STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTHFIELD PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C99 A-11

-and-

SOUTHFIELD EDUCATION ASSOCIATION,
SOUTHFIELD PUBLIC SCHOOLS MICHIGAN
EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION,
and THE EDUCATIONAL SECRETARIES
OF SOUTHFIELD,
Labor Organizations-Charging Parties.
_____/

APPEARANCES:

Miller, Canfield, Paddock & Stone, P.L.C., by George G. Mesritz, Esq., for Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for Charging Parties

DECISION AND ORDER

On February 26, 2001, Administrative Law Judge (ALJ) Julia Stern issued her Decision and Recommended Order in the above matter finding that Respondent Southfield Public Schools did not violate its duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.10(1)(e), and recommending that the charges be dismissed. On April 11, 2001, Charging Parties, Southfield Education Association, Southfield Public Schools Michigan Educational Support Personnel Association, and the Educational Secretaries of Southfield filed timely exceptions to the ALJ's Decision and Recommended Order and a brief in support of the exceptions.1

The facts in this case were set forth fully in the ALJ's Decision and Recommended Order and will not be repeated in detail here. The parties do not dispute the material facts. Briefly, since 1990 or earlier, the collective bargaining agreements between Respondent and each of the Charging Parties have contained provisions for unpaid leaves of absence delineating the reasons for which leaves could be requested, time limits for such leaves, and requirements for requesting extensions. Those contractual provisions have been repeated in the succeeding contracts without change.

1 Respondent filed a brief in response to Charging Parties' exceptions on May 3, 2001. However, since Respondent's brief was not timely, it was not considered by the Commission.

In June of 1990, the parties entered into a "letter of understanding," or "tentative agreement," interpreting the contract language concerning unpaid leaves of absence. This agreement provided that all leaves and extensions, except where specified otherwise, are permissive, that is, Respondent has discretion to grant or deny leave requests as it determines appropriate based on individual circumstances and the District's needs. The parties also entered into new collective bargaining agreements for the period of 1990-1993. The parties referenced the June 1990 agreement in each of the succeeding collective bargaining agreements.2

From about 1982 until the 1998 memo that led to the unfair labor practice charges before us, Respondent granted all leave requests and requests for extensions. During that time period, Respondent also refrained from enforcing time limits on extensions and provisions in the respective collective bargaining agreements that would allow it to terminate the employment of employees who failed to comply with requirements for obtaining extensions of leaves.

On July 27, 1998, Respondent issued a memo to the members of Charging Parties' bargaining units announcing its intention to discontinue what it referred to as its "permissive" policy with respect to leaves. Respondent did not immediately send the July 27, 1998 memo to Charging Parties or otherwise notify Charging Parties of its intentions. When Patricia Haynie, the executive director for the coordinating council for Charging Parties, learned of the memo she requested and received a copy from Respondent. She then made an unsuccessful effort to persuade the employer to rescind the memo. On August 28, 1998, Charging Parties made a formal written demand to bargain. On February 9, 1999, Respondent sent letters to all employees who were on leave of absence status advising them that they could return from leave, request an extension, or resign. The record indicates that all requests for extensions were denied.

It is Charging Parties' contention that by changing its policy, Respondent made unilateral changes in established practices regarding mandatory subjects of bargaining and, thereby, violated its duty to bargain in good faith under Section 10(1)(e) of PERA. Charging Parties also contend that by sending the July 27, 1998 memo directly to bargaining unit members, Respondent violated its duty to bargain exclusively with Charging Parties as the recognized bargaining agents of these employees and engaged in direct dealing with the employees.

Discussion and Conclusions of Law

Charging Parties take exception to the ALJ's finding that, as of 1982, Respondent had deviated from the contract language and implemented the practices at issue. Charging Parties also assert error in the ALJ's finding that Respondent returned to following the contract language in 1998. It is Charging Parties' contention that Respondent always had the same practice. The record supports the findings of the ALJ on these points. The evidence in the record shows that Respondent had begun its permissive policy of granting leaves by 1982. There is nothing in the record to indicate what Respondent's practices were concerning leaves of absence prior to 1982. We find the ALJ's observation that Respondent continued its permissive practice until July 27, 1998, when it sent the memo, to merely indicate the date on which Respondent announced its intention to discontinue that

2 The agreement was referred to by the parties as the "June 1990" agreement and was entered into the record as Union Exhibit 22. However, it appears that it was executed on August 19, 1990, and is identified by that date in each of the collective bargaining agreements.

practice. Consistent with the record, the ALJ noted that Respondent began carrying out its announced intentions on February 9, 1999.

Charging Parties assert that the ALJ erred by not following the law established in *Port Huron Educ Ass'n* v *Port Huron Area Sch Dist*, 452 Mich 309 (1996). On the contrary, we find the ALJ's decision to be entirely consistent with *Port Huron*. There, the court warned, at page 330, against "raising the parties' past actions to the same status as the written provisions in the agreement. . . . The agreement embodies mutual assent and, during the duration of the contract, either party should be able to rely on the provisions previously bargained for during negotiation of the agreement."

Charging Parties contend that the controlling precedents of *Port Huron* and *DPOA* v *City of Detroit*, 452 Mich 339 (1996), required the ALJ to find an illegal unilateral change in the terms of employment once she concluded that Respondent's practices were "longstanding, well-documented, prevalent, well-accepted and knowingly and intentionally practiced." We disagree.

Both cases cited by Charging Parties stand for the proposition that a past practice, which contradicts a collective bargaining agreement provision, may rise to the level of an agreement to modify the terms of the contract. However, in this case there was no contradictory practice with respect to the granting of leaves of absence and extensions. The language of the contracts, and the 1990 agreement, provide that Respondent has discretion to grant or deny such requests as it determines appropriate based on individual circumstances and the District's needs. Respondent exercised its discretion by granting all requests for many years. Such practice does not contradict the language of the collective bargaining agreements.

While Respondent's practice of ignoring certain contractual leave restrictions and requirements placed on employees did contradict the terms of the contract, we still find no unfair labor practice. As noted by the ALJ, both *Port Huron* and *DPOA* provide that a past practice that contradicts the language of a collective bargaining agreement does not become a term of employment unless the evidence establishes that the parties had a meeting of the minds and both intended to amend the contract. As the court pointed out in *Port Huron*, at 329:

> 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 the past practice. (Emphasis added.)

In the matter before us, Charging Parties contend that Respondent's acknowledgement of its permissive policy of granting all leave requests and its failure to enforce the restrictions on leaves and extensions is sufficient to establish an intent to amend the contract. Thus, it is appropriate to compare the facts of *Port Huron*, *DPOA*, and the instant case. In *Port Huron*, it was not established that the employer was aware that its practices were contrary to the terms of the collective bargaining agreement. There was no evidence of a conscious, much less intentional, desire to amend its rights and duties under the collective bargaining agreement. Thus, the court in *Port Huron* concluded that the past practices did not amend the clear and unambiguous contract language.

On the other hand, in *DPOA*, the employer was clearly aware that its practices differed from the contract. In *DPOA*, the employer's board of trustees had delegated to a medical board of review

the responsibility to determine both the presence of a medical disability and the duty-relatedness of said disability with respect to employee pension claims. After following that practice for many years, the employer sought to have the board of trustees determine the duty-relatedness of employee disabilities. However, it was clear that the employer had adopted the past practice as an amendment to the contract, as the employer created forms used in the disability claims process stating that the medical board of review was the final authority responsible for determining the duty-relatedness of employee disabilities. Thus, not only had the employer knowingly followed practices that deviated from the language of the collective bargaining agreement, the employer also took tangible and affirmative steps to incorporate those practices into its administration of the contract.

This case falls somewhere between *Port Huron* and *DPOA*. Here it is evident that Respondent knowingly and intentionally refrained from enforcing contractual provisions restricting the length of leaves or the number of extensions that could be granted. Respondent also knowingly declined to discharge employees who had failed to return from their leaves and failed to submit requests for leave extensions. Unlike the employer in *Port Huron*, Respondent has not asserted that its failure to enforce these contractual provisions was a mistake. On the other hand, unlike the employer in *DPOA*, Respondent did not take tangible affirmative steps indicating that its deviation from the contractual language was intended to amend the contract. Instead, after many years of not enforcing the terms of the contracts regarding the leave restrictions, Respondent negotiated the June 1990 agreement with Charging Parties, affirming that the granting of unpaid leaves was permissive on its part and reiterating the responsibilities of employees on leave.

The references to the June 1990 agreement in each of the succeeding collective bargaining agreements confirm that, despite Respondent's liberal policy with respect to granting leaves and its failure to enforce restrictions on leaves, Respondent retained the right to exercise its discretion to deny leaves and to enforce leave restrictions. The mere fact that Respondent refrained from denying leaves and enforcing restrictions on leaves in the past does not establish that there was a "past practice" prohibiting Respondent from doing so in the future. *City of Detroit, Transp Dep't*, 1989 MERC Lab Ops 30, 35. See also *Wayne Co Health Dep't***,** 1999 MERC Lab Ops 99, 106 (no exceptions). Respondent had no obligation to bargain with Charging Parties before announcing that it intended to exercise its contractual rights.

Since Respondent had no duty to bargain over the matters incorporated in the July 27, 1998 memo, sending that memo directly to the bargaining unit members was not "direct dealing." See *Pontiac Schs Bd of Educ*, 1994 MERC Lab Op 366, 374 (no exceptions); and *North Ottawa Community Hosp*, 1982 MERC Lab Op 555, 560 (no exceptions). As the ALJ pointed out, there is no evidence that Respondent sought to bargain with the employees over their rights and obligations regarding unpaid leaves.

For the reasons set forth above, we find the exceptions of Charging Parties to be without merit and adopt the ALJ's findings of fact and conclusion of law. Accordingly, we find that Respondent did not violate Sections 9, 10(1)(a)(e), (11) or (15) of PERA.

ORDER

The charges in this case are dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated:_____

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Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for the Charging Parties

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 June 12, 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 parties on or before September 20, 2000, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on January 19, 1999, against the Southfield Public Schools by the Southfield Education Association (SEA), the Southfield Public Schools Michigan Educational Support Association (S-MESPA), and the Educational Secretaries of Southfield (ESOS). The Charging Parties represent bargaining units consisting of certified teachers and other professional employees; support personnel including paraprofessionals, food service employees, bus drivers and custodians; and clerical employees of the Southfield Public Schools. The charge alleges that on July 27, 1998, Respondent sent a memo to all employees in these bargaining units announcing changes in the parties' established practices pertaining to the granting of unpaid leaves of absence. Charging Parties allege that Respondent's unilateral action violated its duty to bargain in good faith under

Section 10(1)(e) of PERA. Charging Parties also allege that by sending the memo Respondent violated its duty to bargain exclusively with Charging Parties as the recognized bargaining agents for these employees.

Facts:

Collective bargaining agreements for all three bargaining units contain provisions covering unpaid leaves of absence. Article XIV of the 1996-2000 collective bargaining agreement between the SEA and the Respondent provides for the following types of unpaid leave: sabbatical, including approved study and educational travel; health and long term disability; parental; military; personal; alternative career; exchange teaching; teaching in overseas dependent schools, the Peace Corps orVolunteers in Service to America (VISTA); serving in professional organizations; approved work experience in business, industry and/or government; campaigning or serving in public office, educational research, study, and travel. Sabbatical leaves are limited to one year. Leaves of absence for exchange teaching, service in overseas dependent schools, the Peace Corps, VISTA, and approved work experience may be granted for one year, but may be extended for one additional year. Parental leave may be granted for a period of up to one year and may be renewed annually for an additional five years. All other types of leave may be granted for a period up to one year, and may be extended annually for an indefinite period. Article XIV (F) states that teachers who take employment as a teacher in another school district while on leave of absence, or otherwise violate the terms of their leaves, are deemed to have terminated their relationship with the Respondent Language identical to Article XIV has been in all contracts between these parties since before 1990.

Unpaid leaves of absence are covered in Article XXI of the 1996-2000 contract between S-MESPA and the Respondent. Article XXI states that after a period of one year of continuous service, an unpaid leave of absence may be granted for up to one year for the following reasons: health(including maternity), military service, personal reasons, study or travel, Peace Corps, VISTA, adoption, paternity, service in political office, and service in an Association position. Unpaid leave is not to exceed one year except for leave granted for health purposes. Article XXI states that health leave shall be granted upon the recommendation of a physician, but that extensions of such leave must be requested on at least an annual basis. Language identical to Article XXI has been in all contracts between these parties since before 1990.

In the 1996-2000 ESOS agreement, Article XVII covers unpaid leaves of absence. Section A(1) states that "a secretary may be granted a health leave when his/her health or the health of a member of the immediate family . . . warrants it. Such leave may be renewed and extended for an additional five years, one year at a time. At the end of such leave, the secretary must either return or resign." This article also states that maternity leave shall be granted for one year and shall be renewable annually for a period of up to five years; leave for adopting a child may be granted after one year of service for a period of one year and may be renewed annually for an additional five years; Peace Corps leave may be granted for a maximum of one year, with renewal for one additional year; leave for service in specified professional organizations, study or travel leave, and VISTA service may be granted for a maximum of one year; personal leaves may be granted for a period not to exceed 90 days. Language identical to Article XVII has been in all ESOS contracts since before 1990.

In 1990, the parties entered into what Respondent characterizes as a letter of understanding and what Charging Parties describe as a tentative agreement. The document stated that the parties agreed to the following interpretations of existing contract language at it related to unpaid leaves of

absence: All SEA leaves are permissive, including extensions. All ESOS leaves are permissive, except maternity and military, and all leave extensions are permissive except maternity. All S-MESPA leaves are permissive and except health and military, and all leave extensions are permissive. SEA members must notify the superintendent in writing by March 15 of each year of his/her intention to return from leave, request an extension, or resign. If a member fails to request an extension, or his/her request is denied, the member is presumed to be returning to work the following fall, and a failure to report for work at that time will be considered an abandonment of the position. ESOS members are required to notify personnel in writing at least 60 days before the expiration of a leave indicating his/her desire to return to work, request an extension, or resign. A member who failed to do so will be considered to have terminated his/her employment. S-MESPA members are required to notify personnel in writing at least 30 calendar days preceding the expiration date of a leave indicating his/her desire to return, request an extension or resign, or be terminated.

From about 1982 until the 1998 memo which is the subject of this charge, Respondent routinely granted all requests for unpaid leaves of absence, for any reason, made by members of Charging Parties' bargaining units. Respondent also routinely granted all requests for extensions of leave. Respondent made no attempt to enforce contractual provisions restricting the length of leaves for certain purposes. Moreover, employees who failed to submit requests to have their leave extended, and whom Respondent could not contact, were not terminated. There is no evidence that Respondent terminated any member of Charging Parties' bargaining units during this period for failure to return from an unpaid leave of absence. The record also establishes that in the early 1980s Respondent made a deliberate decision not to deny leave requests and not to enforce the contractual requirements for unpaid leave. Respondent knowingly and intentionally continued these practices until July 27, 1998, when it sent a memo to members of Charging Parties' bargaining units which stated the following:

> Leave and Layoff Changes
>
> This memorandum is to inform you of a change in the District's practice with regard to leaves of absence, return from leaves of absence, and return from layoff. The School District has employed a "permissive" practice with regard to granting leaves of absence, extending leaves of absence, and return from layoff. Leaves and leave extensions have been routinely granted. In some instances, people on layoff have been allowed to stay on layoff even though they have rejected offers of jobs by the District, and, in some instances, individual [sic] not reachable or not meeting or complying with the notice requirements of the master agreement have, nonetheless, been allowed to maintain their leave or layoff status. This practice arose in the years when we were laying off employees because of enrollment decline, and we wished to minimize layoffs at that time - the fewer people returning from leave or layoff, the fewer layoffs that were necessary. Over the years, we have continued our permissive policy. However, our present situation finds the District not losing enrollment, but gaining it. Our Board of Education has discussed this matter and feels strongly that this permissive practice must be discontinued.
>
> The District has a joint understanding with the employee associations that establishes that leaves of absence, except in the case of active military service, instances of long term disability, and other exclusions re-printed in the attached letter of

understanding, are permissive on the part of the Board -can be approved or rejected. This L.O.U. is also referred to in all three current master contracts. Therefore, effective immediately, the following will be the practice of the School District consistent with the master agreements, the attached joint understanding, and the law:

1. Leaves of absence will be granted or denied as determined by the administration;

2. Extensions of leaves of absence will be granted or denied as determined by the administration.

3. The appropriate (legal and contractual) steps will be taken to terminate individuals on layoff who refuse offered positions or who remain not reachable.

4. The appropriate (legal and contractual) steps will be taken to terminate individuals on leave who refuse offered positions or who remain not reachable.

5. In the case of teaching personnel, if a teacher on leave takes a teaching position with another School District, he/she shall be terminated;

6. All existing contractual provisions shall be expressly applied.

Respondent did not immediately send copies of this memo to the Charging Parties. After she learned about it from her members, MEA Uniserv Director Patrician Haynie called the author of the memo, Respondent's associate superintendent for employee relations, Jack Chekaway. Chekaway told Haynie that the Respondent had always granted leaves but that it was upset about two teachers who were returning to work after a long period of time. Chekaway said that Respondent had decided to change its practice. Haynie was unsuccessful in persuading Chekaway to rescind the memo. On August 28, 1998, Charging Parties wrote Respondent making a formal demand to bargain. This letter also accused Respondent of making unlawful unilateral changes in existing working conditions.

On February 9, 1999, Respondent sent all employees who were in leave of absence status letters stating that they could return from leave, request an extension, or resign. Some employees requested extensions of their leaves; insofar as the record discloses, all such requests were denied. As a result of Respondent's action, some employees resigned and some retired.

Discussion and Conclusions of Law:

The issue here is whether Respondent's practices with respect to unpaid leaves of absence developed into terms and conditions of employment which Respondent could not unilaterally repudiate. Charging Parties cite *Port Huron Education Assoc v Port Huron Area School Dist*, 452 Mich 309 (1996), and *DPOA v Detroit*, 452 Mich 339 (1996), for the proposition that if there is no language in a collective bargaining agreement covering the subject of the past practice, or if the contract language is ambiguous, there need only be "tacit agreement that the practice would continue" for the practice to become a term of employment. *Port Huron*, at 325. According to Charging Parties, these cases also hold that if the contract language is unambiguous, the unambiguous language controls "unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract." *Ibid*, at 329. According to Charging Parties,

the leave of absence language in all three contracts should be read in light of Respondent's past practice. However, according to Charging Parties, even if the original contract language is deemed unambiguous, the practice was so clear, unequivocal, and fully admitted that it amended the contract. Therefore, Charging Parties assert, the literal language of the contracts is irrelevant.

According to Respondent, *Port Huron* and *DPOA* are inapplicable here. Respondent asserts that these cases stand only for the proposition that an employer's past practice which contradicts an unambiguous contract provision may rise to the level of an "agreement" to amend the contract. Respondent notes that the Court in *DPOA* framed the issue in that case as follows:

> Whether the parties' past practice is so widely acknowledged and mutually accepted that it amends the contradictory and unambiguous contract language in the collective bargaining agreement. (Emphasis added) *DPOA*, at 340

According to Respondent, the contracts here unambiguously give Respondent the right to either grant or refuse requests for almost all types of unpaid leaves of absence. Therefore, Respondent asserts that its practice prior to 1998 did not contradict the language of the contracts. Moreover, there is no evidence that the parties here had an agreement to modify the contract language. In this case Charging Parties are simply attempting to rewrite their contracts, according to Respondent.

I find, first, that the contracts unambiguously give Respondent the right to either grant or deny requests for unpaid leaves of absence and requests to extend such leaves. The only exceptions are requests for maternity and military leave by members of the S-MESPA and ESOS units. I find that by using the term "may" in their contracts the parties clearly ceded to Respondent the right to grant or deny a leave of absence based on the individual's circumstances and/or Respondent's own needs. The fact that these same provisions also provide that Respondent "shall" grant certain leave requests, e.g., requests for maternity leave by S-MESPA members, emphasizes that the parties intended the word "may" to indicate that a leave was permissive. The parties' 1990 agreement clarifying the contract language makes the same point. I conclude that Respondent's practice of routinely granting all requests for leaves of absence did not contradict the language of Charging Parties' contracts.

However, in addition to exercising its contractual rights to routinely grant leave requests, Respondent also opted to ignore certain leave restrictions and requirements placed on employees by the contracts. For example, contracts for all three units require employees on unpaid leave to request extensions annually. Prior to 1998 Respondent did not terminate employees who did not submit requests to extend their leaves, even when the employees had moved and Respondent could not reach them. Respondent also did not enforce contract provisions limiting the length of unpaid leaves for certain purposes, or prohibiting teachers from taking positions in other districts. For example, the responses to the letters Respondent sent out on February 9, 1999 indicated that one teacher had been on a business experience leave of absence since 1983. Another teacher stated that he had been granted a leave of absence to attend medical school in 1983, and was now practicing medicine in Florida. Other teachers responded that they were teaching in other school districts. By ignoring these restrictions and requirements, Respondent acted contrary to the contract language.

In *Port Huron, supra,* the contract provided that insurance benefits for the following summer were to be prorated for teachers hired after the beginning of the school year. Despite the contract language, the employer's longstanding practice was to pay for full benefits for all teachers during the

summer months. The evidence indicates, however, that the employer's failure to prorate benefits for new teachers was a mistake, not a conscious decision. The Court held that the Commission's finding that the employer knew or should have known that it was acting contrary to the agreement was insufficient to overcome the express language in the agreement.

In *DPOA*, the City's charter explicitly gave the board of trustees of the police and fire fighter's retirement system the power to determine whether an employee's disability was duty-related. However, the established practice, as the employer admitted, was for the board's medical director to determine both medical incapacity and duty-relatedness. Disputes over the medical director's finding then went to a medical board of review, whose findings on both aspects were accepted as binding by the board of trustees. In *DPOA,* the Supreme Court affirmed the Commission's finding that the practice constituted a term of employment. It accepted the Commission's conclusion that the City committed an unfair labor practice when the board of trustees attempted to take back its authority to determine duty-relatedness without affording the unions an opportunity to bargain. According to the Court in DPOA, the facts established that the parties had a meeting of the minds with respect to the new terms or conditions of the past practice. The Court noted, first, that the practice was "prevalent and widely accepted." Secondly, the Court held that the parties' agreement to amend the contract could further be deduced from the fact that the board of trustees "unequivocally and intentionally" agreed to be bound by the medical board's determination. The Court held, "the evidence in the record supports a finding that the board of trustees intentionally chose to reject the negotiated contract and knowingly acted in accordance with the past practice." *Id,* at 348-49

Under *Port Huron* and *DPOA,* a past practice which contradicts the language of a collective bargaining agreement does not become a term of employment unless the union is able to show that the parties had a meeting of the minds, i.e., that they both intended to amend the contract. As indicated in *DPOA*, the employer's intent can be shown by a course of conduct. Like the employers in both *Port Huron* and *DPOA*, Respondent had a longstanding, well documented, practice of permitting employees to remain in leave of absence status even though they had not complied with the requirements in their union contracts. As in *DPOA*, the practice was "prevalent and well accepted." Moreover, unlike the employer in *Port Huron,* Respondent knowingly and intentionally failed to enforce the contract language.

I conclude, nevertheless, that Charging Parties have not shown that the parties in this case intended the practice to supplant the unambiguous contract language. First, in *DPOA* the employer actually ceded to another body, the medical review board, authority which the contract gave to the employer's board of trustees. In this case, Respondent merely elected not to enforce certain contract provisions which would have forced employees on leave to return to work or be terminated. Secondly, in 1990, at least 10 years after Respondent stopped enforcing the contracts' unpaid leave provisions, the parties entered into an agreement which reaffirmed Respondent's rights and the employees' obligations under that language. Although Respondent did not change its practices, the fact that the parties agreed in 1990 that the contract requirements remained unchanged supports Respondent's claim that it never agreed, tacitly or otherwise, to modify the contracts. I conclude that Respondent's practice of ignoring certain requirements and/or restrictions imposed by the contracts did not become a term or condition of employment. As a consequence, I also conclude that Respondent did not have an obligation to bargain with Charging Parties before announcing that it would return to strictly enforcing the contract language.

Charging Parties also allege that Respondent engaged in unlawful "direct dealing" with employees by sending out the July 27, 1998 memo. Since I have found that Respondent had no obligation to bargain with Charging Parties over the matters incorporated in this memo, I conclude that the allegation of "direct dealing" is also without merit. I also note, however, that there is no evidence in the record that Respondent attempted to bargain with employees over the requirements for leaves of absence.

In accord with the findings of fact, discussion and conclusions of law above, I find that Respondent did not violate its duty to bargain under Section 10(1)(e) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: