STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPT OF PUBLIC WORKS),
Respondent-Public Employer,

Case No. C99 C-58

-and-

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 808M,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Bruce Campbell, Esq., City of Detroit Law Department, for the Respondent

L. Rodger Webb, Esq., for Charging Party

DECISION AND ORDER

On December 27, 2000, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent City of Detroit violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210, by unilaterally instituting a requirement that environmental control inspectors (ECIs) drive their own vehicles in the field, thereby removing an existing benefit of their employment. Respondent filed timely exceptions to the Decision and Recommended Order of the ALJ on February 20, 2001.

The facts of this case were accurately set forth in the Decision and Recommended Order and need not be repeated in detail here. Briefly, Charging Party represents a bargaining unit consisting primarily of certain nonsupervisory employees of the City's public works department. Approximately half of this unit consists of environmental control inspectors (ECIs). In early 1999, Respondent revised the job specifications for this classification to require that ECIs "provide their own motor vehicles for transportation on a reimbursed mileage basis." On March 29, 1999, the SEIU filed an unfair labor practice charge alleging that this revision constituted a unilateral change in violation of Section 10(1)(e) of PERA. The ALJ agreed, concluding that requiring ECIs to have or drive their own vehicles altered the terms of their employment by removing an existing job benefit. The ALJ recommended that the Commission order the City to cease and desist from making unilateral changes in mandatory subjects of bargaining, remove the offending sentence from the ECI job specification, refrain from ordering ECIs to drive their own vehicles for work-related purposes, and post an appropriate notice.

On exception, Respondent contends that the ALJ erred in finding that the parties' past practice concerning the use of employer-owned vehicles created a benefit of employment which the Employer was not entitled to alter without bargaining. 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 a "tacit agreement" that the practice would continue. *Port Huron Education Ass'n v Port Huron Area School District*, 452 Mich 309, 325 (1996), quoting *Amalgamated Transit Union v Southeastern Michigan Transportation Authority*, 437 Mich 441, 454-455 (1991). Where the contract unambiguously covers a term of employment that conflicts with a party's past behavior, however, 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 Education Ass'n,* 452 Mich at 329. In such circumstances, the party "seeking to supplant the contract language must submit proofs illustrating that the parties had a meeting of the minds with respect to the new terms or conditions -- intentionally choosing to reject the negotiated contract and knowingly act in accordance with past practice." *Id*. See also *Grand Rapids Community College*, 1998 MERC Lab Op ___, issued 12/29/98.

In the instant case, Article 47, Section A, of the parties' current collective bargaining agreement contains language regarding reimbursable mileage. That provision states that twenty-six cents per mile will be paid "when an employee covered by this agreement is assigned to use his/her automobile to perform his/her job." Article 47, Section A, further provides that $2.19 per day is to be paid "for each day an employee is required to use his/her car for City business." Such language is capable of only one interpretation, as it clearly provides that the employees covered by this agreement may be "required" or "assigned" to use their own vehicles. A contract may not be said to be ambiguous if it fairly admits of but one interpretation. See *Farm Bureau Mut Ins Co. of Mich v Nikkel*, 460 Mich 558, 566 (1999); *Raska v Farm Bureau Mut Ins Co*, 412 Mich 355, 362 (1982). Although the record indicates that Respondent has been lax in enforcing Article 47, Section A, for some time, there is no evidence that the parties ever had a meeting of the minds with respect to the use of employer-owned vehicles. The most that can be said based upon the evidence before us is that the parties may have had a "tacit agreement" that the practice of allowing ECIs to use employer-owned vehicles would continue. An implicit agreement such as this is not sufficient to establish a term or condition of employment. See *Port Huron Education Ass'n*, *supra*. Accordingly, we conclude that the ALJ erred in finding that Respondent unilaterally changed the contract in violation of Section 10(1)(e) of PERA.

While we have the authority to interpret a contract to determine whether an unfair labor practice has been committed, not all contract disputes give rise to statutory issues. See *City of Ann Arbor*, 1990 MERC Lab Op 528. It is well-established that an employer's alleged breach of contract will not constitute an unfair labor practice unless repudiation of the contract can be demonstrated. *Oakland County Sheriff*, 1983 MERC Lab Op 538, 542. We will find a repudiation only when there has been a substantial abandonment of the collective bargaining agreement or relationship. *Twp of Redford*, 1985 MERC Lab Op 1180; *Taylor Bd of Ed*, 1983 MERC Lab Op 77; *Cass City Public Schools*,1980 MERC Lab Op 956, 960.

As noted, the collective bargaining agreement at issue in the instant case expressly provides that employees may be "required" or "assigned" to use their own vehicles. Given the unambiguous nature of this language, we are unable to conclude that Respondent's actions in the instant case in any way constitute a repudiation of the contract. We conclude that the instant charge involves, at best, a bona fide dispute over the interpretation of the terms of the contract, and not an unfair labor practice dispute under PERA. Therefore, to the extent that Charging Party desires to pursue its claim further, it must proceed according to the terms of the grievance-arbitration procedures of the parties' collective bargaining agreement.

Finally, we note that no exception was taken to the ALJ's conclusion that Respondent did not violate its duty to bargain by adding a sentence to the ECI job specification which stated that incumbents may be required to "perform job-related responsibilities and tasks other than those set forth in this specification." Accordingly, we adopt the ALJ's decision with respect to that issue.

ORDER

It is hereby ordered that the unfair labor practice charge filed in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Chair

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Harry W. Bishop, Member

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C. Barry Ott, Member

Dated:_____

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APPEARANCES:

Bruce Campbell, Esq., City of Detroit Law Department, for the Respondent

L. Rodger Webb, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on May 10, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the Respondent on July 24 and by the Charging Party on October 30, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Positions of the Parties:

The charge was filed on March 29, 1999 by the Service Employees International Union, Local 808M, against the City of Detroit. Charging Party represents a bargaining unit consisting of certain nonsupervisory classifications employed in the City of Detroit's department of public works (DPW) and in the City's health department. Environmental control inspectors (ECIs) make up about half this unit. The charge alleges that in January 1999, Respondent unlawfully revised the written job specifications for ECIs without giving Charging Party an opportunity to demand bargaining. Charging Party alleges that the revised job specifications altered the employees' terms and conditions of employment by providing that ECIs may be required to use their personal vehicles on the job. Charging Party also alleges that Respondent unlawfully added language to the job specifications which broadened the scope of the ECIs' responsibilities.

Respondent denies that the new job specifications changed the ECIs' terms or conditions of employment in any way. Respondent asserts that Article 47 of the parties' contract provides that ECIs may be required to use their own vehicles. Respondent also asserts that by past practice ECIs have been required to have a personal vehicle available in case Respondent needs them to use it. Respondent also relies on Article 2(management rights and responsibilities) of the current collective bargaining agreement.

Facts:

All ECIs are employed in the DPW. ECIs enforce health ordinances pertaining to rodent control, litter and debris, and hazardous conditions caused by snow and ice. ECIs visit and inspect private residences, commercial establishments, and vacant lots. They educate city residents about keeping their property clean, and they have the power to write tickets. ECIs may arrange for private contractors to cut grass when an owner fails to do so. The ECIs' job responsibilities include putting down rat poison. ECIs work regular shifts, Monday through Friday, 8:00 a.m. to 4:30 p.m. ECIs typically spend about six hours per day in the field, usually working alone. ECIs normally use city-owned trucks in the field; if ECIs are engaged in rat baiting, they are required to use city-owned trucks.

In the 1970s, and continuing at least into the mid-1980s, Respondent required ECIs to have their own vehicles available to use on the job. The current interim assistant supervisor for environmental control, who was hired as an ECI in 1976, recalled that this requirement was set down in a written policy. The existence of this policy is substantiated by a 1979 arbitration award which indicates that Charging Party, at that time, admitted that ECIs were required to own or have regular access to a vehicle. At the time of the hearing, Respondent did not have a copy of the written policy. It was not clear from the record when this policy was last distributed to employees.

Job specifications for the ECI position were issued in 1976 and revised in 1992 and 1994. The job specifications state that ECIs are required to operate a motor vehicle and possess a valid driver's license. Prior to 1999, the specifications did not state that ECIs were required to own or have access to a car for use on the job.

Article 2 of the parties' current collective bargaining agreement states that Charging Party recognizes the "prerogatives of the City to operate and manage its affairs." It also states that Respondent shall have "the right to establish . . . the method and processes by which . . . work is performed." Article 47, Section A, of the current contract states:

> A. **Rates of Payment.** Effective October 1, 1983, when an employee covered by this Agreement is assigned to use his/her automobile to perform his/her job, he/she shall be paid twenty-six (26¢) per mile for all reimbursable mileage. In addition, two dollars and nineteen cents ($2.19) per day is to be paid for each day an employee is required to use his/her car for City business.

In past years Respondent has sometimes needed ECIs to use their personal vehicles when, because of maintenance needs, there were not enough city-owned vehicles to go around. The need for ECIs to drive their own vehicles has fluctuated over the years with the state of Respondent's fleet. In 1988, and again in 1994, Respondent bought new vehicles for the ECIs. The frequency with which Respondent needed ECIs to drive their own vehicles declined after these purchases. At the time of the hearing, Respondent had more vehicles than ECIs, and the record indicated that no ECI had driven his or her own vehicle in the field since June 1998. However, Respondent anticipated hiring more ECIs in the 2000-2001 fiscal year. It also anticipated that at some point during that year it would have more ECIs than it had vehicles.

As both parties acknowledge, Respondent's practice has always been to ask ECIs to volunteer to use their own vehicles when Respondent is short of trucks. The record reflects that Respondent has rarely had trouble finding volunteers willing to drive their own vehicles in return for the mileage reimbursement. In fact, the practice has been to offer ECIs the opportunity to use their personal vehicles by order of seniority. ECIs who do not want to volunteer have been required to put this in writing. ECIs who are on the volunteer list, however, are expected to have their personal cars available when Respondent needs them unless there is an emergency, i.e., the ECI's own vehicle is undergoing repairs. Both parties acknowledge that when Respondent exhausted the list of volunteers, the practice was for Respondent to "order" (according to Respondent), or "ask" (according to Charging Party), ECIs at the bottom of the seniority list to drive their own vehicles. Even in this rare situation, however, ECIs not on the volunteer list usually stepped in and agreed to drive their own vehicles until Respondent could get its own vehicles repaired. Respondent has not,

within the memory of anyone who testified, disciplined an ECI for refusing to drive his or her own vehicle.

Charging Party's current president has held that office since about 1992. Insofar as the record indicates, during that period only three ECIs who did not volunteer were actually ordered to use their own vehicles. Two of the three obeyed the order, and complained to Charging Party's president afterward. On both occasions, the president complained to management, and the next day the employees were given special temporary office assignments. There is no indication in the record that any other ECI has been forced to drive his or her own vehicle since at least 1992. During this period, a third ECI was ordered to use his vehicle, but complained to Charging Party's president before taking it out. The president went to the ECI's supervisor and asked how he could force the ECI to use his car. The supervisor responded by rescinding the order, and the ECI was given an inside assignment.

On January 27, 1999, Respondent sent Charging Party's president a copy of a letter from the City's human resources director to the DPW's chief human resources officer stating that it had adopted revised job specifications for the ECI classification. Charging Party had not been notified that any change had been contemplated. On February 3, 1999, the president received a copy of the revised specifications. There were two changes. The revised specification stated that ECIs "may be required to provide their own motor vehicles for transportation on a reimbursed mileage basis." The following language was also added to the specifications:

> The above statements describe the general nature and level of work performed by employees assigned to the class. Incumbents may be required to perform job-related responsibilities and tasks other than those stated in this specification. Essential duties may vary from position to position.

After receiving the new specifications, Charging Party's president called the representative in Respondent's labor relations division who generally handles matters involving her bargaining unit. She asked him why Respondent had changed the specifications, and why they hadn't brought the changes up with the union. The labor relations representative told her that the new specifications would be rescinded. When this did not occur within a month, Charging Party filed the instant unfair labor practice

Throughout 1998 and into 1999, Respondent and Charging Party were engaged in negotiating a new collective bargaining agreement. Charging Party's original proposal included an increase in the mileage reimbursement rate; by the time the revised ECI job specifications were issued, Respondent had rejected this proposal. After the revised job specifications were issued, Charging Party's president brought up the vehicle requirement informally at the bargaining table. The president told Respondent that if it "gave us money, we would be able to buy a car . . . if it was required." Respondent replied that it didn't have the money, and there was no further discussion of this issue at the bargaining table.

Between January 1999 and the date of the hearing in May 2000, no ECI had been ordered to use his own vehicle.

Discussion and Conclusions of Law:

I find, first, that the use of an employer-owned vehicle, whether for work or non-work purposes, qualifies as a benefit of employment. Requiring employees to have or drive their own vehicles removes that benefit, and thereby alters their terms of employment. The methods or processes by which work is to be performed, matters left to an employer's control under the law and to Respondent by Article 2 of the contract here, are not affected by requiring an employee to use his own vehicle instead of one provided by the employer. I conclude, therefore, that a requirement that employees use their own vehicles is a mandatory subject of bargaining under PERA.

Respondent argues that Article 47 of the contract covers the issue in dispute, while Charging Party maintains that Article 47 does not apply. Respondent points out that Article 47, Section A, states "when an employee covered by this Agreement is assigned to use his/her automobile . . . "

This same section also includes the phrase, "to be paid for each day an employee is required to use his/her car . . ." (Emphasis added in both sentences.) Despite the use of the terms "assigned" and "required," I find that Article 47, Section A, when read in the context of the parties' practice, does not unambiguously provide that Respondent may force ECIs to use their own vehicles. First, the purpose of Article 47, as its title suggests, is to set the amount employees will be reimbursed by Respondent when they use their private vehicles for work-related purposes. Moreover, ECIs are reimbursed in accord with Article 47 even when they volunteer to use their own vehicles. In light of the actual practice, Article 47 could be interpreted to mean that an ECI who volunteers to use his own vehicle will be paid the contractual mileage rate when, and only when, Respondent assigns him to use it, and will be paid the contractual daily rate only when Respondent requires him to use it. For this reason, I conclude that whether ECIs may be forced to use their own vehicles on the job is not a subject "covered by" Article 47 of the parties' collective bargaining agreement.

Respondent also argues that ECIs have been required, by past practice, to drive their own vehicles when Respondent needs them to do so. Charging Party disputes the existence of this practice. I find that the record establishes that there was at one time a policy, acknowledged by the union, that ECIs could be forced to drive their own vehicles if Respondent needed vehicles and not enough ECIs volunteered. In the minds of Respondent's managers, this policy was evidently still in effect. The record does not establish, however, that Charging Party either recognized or should have recognized that this policy remained in effect at the time that Respondent modified the job specifications in January 1999.

A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition or employment. The creation of a term or condition of employment by past practice is premised upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that the practice will continue. *Amalgamated Transit Union v SEMTA*, 437 Mich 441,454-455, (1991). If the past practice is contrary to a provision of the contract, the party arguing that the practice has become a term or condition of employment must demonstrate that the parties intended by the practice to modify the contract language. However, where the collective bargaining agreement is ambiguous or silent on a subject, there need only be tacit agreement that the practice will continue in order to create a term or condition of employment. *Port Huron EA v Port Huron SD*, 1996 Mich 309, 325 (1996).

I find no evidence of an explicit agreement between Charging Party and Respondent that in 1999 Respondent could force ECIs to drive their own vehicles. As indicated above, I have concluded that Article 47, Section A, of the parties' contract does not constitute such an agreement. I also find that the parties did not continue to have a tacit agreement to this effect in 1999. The evidence indicates that between 1992 and 1999, Respondent backed down every time its attempts to order ECIs to use their own vehicles were challenged by Charging Party's president. Moreover, the job specifications for the ECI position prior to 1999 did not state that ECIs were required to drive their own vehicles, and there is no indication that Charging Party knew in 1999 that there was a written policy. I find that the ECIs' terms and condition of employment in 1999 did not include the requirement that they drive their own vehicles on the job. I conclude that when Respondent revised the ECI job specifications to state that ECIs "may be required to provide their own motor vehicles for transportation on a reimbursed mileage basis," it altered the terms of their employment by removing an existing job benefit.

Respondent also argues, as a defense to the charge, that Charging Party waived any right it had to bargain by failing to make a timely demand. However, the evidence indicates that the new specifications had been adopted by the time Charging Party received any notice that changes were contemplated. Since I have concluded that the requirement that employees drive their own vehicles was not covered by Article 47 of the contract, I do not agree with Respondent that Charging Party had an obligation to propose changes to the language of that article.

Charging Party also alleges that Respondent violated its duty to bargain by adding the sentence, "incumbents may be required to perform job-related responsibilities and tasks other than those stated in this specification," to the ECIs' job description. The Commission has consistently held that changes in job duties within the scope of the normal workday which do not change the nature of the job are permissive subjects of bargaining only. *City of Westland*, 1988 MERC Lab Op

853; *Township of Meridian*, 1986 MERC Lab Op 915. In this case there is no evidence that Respondent changed the actual job duties of the position, and nothing in the sentence added to the job specifications suggests that Respondent intends to require ECIs to perform duties which changed the nature of the job.

In summary, I find that Respondent violated Section 10(1)(e) of PERA in January 1999 by unilaterally instituting a requirement that ECIs drive their own vehicles in the field, thereby removing an existing benefit of the ECIs' employment. I find, however, that Respondent did not violate its duty to bargain by adding the sentence, "incumbents may be required to perform job-related responsibilities and tasks other than those stated in this specification," to the ECI job specifications. In accord with these findings, and the findings of fact and discussion and conclusion of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent City of Detroit, its officers and agents, shall:

1. Cease and desist from making unilateral changes in the wages, hours, working conditions, or terms and conditions of employment of environmental control inspectors (ECIs) employed in Respondent's department of public works and included in a bargaining unit represented by Charging Party Service Employees International Union, Local 808-M.

2. Pending proper notice and satisfaction of Respondent's duty to bargain in good faith, remove from the ECIs' job specifications the sentence, "employees in this class may be required to provide their own motor vehicles for transportation on a reimbursed mileage basis," and refrain from ordering ECIs to drive their own vehicles for work-related purposes.

3. Post, for thirty consecutive days, copies of the attached notice to employees in conspicuous places on the Respondent's premises, including all locations where notices to ECIs are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: