STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HURLEY MEDICAL CENTER
Public Employer-Respondent

MERC Case No. 19-H-1753-CE

-and-

REGISTERED NURSES & REGISTERED
PHARAMCISTS ASOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, for Charging Party

DECISION AND ORDER

On June 10, 2020, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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 either 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

Samuel R. Bagenstos, Commission Chair

Robert S. LaBrant, Commission Member

Issued: September 8, 2020

Tinamarie Pappas, Commission Member

[1] MOAHR Hearing Docket No. 19-017503

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

In the Matter of:

HURLEY MEDICAL CENTER,
Respondent-Public Employer,

Case No. 19-H-1753-CE
-and- Docket No. 19-017503-MERC

REGISTERED NURSES & REGISTERED PHARMACISTS ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Giarmarco, Mullins & Horton, P.C., by John C. Clark, for Respondent

Miller Cohen, P.L.C., by Richard G. Mack, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case arises from an unfair labor practice charge filed by the Registered Nurses and Registered Pharmacists Association (RNRPH) against Hurley Medical Center (HMC). 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 Office of Administrative Hearings and Rules (MOAHR), formerly the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed on or before January 24, 2020, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural Background:

Charging Party RNRPH represents a bargaining unit consisting of approximately 985 employees of Hurley Medical Center in the classifications of graduate nurse, general duty nurse, charge nurse, assistant nurse manager, graduate pharmacists and all registered staff pharmacists. On August 26, 2019, the RNRPH filed the instant charge alleging that Respondent violated Section 10(1)(e) of PERA by discontinuing privileges that had been previously granted to the Union. Specifically, the charge alleged that Respondent unilaterally stopped furnishing Charging Party with office space and other related amenities

which the Union had utilized for representational purposes.[1] Charging Party asserted that Respondent's decision to evict the Union from its facilities constitutes an illegal midterm modification and/or repudiation of the parties' collective bargaining agreement or, alternatively, a repudiation of an established past practice.

Findings of Fact:

I. Background

Respondent HMC is a 443-bed public teaching hospital located within the City of Flint, Michigan, serving residents of Flint, Genesee County and the surrounding counties of Lapeer and Shiawassee. At the time of the hearing in this matter, ten bargaining units represented HMC employees. Besides Charging Party, HMC bargaining units include AFSCME Council 25, Local 1603, AFL-CIO, Local 2056, AFSCME Local 1973, the Office of Professional Employees International Union (OPEIU) and a bargaining unit comprised of the medical center's public safety officers. AFSCME Local 1603 has around the same number of employees as Charging Party, while the remainder of the HMC bargaining units are considerably smaller in size. For example, AFSCME Local 2056 has around 200 members, while Local 1973, which is a supervisory unit, has less than 100 members. RNRPH and AFSCME Local 1603 are the only bargaining units whose representatives have full-time paid release time.

The most recent collective bargaining agreement between the RNRPH and Respondent expired on June 30, 2016. Article 6, Section D of that contract requires that HMC provide representatives of the Union with "reasonable release time" for any scheduled working hours required in the grievance procedure, with compensation at the regular hourly rate. Section I gives Charging Party representatives the right to visit areas of the medical center where the employees they represent are located for the purpose of representing members, as long as prior notice is provided to the Employer's administrator or designated representative and as long as such visits "occur at reasonable intervals during working hours and . . . do not interfere with the service of the Medical Center."

Article 6, Section J, which governs the representational activities of RNRPH bargaining unit chairpersons, provides:

> The Bargaining Chairperson and the PRR Chairperson will be granted full-time union release from their home department equal to 1.8 FTE to handle union business. The Medical Center agrees that during working hours, on the Medical Center's premises and without loss of pay, the chairperson of the bargaining unit and the grievance committee member shall be allowed to:

[1] American Federation of State, County & Municipal Employees (AFSCME) Council 25, Local 2056, raised the same issue in Case No. 19-H-1739-CE; Docket No. 19-017505. That charge was consolidated with the charge filed by the RNRPH and the matters were heard together. After the hearing, but before the filing of post-hearing briefs, AFSCME notified the undersigned that the matter had been resolved and that it was withdrawing its charge against Hurley Medical Center.

1. Transmit communications authorized by the chairperson of the bargaining unit or the grievance chairperson to the employer or his representatives.

2. Consult with the employer or his representative during the enforcement of any provisions of this agreement.

3. Consult with the grievance chairperson on specific grievance cases. Any abuse of the intent of this section shall be a proper subject for a special conference.

Article 35 of the collective bargaining agreement is entitled, "Maintenance of Benefits; Integration." That article states:

A. Maintenance of Benefits. Except for specific provisions made elsewhere in this Agreement, all privileges and benefits will be maintained during the term of this Agreement at not less than the current minimum standard in effect.

B. Integration of Agreement. This Agreement incorporates the entire understanding of the parties on all issues which were or could not have been subject to negotiation.

Bargaining on a successor contract for the RNRPH unit began in the spring of 2016. A tentative agreement was ratified by Charging Party's membership and the HMC at the end of September 2018. By its terms, the new agreement was to be effective through June 30, 2022. However, that agreement had not been signed as of the date of the hearing in this matter due to a controversy over an issue unrelated to the instant dispute. Like the prior contract, the new agreement contains a maintenance of benefits provision and requires HMC to grant paid release time to RNRPH representatives for any scheduled working hours required in the grievance procedure. The new agreement also contains the same language with respect to medical center access by RNRPH representatives as in the prior contract. With respect to unit chairpersons, the new agreement provides:

The Chairperson of the Organizing and Bargaining Chairperson will be granted full time union release from their home department equal to 2.0 FTEs to handle union business through June 30, 2020. As of July 1st, 2020, the Chairperson of the Organization will be granted full-time union release from their home department up to 1.0 FTE to handle union business between the two parties. Additionally, and for the current term of the Bargaining Chairperson at ratification of the contract, the Organization will reimburse, as of July 1, 2020, the Employer base wages paid to the Bargaining Chairperson, monthly for up to 2080 hours paid per year. The Medical Center agrees that during normally scheduled hours, on the Medical Center's premises and without loss of pay, the chairperson and bargaining chairperson shall be allowed to:

a. Transmit communications authorized by the chairperson of the bargaining unit or the grievance chairperson to the employer or his representatives.

b. Consult with the employer or his representative during the enforcement of any provisions of this agreement.

c. Consult with the grievance chairperson on specific grievance cases. Any abuse of the intent of this section shall be a proper subject for a special conference.

II. Union Office Space

HMC has provided Charging Party with office space and other related amenities for more than thirty years without ever requiring compensation from the RNRPH. The office space which was initially provided to Charging Party was located in a house directly across the street from the medical center. Charging Party shared that space with other labor organizations, including AFSCME Locals 2056 and 1603. Respondent's labor relations department was also located within the house. In or around 1988, the house was demolished and the unions which were utilizing that space, including the RNRPH, were moved to a facility on Patrick Street known as the "Bachelor's Quarters." Sometime thereafter, Respondent notified the RNRPH that the facility on Patrick Street was going to be torn down and that the Union was moved to office space within the Philip Dutcher Center.

The Dutcher Center is located on the HMC campus directly across the street from the hospital. Charging Party's office is in Room 206 within the same wing of the building as office space occupied by AFSCME Locals 2056, 1603 and 1973. The RNRPH office has two desks, telephones, computers with email access, a printer, storage cabinets and a water source. Respondent maintains the equipment within the RNRPH office at no cost to Charging Party. Parking is also provided for occupants of the office staff in a gated lot. A security swipe card is required for entry into the Dutcher Center, while another swipe card is needed to access the wing utilized by Charging Party and the other labor organizations. Entry into the RNRPH office space requires a key.

Charging Party's office is staffed by the RNRPH president, Pamela Campbell, and Gina Forbes, the bargaining chair. Forbes supervises all of the Union's bargaining representatives and oversees the grievance process, up to and including arbitration. The office is open eight hours a day, Monday through Friday. According to Campbell, RNRPH members visit the office "very often" to discuss issues such as potential discipline, problems in the working environment, grievances and ideas on improving workflow within the medical center. During the months preceding the hearing in this matter, there has been at least one bargaining unit member in the office on any given day. Management representatives also frequently visit Charging Party's office to discuss concerns relating to interpretation of the collective bargaining agreement and other subjects.

Campbell routinely goes back and forth from the Dutcher Center to the hospital to deal with matters of concern for both Respondent and the RNRPH. She visits the hospital to deal with disciplinary matters involving bargaining unit members, as well as staffing and attendance issues. She testified that it is important for her to be able to resolve staffing issues at the beginning of an employee's scheduled shift, rather than after the fact by way of a grievance, so as to ensure that patient care is not adversely affected. In order to address

attendance issues, Campbell and Forbes often need to visit the medical center's human resources department to obtain relevant documentation. Campbell described employee attendance as "a big issue, we have issues with attendance . . . more than a couple days a week." Campbell also visits the hospital to confer with unit members and HMC managers and to attend meetings with hospital officials, including a bi-weekly meeting with the Director of Nursing. There have also been several instances in which Campbell had to go from the medical center to the RNRPH office in the midst of contract negotiations to procure documents.

In addition to attending to visitors at the Dutcher Center location, Campbell and Forbes regularly respond to bargaining unit members and management representatives who call the RNRPH office with questions or concerns. Forbes testified that during the period from October of 2018 through September of 2019, the Union office received 486 telephone calls from Respondent's labor relations department or nurse managers seeking a Union representative to assist employees regarding matters such as *Weingarten* meetings and attendance issues.[2] The RNRPH office also received hundreds of additional telephone calls during that period, including calls directly from unit members.

There are 23 elected stewards and other RNRPH representatives working throughout the hospital who are authorized to address staffing and disciplinary issues. However, there are not enough of these representatives to cover every floor of the hospital. When a representative is not available to address a Union matter because he or she is busy working with a patient, Campbell or Forbes are called over from the RNRPH offices. In addition, there are instances when Campbell and Forbes are summoned to the medical center to attend *Weingarten* meetings on behalf of members of the bargaining unit.

Campbell testified that having Union office space near the hospital is a benefit to Respondent because it allows management to have immediate access to Union representatives for the purpose of holding meetings. This view was echoed by Barry Fagan, Respondent's labor relations manager. Fagan, a former RNRPH president, testified that it is convenient for Respondent to have labor organizations right across the street from the HMC and that it has probably been beneficial to the administration of labor relations for both parties. However, Fagan has not experienced any difficulties in dealing with the other unions who do not have office space on Respondent's premises. Fagan testified that he can communicate with those labor organizations by telephone, email and text message and that he routinely interacts with representatives of those unions via meetings held in his office or in conference rooms throughout the hospital. Fagan testified that Respondent also makes its conference rooms available to labor organizations so that they may hold their own meetings and conduct other activities.

[2] Under both the National Labor Relations Act (NLRA) and PERA an employee has the right, upon request, to the presence of a union representative at an investigatory interview. *NLRB v Weingarten, Inc*, 420 US 251 (1975). See also *University of Michigan*, 1977 MERC Lab Op 496.

III. Elimination of Union Office Space

Beginning in 2004, Respondent began exploring the possibility of creating a Behavioral Health Emergency Center (BHEC). The BHEC was envisioned as a community based urgent care facility serving walk-in patients who are experiencing behavioral health issues, including substance abuse problems. The BHEC would be home to a number of different agencies providing various mental health services in a one-stop location. There is no such service currently available in Genesee County. Rather, patients with behavioral health issues are taken to emergency rooms, primarily the emergency room at Hurley Medical Center.

Respondent ultimately entered into discussions with the Genesee Community Health System (GHS) regarding the possibility of partnering on the creation of the BHEC, including planning for how the facility would be funded. In early or mid-2018, the HMC and GHS began focusing on utilizing the Dutcher Center as the location for the proposed behavioral health facility. Michael Burnett, Respondent's Vice President for Service Line Development, Chief Strategy Officer and Chief Philanthropy Officer, testified that the HMC and GHS decided to use the Dutcher Center for the BHEC because purchasing another building or constructing an entirely new facility for that purpose would have been cost-prohibitive. According to Burnett, "It was very difficult to even locate a building of the size and magnitude and location that we needed in the first place. So to consider going out and buying the building, the capital outplay for that would have really sunk the project from the beginning."

Around this time, rumors began to circulate amongst hospital staff that Respondent was planning to demolish the Dutcher Center. On or about March 19, 2018, Campbell sent an email to Respondent's CEO, Melany Gavulic, inquiring as to the status of the Dutcher Center. Campbell wrote, "We keep hearing that this building will be emptied by July 1 for it to be demolished. If this is the plan I would have expected to be informed, also if this is the plan where are you anticipating our office to be relocated?" Gavulic responded to Campbell a few minutes later, denying that there was any plan to demolish the Dutcher Center. Gavulic wrote, "As you may have noticed, the U of M Flint-CRNA program moved out of their space on the main floor a couple of weeks ago. Genesee Health System has inquired about leasing some space, but that is in the very early stages as it was simply an inquiry and a tour." In an email sent to Campbell later that same day, Gavulic promised that Respondent would provide Charging Party with notice of any changes impacting occupants of the Dutcher Center.

In early 2019, discussions between Respondent and the GHS became more serious. On or about February 18, 2019, the parties entered into a Memorandum of Understanding formalizing the proposed creation of the BHEC. The following week, Respondent submitted a competitive grant application to the Community Foundation of Greater Flint for the purpose of securing $100,000 to help fund the new behavioral health center. As part of its submission, Respondent revealed that the planning phase for the BHEC would formally commence on June 1, 2019, and continue through May 31, 2020. The grant application was approved and the funds were awarded to the HMC in April of 2020.

Respondent did not notify Charging Party of its plans to create the BHEC until July 1, 2019, when Gavulic sent an eviction letter to representatives of the RNRPH and the other labor organizations who had offices in the Dutcher Center. The letter provides:

> Recently further progress has been reported in the planning for wrap around mental health services provided by Genesee Health System and located on the campus of Hurley Medical Center. We are pleased to have them utilizing the Philip Dutcher Center for housing these services as they will address the myriad of mental health needs that are of great importance to the patient population we serve and will assist in allowing us to move patients into these services more efficiently.
>
> While this is a very positive and much needed development for Hurley, it will result in the displacement of the remaining users of the Phillip Dutcher Building, including rooms occupied by your respective unions (Rooms 201, 205, 206, 207 & 208).
>
> I appreciate the impact of this change, so wanted to provide as much advanced notice as possible. Your use of the Phillip Dutcher Building will terminate effective December 31, 2019, at which time the subject space needs to be vacated.
>
> Please direct any questions regarding this matter to the Labor Relations Officer, Barry Fagan.

Upon receipt of the eviction notice, Charging Party, along with representatives of AFSCME Locals 1603 and 2056, requested a meeting with Respondent's CEO to discuss the issue. During the meeting, which was held sometime in July, Gavulic stated that HMC was not going to provide office space at any location, even if the unions agreed to pay rent to the medical center. She also suggested that the union representatives instead work out of their homes or in the hospital lobby if they were unable to find office space elsewhere.

On or about July 29, 2019, the RNRPH formally responded to the eviction notice by way of a letter to Respondent from Charging Party's attorney, Richard Mack, Jr. The letter states:

> I understand that the Employer has decided to deny the RNRPh Union the use of its office space. As you likely know, Article 35 of the Union contract provides that the conditions enjoyed by Employees at the time the contract is signed shall be maintained. We assert that the Hospital's actions violate the Union contract.
>
> I also understand that the Employer makes the case that it is illegal for the Hospital to so provide office space, notwithstanding the many decades it has done so. Will you provide case law indicating as much? Hopefully within the next seven (7) days.

> The local will be prosecuting a grievance over the blatant violation of the Union contract. Without this matter being resolved quickly, the Local may also seek immediate injunctive relief -- given the importance of a Union office to its membership. I hope to hear from you with case law by or before August 5th.

As of the date of the hearing in this matter, Respondent was in the process of engaging with an architect on the design of the BHEC and no determination had been made with respect to which areas of the Dutcher Center would be used for the mental health facility. According to Burnett, Respondent planned to defer to the expertise of the GHS with respect to issues such as building utilization and timeframes. When asked whether the HMC could proceed with the creation of the BHEC if the Union offices remained in that building, Burnett testified, "I'm not sure yet I can answer that question, we're only now getting into the portion of this where we're looking at what needs to happen with the building physically, what types of modifications need to occur, and I don't know what degree those may or may not be disruptive to that area of the building."

At hearing, Respondent elicited testimony from Sharon Reisenuer in an effort to establish the fair market value of office space in the Dutcher Center. Reisenuer is a licensed realtor and has been employed by HMC as Property Management Coordinator since February of 2017. In preparation for the hearing, she drafted a valuation report for the Dutcher Center which concluded that that the fair market valuation for office space in the property, including rent, lawn care, snow removal, parking lot maintenance, utilities and building maintenance, is between $600 and $700 per month. However, Reisenuer did not personally inspect all of the allegedly comparable properties in preparing this report. Rather, she relied on information published on the internet and compiled by individuals who were not called to testify in this matter. Moreover, although Reisenuer has received training pertaining to property valuation, she is not herself a certified appraiser. Finally, Reisenuer conceded that in preparing the report, she did not take into account any properties located within the City of Flint where the HMC is located. For these reasons, I conclude that her testimony is of negligible value in this matter. Moreover, the appraised value of the RNRPH office space in the Dutcher Center is not relevant to a determination as to whether Respondent violated Section 10(1)(e) when it evicted Charging Party from that location.

Discussion and Conclusions of Law:

Charging Party contends that Respondent's unilateral decision to eliminate its office space on HMC property was an illegal midterm modification of the parties' collective bargaining agreement or, in the alternative, constituted a unilateral change regarding a mandatory subject of bargaining. Respondent does not dispute the Union's assertion that the provision of office space is a mandatory subject of bargaining. Rather, the Employer argues that its decision to evict Charging Party and other labor organizations from the Dutcher Center was justified because had HMC continued to provide those unions with free office space and other amenities, Respondent would be making an illegal contribution to these labor organizations in violation of Section 10(1)(b) of PERA. Alternatively, Respondent argues that its actions were lawful because the past practice of the parties dictates that HMC has the discretion to make unilateral changes to Charging Party's office space.

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, 329 (1996); *Detroit Bd of Ed*, 2000 MERC Lab Op 375, 377.

Although the Commission has not specifically addressed whether an employer is required to bargain over providing a union with office space and other related amenities, it is well-established that privileges and benefits extended to labor organizations or their representatives by the employer constitute mandatory subjects of bargaining when they relate to the union's representation of members of the bargaining unit. *NLRB v Borg-Warner Corp*, 356 US 342 (1958). See also *South Lake Sch*, 13 MPER 31 (2000) (no exceptions); *Central Michigan Univ*, 1994 MERC Lab Op 527, aff'd 217 Mich App 136 (1996). The record in this matter overwhelmingly establishes that Charging Party utilizes office space in the Dutcher Center for representational activities, including meetings with employees and management concerning issues arising under the contract, activities which encourages the collective bargaining process and directly benefit members of the unit. Accordingly, I conclude that the provision of office space and related amenities to Charging Party is a mandatory subject of bargaining under PERA.

The parties can fulfill their statutory obligation to bargain regarding a mandatory subject by negotiating over the issue and memorializing resolution of that subject in a collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining. *Port Huron Ed Ass'n*, *supra.* Agreement on such a subject enables both parties to rely on the language of that agreement as the statement of their obligations regarding that topic as covered by the agreement. *Port Huron* at 327; *Calhoun County*, 29 MPER 71 (2016) (no exceptions). As the Commission stated in *St Clair Co Rd Comm*, 1992 MERC Labor Op 533, 538, where there is a contract covering the subject matter of a 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 Commission finds that the contract controls and no PERA issue is presented.

In support of its contention that the elimination of office space for use by the RNRPH president and bargaining chair was contrary to the language of the parties' collective bargaining agreement, Charging Party relies upon Article 6, Section J of the contract which gives Union representatives the right to engage in certain activities on HMC premises. The Union contends that this provision "clearly provide[s] for the use of Union office space." I disagree. Article 6, Section J lists three specific activities which the RNRPH chairperson and the bargaining chairperson may perform during normally scheduled hours and without loss of pay: the transmittal of communications to the Employer, consultation with the Employer during the enforcement of any provision of the agreement, and consultation with the grievance chairperson. The collective bargaining agreement simply does not address the issue of office space for RNRPH representatives, either explicitly or by implication. For this reason, I reject Charging Party's assertion that the actions taken by HMC constitute an illegal midterm modification of the parties' collective bargaining agreement.

Having concluded that the collective bargaining agreement did not cover the issue of Union office space, the next issue is whether the provision by HMC of office space and other related amenities to Charging Party had become a term and condition of employment independent of any contractual obligation such that Respondent's decision to evict RNRPH from the Dutcher Center constituted a unilateral change in a mandatory subject of bargaining in violation of Section 10(1)(e) of PERA. A past practice that does not derive from the parties' collective bargaining agreement may nonetheless become a term or condition of employment which is binding on the parties. *Mid-Michigan Ed Ass'n v St Charles Comm Sch*, 150 Mich App 763, 768(1986), rev'd on other grounds *Port Huron Educ Ass'n*, *supra*. See also *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 454, 455 (1991). If a past practice becomes part of the structure and conditions of employment, the past practice assumes the same significance as other portions of the collective bargaining agreement. *Mid-Michigan*, *supra* at 768. Where an employer institutes a practice and permits it to continue, it cannot later change the practice without first giving the union notice and an opportunity to bargain. *Id.* This principle recognizes the impracticability of the parties expressly listing or describing every conceivable practice or procedure within the agreement itself.

In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." *Id.* However, where the contract unambiguously covers a term of employment that conflicts with a party's behavior, a higher standard of proof is required. In such situations, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron Ed Ass'n*, 452 Mich at 329. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment." *Macomb County*, 23 MPER 8 (2010), aff'd *Macomb County v AFSCME Council 25*, 294 Mich App 149 (2011).

As noted, the collective bargaining agreement between the HMC and Charging Party is silent with respect to the issue of Union office space. Under such circumstances, the lesser standard of tacit approval applies. However, even under the higher standard, I would nonetheless find the existence of a mutually accepted past practice which became a term or condition of employment binding on the parties. See *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 454-455 (1991); *Mid-Michigan Ed Ass'n*, *supra*. Respondent's longstanding history of providing free office space and related amenities to Charging Party, as well as other labor organizations, is clear and undisputed. This practice has been in existence for more than thirty years, beginning at least as early as 1988 with offices located within a house across the street from the hospital. The existence of such office space was known to management, as reflected by the fact that HMC representatives have routinely visited the offices to discuss contract interpretation issues and other matters. Although Respondent has moved the RNRPH and other unions from one facility to another over the years, it has never outright discontinued the practice of making office space and amenities available to Union representatives, nor did the HMC ever express to Charging Party an intent to stop providing this benefit before it presented the termination of the past practice as a *fait accompli* when it issued the eviction notice to the RNRPH on July 1, 2019. The fact that Respondent unilaterally discontinued the practice just months

after concluding negotiations on a successor contract which contains a maintenance of conditions clause makes its decision here particularly egregious. Based upon these facts, I conclude that Respondent had a clear, consistent, conscious practice of making office space and other related amenities available to Charging Party sufficient to create a term or condition of employment which is binding on the parties and which cannot be changed without negotiations. *Amalgamated Transit Union, Local 1564, AFL-CIO v SEMTA*, 437 Mich 441, 454-455 (1991).

Respondent asserts that regardless of the language in the collective bargaining agreement or the existence of an established past practice, its actions were justified in this matter because the medical center would have been in violation of Section 10(1)(b) of PERA had it continued to provide office space and amenities to Charging Party. Before addressing the substance of this argument, I first note that there is no indication in the record that Respondent ever raised a concern over a possible violation of Section 10(1)(b) during the past 30 years of providing office space to Charging Party and its other unions and that the HMC only made this an issue after deciding that it wished to utilize the Dutcher Center for other purposes. Thus, it appears that Respondent is simply attempting to manufacture a reason to deny office space to the RNRPH. In any event, I find Respondent's reliance on Section 10(1)(b) to be entirely without merit.

Section 10(1)(b) of the Act provides, in pertinent part, "It shall be unlawful for a public employer or an officer or agent of a public employer . . . to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization." A violation of Section 10(1)(b) involves circumstances where the employer's actions are likely to abridge public employees' Section 9 rights to "bargain collectively with their public employers through representatives of their own free choice." See *Michigan Quality Community Care Council*, 26 MPER 49 (2013); *Detroit Pub Sch*, 22 MPER 89 (2009) (no exceptions). The "evil" which Section 10(1)(b) was intended to prevent was the "subversion of the Union's independence." *Lansing Sch Dist*, 21 MPER 21 (2008).

Section 10(1)(b) is patterned on Section 8(a)(2) of the National Labor Relations Act (NLRA), 29 USC 150, et seq., which prohibits an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it." As with other provisions of PERA, the Commission is guided by federal case law in interpreting Section 10(1)(b). See *Lansing Sch Dist*, *supra*. The primary legislative purpose of Section 8(a)(2) was to eradicate company unionism, a practice prevalent at the time the NLRA was adopted whereby employers would establish and control in-house labor organizations in order to prevent organization by autonomous unions. See *Dana Corp & Int'l Union*, 356 NLRB 256, 259 (2010), cited with approval by *Hurley Medical Center*, 30 MPER 58 (2017).

In a position statement filed prior to the hearing in this matter, Respondent argued that the NLRB's decision in *Lakes Pilots Ass'n*, 320 NLRB 168 (1995) establishes that an employer's provision of office space and other amenities to a labor organization is unlawful. Such an assertion constitutes an oversimplification of the Board's findings. In *Lakes Pilots Ass'n*, the ALJ found that the employer had interfered with the administration of the union and rendered support to it, in violation of Section 8(a)(2) of the NLRA by virtue of the fact that its shareholders included all of the registered pilots who made up the majority of the

union's membership, all of its officers, and all members of the bargaining committee. The Judge also found that the employer had unlawfully assisted the Union by providing it with free office space and telephone service. Although the Board adopted the ALJ's recommended decision, it specifically declined to address whether the provision of office space and amenities, standing alone, would constitute a violation of the Act:

> Because we agree with the judge that the Employer interfered with and assisted the Union in other, more serious ways, we adopt his finding that the Employer also violated Sec. 8(a)(2) by providing the Union with free office space and telephone services. It is not necessary for us to decide whether the latter forms of assistance would be unlawful if the other 8(a)(2) violations had not been committed." [*Id*. at fn 2.]

Under federal law, the mere provision of privileges or benefits to Union representatives is not per se unlawful. Rather, the test for determining whether Section 8(a)(2) has been violated is whether the employer's assistance is actually creating employer control over the union. *Federal-Mogul Corp, Coldwater Distrib Ctr Division v NLRB*, 394 F2d 915 (CA 6 1968); *Modern Plastics Corp*, 379 F2d 201 (CA 6 1967). For example, in *Modern Plastics Corp*, the Court of Appeals for the Sixth Circuit rejected a finding by the Board that an employees' committee was dominated by the employer. The employer compensated employees for their time spent at committee meetings at which the employer provided free food and drinks to attendees. The committee received no dues and operated without a constitution or by-laws. The Board found that the employer's conduct constituted a violation of Section 8(a)(2) of the Act. The Court disagreed with the Board's conclusion. Recognizing that the NLRA was intended to foster industrial peace through collective bargaining, the Court emphasized the importance of encouraging cooperation between labor and management:

> The employer-employee relationship itself offers many possibilities for domination, but active domination must be shown before a violation is established. Assistance or cooperation does not always mean domination. The Board must prove that the employer's assistance is actually creating Company control over the Union before it has established a violation of Section 8(a) (2). *Chicago Rawhide Manufacturing Co. v NLRB*, [221 F2d 165 (CA 7 1955). The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of employees. *NLRB v Sharples Chemicals*, 209 F.2d 645 (CA 6 1954).
>
> All of the acts cited by the Board as unfair labor practices in this matter actually show no more than the Company's cooperation with the Committee, to the Committee's satisfaction and for the benefit of the employees. It is true that the acts rendered might be the means by which the Company could exert pressure, but we do not find any substantial evidence in the record that it was so used by the Company, or was so considered by the employees.
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> * * *

> Finally, the record contains no showing of anti union bias by the Company nor does the record contain any evidence of employee dissatisfaction with the manner in which the Committee represented them. As a matter of fact, as stated earlier, the Examiner found that the Committee adequately represented its members. [*Id*. at 204.]

In *BASF Wyandotte Corp*, 274 NLRB 978 (1985), the Board adopted the ALJ's findings that the employer unlawfully discontinued certain privileges that it had previously granted to the union. The privileges included a small portable building on the employer's premises for use as the office of the union chairperson. The office was equipped with a desk, cabinet, telephone and other furniture. In addition, the employer had provided the chairperson with the use of telephones and a copy machine within its facility. As in the instant case, the employer's sole argument to the Board was that the provision of office space and amenities to the union was a violation of Section 8(a)(2) of the NLRA. In rejecting that argument, the Board held:

> The use of company time and property does not per se establish unlawful employer support and assistance. *Coamo Knitting Mills*, 150 NLRB 579, 582 (1964); see *Elias Mallouk Realty Corp*, 265 NLRB 1225, 1236 (1982). "[W]here a union lawfully has been established as the employees' bargaining representative, and has been accorded lawful recognition by an employer who, following recognition, deals with that representative at arm's length," the Board has regarded the use of company time and property, in the absence of deeper employer involvement or intrusion in union affairs, to be merely "friendly cooperation growing out of an amicable labor-management relationship." *Duquesne University of the Holy Ghost*, 198 NLRB 891 (1972). Indeed, permitting the use of company time and property in such circumstances "serve[s] to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case." *Sunnen Products*, 189 NLRB 826, 828 (1971). With regard to practices similar to those present in this case, former Chairman Edward B. Miller observed: "[T]o require employers to follow a practice of docking employees for brief periods of time spent in conference with a union representative whose duty it is to service employees in an organized plant would often create an abrasive and wholly unnecessary interference with a healthy contractual relationship." *Longchamps, Inc*, 205 NLRB 1025, 1026 (1973) (dissenting opinion). Because the Union here clearly is an independent entity with a well-established history of arm's-length dealing with BASF, we find that the privileges that BASF had granted to the Union, like the similar privileges in *Sunnen Products*, *supra*; *Ladish Co*, 180 NLRB 582 (1970); and *Hesston Corp*, 175 NLRB 96 (1969), did not violate Section 8(a)(2).

In enforcing the Board's decision in *BASF Wyandotte Corp*, the Court of Appeals for the Fifth Circuit agreed that Section 8(a)(2) of the NLRA did not justify the employer's unilateral discontinuation of union privileges. The Court held, "The legislative history of Section 8(a)(2) makes clear that Congress intended it, much as Section 302, to be a provision prohibiting bribery and company dominated unions, not prohibiting the kind of labor/management cooperation necessary to collective bargaining as at issue in the instant

case." *NLRB v BASF Wyandotte Corp*, 798 F2d 849, 856 (CA 5 1986). See also *NLRB v Homemaker Shops, Inc*, 724 F2d 535 (1984) (employer did not violate Section 8(a)(2) by conduct such as sending out notices of committee meetings, providing coffee and a meeting room and reimbursing committee members for travel expenses); *Federal-Mogul Corp, Coldwater Distrib Ctr Division v NLRB*, *supra* at 921 (it is only when management's activities actually undermine the integrity of the employees' freedom of choice and independence in dealing with their employer that such activities fall within the proscriptions of the Act); *Hetzka & Knowles v NLRB*, 503 F2d 625, 630 (CA 9 1974), cert denied 423 US 875 (1975) ("Literally . . . almost any form of employer cooperation, however, innocuous, could be deemed 'support' or 'interference.' Yet such a myopic view of Section 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole . . ."). See also *Axelson, Inc, Subsidiary of USA Indus, Inc v NLRB*, 599 F2d 91, 95 (1979) (paid release time to conduct union business is a mandatory subject of bargaining because such compensation benefits all members of the unit by encouraging the bargaining process).

The primary objective of PERA, like the NLRA, is the preservation of labor peace. *City of Lansing*, 29 MPER 63 (2016); *Waterford Sch Dist*, 23 MPER 91 (2010) (no exceptions). The Commission has similarly recognized that permitting a labor organization to use employer property and time for bargaining activities can serve to encourage cooperation to the benefit of both the employer and the union. For example, it is well established that contractually provided paid release time for union officers is a mandatory subject of bargaining under the Act because it vitally affects the employee-employer relationship. *Central Michigan Univ*, 1994 MERC Lab Op 527, aff'd 217 Mich App 527 (1996). In *South Lake Sch Dist*, 13 MPER 31 (2000) (no exceptions), the ALJ concluded that the location of a telephone on an employer's premises which is reserved for communications between the union and members of the bargaining unit constitutes a mandatory subject under the Act because it encourages the collective bargaining process. In so holding, the ALJ relied upon *BASF Wyandotte Corp*, discussed above, in which the Board held that the provision of office space and a telephone on the employer's premises did not constitute employer support and assistance.

In the instant case, the record establishes that the office space which Respondent has provided to Charging Party has been used by the RNRPH president and chairperson for representational activities, including the handling of grievances, preparation for contract negotiations and enforcement of the terms of the collective bargaining relationship, all of which directly relate to employees' wages, hours and other conditions of employment. The availability of such office space benefits all members of the unit by encouraging the bargaining process. Having Union representatives nearby and easily accessible is also clearly beneficial to Respondent. At hearing, Charging Party's president Pamela Campbell explained that management representatives frequently visit Charging Party's office to discuss concerns relating to interpretation of the collective bargaining agreement and other subjects. In fact, Barry Fagan, Respondent's labor relations manager and former RNRPH president, conceded that it is convenient for management to have its labor organizations right across the street from the HMC and that it has probably been beneficial to the administration of labor relations for both parties. Although the provision of office space to Charging Party could potentially be used improperly to exert pressure on the Union or its elected representatives, there is simply no evidence in the record to suggest that the HMC has done so or that any of its employees consider the RNRPH to be under Respondent's control. For

these reasons, I find that the provision of office space and other amenities to Charging Party is not violative of Section 10(1)(b) of PERA.

In so holding, I note that none of the Commission cases relied upon by Respondent involving Section 10(1)(b) are controlling in this matter. For example, the HMC cites *City of Detroit (Dept of Transp)*, 1995 MERC Lab Op 362, in support of its contention that the provision of office space to Charging Party constituted unlawful support and assistance. At issue in that case were vending and gaming machines located in bus drivers' departmental terminals, the profits from which went into the union recreation fund. After the employer unilaterally directed the vending company to remove its machines, the union filed an unfair labor practice charge alleging that the employer's actions constituted an unlawful termination of an established past practice. The ALJ recommended dismissal of the charge, concluding that the practice was not a mandatory subject of bargaining. In so holding, she opined in a footnote that the practice of allowing the Union to control the vending machines on City property and receive profits therefrom "could, in fact, be viewed as constituting a contribution to a labor organization by Section 10(1)(b) of PERA." On exceptions, however, the Commission expressly declined to consider that issue, noting that no charge had been filed against the employer alleging a violation of that provision of the Act. The Commission also disagreed with the ALJ with respect to the substance of the charge, finding that the employer had a duty to bargain over the distribution of proceeds from machines on its premises because those funds benefited members of the bargaining unit and, therefore, the unilateral termination of the past practice permitting the union to collect the proceeds of the vending and pay-for-play machines at the bus terminals was a violation of the employer's duty to bargain under Section 10(1)(e) of the Act.

Respondent's reliance on *Hurley Medical Center*, 30 MPER 58 (2017) (no exceptions), a case involving this same public employer, is similarly misplaced. In that matter, the union and the HMC filed charges against each other relating to certain payments made by the employer to the union which were made pursuant to a memorandum of understanding (MOU). Under the terms of the MOU, the parties agreed that employees would be provided with short-term sick and accident insurance benefits. At the end of each fiscal year, the employer calculated its annual funding obligation for that program. If that obligation exceeded the amount actually paid to members of the bargaining unit, the HMC paid the union the difference. The ALJ concluded that the payments constituted an unlawful contribution to the administration of the union "because the MOU did not require the union to, and the union did not, segregate the money it received pursuant to the MOU in a separate fund to be used solely for covering the costs of the sick and accident program *or otherwise for the benefit of unit employees*." (emphasis supplied). In contrast, the privileges at issue in the instance case are directly related to the administration and enforcement of the contract and, as described above, serve to benefit both the employer and members of the RNRPH unit, as well as the bargaining relationship between the parties.

In conclusion, I find that the provision of office space and other related amenities to Charging Party was a mandatory subject of bargaining and that the HMC's unilateral decision to discontinue its longstanding practice of providing those benefits to the RNRPH was a violation of Section 10(1)(e) of PERA. In so holding, I reject Respondent's contention that these benefits constituted an unlawful contribution to the administration of a labor

organization under Section 10(1)(b) of the Act. For these reasons, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Hurley Medical Center, its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally changing existing terms and conditions of employment of the employees in the bargaining unit represented by Charging Party Registered Nurses and Registered Pharmacists Association by discontinuing the practice of providing the union with office space and other related amenities.

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

   a. On request from Charging Party, reinstitute its former practice of providing the Union with office space and other related amenities in the Dutcher Center or a comparable location.

   b. Post the attached notice on Respondent's premises in places where notices to employees are customarily posted for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: June 10, 2020

NOTICE TO ALL EMPLOYEES

HURLEY MEDICAL CENTER, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the order of the MICHIGAN EMPLOYMENT RELATIONS COMMISSION, we hereby notify our employees that:

WE WILL cease and desist from unilaterally changing existing terms and conditions of employment of the employees in the bargaining unit represented by Charging Party Registered Nurses and Registered Pharmacists Association by discontinuing our practice of providing the union with office space and other related amenities.

WE WILL, on request from Charging Party, reinstitute our former practice of providing the Union with office space and other related amenities in the Dutcher Center or a comparable location.

WE ACKNOWLEDGE THAT all of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of PERA.

HURLEY MEDICAL CENTER

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.