STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (FIRE DEPARTMENT),
Public Employer-Respondent,

MERC Case No. 19-C-0479-CE

-and-

DETROIT FIRE FIGHTERS ASSOCIATION,
LOCAL 344,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Valerie Colbert-Osamuede, Deputy Director of Labor Relations, City of Detroit, for Respondent

Legghio & Israel, PC, by Megan Boelstler, for Charging Party

DECISION AND ORDER

On October 15, 2019, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order[1] in the above matter. The ALJ found that the Detroit Fire Department violated §10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, by unilaterally changing the terms and conditions of employment for its employees. In particular, the Department, without bargaining with the Union, used newly available data from its Zoll X heart monitor to investigate employee conduct for potential disciplinary action, and to support a decision to impose discipline.

[1] MOAHR Hearing Docket No. 19-005161

Respondent filed exceptions[2] and a supporting brief, and Charging Party filed a brief in support of the Decision.[3] After consideration of the record, and the exceptions and briefs filed by the parties, we find the exceptions to be without merit.[4] Accordingly, we affirm the ALJ's Decision for the reasons set forth below.[5]

Facts:

Charging Party, Detroit Fire Fighters Association Local 344 ("Union") represents a unit of Emergency Medical Technicians (EMT) and Paramedics employed by the City of Detroit Fire Department ("Employer").

The Management Rights clause of the parties' collective bargaining agreement provides, among other things, as follows:

Except as specifically limited by the provisions of this Agreement or applicable law, the Department will have the unlimited discretion and authority:

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To establish, regulate, determine, revise, or modify at any time the policies, practices, protocols, processes, techniques, methods, means, and procedures used in the Department

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[2] Charging Party asserts that Respondent's exceptions should be rejected pursuant to R 423.176(7) for failure to comply with R 423.176(4) which, in part, requires that the exceptions: (a) Set forth the specifically the question or procedures, fact, law, or policy to which exceptions are taken; (b) Identify that part of the administrative law judge's decision and recommended order to which objection is made, and; (c) Designate, by precise citation of page, the portions of the record relied upon. We agree that Respondent's exceptions fail to comply with the foregoing requirements.

We have held in prior cases, primarily involving laypersons acting *pro se*, that we would consider non-compliant exceptions to the extent we were able to discern the issues on which the excepting party has requested review. *Detroit Transportation Corp., 28 MPER 64 (2015); City of Detroit, 21 MPER 2008*). We have cautioned however, that our acceptance of non-complying exceptions should not be viewed as an indication that we will accept such submissions in the future. *Government Administrators Assn., 22 MPER 61 (2009); City of Detroit, supra*. Here, the excepting party was represented by experienced legal counsel capable of reviewing, understanding, and complying with the foregoing Rule. We will consider Respondent's exceptions in this case because we have not given clear prior notice of our intent to enforce strict compliance with the rule. However, non-compliance is to be discouraged, and we believe that attorneys appearing before the Commission should be held to a higher standard than laypersons. Accordingly, we put parties on notice that in the future we reserve the right to reject exceptions filed by a party represented by legal counsel where the exceptions fail to comply with the requirements of the rule, regardless of whether we are otherwise able to discern the issues on which review is requested.

[3] No exceptions were filed over the ALJ's refusal to order the recission of the discharges of the involved employees based on her determination that the basis for the disciplinary action was not limited to evidence obtained from the Zoll X.

[4] Consistent with the parties' agreement on the record, no exception was taken to the ALJ's findings and conclusion that the Employer did not unlawfully fail or refuse to bargain over either the decision to purchase the Zoll X monitor, or the direction given to employees concerning the use of the Zoll monitor in administering patient care.

[5] We adopt the facts as set forth in the ALJ Decision, where not otherwise repeated, supplemented or modified herein.

including, but not limited to machinery, materials, methods, facilities, tools, and equipment.

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The Department reserves the right to discipline and discharge employees for just cause. The collective bargaining agreement further provides for binding arbitration of grievances.

Prior to 2019, the Employer's EMTs and Paramedics used a portable combined heart monitor and automatic external defibrillator (AED) called the Lifepack 15 to restore a heart rhythm to patients in cardiac arrest pending ambulance transport to a medical facility. In 2018 the Employer decided to replace the Lifepack 15 with a new heart monitor/AED called the Zoll Series X.

Although both the Lifepack 15 and Zoll X monitor provide EKG data, the Zoll X provides EMTs with real-time feedback on their performance of cardiopulmonary resuscitation (CPR) during emergency runs. In other words, it coaches the EMTs to push harder or faster while performing CPR. It also displays real-time data not available with the Lifepack 15. The availability of real-time feedback to improve patient care was the primary reason for the Employer's decision to start using the Zoll X. The difference in the two devices does not end there, however.

The Lifepack 15 could store only the EKG data showing the patient's heart activity. That data would, in turn, reveal whether CPR had been performed. But, the Zoll X not only shows *whether* CPR has been performed (through the EKG data). It also provides, *qualitative* data on the depth, release velocity, and rates of compression of the CPR performed. The Zoll X also offers real-time prompts to defibrillate, *i.e.*, shock, the patient--a determination previously made solely by the EMTs without assistance from the Lifepack 15. The Zoll X can generate a "report card" for each use. And data from the Zoll X is much easier to retrieve than that from the Lifepack 15.

Employee training on the Zoll X took place in May 2018. During that training, the EMTs expressed concern about the potential for data from the Zoll X to be used as a punitive device from which disciplinary action could be imposed. In response to these concerns, the Employer's training official assured the EMTs and the Union's fire department liaison that the Zoll X was designed for quality assurance and quality improvement purposes and would not be used in the discipline of employees. The Employer's ambulances were equipped with the Zoll X in about December 2018.

In January 2019, the Employer investigated two EMTs following the receipt of a complaint from a patient's family concerning their performance during an emergency run. Data from the Zoll X was reviewed as part of the investigation. At no time prior to the onset of the investigation did the Employer notify the Union that it intended to use data retrieved from the Zoll X in disciplinary investigations, or to support the discipline of an employee.

The February 1, 2019 investigation report included the following analysis of the Zoll X data as interpreted by the Employer:

> The CPR data, report card and complete playback are not consistent with a crew performing CPR. No AHA guidelines were followed and the crew failed to follow any of the prompts from the Zoll X Series. The ECG data does not reflect compressions and more closely resembles the puck bouncing with road noise. The feedback on the monitor was not utilized, as there was no improvement in the CPR overtime and there were no consistent rates, depth, or release velocity obtained throughout the duration of the recorded CPR time.[6]

The analysis concerning consistent rates, depth and release velocity, and the employees' failure to follow the Zoll X "prompts", were all based on information previously unavailable to the Employer from the Lifepack 15. The report concluded that the involved employees had failed to perform CPR and recommended that they be charged with Neglect of Duty. They were subsequently discharged from employment by the Employer.

Discussion and Conclusions of Law:

1. *Legal Standards*

Section 15 of the Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions with respect to those matters which constitute "mandatory subjects of bargaining." MCL 423.215; *Detroit v Michigan Council 25, AFSCME,* 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact on "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield*, 433 Mich. 168, 177; 445 NW2d 98 (1989); *Port Huron Area School Distric*t, 28 MPER 45 (2014). The Commission has taken a broad view of the phrase "other terms and conditions of employment" for purposes of determining whether an issue involves a mandatory subject of bargaining. *Central Michigan Univ. Faculty Ass'n v. Central Michigan Univ.*, 404 Mich. 268, 279-290, 273 NW 2d 21, 25-31(1978).

If a collective bargaining agreement covers a mandatory subject of bargaining, the parties are deemed to have fulfilled their statutory duty to bargain regarding the matter. As the Michigan Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist,* 452 Mich 309, 321 (1996):

> When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v. Detroit,* 408 Mich. 663, 293 N.W.2d 278 (1980) . . . In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

[6] It is undisputed that, as at least as of the date of the hearing, the calibration and reliability of the Zoll X monitor in a moving vehicle had not been established. Because the involved EMTs claimed they had, in fact, performed CPR, and due to the potential ambiguity of the Zoll X data when used in a moving vehicle, the Employer's investigators designed and conducted their own admittedly unscientific experiments in an attempt to ascertain how the data would look after use of the Zoll X in a moving vehicle with varying placements of the monitor pads.

Even where there is no bargaining obligation with respect to a particular decision, an employer has a duty to bargain over the impact or effect of that decision. *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line*, 414 Mich 642, 661-662 (1982) (decision to layoff employees was not mandatory subject of bargaining, but impact of the decision was mandatory subject of bargaining); *Ishpeming Supervisory Employees v City of Ishpeming*, 155 Mich App 501, 508 (1986) (no obligation to bargain over reorganization plan, but duty to bargain over impact of reorganization); *King Soopers, Inc.*, 340 NLRB 628 (2003) (employer's decision to install scanners for prescriptions not a mandatory subject of bargaining, but the potential disciplinary impact and effect of the scanner policy implemented by the employer was a mandatory subject of bargaining).

2. *The Parties' Contentions*

The ALJ found, and the Union did not dispute, that the Employer had the unilateral right under the management rights clause of the collective bargaining agreement to select and purchase new equipment, as well as to establish procedures and protocols for the EMTs and Paramedics to follow in administering patient care. But the ALJ determined that the Employer's use of newly available data from the Zoll X to investigate employees for potential disciplinary action and/or to support the imposition of discipline, was a mandatory subject of bargaining not covered by the collective bargaining agreement. It was, therefore, a term or condition of employment over which the Employer was obligated to bargain. The Union argues that the use of the Zoll X data for investigatory and disciplinary purposes was an impact or effect of the decision to purchase the new equipment over which the Employer was obligated to bargain.

Conversely, because the collective bargaining agreement "covered" the decision to purchase, install, and direct employees to use the Zoll X, as well as to establish policies, methods and procedures to be utilized, and to discipline employees for just cause, the Employer contends that it had no duty to bargain over the utilization of the new Zoll X data as a tool for investigatory or discipline-related purposes.[7] We agree with the Union's position and disagree with the Employer's.

3. *Disciplinary Use of Zoll Monitor Data Was a Mandatory Subject Not Covered by the Agreement*

It is well-settled that the discipline of employees is a mandatory subject of bargaining. *Amalgamated Transit Union, Local 1564 v. Southwestern Michigan Transp. Authority*, 437 Mich 441, 473 NW 2d 249 (1990); *Pontiac Police Officers Assn. v. Pontiac*, 397 Mich. 674; 246 NW 2d 83 (1976). Whether or not the use of Zoll X data as a new tool for disciplinary investigations and to support disciplinary action constitutes an "impact" or "effect" of the Employer's purchase and installation of the equipment, the issue is whether the parties, as evidenced by the terms of the collective bargaining agreement, had already bargained

[7] In light the fact that the parties agree with the ALJ's determination of contract coverage as it relates to the Employer's purchase, installation, and use of the Zoll X, it is unnecessary for us to determine whether the decision involved a mandatory or permissive subject of bargaining.

over the use of the newly available data provided by the Zoll X as an investigative tool in the disciplinary process. We find that the evidence in this case is clear that the collective bargaining agreement did not cover this matter. As a result, the Employer retained its duty to bargain.

Although the collective bargaining agreement gives the Employer the right to purchase, install, and direct employees to use equipment like the Zoll X, there is no provision even remotely suggesting the parties bargained over the Employer's use of the new Zoll X data as a tool to investigate employee conduct for potential disciplinary purposes. Likewise, although the collective bargaining agreement vests the Employer with the right to discipline employees for "just cause", it does not address in any way the use of data from the Zoll X for the purposes of investigating employee conduct or to support disciplinary action, and the previously unavailable data provided by the Zoll X unquestionably altered the character and type of evidence on which an employee's job security might depend.

The record contains no evidence of any policy or procedure suggesting or authorizing the use of Zoll X data for such purposes. Although the Employer's standards (and American Heart Association (AHA) standards) require employees to administer CPR to a patient in cardiac arrest, there exists no policy or AHA guideline requiring that the CPR meet the qualitative or quantitative parameters measured by the Zoll X, or that employees follow the prompts given by the Zoll X while administering CPR. Nor does past practice support the Employer's position that the collective bargaining agreement covered the use of the Zoll X data for disciplinary purposes. Indeed, the Employer acknowledged that prior to purchasing the Zoll X, it had reviewed data from the LifePack 15 infrequently at best, and had on only one or two occasions in 2010 or 2011 relied on data from an EKG report as part of the basis for issuing discipline to an employee.

In light of this background, we cannot say that the parties "negotiat[ed] for a provision in the collective bargaining agreement that fixes the parties' rights and forecloses further mandatory bargaining" over the disciplinary use of Zoll data. *Port Huron*, 452 Mich at 318; 550 NW2d at 234 (internal quotation marks omitted). The parties neither "bargain[ed] about [this] subject" nor "memorialize[d] the results of their negotiation" over it. *Id.* at 319; 550 NW2d at 235 (internal quotation marks omitted). The matter is thus not "covered" by the collective bargaining agreement, and the Employer has not "fulfilled its duty to bargain" over it. *Id.* at 318; 550 NW2d at 234.

Our cases support the conclusion that the Employer did have a duty to bargain over the disciplinary use of the Zoll data. In *City of Detroit (Fire Dept.)*, 15 MPER 33013 (2001) (exceptions denied as untimely), the Commission affirmed the ruling of the ALJ that the Employer was obligated to bargain over the use of workplace response teams as a tool to review employee misconduct and, if necessary, impose discipline. In so ruling, the ALJ adopted the conclusions of the Michigan Supreme Court in *Pontiac Police Officers Ass'n v. Pontiac (after remand)*, 397 Mich 674, 246 NW 831(1976) in which the Court held that disciplinary procedures are a mandatory subject of bargaining because they affect other terms and conditions of employment. The ALJ further concluded that "disciplinary procedures include the procedures for investigating the alleged employee misconduct, as well as those for determining whether discipline will be imposed." *City of Detroit (Fire Dept.), supra*.

In *City of Detroit and Senior Accountants, Analysis & Appraisers Ass'n,* 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1980), the Commission followed the decisions of the National Labor Relations Board (Board) in finding that drug testing for employees returning from layoff was a mandatory subject of bargaining. Specifically, in *Johnson-Bateman, Inc.*, 295 NLRB 180, 183 (1989), the Board found drug testing of employees to be a mandatory subject of bargaining because it changed the method by which the employer investigates employee responsibility for workplace accidents, and "introduced relatively sophisticated technology, substantially varying both the mode of the investigation and the character of proof on which an employee's job security might depend." The Board relied on its prior decision in *MediCenter, Mid-South Hospital,* 221 NLRB 670 (1978), in which it had affirmed the ALJ's conclusion that for the same reasons, polygraph testing was also mandatory subject of bargaining.

Our dissenting colleague relies on prior cases in which the Commission has dismissed unfair labor practice charges alleging a duty to bargain over an employer's installation and use of new equipment. But those cases are decisively different than this one, because they involved merely the basic decision to acquire and use the new technology. They did not involve any particular uses of that technology for disciplinary purposes—a separate and distinct mandatory subject. E.g. *Berrien County*, 33 MPER 30 (2019)(no duty to bargain over body worn cameras where collective bargaining agreement allowed employer to determine work to be performed and equipment to be used); *City of Portage (Police Dep't)*, 1995 MERC Lab Op 251 (no exceptions)(no duty to bargain over the installation of video recording equipment with remote audio recording microphones in its patrol cars).

The Board has also found the installation of surveillance equipment to be a mandatory subject of bargaining because, like the use of data from drug tests and polygraph tests, the data derived from the equipment has the potential to affect the job security of employees. *See, Colgate-Palmolive Company,* 323 NLRB 515 (1997); *Anheuser-Busch, Inc.*, 342 NLRB 560 (2004). Our dissenting colleague believes that these Board decisions are inconsistent with Commission precedent, notably *Portage* and *University of Michigan*, 25 MPER 64 (2012). We explained above why *Portage* is inapposite. And in *University of Michigan*, although the Commission found the Employer had no duty to bargain over its installation of surveillance cameras in an unauthorized break room and subsequent discharge of the employees it caught sleeping in the room during working time, it took pains to distinguish the case from the Board decisions we have cited. More specifically, in dismissing the charge the Commission noted that the "employees caught by Respondent' s camera, unlike those in Colgate-Palmolive, had no legitimate expectation of privacy."

At the hearing in this matter, the Employer unequivocally stated its intent to utilize the Zoll X data for the investigation of employee conduct and, if necessary, to support the imposition of disciplinary action. As with the use of data from drug tests, polygraph tests, and surveillance equipment, we conclude that the use of data from the Zoll X which had not been available from prior heart monitor/AED equipment constituted a mandatory subject over which the Employer had a duty to bargain.

4. *The Union Did Not Waive its Right to Bargain*

The Employer contends that the Union waived its right to bargain by failing to demand bargaining. That argument is without merit.

The Commission has held that an employer's obligation to bargain is "triggered by a timely demand". *City of Highland Park*, 17 MPER 86 (2004), citing *Local 586, SEIU v. Village of Union City,* 135 Mich App 553 (1984); *United Teachers of Flint v. Flint School District*, 158 Mich App 138 (1986); *Decatur Public Schools*, 27 MPER 41 (2014); *City of Dearborn*, 20 MPER 110 (2007).

The determination whether a timely demand has been made first involves consideration of the well-settled principle that an employer is obligated to provide the union with notice and an opportunity to bargain before making the change at issue. *City of Detroit (Water & Sewage Dept.)*, 33 MPER 13 (2019); *Wayne County*, 26 MPER 22 (2012); *City of Detroit (Fire Department)*, 20 MPER 39 (2007). An employer who fails to give notice of the change in advance of its implementation is deemed to have violated its duty to bargain because it has deprived the union of the opportunity for meaningful bargaining. *Id.*; *Wayne County, supra*. In that situation, a union has no duty to demand bargaining because the subject in dispute was presented as a *fait accompli*. *Inter Urban Transit Partnership*, 21 MPER 47 (2008); *City of Highland Park*, 17 MPER 86 (2004).

Our dissenting colleague argues that these decisions are inapposite, not with regard to the legal standard articulated, only as to the facts, but he cannot offer a defense on the merits of his basic position that a union has an obligation to demand bargaining over an action of which it had no notice. While he asserts that the Union had knowledge of the type of data produced by the Zoll X as of the date employees were trained on the equipment, he fails to address the fact that employees were told by the Employer that the Zoll X data *would not be used for disciplinary investigations.* So the only notice either the Union or employees were ever given prior to the use of the data in an disciplinary investigation, was notice *obviating any need to demand bargaining.* The notion that a party can waive a statutory right without any notice that the right is at issue flies in the face of basic tenets of our legal system, as well as our own Supreme Court's interpretation of PERA. See *Port Huron Ed Ass'n*, 452 Mich at 320; 550 NW2d at 235 (requiring "unmistakable evidence to support a claim that the union has waived the statutory right"). Our dissenting colleague also asserts that the Union could have demanded bargaining *after* the employees were disciplined. Again, it is well-established that meaningful bargaining, to which the Union was entitled, necessitated that notice be given *before, not after,* the Employer implemented its use of the data for purposes of the disciplinary investigation.

Here, the Employer provided the Union with neither notice nor opportunity for bargaining before using the new data from the Zoll X to investigate and, ultimately, discharge the involved employees. The Employer suggests that the employees and Union should have known that the data from the Zoll X would be utilized because it is part of the patient record. That argument is a red-herring. At least one Employer witness stridently maintained that the evidence of a lack of CPR having been performed could have been gleaned from a review of only the EKG data, without the additional information provided by the Zoll X showing the "quality" of the CPR

performed. Moreover, it is undisputed that the only information imparted to employees and the Union concerning the Employer's prospective use of Zoll X data, was that it would not be used punitively for investigative or disciplinary purposes.

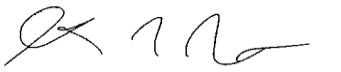
Even assuming the Zoll X data is part of the patient's record, the Employer gave assurances that it would not be utilized for any purpose other than quality assurance and quality control. Then, in the absence of any notification to the contrary, the Employer implemented a decision to use the Zoll X data with its ability to reveal and quantify the quality of the CPR performed, and whether employees had followed the prompts given when performing CPR, for the purpose of investigating employee performance and to support potential disciplinary action. Like the data retrieved from drug tests, polygraphs, and surveillance cameras, the new data from the Zoll X constitutes a variation "in the mode of investigation and character of proof upon which an employee's job security might depend." *City of Detroit, supra*; *Medicenter, supra.* Respondent violated its duty to bargain by failing to provide the Charging Party with prior notification and an opportunity to bargain before utilizing the Zoll X data in a disciplinary investigation. The Union had no duty to demand bargaining because the issue in dispute was presented as a *fait accompli*.[8]

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

ORDER

The Decision and Recommended Order of the Administrative Law Judge is affirmed and adopted in its entirety as our final Order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Samuel R. Bagenstos, Commission Chair

Tinamarie Pappas, Commission Member

Issued: October 22, 2020

[8] The Employer argues that the ALJ has foreclosed it from utilizing patient records when determining the quality of patient care. Again, we disagree. The ALJ specifically ruled that the Employer was not prohibited from continuing to utilize the same data and evidence available prior to the installation of the Zoll X for purposes of investigating employee conduct and potential discipline. Moreover, the ALJ's decision is limited to an order requiring Respondent to bargain in good faith prior to utilizing the newly available data from the Zoll X for purposes other than quality assurance and quality control. As a matter of law, the requirement to bargain would generally continue only until such time as the parties either reach agreement or a valid impasse over the issue. *Kalkaska County Road Commission*, 29 MPER 65 (2016).

Robert S. LaBrant, Commission Member, Dissenting.

The Public Employment Relations Act (PERA) imposes a duty to bargain on public employers and unions only with respect to those matters which constitute "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact upon "wages, hours and other terms and conditions of employment." *Southfield Police Officers Ass'n v Southfield*, 433 Mich. 168, 177; 445 NW2d 98 (1989); *Port Huron Area School Distric*t, 28 MPER 45 (2014). Issues falling outside mandatory subjects of bargaining are classified as either permissive or illegal. *Southfield Police Officers Ass'n* at 178. What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n*, at 178. In *Metropolitan Council No. 23 and Local 1277, AFSCME v City of Center Line*, 414 Mich 642, 660 (1982), the Michigan Supreme Court held that matters that impinge upon a city's fundamental right to make decisions regarding the size and scope of municipal services based on factors such as need, available revenues, and the public interest are permissive, not mandatory, subjects of bargaining.

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 a collective bargaining agreement covers a mandatory or permissive subject of bargaining, however, the parties have fulfilled their statutory duty to bargain and further bargaining regarding the decision or its effects is not required. As the Michigan Supreme Court stated in *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996):

> When the unfair labor charge is the failure to bargain, however, it is often necessary for the MERC, like the NLRB, to review the terms of an agreement to ascertain whether a party has breached its statutory duty to bargain. See *Detroit Fire Fighters Ass'n v. Detroit*, 408 Mich. 663, 293 N.W.2d 278 (1980); Edwards, *Deferral to arbitration and waiver of the duty to bargain: A possible way out of everlasting confusion at the NLRB*, 46 Ohio St. L.J. 23, 24 (1985) (describing a similar requirement for the NLRB). In reviewing an agreement for any PERA violation, the MERC's initial charge is to determine whether the agreement "covers" the dispute. If the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration.

In *Port Huron Ed Ass ' n*, the Court further noted that the procedure for determining whether an employer must bargain before altering a mandatory subject of bargaining involves a two-step analysis: Is the issue the union seeks to negotiate covered by the collective bargaining agreement? If not, did the union somehow waive or relinquish its right to bargain? *Id.* at 322; *Org of School Administrators and Supervisors v Detroit Bd of Ed, 229 Mich App 54, 65* (1998).

In *Macomb Cty v. AFSCME Council 25*, 494 Mich. 65 (2013), the Supreme Court reaffirmed its decision in *Port Huron Ed Ass ' n* and emphasized that any doubt about whether a

subject matter is covered by a collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute. In *Macomb Cty*, a group of five unions filed unfair labor practice charges with the Commission as a result of the county's unilateral decision to change the actuarial table used to calculate joint and survivor retirement benefits. The Commission held that since the method for calculating pension benefits was not contained in the contracts, the contracts did not cover the issue and that the county's unilateral change violated its duty to bargain. The Supreme Court reversed the Commission and found that the contract covered the issue. The Court noted:

> Moreover, because "arbitration has come to be the favored procedure for resolving grievances in federal and Michigan labor relations," doubt about whether a subject matter is covered should be resolved in favor of having the parties arbitrate the dispute. *Id* at 82 (Citation omitted).

See also *Cty. of Wayne v. Michigan AFSCME Council 25*, 28 MPER 23 (2014) (scope of Commission's authority in reviewing a claim of refusal-to-bargain when the parties have a separate grievance or arbitration process is limited to whether the agreement covers the subject of the claim); *Gogebic Cmty Coll Michigan Educ Support Pers Ass'n v. Gogebic Cmty. Coll.*, 246 Mich. App. 342 (2001); *St. Clair Co Rd Comm*, 1992 MERC Lab Op 533. A subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement. *Port Huron Educ. Ass'n*, 452 Mich at 323 n 16; *City of Royal Oak*, 23 MPER 107 (2010).

In the present case, Charging Party Detroit Fire Fighters Association, Local 344 (Union) represents two separate units of employees of the City of Detroit Fire Department (Employer). One unit includes fire fighters and the other, the unit involved in this dispute, includes Emergency Medical Services (EMS) technicians in the EMS Division of the Fire Department.

Article 3(B)(9) of the Agreement specifically gives the Employer the right to:

> Establish, regulate, determine, revise, or modify at any time the policies, practices, protocols, processes, techniques, methods, means, and procedures used in the Department including, but not limited to machinery, materials, methods, facilities, tools, and equipment.

Additionally, Article 8 provides for binding arbitration and Article 9 governs discipline.

In 2018, the Department replaced the portable heart monitor/defibrillator devices in its ambulances with a new portable device called a Zoll Series X monitor. The Zoll Monitor is a heart monitor and automatic external defibrillator (AED) that provides technicians with real-time feedback on their performance of cardiopulmonary resuscitation (CPR) during emergency runs. The Zoll monitor also stores this data for later review.

In May 2018, EMS technicians received formal training on the use of the Zoll monitor. During training, the Union contends that technicians were told that the Zoll monitors were designed for quality assurance/quality improvement (QA/QI) and not for discipline.

In December 2018, the first emergency vehicles were equipped with Zoll Monitors without objection from the Union. In January 2019, however, the Department investigated the

performance of two EMS technicians during a run after the patient's family made a complaint. The EMS Division reviewed data from the Zoll Monitor as part of the investigation. The report on the investigation was issued on February 1, 2019, included an analysis of this data, and recommended that both technicians be charged with neglect of duty. Shortly thereafter, the two technicians were discharged and Charging Party filed a grievance over the discharges.

On March 8, 2019, the Union filed the instant unfair labor practice charge alleging that Respondent violated its duty to bargain in good faith, and Section 10(1)(a) and (e) of PERA, by using "Zoll Monitor data for disciplinary purposes."

In her Decision and Recommended Order, the ALJ concluded that, under Article 3(B)(9) of the parties' collective bargaining agreement, the Employer had the unilateral right to select and purchase new equipment for the Department. The ALJ also found that Respondent had the unilateral right to establish procedures and protocols for its EMS technicians to follow in treating patients. Consequently, the ALJ concluded that Respondent had no duty to bargain with Charging Party over its decision to purchase the Zoll Monitor and had no duty to bargain over the requirement that EMS technicians use the monitor when and in the manner prescribed, or the requirement that they perform CPR in the appropriate circumstances and in accord with standards established by the Department. Nonetheless, the ALJ concluded that "Respondent had, and has, a duty to bargain on demand over the use of the new data made available by the Zoll monitor as an investigatory or disciplinary tool."

Charging Party, in its Brief in Support of the ALJ's decision, notes, at Footnote 3, that even if the decision to purchase new monitors was a permissive subject—an issue Charging Party does not dispute—the impact and effect of that decision is a mandatory subject of bargaining. Respondent contends that the collective bargaining agreement covers the matter in dispute and that the details and enforceability of the relevant provisions of the agreement should be left to arbitration.

In rejecting Respondent's position, my colleagues admit that the collective bargaining agreement gives the Respondent Employer the right to purchase, install, and direct employees to use the Zoll X monitor. Similarly, my colleagues do not dispute the fact that one impact or effect of the utilization of the Zoll X Monitor is the recording of data regarding how fast and how evenly technicians are performing compressions while doing CPR, how deep these compressions are, and how quickly the technicians are removing their hands on each compression, all factors that are significant in determining the quality of the CPR. Nonetheless, my colleagues assert that there is no provision of the agreement suggesting to my colleagues that the parties bargained over the Employer's use of this data as a tool to investigate employee conduct for potential disciplinary purposes. Consequently, my colleagues believe that the use of data from the Zoll X monitor constituted a mandatory subject over which the Employer had a duty to bargain regardless of whether the agreement covered the employer's decision to purchase, install, and direct employees to use the Zoll X monitor.

Contrary to my colleague's position, however, the Commission and Michigan's Courts have recognized that, if a bargaining agreement covers a mandatory or permissive subject of bargaining, the parties have fulfilled their statutory duty to bargain and further bargaining regarding the decision or its effects is not required.

In *Berrien County,* 33 MPER 30 (2019), for example, the Commission recently dismissed an unfair practice charge in which the union disputed a county's refusal to bargain over the impact and/or effects of its revised policy concerning body-worn cameras. There was no evidence that the parties discussed the issue of cameras, body-worn or otherwise, during negotiations for their current contract (Decision and Order p. 7). Although the ALJ noted that "the use of body-worn cameras could have an impact on disciplinary matters" (Decision and Order p. 7), the Commission found that Article 4, Section 1 of the parties' collective bargaining agreement allowed the Employer to determine the work to be performed and the equipment to be used. Accordingly, the Commission decided that the parties' bargaining agreement covered the dispute and that the employer lacked a duty to engage in further impact and/or effects bargaining over the revised camera policy.

Similarly, in *City of Bay City*, 34 MPER 2 (2020), the Commission dismissed an unfair labor practice charge alleging that the city violated its duty to bargain in good faith when it installed video cameras inside its sanitation vehicles and refused to bargain over the decision to install the cameras or its effects on unit employees. In *City of Bay City*, the parties' prior collective bargaining agreement expired at the end of 2017 and, during the negotiations for a successor agreement, the employer installed new driver-focused cameras in its sanitation vehicles. The employer did not notify the union of its intent to install the cameras and rejected the union's demand to bargain over the cameras and to engage in effects bargaining. In rejecting the union's demand, the employer asserted that the cameras were installed as a safety measure and therefore were a management right. In a recommended decision and order, the ALJ found that the employer violated Section 10(1)(a) and (e) when it installed the cameras and refused the union's subsequent bargaining demand. The ALJ noted that the purpose of the cameras was "clearly to capture driver misconduct in the form of distracted driving or other violation of Respondent's rules" and that the cameras were "a new tool to determine whether a driver has engaged in misconduct" (Decision and Order, pp.11-12).

On exceptions to the ALJ's decision, we observed that the parties had reached a new collective bargaining agreement in 2019, after issuance of the ALJ's decision, and that the new bargaining agreement included, among other things, a provision that required employees to use prescribed safety equipment. On this basis, we concluded that the matter involved in the dispute was "covered by" the agreement and that the Employer could not be required to bargain further regarding the matter. In dismissing the charge, we held that "if a bargaining agreement covers a mandatory or permissive subject of bargaining, the parties have fulfilled their statutory duty to bargain and further bargaining regarding the decision or its effects is not required."

Additionally, our unanimous decisions in *Berrien County* and *City of Bay City*, were consistent with longstanding Commission and Court precedent. As noted in *St. Clair County Road Commission*, 1992 Lab Op 533, a decision cited and reaffirmed by the Supreme Court in *Macomb Cty v. AFSCME Council 25*, 494 Mich. 65, 81 (2013), at Footnote 48:

> 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].

See also *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321-322, Footnote 16 (1996) (if the term or condition in dispute is "covered" by the agreement, the details and enforceability of the provision are left to arbitration, affirming *St. Clair County Road Commission,* and noting that a subject need not be explicitly mentioned in an agreement in order for the subject to be "covered by" the agreement); *Gogebic Cmty Coll Michigan Educ Support Pers Ass'n v. Gogebic Cmty. Coll.*, 246 Mich. App. 342, 350 (2001) (although the agreement did not specify a dental insurance carrier that the employer must provide, the issue of dental coverage was "covered by" the collective bargaining agreement, the union exercised its right to bargain concerning this issue and could have negotiated for more specific terms, if it had wished to do so); and *Cty. of Wayne v. Michigan AFSCME Council 25*, 28 MPER 23 (2014) (although the CBAs do not specifically reference the right to health care benefits for "disability retirees," this does not render the contracts silent on this subject); and *Wayne Cty. v. Michigan AFSCME Council 25, AFL-CIO*, 30 MPER 47 (2017), affirming our decision in *Wayne County*, 29 MPER 1 (2015).

Further support for this proposition can be found in the following cases*: Wayne State University*, 1997 Lab Op 484 (refusal to bargain over the impact of decision to implement a new attendance policy did not violate PERA--once employer rights in a particular area have been bargained, defined, and embodied in an agreement, a waiver may be found even though each and every work rule or situation is not delineated); *City of Pontiac*, 26 MPER 30 (2012) (where the contract provisions cover the matter in dispute and those provisions may reasonably be relied on for the action at issue, the parties' dispute must be resolved by their contract's grievance arbitration procedures); and *City of Bay City*, 34 MPER 1 (2020) (to be covered by the collective bargaining agreement a topic need not be specifically mentioned).[9]

In the present case, regardless of whether the decision to implement the Zoll Monitor or the effects of this decision were mandatory subjects of bargaining, the collective bargaining agreement covered the matter in dispute and there was no duty to engage in further bargaining.

Although my colleagues also point out that the NLRB has found the installation of surveillance equipment to be a mandatory subject of bargaining because, like the use of data from drug and polygraph tests, it has the potential to affect the job security of employees and imply that a Zoll Monitor can function in a manner akin to a hidden surveillance camera, longstanding

[9] Although my colleagues cite *City of Detroit (Fire Dept.)*, 15 MPER 33013 (2001) in support of their decision, the ALJ's decision in *City of Detroit (Fire Dept.)* was adopted when no timely exceptions were filed. The case was never subsequently cited with approval by the Commission. Consequently, the case the case is not considered binding precedent. See *City of Saline*, 29 MPER 53 (2016). That aside, the case is easily distinguishable from the present case.

Commission precedent has addressed the installation of surveillance cameras to observe employee behavior.

In *University of Michigan*, 25 MPER 64 (2012), for example, the Commission adopted an ALJ' s dismissal of an unfair practice charge challenging the Employer's unilateral installation of surveillance cameras to observe employee activities in an unauthorized break room. After installing the cameras, the Employer terminated two employees who were sleeping and watching movies in the room during work time. The Commission agreed with the ALJ' s conclusion that the employer' s use of a hidden camera in a non-work location fell within management' s right to supervise its employees during work time. In dismissing the charge, the Commission noted that the "employees caught by Respondent' s camera, unlike those in Colgate-Palmolive, had no legitimate expectation of privacy."

Prior to this, in *City of Portage (Police Dep ' t)*, 1995 MERC Lab Op 251 (no exceptions), the City installed video recording equipment with remote audio recording microphones in its patrol cars, and issued a new work rule requiring officers to video and audio record their activities during the normal work day. As a result, the Union filed a charge alleging that these actions constituted unilateral changes in working conditions in violation of the Employer's duty to bargain under Section 10(1)(e) of PERA, and in addition interfered with the Section 9 rights of the officers in violation of Section 10(1)(a). In dismissing the charge, the ALJ determined that the City's decision to purchase and install cameras in its patrol cars was not a mandatory subject of bargaining. The ALJ found it significant that "the decision to buy MVR systems for patrol cars is similar to the decision of an employer to utilize any equipment in its various operations, such as the decision to use patrol cars in the first place, and that such decisions are matters of management prerogative. See in addition to *Clinton, supra,* (decision to have an employee evaluation system), *Swartz Creek Comm. Schools*, 1994 MERC Lab Op 223, 225-226, 231-232 (decision to reduce size of work force); and *Ingham County and Sheriff*, 1988 MERC Lab Op 170, 172, 176 (decision of sheriff as to who will be permitted to carry weapons)."

Subsequent to this, in *Van Buren County*, 14 MPER 32004 (2000), the Commission commented on a number of its prior decisions involving the effects of technology and cited *City of Portage (Police Dep ' t)* with approval. See also *Charlotte School District, Board of Education*, 1996 MERC Lab Op 193, 9 MPER 27059 (no exceptions) and *City of Grand Rapids (Fire Department)*, 1997 MERC Lab Op 69, 10 MPER 28021 (no exceptions).

In the instant case, as in *University of Michigan* and *City of Portage (Police Dep ' t)*, Respondent's decision to purchase and install Zoll Monitors was a matter of managerial prerogative and not a mandatory subject of bargaining. Although my colleagues appear to exhibit a preference for Board precedent, in *Hurley Medical Center*, 31 MPER 41 (2018), we recently noted that, while federal precedent under the NLRA is often given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA, MERC is not bound to follow "every turn and twist" of NLRB case law. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co Health Dep ' t*, 1993 MERC Lab Op 901, 906. This is especially true where NLRB precedent conflicts with that of the Commission, the Michigan Courts or with other NLRB precedent. See *Kent County*, 21 MPER 61, 221 (2008); *Seventeenth District Court (Redford Twp)*, 19 MPER 88 (2006); and *Michigan Technological Univ*, (no exceptions).

In the present case, the NLRB precedent cited by my colleagues conflicts with that of the Commission and is not persuasive. Moreover, it is easily distinguishable from the facts involved in this case.

Notwithstanding the above, Section 15 of PERA expressly conditions the employer's duty to bargain on there being a request for bargaining from the employees. *St. Clair Prosecutor v. AFSCME*, 425 Mich 204, 242 (1986) (PERA makes it an unfair labor practice for the employer "to *refuse* to bargain collectively with the representatives of its public employees"...It does not require the employer to initiate bargaining); *Decatur Public Schools*, 27 MPER 41 (2014), affirmed by the Court of Appeals in *Van Buren Co Ed Ass 'n & Decatur Ed Support Pers Ass ' n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630; 28 MPER 67 (2015); *City of Dearborn*, 20 MPER 110 (2007).

In the present case, there is no evidence that the Union ever made a demand to bargain over the Employer's decision to use Zoll Monitors or the effects of that decision. Although the ALJ found that Charging Party failed to initially make a demand to bargain because Charging Party could have reasonably believed that Zoll Monitor data would not be used to support disciplinary charges, nothing in the record establishes that there was a request for bargaining from the Union even after it became aware that the Employer was using data from the Zoll Monitors to investigate employee misconduct. Consequently, the Employer had no duty to bargain over its decision to use Zoll Monitors or the effects of that decision even if the collective bargaining agreement did not cover the matter in dispute.

Although my colleagues argue that the employer failed to provide the Charging Party with prior notification and an opportunity to bargain before utilizing the Zoll X data in a disciplinary investigation and that the Charging Party had no duty to demand bargaining because the issue in dispute was presented as a *fait accompli*, I disagree.

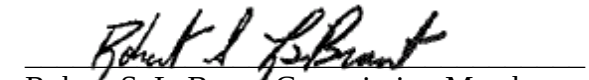
The ALJ did not mention "fait accompli" in her decision and Charging Party did not mention it in its brief or at the hearing. I believe this was because the utilization of the data produced by the Zoll monitor in disciplinary investigations is an on-going process and not a discrete event. That is, the utilization of the data is not restricted to a thing that has already happened or been decided before those affected hear about it, leaving them with no option but to accept it. In this case, EMS technicians, including some who were Union representatives, were trained on the Zoll monitor in May 2018, seven months before the Zoll monitors replaced the Lifepaks in the Division's ambulances. Therefore, Charging Party knew what kinds of additional information the Zoll monitors provided but did not demand bargaining at that time. Similarly, Goodson's report was released on February 1, 2019, prior to the imposition of discipline as I understand it, but no demand was made to bargain at that time. Even after discipline was assessed, no demand to bargain was made (the discipline could have been rescinded). Additionally, although the Union filed the instant unfair labor practice charge on March 8, 2019 alleging that Respondent violated its duty to bargain in good faith and sought to prohibit the Employer from using Zoll monitor data for prospective disciplinary purposes, no demand to bargain was made even at that time.

Although my Colleagues cite certain decisions in support of their position, a review of the decisions establishes that they are either (1) nonprecedential, see *City of Detroit (Fire Department)*, 20 MPER 39 (2007) (no exceptions); *City of Highland Park*, 17 MPER 86 (2004) (dispute underlying the charge had been settled and Commission dismissed the matter); or (2) support my position, see *City of Detroit (Water & Sewage Dept.)*, 33 MPER 13 (2019) (ALJ did not err by finding that Charging Party failed to make a timely bargaining demand regarding the impact of the reduction in force); *Wayne County*, 26 MPER 22 (2012), reversed by the Michigan Court of Appeals in *County of Wayne v. Michigan AFSCME Council 25*, 28 MPER 23 (2014) (ALJ and majority of the MERC panel erroneously determined that the relevant CBAs were silent with regard to health care benefits for disability retirees); *Inter Urban Transit Partnership*, 21 MPER 47 (2008) (after discrete act of diversion of unit work, the Union subsequently requested to bargain).

Section 15 of PERA expressly conditions the employer's duty to bargain on there being a request for bargaining from the employees. In the absence of a demand to bargain, there can be no refusal to bargain under Section 10. *St. Clair Prosecutor* at 242. In the absence of a violation of Section 10, we cannot impose a remedy under Section 16.

I would reverse the ALJ's proposed decision and order and dismiss the complaint in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Robert S. LaBrant, Commission Member

Issued: October 22, 2020

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

In the Matter of:

CITY OF DETROIT (FIRE DEPARTMENT),
Public Employer-Respondent,

Case No. 19-C-0479-CE
Docket No. 19-005161-MERC

-and-

DETROIT FIRE FIGHTERS ASSOCIATION,
LOCAL 344,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Valerie Colbert-Osamuede, Deputy Director of Labor Relations, City of Detroit, for Respondent

Legghio & Israel, PC, by Megan Boelstler, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

On March 8, 2019, the Detroit Fire Fighters Association, IAFF Local 344, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Detroit pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. The charge was heard on June 3 and June 12, 2019, before Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Office of Administrative Hearings and Rules (formerly the Michigan Administrative Hearing System) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by both parties on or before September 30, 2019, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Charging Party represents two separate units of employees of the City of Detroit Fire Department. One includes fire fighters and the other, the unit at issue, includes Emergency Medical Services (EMS) technicians in the EMS Division of the Fire

Department.[1] In 2018, the Department replaced the portable heart monitor/defibrillator devices in its ambulances with a new portable device called a Zoll Series X monitor. The Zoll monitor is a heart monitor and automatic external defibrillator (AED) that, unlike the Department's previous devices, provides technicians with real-time feedback on their performance of cardiopulmonary resuscitation (CPR) during emergency runs. The Zoll monitor also stores this data for later review.

In May 2018, EMS technicians received formal training on the use of the Zoll monitor. During training, they were told that the Zoll monitors were designed for quality assurance/quality improvement (QA/QI) and not for discipline. In December 2018, the first emergency vehicles were equipped with Zoll Monitors without objection from Charging Party. In January 2019, however, the Department investigated the performance of two technicians, MM and JH, during a run after the patient's family made a complaint. The Division reviewed data from the Zoll monitor as part of the investigation. The report on the investigation issued on February 1, 2019 included an analysis of this data. The report recommended that both technicians be charged with neglect of duty. Shortly thereafter, the two technicians were discharged.

Charging Party alleges that Respondent violated its duty to bargain in good faith, and Section 10(1)(a) and (c) of PERA, by using the Zoll monitor data as a vehicle for discipline without giving Charging Party the opportunity to bargain over this use of the device. According to Charging Party, issues over which Respondent has a duty to bargain include how the monitors are calibrated, the rate at which they malfunction, who reviews data from the monitors, and when and how often the data is reviewed.

Findings of Fact:

The Division's EMS technicians consist of emergency medical technicians (EMTs) and paramedics, who have additional training. The Division has both basic ambulances, which are usually staffed by two EMTs, and paramedic ambulances, which can have either two paramedics or one paramedic and one EMT.

The collective bargaining agreement currently in effect between the parties was originally negotiated between Respondent and the unit's previous bargaining representative. The management rights clause in this agreement, Article 3(B)(9), specifically gives the Department the right to:

> Establish, regulate, determine revise, or modify at any time the policies, practices, protocols, processes, techniques, methods, means, and procedures used in the Department including, but not limited to machinery, materials, methods, facilities, tools, and equipment.

[1] In this decision, "Respondent" refers to the City of Detroit, "the Department" refers to its Fire Department, and "the Division" refers to the Department's EMS Division.

The Department has detailed written treatment protocols outlining what EMS technicians are to do in various situations, including a protocol for general pre-hospital care and specific protocols for respiratory distress and cardiac arrest.

Prior to the purchase of the Zoll monitors, the Division's basic ambulances carried a heart monitor/AED called the Lifepak 1000. Lifepak 1000s were and still are carried in Respondent's fire trucks and squad cars and kept at all fire stations. There is little description in the record of the Lifepak 1000 except that it is a simpler device than the Lifepak 15, which the paramedic ambulances carried. Because EMTs are sometimes assigned to paramedic ambulances, both EMTs and paramedics were trained on the Lifepak 15.

The Lifepak 15, like the Zoll monitor, is considered an advanced cardiac care monitor with the capacity to both monitor heart activity, and, through the AED, deliver electrical current to the heart in a manner that can take over the heart's pacing rhythm and return it to normal. The Lifepak 15 has attachments that allow technicians to measure and monitor pulse, blood pressure, "end tidal" carbon dioxide levels in the patient's breath, and the patient's respiration rate. The Lifepak 15 monitors electrical activity in the heart (ECG, also referred to as EKG, rhythm) via electrodes placed on the chest and connected to the monitor by a 12-lead cable. If the heart's rhythms are abnormal, but "shockable," technicians use the AED to attempt to return them to normal. The Lifepak 15 requires a paramedic to interpret the ECG to determine when and whether to shock. Treatment protocols provide that if the patient does not have a pulse, EMS technicians are to perform cardiopulmonary resuscitation (CPR) to move blood and oxygen through the body and to the brain. CPR, which involves hand compressions of the patient's upper body, is performed with the ECG sensors on the patient's chest. Technicians can transmit Lifepak 15 data to the hospital as they transport the patient there. The Lifepak 15 stores its data for later review.

As discussed in more detail below, the Department has a long-established process called QA/QI. When an EMS run was selected to be reviewed as part of the QA/QI process, the Lifepak 15 data was downloaded and included in the materials reviewed, which also included records of the 911 call, the dispatch information, and the electronic patient care report prepared by technicians after each run. Because it was cumbersome to download, and possibly also because of its limited utility, the Department did not regularly look at Lifepak 15 data for other purposes. However, the record indicated that Lifepak 15 data had been used in the past to support disciplinary action. Assistant Superintendent Joseph Barney, who was a Union representative at the time, recalled a 2010 incident where the Department, after a supervisor noticed something suspicious, used ECG data from the Lifepak 15 to discipline a paramedic for improperly interpreting ECG data and as a result improperly administering shocks to a patient. Barney testified

that Lifepak data was also used in a case in which technicians were charged with failing to transmit data from the monitor to the hospital to which they transported the patient.

Witnesses from both parties agreed that the Lifepak 15 did not evaluate the quality of the CPR performed. However, two Respondent witnesses, Lieutenant Glen Goodson from the Department's training academy, and Sean Larkin, Superintendent of the EMS Division, both with extensive paramedic experience, testified that the ECG data from the Lifepak 15 could be used to determine with reasonable certainty whether CPR has been performed at all. That is, they testified that the chest compressions in CPR cause an interruption of the flow of electricity between the monitor's chest pads that is discernible from the ECG. Lloyd Watley, currently a Charging Party's representative and a paramedic with long experience, disagreed that one could determine from Lifepak 15 data whether CPR had been performed. There was no evidence that the Department had ever disciplined a technician for failing to perform CPR based on data from the Lifepak 15.

The American Heart Association (AHA) now recommends that all ambulances be equipped with monitors that provide feedback to technicians during chest compressions. Because the Lifepak 15 does not have this function, the Department sought and obtained a grant that partially covered the cost of replacing its Lifepak 15s, and the Lifepak 1000s in the basic ambulances, with a new device, the Zoll Series X portable monitor.[2] Zoll Series X monitors/defibrillators have all the capabilities of and monitor and collect all the information that the Lifepak 15 does. However, the Zoll monitor, unlike the Lifepak 15, provides EMS technicians with real-time feedback, and oral instructions, as they perform CPR. When the Zoll monitor's pads are placed on the patient and the monitor is turned on, it begins monitoring the patient's heart rhythms and orally instructs the technician to perform CPR. If CPR is not necessary because the patient has a pulse, the technician can hit a pause button which allows the technician to use the monitor for assessment purposes, including obtaining vital signs and taking pulse oximetry readings. If the pause button is not pushed, the Zoll monitor displays, in real time as the technician performs CPR, the rate at which chest compressions are being performed; the depth of the compressions; the release velocity, i.e. how fast the person performing CPR is coming back off the chest, and whether the chest compressions are within the appropriate range for these three factors. The Zoll monitor also provides oral prompts such as "push harder," or "push faster" and, like Lifepak 15, has a metronome that helps the technician find the proper rhythm. The Zoll monitor display also shows the patient's profusion status, i.e. how much blood is in the heart, while CPR is being performed. In sum, the Zoll monitor allows technicians to assess and correct the quality of their CPR as they are

[2] The grant application, which also covered a device which provides fire fighters with breathable air when they are trapped by a fire, stated that the purpose of the grant was to improve "citizen safety and the health and safety of fire fighters." The Zoll monitor improves the quality of care provided to persons in the City of Detroit, including fire fighters if they are injured, but there is no evidence that it otherwise affects fire fighter health or safety.

performing it. In addition, the Zoll monitor also calculates and records for the period it is turned on the average compression rate, average compression depth, average release velocity, number of pauses greater than 10 second, the time and length of the three longest pauses, the times the monitor was turned off and on, the times the pads were placed on the patient, the time between when the machine is turned on and the first compression, and the time of any shocks administered. As noted above, the Lifepak 15 required a paramedic to determine from the ECG whether a patient should be shocked, or shocked again, with the AED. The Zoll monitor, however, interprets the ECG and orally tells a technician whether and when to shock. All the information collected by the Zoll monitor is downloaded directly from the device to cloud storage and can be easily accessed for later review.

For the monitor to accurately receive and record data about their compressions, technicians must place the monitor's pads correctly on the patient's chest. Also, as noted above, the Zoll monitor records the number of pauses during CPR of greater than ten seconds. There are several legitimate reasons why technicians might properly stop CPR and then begin it again. Thus, in order to determine whether there was an improper gap in care, the person reviewing the Zoll monitor data must also refer to the technicians' patient care report. Goodson, who is the individual designated as the Department's Zoll monitor liaison, admitted that there were certain situations in which a technician should not follow the monitor's prompts. Goodson also testified that he did not know whether the monitor's accuracy had been tested in the back of a moving ambulance.

The Department received the Zoll monitors in June or July of 2018. The first training sessions for EMS technicians were held in May 2018. Representatives from the manufacturer conducted the sessions along with members of the Department's training staff. Goodson was present at most of these sessions. The training sessions were approximately two hours in length and during the sessions the trainers went over the monitors' functions, both basic and advanced, with both paramedics and EMTs. Zoll representatives also held separate training sessions for the Department's training staff, including Goodson, where the training staff learned how to read and interpret data from the monitors. This included how to generate a "report card" for each use of the monitor during CPR. During their training, the EMS technicians were told about these report cards and that they would be able to see them.

Two technicians who attended different training sessions testified that during their sessions, employees asked if the monitor would be used for discipline. Both testified that Goodson replied that it would not be used punitively or for disciplinary action, but would be used only for quality control purposes, to provide training, and to make technicians aware of any deficiencies in their personal efforts. Goodson testified that he told technicians during training that the monitor was for QA/QI and training purposes and was not designed for discipline. However, he testified that "it was understood that if there's stuff that falls outside [the QA/QI process] … that there would be further investigation."

Goodson also testified that his understanding of the Department's policy was that the QA/QI review of the Zoll monitor data was for training purposes and would not be used to discipline "unless there is an egregious or neglectful thing." However, he admitted that he might not have explained during training that there might be circumstances when Zoll monitor data was used for discipline.

Ninety-five percent of EMS technicians, including technicians who were Charging Party representatives, received training in May 2018. In November 2018, shortly before the Zoll monitors were deployed, the Department held one-hour refresher training sessions. All EMS technicians who did not attend the May training were required to attend one of the refresher sessions. The Zoll monitors were placed in ambulances in December 2018 without objection from Charging Party.

As is required by the State of Michigan for fire departments, the Department has a QA/QI program that covers both fire and EMS runs. Under that program, runs are chosen randomly and the records from these runs are reviewed for deficiencies in following protocol or in record-keeping. If the reviewer spots something unusual, the records are reviewed by a quality control committee made up of Department managers. The committee decides whether to take any further action which, according to the current protocol, may include referring a case to be reviewed for disciplinary action. As noted, ECG data from the Lifepak 15s were included in the records from EMS runs that were reviewed as part of the QA/QI program. However, after the Zoll monitors went into use, the Division set itself the goal of looking at the Zoll monitor data for all runs where CPR had been performed or where the AED was used. By the time of the hearing in June 2019, the Division was looking at 90-100% of such runs. It was also handing out report cards for individual runs generated by the Zoll monitor so that the technicians on these runs could see how the monitor had assessed their CPR. In addition to looking at the monitor data, the reviewers, which included Goodson, looked at the technicians' patient care reports to see how their accounts compared to the monitor data. While Goodson testified that he would refer a matter that he discovered in a quality control review to a technician's supervisor if appropriate, he had never done so. At the time of the hearing, the Department had not disciplined any technician based on information gathered as part of its routine checks of Zoll monitor data.

On January 4, 2019, a patient's family filed a complaint with the Division over the care provided to the patient by MM and JH, an EMT and a probationary paramedic, during a run earlier that day. The patient suffered cardiac arrest while being transported to a hospital and could not be revived. On January 22, 2019, the Department began an investigation that included reviewing the 911 call and the patient care report for the run and taking statements from the patient's family members as well as the two technicians. The statements gave different versions of what the technicians did when they first arrived at the scene, but they all agreed that the technicians did not place the Zoll monitor pads on the patient until after they moved him from his apartment to the ambulance.

According to the patient care report and the statement of the technician in the back of the ambulance, the patient went into cardiac arrest as he was placed in the ambulance and CPR was performed in the ambulance, including while it was being driven to the hospital.

As part of the investigation, the Zoll monitor data was retrieved and given to Goodson for review. Goodson also looked at the technicians' patient care reports. The Zoll monitor provided Goodson with a record of when, according to the monitor, compressions had been performed and the data for those compressions. It also reported at what points during the sessions it had analyzed the patient's heart rhythm and what the EKG looked like during these analyses, as well as providing a picture of the patient's EKG rhythm every ten seconds during the session. Goodson concluded in his written report:

> The CPR data report card and complete playback are not consistent with a crew performing CPR. No AHA guidelines were followed and the crew failed to follow any of the prompts from the Zoll X series. The ECG data does not reflect compressions and more closely resembles the [sensor] bouncing with road noise. The feedback on the monitor was not utilized, as there was no improvement in the CPR over time and there were no consistent rates, depth or release velocity obtained through the duration of the recorded CPR time.

Goodson's report was incorporated into the Department's overall report on the incident. The report, which was released on February 1, 2019, concluded that the technicians had breached several protocols. These included, but were not limited to, failing to conduct a thorough assessment of the patient's condition and set up the Zoll monitor soon enough, not using the proper techniques and equipment to move the patient inside his apartment and to the ambulance, and failing to initiate and provide proper CPR from the time of the cardiac arrest until arrival at the hospital. The Department's report also concluded:

> Based upon the three witnesses recounting the same series of events and lack of action on the part of the crew, the inconsistencies on the part of the EMS crew as detailed above, lack of proper and complete documentation and the analysis of the data showing CPR NOT [emphasis in original] being performed the conclusion is drawn that the complaint is substantiated.

EMS Supervisor Larkin testified that the Department based its conclusion that CPR was not performed on the EKC data, and not the compression data provided by the monitor. MM and JH were discharged, after which Charging Party filed a grievance and this charge.

Discussion and Conclusions of Law:

Under the management rights clause of the parties' collective bargaining agreement, Respondent has the unilateral right to select and purchase new equipment for the Department. It also has the unilateral right to establish procedures and protocols for its EMS technicians to follow in treating patients. Thus, Respondent had no duty to bargain with Charging Party over its decision to purchase the Zoll Monitor. It also had no duty to bargain over the requirement that EMS technicians use the monitor when and in the manner prescribed, or the requirement that they perform CPR in the appropriate circumstances and in accord with standards established by the Department. As I understand it, Charging Party does not disagree with any of the above. However, it alleges that as the Zoll Monitor Series X is a new device, Respondent had a duty to bargain over the use of its data to discipline employees.

The Zoll monitor, like its predecessor the Lifepak 15, helps EMS technicians care for patients by monitoring certain aspects of the patients' condition as the technicians treat them and by allowing the technicians to administer electric shocks to normalize the patients' heart rhythms. The Zoll monitor is not a safety device; it is not designed to protect the health or safety of the employees who use it but rather to improve patient care. The Zoll monitor includes several features that its predecessor did not have. Among these are the ability to record, for later review, how fast and how evenly technicians are performing compressions while doing CPR, how deep these compressions are, and how quickly the technicians are removing their hands on each compression, all factors that are significant in determining the quality of the CPR. The monitor, therefore, clearly has the potential to be a disciplinary tool. Moreover, the Zoll monitor provides the Department with information about the quality of the CPR to which the Department previously had no access.

In *City of Detroit,* 1989 MERC Lab Op 788, aff'd 184 Mich App 551 (1990), the Commission followed the lead of the National Labor Relations Board (NLRB or the Board) in holding that the institution of drug testing for current employees returning from layoff was a mandatory subject of bargaining. In *Johnson-Bateman, Inc,* 295 NLRB 180 (1989), the NLRB held that the implementation of drug and alcohol testing for current employees who were injured on the job was a mandatory subject of bargaining under the National Labor Relations Act (NLRA), 29 USC 150 et seq. The Board drew a parallel between drug and alcohol testing and polygraph testing, which it had held in *Medicenter, Mid-South Hospital,* 221 NLRB 670 (1975) to be a mandatory subject and in which the Board majority held that a "change of this nature in the method by which the employer investigated suspected employee misconduct is a change in the terms and conditions of employment. " *Johnson-Bateman* found that its case and *Medicenter* were similar in that: (1) there was a change in the methodology by which the employer investigated possible employee misconduct, and (2) the Employer had introduced relatively sophisticated technology varying both the mode of the investigation and the character of the proof upon which an employee's job security might depend. The Board held that drug and alcohol testing was a mandatory subject of bargaining because it had the potential to affect the continued employment of employees who became subject to it. The Commission in *City*

of Detroit agreed with this reasoning and concluded that the employer had a duty to bargain over the institution of mandatory drug testing for employees returning from layoff.

The NLRB has also found the installation of hidden surveillance cameras to be a mandatory subject of bargaining, because, like drug and alcohol testing, physical examinations, and polygraph testing, the surveillance cameras were germane to the working environment as "investigatory tools or methods used by an employer to ascertain whether any of its employees has engaged in misconduct." *Colgate-Palmolive Co,* 232 NLRB 515 (1997). See also *Anheuser Busch, Inc,* 342 NLRB 560 (2004); *Springfield Day Nursery,* 362 NLRB 261 (2015).

As noted above, the Zoll monitor provides the Department with information about the CPR performed by its technicians, information to which the Department did not previously have access, and which is relevant to employees' work performance. I conclude that Respondent had, and has, a duty to bargain on demand over the use of the new data made available by the Zoll monitor as an investigatory or disciplinary tool.

I also find that Charging Party did not waive its right to bargain by failing to make a timely demand to bargain. EMS technicians, including some who were Charging Party representatives, were trained on the Zoll monitor in May 2018, seven months before the Zoll monitors replaced the Lifepaks in the Division's ambulances. Therefore, Charging Party knew what kinds of additional information the Zoll monitors provided. It also knew, according to the testimony of technicians who attended that training, that the data would be used for quality control and, therefore, examined by supervisors after the event. According to the their uncontradicted testimony, technicians realized that this information could potentially be used to discipline employees and inquired about this during the training sessions. According to the two technicians, who attended separate sessions, they were told that the Zoll monitor would not be used "punitively" or for discipline. Even Goodson, the primary trainer, admitted that he said that the Zoll monitor was not "designed for discipline," and that he probably did not explain that the data might be used for discipline under certain circumstances. I find no indication that Goodson intended to misrepresent the Zoll monitor's purposes; as of the date of the hearing, Goodson had not referred any of the Zoll monitor cases he had reviewed for quality assurance purposes for possible disciplinary action. I conclude, however, that Charging Party could have reasonably interpreted Goodson's statements to its members as an assurance that Zoll monitor data would never be used to support disciplinary charges and that, therefore, there was no need to address such issues as the reliability of the data or how it might be used at the bargaining table.

Respondent asserts that because it has used information from past cardiac monitors to support discipline, the discharge of MM and JH did not constitute a unilateral change in existing terms and conditions of employment. As set out above, EKG data from the Department's previous heart monitor was something that the Department could and did review. In at least one case, it had used this data to support a decision to discipline. Because MM and JH had a Zoll monitor, not a Lifepak, with them on the day of the incident that led to their discharges only Zoll monitor data was available for review. I

find, based on the investigatory report, that Respondent relied in part on the EKG data from the Zoll monitor to conclude that MM and JH had not performed CPR on the patient. However, I also find, based again on the report, that it also looked at data from the Zoll monitor about the rate, depth and release velocity of the compressions to reach this conclusion. I conclude that under the circumstances Respondent's use of this new data from the Zoll monitor to support its decision to discipline MM and JH constituted an unlawful unilateral change in terms and conditions of employment.

The remaining issue is that of the appropriate remedy. Charging Party seeks an order to Respondent to bargain over the use of Zoll monitor data as "an instrument of investigation and discipline" and an order to Respondent to cease and desist from using this data pending satisfaction of its obligation to bargain. It also seeks an order requiring Respondent to rescind all discipline that referenced or relied upon Zoll monitor data. I agree that an order requiring Respondent, upon demand, to bargain over the use of the new data provided by the Zoll Series X monitor as a tool to investigate potential employee misconduct is appropriate in this case. I also agree that Respondent should be ordered to cease and desist from using this new data for disciplinary purposes pending satisfaction of its obligation to bargain. I do not agree, however, that MM's and JH's discharges should be set aside even though I have found that Respondent relied in part on new data from the Zoll monitor. First, as noted above Respondent's conclusion that MM and JH did not perform CPR was based not only on newly available data but on EKG data that was available from the previous Lifepak monitors, data that Respondent had used at least once to support a disciplinary decision. Second, Respondent's decision to discharge the two technicians was also based in part on alleged violations of treatment protocols unrelated to the performance of CPR. I conclude that whether Respondent had just cause to discharge MM and JH without relying on the new Zoll monitor is a contractual issue properly left to arbitration, and not an issue that should be resolved by me or by the Commission. I recommend, therefore, that the Commission issue the following order:

RECOMMENDED ORDER

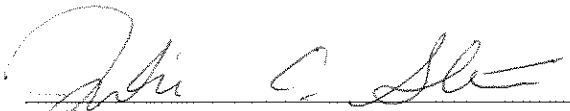
The City of Detroit (Fire Department), its officers and agents, are hereby ordered to:

1. Cease and desist from unilaterally altering existing terms and conditions of employment for employees represented by the Detroit Fire Fighters Association, Local 344 (the Union) by using newly-available data from its Zoll Series X heart monitors to investigate employee misconduct or support a decision to discipline employees without giving the Union the opportunity to bargain. This order does not prohibit Respondent from using the type of data, including ECGs, that was available from previous generations of heart monitors for disciplinary purposes.

2. Upon demand, bargain with the Union over the use for disciplinary purposes of the new data made available by the Zoll Monitor Series X heart monitor.

3. Post the attached Notice to Employees in all locations where notices to members of the Union's bargaining unit are customarily posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: October 15, 2019

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF DETROIT (FIRE DEPARTMENT)** 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 NOT unilaterally alter existing terms and conditions of employment for employees represented by the Detroit Fire Fighters Association, Local 344 (the Union) by using newly-available data from our Zoll Series X heart monitors to investigate employee misconduct or support a decision to discipline employees without giving the Union the opportunity to bargain.

WE WILL, upon demand, bargain with the Union over the use for disciplinary purposes of the new data made available by the Zoll Monitor Series X heart monitor.

CITY OF DETROIT (FIRE DEPARTMENT)

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 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. 19-C-0479-CE.