchard & Walker, P.C., by Nicholas Roumel and Edward A. Macey, for Charging Party

DECISION AND ORDER

On February 5, 2015, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: March 23, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On January 17, 2014, the University of Michigan Skilled Trades Union filed an unfair labor practice charge against the University of Michigan. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the pleadings, the transcript of the oral argument held July 8, 2014, and the exhibits stipulated to by the parties, I make the following findings of fact and conclusions of law.

The charge arises from Respondent's use of contract vendor labor to perform bargaining unit work. The Union asserts that Respondent has repudiated the terms of the parties' collective bargaining agreement by retaining employees of third-party contractors for more than one year in violation of Article 1, Section B, paragraph 1-4 of the contract. In addition, the Union contends that Respondent violated Section 10(1)(a) of PERA by failing or refusing to enter into new contracts with outside contractors, thereby preventing the contract's limitation on the use of third-party labor from taking effect. Respondent asserts that the collective bargaining agreement covers the matter in dispute and that the Union has failed to establish a repudiation of the contract.

A prehearing conference was held on April 17, 2014, during which I indicated to the parties that dismissal of the charge on summary disposition appeared to be warranted because the charge failed to establish any repudiation of the collective bargaining agreement by the University. The matter was then adjourned for several months so that the parties could engage in settlement discussions and to give Charging Party the opportunity to determine whether to file a petition for unit clarification pertaining to the contract employees who are the subject of the instant charge. No such petition was ever filed.

The parties appeared for oral argument before the undersigned on July 8, 2014, during which time Respondent formally moved to dismiss the charge. After considering the extensive arguments made by counsel on the record, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland Cnty and Oakland Cnty Sheriff v Oakland Cnty Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party had failed to state a valid claim under PERA. Rather than immediately issue the decision, however, I held the record open to give Charging Party the opportunity to request additional information from the University concerning its use of contract vendor labor. On December 11, 2014, the Union filed a supplemental statement and motion for evidentiary hearing. The University filed a response to Charging Party's supplemental statement on December 22, 2014.

Findings of Fact:

The following facts are derived from the pleadings and the assertions of the parties at oral argument, as well as the exhibits stipulated to by counsel, with all factual allegations set forth by Charging Party accepted as true for purposes of this decision. Charging Party represents a bargaining unit of employees of the University of Michigan at its various campuses. Among the many positions represented by Charging Party are electricians, sheet metal workers, roofers, painters, masons and carpenters.

The University of Michigan has a longstanding practice of using contract vendor labor to do work normally performed by Charging Party's members. The use of third-party contractors has been a subject of concern for Charging Party for many years. On October 20, 2011, the parties entered into a new collective bargaining agreement covering the period August 1, 2011, through May 31, 2015. The agreement contains a multi-step grievance procedure culminating in final and binding arbitration and a management rights clause, Article 2, which provides:

> The University retains, solely and exclusively, all its inherent rights, functions, duties and responsibilities with the unqualified and unrestricted right to determine and make decisions on all terms and conditions of employment and the manner in which the operations of the University will be conducted except where those rights may be clearly, expressly, and specifically limited in this agreement. It is expressly recognized, merely by way of illustration and not by way of limitation, that such rights, functions, duties, and responsibilities which are solely and exclusively the responsibility of the University include, but are not limited to: (1) full and exclusive control of the management of the University, the supervision of all

> operations, methods, processes, means, and personnel by which any and all work will be performed, the control of property and the composition, assignment, direction, and determination of the size and type of its working forces; (2) the right to determine the work to be done and the standards to be met by employees covered by this agreement; (3) the right to change or introduce new operations, methods, processes, means, or facilities, and the right to determine whether and to what extent work shall be performed by employees; (4) the right to hire, establish, and change work schedules, set hours of work, establish, eliminate, or change classifications, assign, transfer, promote, demote, release, and lay off employees; (5) the right to determine the qualifications of employees and to suspend, discipline, and discharge employees for cause and otherwise to maintain an orderly, effective, and efficient operation.

In attempt to address Charging Party's concerns regarding the University's use of contract vendor labor, the agreement also contains a provision addressing the circumstances pursuant to which employees of third party contractors may be utilized. Article 1, Section B, paragraph 1-4 provides:

> Contract Vendor Labor are third party contractors utilized by the University to augment the regular and temporary workforce, and they are not subject to the work duration limitations [for temporary employees] stated in paragraph 1-3 above. It is the parties' intent that typical bargaining unit work be performed by employees within the bargaining unit whenever practicable. Accordingly, individual employees of Contract Vendor Labor may not perform services continuously for the same departmental unit for longer than one calendar year. This paragraph shall only apply to individual employees of Contract Vendor Labor governed by contracts that are signed after the effective date of this Agreement. This paragraph is not subject to the grievance procedure.

On September 29, 2013, John Lund, an administrator in the University's Human Resources Department, forwarded an email message to Charging Party listing "the rules in Plant Operations regarding the use of contract employees." The email explained that individual contract vendor employees "will not work more than 12 months in any 14 month rolling period." According to the email, the limitation on the use of contract vendor labor "does not apply to any shop/region with an average Skilled Trades sick time usage over 140 hours in the previous fiscal year." The average includes short-term and extended sick." Finally, Lund noted that the University would not permit departmental units to "trade" employees of third-party contractors.

At the time the 2011-2015 collective bargaining agreement was executed, the University was a party to various contracts with third-party vendors and Respondent maintained its use of contract vendor labor pursuant to the terms of those agreements. As those contracts expired, Respondent continued to employ outside labor while, at the same time, the University issued requests for proposals, or "request for quotes" from third party contractors, including some vendors with whom the University had not previously had a business relationship.

In the spring of 2013, the University entered into new contracts with two outside vendors, Turner Electric and Goyette Mechanical.1 The contract with Turner Electric was signed on April 28, 2014, and it covered the period August 1, 2013, through June 30, 2015. The University's contract with Goyette Mechanical was for the period July 1, 2010, through June 30, 2013. That agreement was signed by representatives of the University on April 1, 2014, and by Goyette on May 12, 2014. The Goyette agreement contains language mirroring Paragraph 1-4 of the contract between Charging Party and the University. Specifically, Exhibit A of the Goyette contract provides, "Any individual employee of the Supplier providing supplemental labor may not perform services continuously for the same departmental unit for longer than one calendar year."

Charging Party has identified four employees of Turner Electric who have been performing services for Respondent for an extended period of time. Brian Barnes and John Pehovic have been working at the University continuously since 2009, while the University has utilized Tony James as a contract employee since October 18, 2010. Turner employee Gary Wiska has performed work for Respondent since April 23, 2013. The Union also identified nine employees of Goyette Mechanical who have worked at the University as steam fitters for more than one year, including Josh Thompson, who began performing services for Respondent on June 1, 2009, and Tom Rickleman, Matt Tschirhart and Ken Wood, each of whom started working at the University in 2010. According to the Union, employees of Goyette Mechanical comprise approximately one quarter of the total number of steam fitters within the bargaining unit.

Discussion and Conclusions of Law:

Charging Party asserts that the University has repudiated Article 1, Section B, Paragraph 1-4 of the parties' collective bargaining agreement and interfered with its rights under Section 10 of PERA by retaining employees of third-party contractors for periods greater than twelve months. Respondent asserts that the use of contract vendors is covered by the contract and that there have been no facts alleged by the Union which would establish a repudiation of paragraph 1-4 of the agreement. According to Respondent, the charge should be dismissed on summary disposition because the parties have a bona fide dispute over the meaning of that contractual provision.

Commission Rule 423.165 allows for a pre-hearing dismissal of a charge, or for a ruling in favor of the charging party. In the instant case, it appears that dismissal of the charge without a hearing is warranted on the ground that Charging Party has failed to set forth any factually supported allegations which, if true, would establish a violation of PERA.

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 Education Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317; *Detroit*

1 There were references to other "new" contracts between the University and outside vendors during oral argument. However, the Turner Electric and Goyette Mechanical contracts are the only such signed agreements relied upon by Charging Party in its supplemental position statement.

Bd of Education, 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. *Port Huron* at 318; *St Clair Cnty ISD*, 2005 MERC Lab Op 55, 61-62. 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 Cnty Comm Coll*, 20 MPER 59 (2007).

In the instant case, is apparent that the parties have bargained over the topic in dispute, specifically the scope of Respondent's authority to utilize contract vendor labor. Article 1, Section B, paragraph 1-4 of the collective bargaining agreement contains a broad management rights clause which gives Respondent full and exclusive control of the management of the University, including the right to control "operations, methods, processes, means, and personnel" and the authority to determine the "composition, assignment, direction, and determination of the size and type of its working forces." The third sentence of Article 1, Section B, paragraph 1-4, sets forth a specific limitation on that managerial authority by restricting the amount of time employees of vendor labor may perform services continuously for a departmental unit of the University to a period not to exceed one calendar year. The parties disagree, however, on the proper interpretation of that provision.

Charging Party asserts that the limitation on the use of outside labor set forth in paragraph 1-4 applies to circumstances in which a vendor contract has expired, but the University has exercised its right to renew the agreement or otherwise continued to utilize employees of that third-party contractor without formally signing a new contract. With respect to Turner Electric and Goyette Mechanical, vendors with whom the University entered into new agreements, Charging Party asserts that the one year limitation on the use of outside labor began to run from the effective date of the new contracts, rather than the date those contracts were actually signed. Since the terms of the contracts with Turner Electric were made retroactive to August 1, 2013, the Union asserts that Respondent repudiated the collective bargaining agreement by continuing to utilize four employees of Turner Electric for longer than one calendar year from that date. Charging Party further contends that the University acted contrary to paragraph 1-4 of the contract by using nine steam fitters for more than one year following the August 1, 2013, effective date of the Goyette contract. Charging Party further asserts that the policy stated by the University in the email message issued by Lund on September 29, 2013, is contrary to both the terms and the spirit of paragraph 1-4 of the agreement in that the message expressed the University's intent to utilize contract vendor labor for periods longer than one calendar year.

Respondent asserts that the collective bargaining agreement's use of the word "signed" is determinative and that, by its terms, Article 1, Section B, paragraph 1-4 only serves as a limitation on the use of outside employees governed by contracts with third party vendors which were actually signed after August 1, 2011, the effective date of Respondent's collective bargaining agreement with Charging Party. As noted, the contract with Turner Electric was signed on April 28, 2014, while the Goyette contract was signed by representatives of the University on April 1, 2014, and by the third-party vendor on May 12, 2014. Because twelve months have not yet elapsed since the Turner and Goyette contracts were signed, Respondent contends that no claim of repudiation under PERA has

been stated. In addition, Respondent denies that the Lund email establishes the University's intention of disregarding the terms of the parties' collective bargaining agreement. According to Respondent, paragraph 1-4 only prohibits outside employees from working for the same department for more than twelve consecutive months at a time. Respondent contends that, pursuant to the plain language of the collective bargaining agreement, it is free to move a contract vendor employee to another departmental unit or terminate the employee and subsequently reemploy that individual at a later date.

The Commission's role in disputes involving alleged contract breaches is limited. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). Where there is a collective bargaining agreement covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is present. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65 (2013). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g. *City of Detroit (Transp Dept)*, 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. A finding of repudiation cannot be based on an insubstantial or isolated breach of contract. *Oakland Cnty Sheriff*, 1983 MERC Lab Op 538, 542. Repudiation exists when 1) the contract breach is substantial, and 2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. The Commission will find a repudiation only when the actions of a party amount to a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

Having carefully reviewed the record in this matter, I conclude that Charging Party has failed to set forth a valid claim of repudiation. Charging Party has presented a plausible interpretation of Article 1, Section B, paragraph 1-4 of the parties' contract. At the same time, the University's interpretation of that same provision cannot reasonably be described as spurious or nonexistant. See *Jonesville Bd of Ed*, at 900-901. Where, as here, the collective bargaining agreement clearly covers the matters in dispute and both parties have articulated credible interpretations of the relevant contract language, no claim under PERA has been stated. Although the Union and its members may justifiably believe that Respondent's actions have been contrary to the spirit of the contract, the University has, at the same time, the right to rely upon the specific terms and conditions of employment set forth therein. Where those terms and conditions are subject to more than one interpretation, Charging Party is left to its contractual remedies for its claim that the language of the collective bargaining agreement is not being properly applied.2 As noted, the Commission will not find a PERA violation where there exists a bona fide dispute over the meaning and interpretation of the contract. *Gibraltar Sch Dist*, 18 MPER 20 (2005); *Plymouth-Canton Comm Sch.*

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2 This would normally entail bringing the claim before a grievance arbitrator. In the instant case, however, the parties specifically agreed that any disputes over the meaning of paragraph 1-4 shall not be pursued via the contractual grievance procedure. By including such language in the agreement, Charging Party has waived its right to challenge the University's interpretation of this specific provision of the contract and agreed that Respondent's interpretation will be final and binding. Cf. *Plymouth-Canton Cmty Sch*, at 897, in which the Commission held that it would exercise jurisdiction over an ordinary contract dispute where the agreement itself did not provide a mandatory binding procedure for dispute resolution.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Although Charging Party contends that the University violated PERA by failing or refusing to enter into new contracts with outside vendors, the Union has set forth no factually supported allegation which, if true, would prove that Respondent intentionally tried to circumvent the language of Article 1, Section B, paragraph 1-4 by delaying negotiations with third-party contractors.

Despite having been given ample opportunity to do so, Charging Party has failed to establish that the University has violated PERA with respect to its use of contract vendor labor. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

The unfair labor practice charge filed by the University of Michigan Skilled Trades Union against the University of Michigan in Case No. C14 A-005; Docket No. 14-000815-MERC is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 5, 2015