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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BERRIEN COUNTY AND BERRIEN COUNTY SHERIFF,
Public Employer-Respondent,

-and- MERC Case No. C17 L-112

POLICE OFFICERS LABOR COUNCIL,
Labor Organization-Charging Party.
/

APPEARANCES:

Abbott Nicholson, by John R. McGlinchey and Kristen L. Baiardi, and by James McGovern, Berrien County Corporate Counsel, for the Public Employer

Michael J. Akins, for the Labor Organization

DECISION AND ORDER

On December 12, 2018, Administrative Law Judge Travis Calderwood issued his Decision and Recommended Order[1] in the above matter finding that Respondent Employer violated § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), when it refused to bargain over the impact and/or effects of its revised policy concerning body-worn cameras. The ALJ found that the collective bargaining agreement did not cover the dispute sufficiently to support a waiver defense. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After receiving an extension of time, Respondent filed its exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on February 1, 2019. Charging Party did not file a response or brief in support of the ALJ's decision.

In its exceptions, Respondent contends that the ALJ erred when he concluded that it was obligated to bargain over the impact and/or effects of its decision to require its officers to wear body cameras and that the ALJ erred when he found that the parties' labor contract did not cover the dispute. Respondent also contends that assigning body cameras is an extension of officers' existing duties which need not be bargained.

We have reviewed the exceptions filed by Respondent and find that they have merit.

[1] MAHS Hearing Docket No. 17-028183

Factual Summary:

Charging Party Police Officers Labor Council (POLC or Union) represents deputies and sergeants employed by Respondent Berrien County Sheriff's Department (Sheriff's Department or Employer) in its Road and Jail Divisions. The POLC and the Sheriff's Department are parties to a collective bargaining agreement effective January 1, 2016, through December 31, 2018.

The Employer has utilized Mobile Video/Audio Recording Systems (MVS), in the form of cameras mounted in patrol vehicles and microphones worn by Road Division deputies since 2003. Chapter 4, Section 7, of the Sheriff's Department Policy and Procedures Manual, effective January 23, 2003, set forth the Employer's Mobile Recording System (MRS) Policy and established "department guidelines for mobile videotaping, tape retention and dissemination." There is no indication in the record that Charging Party ever challenged the existence or reasonableness of that policy.

In addition to the MVS cameras utilized in the Sherriff's Department's vehicles, the Employer has also utilized surveillance cameras within its jail since sometime prior to 2011. There is, however, no indication in the record that the Sherriff's Department maintained any written policy regarding the jail cameras similar to the MRS Policy identified above. As is the case with MVS cameras and microphones, there is no indication that Charging Party ever challenged the existence or reasonableness of the Employer's use of cameras within its jail.

On August 8, 2017, the Employer informed all its deputies that it was revising its MRS Policy to require the use of body-worn cameras. The revised policy, entitled Digital in Car Video System and Body Worn Camera Policy (Car/Body Camera Policy) was effective on August 3, 2017, and provides "guidelines for the operation of the digital in-car camera and body worn camera recording systems utilized" by the Sherriff's Department. In accordance with the Car/Body Camera Policy, in August 2017, the Employer began requiring deputies, in both its Road and Jail Divisions, to use body-worn cameras while performing their duties.

By letter dated August 24, 2017, POLC Labor Representative Will Keizer wrote to Sherriff Paul Bailey and demanded that the Employer "bargain the decision, impact and effect of" the revised camera policy. By letter dated that same day, Undersheriff Charles E. Heit responded to Keizer and indicated that the Sheriff's Department rejected Keizer's demand to bargain over the revised camera policy. Undersheriff Heit's August 24 letter provided, in relevant part:

> We have had a policy in place and operated In-Car Cameras for several years and the operation and policy of the use of these cameras has never been previously challenged by the union. The addition of the Body Worn Cameras is an extension of the use of cameras that has been in place for several years.
>
> Article 4, Section 1 of the current bargaining agreement states the Sheriff is vested with the authority and management of the department including, "the equipment and facilities used," the "means and procedures for performing the work" and "to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions."

> We find that the implementation of the use of Body Worn Cameras clearly and unequivocally falls within the "Management Rights" section of the collective bargaining agreement. Therefore, we reject your demand to bargain this management right.

On December 26, 2017, the Union filed the instant unfair labor practice charge alleging that Respondent violated § 10(1)(e) and § 15(1) of PERA when it refused "to bargain the impact and effect of its body camera policy."

A hearing was held on March 27, 2018 and on December 12, 2018, the ALJ issued a Decision and Recommended Order in which he found that Respondent violated § 10(1)(e) of PERA when it refused to bargain the impact and/or effects of the revised policy covering body-worn cameras on bargaining unit members.

Discussion and Conclusions of Law:

Section 15 of PERA requires a public employer to bargain collectively with the recognized representative of its public employees. Certain issues including "wages, hours and other terms and conditions of employment" are considered to be mandatory subjects of collective bargaining. *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 54-55, 214 N.W.2d 803 (1974); *Local 1277, Metropolitan Council No. 23, AFSCME v. Center Line*, 414 Mich 642, 652, 327 N.W.2d 822 (1982). Issues falling outside of this category are classified as either permissive or illegal subjects of bargaining. *Id.* at 652, 327 N.W.2d 822. Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute an unfair labor practice under § 10(1)(e) of PERA.

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

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

In its exceptions, the Employer argues that it had no duty to bargain over its decision to require officers to utilize body cameras or the effects of its decision because the matter involves a

permissive subject of bargaining that is covered by Article 4, Section 1 of the collective bargaining agreement. The Employer notes that Article 4, Section 1, allows it to determine the work to be performed, the equipment and facilities to be used and allows it to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions.

In his Decision and Recommended Order, the ALJ found that the collective bargaining agreement did not cover the issue in dispute because it did not provide a specific reference to body-worn cameras and would not, therefore, support a "waiver defense." We, however, disagree and find that the issue in dispute is covered by the agreement.

In *Port Huron*, at 319, the Michigan Supreme Court discussed at length the difference between a situation in which a subject is "covered by" a collective bargaining agreement and a situation where a union has waived its right to bargain over that subject. Quoting Judge Harry T. Edwards in *Dep't of Navy v Federal Labor Relations Authority*, 962 F2d 48 (DC Cir, 1992), the Court explained the difference as follows:

> 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.
>
> ...
>
> Indeed, the difference between the two concepts goes to the structural heart of labor law. When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules -- a new code of conduct for themselves -- on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of the Authority, the National Labor Relations Board or the courts to interfere with the parties' choice .... On the other hand, when a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of waiver and have tended to construe waivers narrowly. [Emphasis in original] *Dep't of Navy*, 962 F2d at 57.

In *City of Royal Oak*, 23 MPER 107 (2010), the union argued that the Employer was obligated to bargain over its decision to require police officers to attend training in evidence collection and to assign additional duties to these officers as a result of the training. Although the Employer asserted that the matter was covered by the collective bargaining agreement because the agreement allowed it to determine the duties of officers, the Union responded that the agreement was not sufficiently specific to cover the dispute. In dismissing the charge, the Commission held that a topic need not be specifically mentioned in order to be "covered by" the collective bargaining agreement. Additionally, if a topic is "covered by" the collective bargaining agreement, there is no need to determine if there is clear and unmistakable evidence of a waiver:

> In its brief, Charging Party argues that because the contract does not specifically address this factual scenario, the contract does not cover the issue. This argument parallels a waiver analysis. *See Org. of Sch. Adm'r and Supervisors, AFSA, AFL-CIO v. Detroit Bd. of Ed.*, 229 Mich. App. 54, 66 (1998), requiring clear and unmistakable evidence of a waiver. When analyzing an issue pursuant to the "covered by" doctrine, the waiver analysis is meaningless. *Bath Marine Draftsman's Ass'n v. NLRB*, 475 F3d 14, 25 (CA1 2007). Further, this standard is specifically rejected by the covered by doctrine; to be covered by the collective bargaining agreement a topic need not be specifically mentioned. *See Port Huron Ed Ass'n v. Port Huron Area Sch. Dist.*, 452 Mich. 309, 322 (1996); *citing Dep't of Navy v. Fed. Labor Relations Authority*, 962 F2d 48, 58 (CADC 1998). As mentioned above, the germane question in determining whether the contract covers an issue is if the agreement contains provisions that can be reasonably relied on for the actions in dispute.

Similarly, in *Pontiac Sch Dist,* 2002 MERC Lab Op 20, the Commission held that the employer did not have to bargain over the assignment of new duties to bargaining unit employees because the disputed issue was "covered by" the language in the management rights clause of the collective bargaining agreement. See also *Houghton Lake Community Schools*, 1997 Lab Op 42; *Wayne County*, 29 MPER 1, p. 6 (2015); and *City of Pontiac (Police Dep't),* 1997 MERC Lab Op 201 (no exceptions).

In the present case, as in *City of Royal Oak*, the agreement is not silent regarding the matter in dispute. To the contrary, it contains a provision that can be reasonably relied on to support the Employer's actions. The matter involved in this dispute is, therefore, "covered by" the agreement. Significantly, POLC Labor Relations Representative Keizer testified that the collective bargaining agreement allowed the Sheriff to require employees to utilize equipment such as body-worn cameras and to develop policies related to equipment. See also the Closing Statement of Charging Party Attorney Akins. Although the POLC, nonetheless, contends that the Employer was obligated to bargain over the impact and effect of its decision, the Commission has long recognized that, where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, there is no obligation to engage in further impact and effect bargaining.

As noted by the ALJ, e.g., in *St. Clair County Road Commission*, 1992 Lab Op 533, and affirmed by the Commission on exceptions:

> Under Section 15 of PERA, the bargaining obligation does not compel either party to agree to a proposal or make a concession. Where the subject matter of a dispute under a collective bargaining agreement has been bargained and there is machinery for resolving any dispute under that contract, the Commission cannot require an employer to enter into further bargaining over either the decision or the impact of subject matter encompassed by the contract without violating the spirit, if not the letter, of Section 15. Under the collective bargaining agreement in effect in this case, if the Employer were required to re-bargain the matter of hours and work week during the term of the contract through the use of Commission unfair labor

practice procedures, the net result would be the requirement that the Employer is expected to make further concessions that it did not make when the contract was entered into. [Emphasis added].

Subsequent to this, in *Wayne State University*, 1997 Lab Op 484, the Commission again held that where there is a contract covering the subject matter of a dispute, which has provisions reasonably relied on for the action in question, there is no obligation to engage in further impact and effects bargaining. See also *City of Pontiac*, 26 MPER 30 (2012).

In view of the foregoing, we believe that Respondent reasonably relied on the language of Article 4 of its agreement with Charging Party when making its decision to require officers to utilize body cameras and was not obligated to engage in further impact and effects bargaining. Consequently, the proper forum for resolving any dispute over the contractual propriety of the Employer's actions is the grievance arbitration procedure provided for by Article 5 of the parties' collective bargaining agreement. The Commission, therefore, finds that the ALJ erred by concluding that Respondent violated § 10(1)(e) of PERA; instead, the Commission must dismiss the charge in its entirety.

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: OCT 15 2019

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

BERRIEN COUNTY AND BERRIEN COUNTY SHERIFF,
Respondent-Public Employer,

Case No. C17 L-112
-and- Docket No. 17-028183-MERC

POLICE OFFICERS LABOR COUNCIL,
Charging Party-Labor Organization.
_____/

APPEARANCES:

James McGovern, Berrien County Corporate Counsel, for the Public Employer

Michael J. Akins, for the Labor Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

On December 27, 2017, the Police Officers Labor Council (Charging Party or POLC) filed the above unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against Berrien County and the Berrien County Sheriff (individually the County or Sheriff Department respectively) (collectively Respondent or Employer). 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 Administrative Law Judge Travis Calderwood, of the Michigan Administrative Hearing System, acting on behalf of the Commission. Based upon the entire record, including the transcript of the March 27, 2018, hearing before the undersigned, exhibits admitted at the hearing, and post hearing briefs filed by the parties on or before May 25, 2018, I make the following findings of fact, conclusions of law and recommended order.

Unfair Labor Practice Charge:

Charging Party claims that on or about August 8, 2017, the Respondent enacted new policies regarding body-worn cameras and then refused to bargain with Charging Party over the impact and/or effect of said policies in violation of Section 10(1)(e) of the Act.

Findings of Fact:

Charging Party is the authorized bargaining representative for deputies employed full-time in the Sheriff's Department below the rank of Lieutenant. Bargaining unit members include deputies in both Jail and Road Divisions.

The parties are signatories to a collective bargaining agreement effective January 1, 2016, through December 31, 2018. Article 4, Section 1 of that agreement, the management's right provision, provides the following:

> It is hereby agreed that the customary and usual rights, powers, functions and authority of management are vested in the Sheriff of Berrien County and the Berrien County Board of Commissioners. These rights include but are not limited to those provided by statutes or law, along with the right to direct, hire, promote, transfer, and assign employees; to investigate, suspend, demote, discharge for just cause or to take other disciplinary action that is necessary to maintain the efficient operation of the department; to increase or decrease the working force; to close or discontinue any or all operations; to determine the work to be performed, the equipment and facilities to be used; to establish and/or change classifications of work and the methods, means and procedures for performing the work; to subcontract work; to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions; to schedule hours and shifts of work, including overtime. It is expressly understood that the Sheriff of Berrien County and the County Board of Commissioners, herein referred to as the Employer, hereby retain and reserve all their inherent and customary rights. The Employer agrees that it will not exercise these rights in violation of any specific provision of the Agreement.

Article 17, Section 11, provides waiver language, and states:

> This Agreement contains the entire terms and conditions of employment agreed upon between the Employer and the Union. The Parties acknowledge that there are no other agreements either oral or written, express or implied, that cover the relationship of the Parties. Each Party hereby expressly waives the right to require the other to enter into further negotiations on any matter whatsoever, either covered in the Agreement or not, or where such subject matter was or was not within the knowledge or contemplation of either or both of the Parties at the time they negotiated or executed this Agreement. This Agreement, however, maybe extended by mutual agreement of the Parties in writing.

Since approximately January of 2003, the Employer has maintained and utilized Mobile Video/Audio Recording Systems (MVS), in the form of in-car cameras in its law enforcement vehicles. Chapter 4, Section 7, of the Sheriff Department's Policy and Procedures, effective January 23, 2003, is entitled Mobile Recording System (MRS Policy), and provides "department guidelines for mobile videotaping, tape retention and dissemination." There is no indication in the record that Charging Party ever sought to challenge the existence or reasonableness of that policy.

In addition to the MVS cameras maintained and utilized in the Sherriff Department's vehicles, the County has also utilized surveillance cameras within the jail since sometime prior to 2011. There is no indication in the record that the Sherriff Department maintains any written policy regarding the jail cameras similar to the MRS Policy identified above. The preceding notwithstanding, similar to the MVS cameras, there is no indication in the record that Charging Party ever sought to challenge the existence or reasonableness of the jail's cameras.

In July of 2017, the Governor signed into law Public 85 of 2017, the "Law Enforcement Body-Worn Camera Privacy Act." (Act 85). Act 85's stated purpose was to:

> [T]o exempt from disclosure certain audio and video recordings recorded by law enforcement officers with a body-worn camera in certain private places; to describe certain individuals who may request disclosure of those audio and video recordings; and to prescribe the powers and duties of certain local and state law enforcement agencies.

Act 85 was scheduled to take effect on January 8, 2018, and contained several requirements with which state law enforcement agencies must comply regarding the retention and disclosure of audio and video recordings captured by body cameras worn by law enforcement officers. Section 8 of Act 85 required that law enforcement agencies that utilize body cameras develop a written policy that "complies with the requirements of this act." Act 85 does not require that law enforcement officers wear body cameras and the parties did not identify any state or federal law mandating such.

On August 8, 2017, the Employer forwarded to all Deputies within the Sherriff's Department a revision to MRS Policy to now include the use of body-worn cameras. The revised policy, entitled Digital in Car Video System and Body Worn Camera Policy (Car/Body Camera Policy) was effective August 3, 2017, and provided "guidelines for the operation of the digital in-car camera and body worn camera recording systems utilized" by the Department. There is some evidence that the Department approached a few Deputies in the Jail Division about body-worn cameras prior to the August 8, 2017, email, but the parties agreed that it was not until after that date that any Deputies actually began wearing body-worn cameras.

By letter dated August 24, 2017, POLC Labor Representative Will Keizer wrote to Sherriff Paul Bailey and demanded that the Employer "bargain the decision, impact and effect of" the revised camera policy. By letter, dated that same day, Undersheriff Charles E. Heit indicated that the Department rejected Charging Party's demand to bargain. That letter provided, in the relevant part the following:

> We have had a policy in place and operated In-Car Cameras for several years and the operation and policy of the use of these cameras has never been previously challenged by the union. The addition of the Body Worn Cameras is an extension of the use of cameras that has been in place for several years.
>
> Article 4, Section 1 of the current collective bargaining agreement states the Sheriff is vested with the authority and management of the department including, "the equipment and facilities used", the means and procedures for performing the work" and "to make and enforce reasonable rules and regulations relating to personnel policies, procedures and working conditions."
>
> We find that the implementation of the use of Body Worn Cameras clearly and unequivocally falls within the "Management Rights" section of the collective bargaining agreement.

The record is devoid of any indication that the parties discussed the issue of cameras, body-worn or otherwise, during negotiations for the current contract.

Discussion and Conclusions of Law:

In general terms, Section 15 of PERA bestows upon public employers the duty to bargain in good faith over wages, hours, and other terms and conditions of employment. The items subject to this obligation are "mandatory subjects of bargaining." *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Unilateral action on the part of a public employer, or its refusal to engage in collective bargaining with respect to a mandatory subject, may constitute a violation of Section 10(1)(e) of the Act. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 178 (1989). Moreover, what constitutes a mandatory subject of bargaining is determined on a case by case basis. *Id.*

While an employer is prohibited from taking unilateral action as it relates to mandatory subjects, it does retain significant authority in which to manage its affairs, i.e., management prerogative. These issues are those decisions that "are fundamental to the basic direction of a corporate enterprise," "lie at the core of entrepreneurial control," or "impinge only indirectly upon employment security" and as such are not mandatory subjects of bargaining. See *Detroit Police Officers Association v City of Detroit*, 61 Mich App 487 (1975); See also *Westwood Community Schools*, 1972 MERC Lab Op 31; and *Royal Oak Township*, 2001 MERC Lab Op 117, 126. However, while decisions made subject to management prerogative may be made unilaterally by an employer without any obligation to bargain such decisions, the Commission has repeatedly found a duty under Section 15(1) of the Act to bargain over the "impact and effect" of those decisions on a bargaining unit. Such a duty to bargain on the part of the employer is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City*, 135 Mich App 553 (1984). While a demand to bargain is not required to take a particular form in order to be effective, the employer must know that a request is being made. *Michigan State University*, 1993 MERC Lab Op 52, 63.

The POLC does not challenge the Department's decision to implement the revised Car/Body Camera Policy to now include the use of body-worn cameras. Rather, Charging Party's sole complaint against the Respondent is the latter's outright refusal to bargain the "impact and effect" of the revised policy. The Employer, in support of its position, argues first that the revised camera policy "correlates to a permissive subject of bargaining outside the purview of PERA." Additionally, the Employer claims that its actions are permitted by the management rights clause set forth in the parties' contract and/or that, in any event, the Charging Party waived its right to demand bargaining over the policy by nature of the POLC's acceptance of the MRS Policy from 2003 to August of 2017.

Based upon the charge as filed, the sole issue is whether the implementation of the policy and utilization of body-worn cameras might have an impact on the working conditions of bargaining unit members such that the Employer is obligated to bargain said impact upon a demand by Charging Party. I find that it does. At a minimum, the use of body-worn cameras could have an impact on disciplinary matters. See *City of Portage (Police Dep't)*, 1995 MERC Lab Op 251 (no exceptions) (ALJ determined that the employer's decision to purchase and install cameras in

its patrol cars was not a mandatory subject of bargaining but that the Employer would have been obligated to bargain the impact and effect of that decision had the union made such a demand).

Addressing Respondent's remaining arguments in support of its actions, I note that while Respondent, in its brief, claims that the management rights clause somehow acts as a defense to the allegations levied against itself, the "covered by" analysis it provides in its post-hearing brief is, in the opinion of the undersigned, more appropriate when arguing whether a dispute should proceed through grievance arbitration. The preceding notwithstanding, to the extent that Respondent claims the contract either covers the dispute or is unambiguous such that the Union waived any claim to be able to bargain the issue, for the reasons set forth below, I disagree.

Respondent's management rights clause is broad and provides no specific reference to body-worn cameras, or any cameras for that matter, such that Respondent could rely on the clause to support its argument. See *City of River Rouge*, 1987 MERC Lab Op 1051, 1056 (A general management rights clause making no specific mention of the subject at issue will not support a waiver defense.) Moreover, the contract's waiver clause is similarly vague such that it too cannot support Respondent's actions. Our Commission will not find a waiver based on a "zipper" clause absent specific reference in the clause to the subject of the action and/or there is evidence that the parties discussed the issue during bargaining. See *Kent County Ed Ass'n v Cedar Springs*, 157 Mich App 59 (1987).

Lastly, I note that Respondent also claims that the POLC's apparent acquiesce to cameras in cars as well as surveillance cameras in the jail facilities precludes Charging Party from seeking to demand to bargain over the effect and impact of the camera policy's recent revision. It is true that a past practice can become term or condition of employment. See *Port Huron Ed Ass'n v Port Huron School District*, 452 Mich 309, 325-330 (1996). To that point, where the parties' agreement is silent or ambiguous on an issue, there need only be a "tacit agreement" that the practice would continue. *Id.* In the present matter, even if I were to find present the necessary elements to establish a past practice, such practice would extend only so far as to include cameras in the cars and/or surveillance cameras within the Jail facility. Respondent has made no argument, nor can the undersigned construct one of my own based on the record, from which I could reasonably conclude that the past cameras utilized by the Employer, and which the Charging Party has never contested, were inclusive of body-worn cameras.

I have considered all other arguments as set forth by the parties and conclude that such does not require a change in the conclusion. As such and in accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Berrien County and Berrien County Sheriff, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to bargain collectively with the Charging Party, by refusing to bargain the impact and/or effect of the revised policy covering body-worn cameras on bargaining unit members represented by the Police Officers Labor Council.

2. Make members of Charging Party' s bargaining unit whole for any loss they have incurred as a result of the conduct described above.

3. Post the attached notice to employees, for a period of thirty (30) consecutive days, in conspicuous places on Respondent's premises, including, but not limited to, all places where notices to employees represented by the Charging Party, are normally posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Date: December 12, 2018

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) ON AN UNFAIR LABOR PRACTICE CHARGE FILED BY THE **POLICE OFFICERS LABOR COUNCIL**, THE COMMISSION HAS FOUND **BERRIEN COUNTY AND BERRIEN COUNTY SHERIFF** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL cease and desist from refusing to bargain collectively with the Police Officers Labor Council, by refusing to bargain the impact and/or effect of the revised policy covering body-worn cameras on bargaining unit members represented by the Police Officers Labor Council.

WE WILL take the following affirmative action to effectuate the purposes of the Act:

1. To the extent that we have not yet done so, bargain collectively with the Police Officers Labor Council the impact and effect of the revised policy covering body-worn cameras on bargaining unit members represented by the Police Officers Labor Council.

2. Make members of the Police Officers Labor Council bargaining unit whole for any loss they have incurred as a result of the conduct described above.

BERRIEN COUNTY AND BERRIEN COUNTY SHERIFF

By:_____

Title: _____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

Case No. C17 L-112; Docket No. 17-028183-MERC