STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ROYAL OAK,
Public Employer-Respondent,

Case No. C08 L-263

-and-

ROYAL OAK POLICE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Howard L. Shifman, P.C., by Howard Shifman for Respondent

L. Rodger Webb, P.C., by L. Rodger Webb for Charging Party

DECISION AND ORDER

On May 22, 2009, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that there is no genuine issue of material fact warranting an evidentiary hearing and that the charge filed by Charging Party, Royal Oak Police Officers Association (the Union) under the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 – 423.217 should be dismissed.

After reviewing pleadings filed in response to the ALJ's Order to Show Cause issued pursuant to Rule 423.165(2)(d), the ALJ concluded that the core of the dispute was whether Respondent, City of Royal Oak (Employer) properly sent employees to training and whether certain work was, or might in the future be, assigned to these employees. The ALJ dismissed the charge finding that, at most, it raised a possible dispute over the proper application of existing contract language that should be resolved via arbitration. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Charging Party requested, and was granted, three extensions of time to file its exceptions. On July 22, 2009, Charging Party filed its exceptions and brief in support, along with a request for oral argument. Respondent requested, and was granted, two extensions of time to file its response to Charging Party's exceptions and filed a brief in support of the ALJ's Decision and Recommended Order on October 2, 2009.

In its exceptions, Charging Party contends that the ALJ erred in determining that the charge was simply a contract dispute. Charging Party argues that its charge asserts that

Respondent failed to bargain over the effects of its decision to implement certain training and that this issue encompasses Respondent's statutory duty to bargain, a matter which an arbitrator has no authority to decide. Charging Party further excepts to the ALJ's characterizations of its submissions, questions his impartiality, and requests that the matter be remanded to a different ALJ.

In its response, Respondent maintains that the ALJ's decision is correct, fair and impartial. Respondent submits that employee training issues are covered by the collective bargaining agreement and that all assigned duties are traditional bargaining unit responsibilities and not new work which would require additional bargaining.

After reviewing the exceptions and briefs submitted by the parties, we find that oral argument will not materially assist us in reaching our decision; therefore, Charging Party's request for oral argument is denied. Upon examining the record carefully and thoroughly, we agree with the ALJ's findings of fact and conclusions of law.

Factual Summary:

Unless otherwise noted, we adopt the findings of fact set forth in the ALJ's opinion and repeat them here only as necessary. The Union filed this charge in December 2008, alleging that Respondent was sending bargaining unit patrol officers to evidence training, and that this training covered advanced techniques that were traditionally utilized by non-bargaining unit police detectives. Charging Party also alleged that this training would lead to the assignment of new job duties to bargaining unit members.

The ALJ initially found that the charge lacked sufficient detail and ordered Charging Party to provide a more definite statement. After receiving Charging Party's response, the ALJ still determined that the charge lacked sufficient detail; he, therefore, requested that Respondent file a reply. With its submission, Respondent submitted an affidavit from its Deputy Chief of Police. This affidavit stated that police officers had always collected evidence and that the subject matter of the training was part of the normal job duties of patrol officers.

The ALJ again requested that Charging Party submit more detailed information and, also, respond to the brief submitted by Respondent. Charging Party filed a response, but failed to submit anything to refute the affidavit from the Deputy Chief of Police.[1] Subsequently, the ALJ determined that the Union's charge involved an issue of evidence training, which was an extension of current job duties and covered by the contract, and recommended that we grant summary disposition in favor of Respondent.

Discussion and Conclusions:

As a general rule, it is management's prerogative to assign job duties that are part of its employees' general job description. *Pontiac Sch Dist*, 2002 MERC Lab Op 20; 15 MPER 33025 (2002). Based on the unrefuted affidavit of the City's Deputy Police Chief attesting to the fact

[1] In *Blue Water Trans Comm*, 22 MPER 72 (2009), we held that unsworn documentation (such as that provided by the Union in this case) will not be considered when ruling on a motion for summary disposition.

that patrol officers have always collected evidence at crime scenes the ALJ determined that only an extension of job duties was at issue in this case. In *Pontiac Sch Dist*, we found that a mere extension of current job duties is not a mandatory subject of bargaining. See also *City of Grand Rapids, Fire Dep't*, 1997 MERC Lab Op 69; 10 MPER 28021 (1997*) (*no exceptions*)*, where advanced confined space training only changed how firefighting rescue work was performed, it did not change the underlying type of work. This Commission, therefore, agrees with the ALJ and finds that the evidence training that is the subject of the parties' dispute is merely an extension of the patrol officers' existing job duties.

It is true that an employer may still have a duty to bargain the effect or impact of its decision on employees. *City of Ishpeming*, 1989 MERC Lab Op 234; 2 MPER 20058 (1989). However, if the collective bargaining agreement covers the subject matter in dispute, the parties have fulfilled their statutory duty to bargain. *Pontiac Sch Dist*, 2002 MERC Lab Op 20*;* 15 MPER 33025 (2002). Moreover, if the issue in dispute is covered by the collective bargaining agreement and the contract culminates with binding arbitration, the issue must be resolved through arbitration. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996). When determining whether an issue is covered by the contract, the Commission must determine if the contract has provisions which can be reasonably relied on for the action in question. *Id*. citing *St Clair Co Rd Comm*, 1992 MERC Lab Op 533, 538.

In its brief, Charging Party argues that because the contract does not specifically address this factual scenario, the contract does not cover the issue. This argument parallels a waiver analysis. See *Org of Sch Adm'r and Supervisors, AFSA, AFL-CIO v Detroit Bd of Ed*, 229 Mich App 54, 66 (1998), requiring clear and unmistakable evidence of a waiver. When analyzing an issue pursuant to the "covered by" doctrine, the waiver analysis is meaningless. *Bath Marine Draftsman's Ass'n v NLRB*, 475 F3d 14, 25 (CA1 2007). Further, this standard is specifically rejected by the covered by doctrine; to be covered by the collective bargaining agreement a topic need not be specifically mentioned. *See Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich. 309, 322 (1996); citing *Dep't of Navy v Fed Labor Relations Authority*, 962 F2d 48, 58 (CADC 1998). As mentioned above, the germane question in determining whether the contract covers an issue is if the agreement contains provisions that can be reasonably relied on for the actions in dispute. The Union further argues that its charge is statutory and not contractual; therefore, an arbitrator cannot award appropriate relief. This argument misapplies the "covered by" doctrine; as previously stated, if a topic is covered by the contract, the parties have already fulfilled their statutory duty to bargain and any potential relief is contractual. *St Clair Co Rd Comm*, 1992 MERC Lab Op 533, 535*; United Mine Workers of America v NLRB*, 879 F2d 939, 942-44 (DC Cir 1989).

In this case, Respondent specifically referenced the collective bargaining agreement's training assignments and management rights sections to support its actions. Charging Party argues that the training and management rights clauses of the contract cannot be read in a way to allow Respondent's actions. This is a contract interpretation question in which conflicting meanings are ascribed to the clauses in question. Because this Commission does not adjudicate contractual interpretation disputes, this issue is ripe for arbitration and not for review by this Commission. *Wayne Co*, 19 MPER 61 (2006).

We find that Respondent reasonably relied on the contractual language when making its decision to provide this training to the patrol officers and that the contract language clearly covers both the issue of training and the alleged new job duties of the patrol officers. The proper forum for Charging Party's argument, therefore, is arbitration.

Finally, Charging Party excepts to the ALJ's characterizations of its submissions and challenges the ALJ's "commitment to (or capability to conduct) a fair hearing." Charging Party challenges the ALJ in that he "did not cite any of these alleged shortcomings" in Charging Party's submissions and asserts that the ALJ was predisposed to "disregard Charging Party's position."

Such bare allegations that an ALJ had predetermined or had a preconceived opinion of a case will not support a claim. *Washtenaw Co Bd of Supervisors*, 1968 MERC Lab Op 680. Charging Party's brief does not contain any support for its conclusory statements of misconduct on the part of the ALJ. We have reviewed the record in detail and have discovered nothing that would lead us to find that the ALJ acted with bias toward either party. Accordingly, we find no merit in Charging Party's allegation.

We have considered all other arguments that were timely presented by the parties and conclude that they would not change the result in this case. We agree with the ALJ that there are no genuine issues of material fact warranting an evidentiary hearing and that the charge may be dismissed.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

CITY OF ROYAL OAK,
Public Employer-Respondent, Case No. C08 L-263

-and-

ROYAL OAK POLICE OFFICERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Howard Shifman, for Respondent

L. Rodger Webb, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Based upon the entire record, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Order to Show Cause:

On December 22, 2008, the Royal Oak Police Officers Association (the Union) filed a Charge against the City of Royal Oak (the Employer) asserting that unspecified representatives of the Employer had "recently" violated the Act on unspecified date(s). The factual basis of the Charge, to the extent that it was minimally disclosed, appeared to be that the Employer provided some form of supplemental training in evidence handling to at least some police officers and then assigned duties to those officers consistent with their training. It was unclear how, or if, these factual allegations were intended to support a claim that the Act was violated.

Because such allegations failed to meet the minimum pleading requirements set forth in R 423.151(2)(c), and pursuant to R 423.165(2)(d), the Charging Party was ordered to show cause why the charge should not be dismissed for failure to state a claim upon which relief can be granted. Pursuant to R 423.162, the Charging Party was also

ordered to provide a more definite statement of the Charge against the Employer. The Charging Party was given twenty-one days to submit a written response to the order, with the Union instructed that it must, as expressly required by R 423.151(2), factually address the following deficits in the Charge:

1. The date(s) of the alleged occurrences;
2. The names of each agent of the Employer who is alleged to have engaged in the claimed improper conduct;
3. A factual description of the conduct that is alleged to violate the Act;
4. A factual and legal explanation of how such conduct violates the Act.

Charging Party was further directed to provide a concise and specific description of the relief requested for each claimed violation of the Act.

The Union sought and was granted an extension of time and then filed a timely letter of February 9, 2009, responding generally to the order to show cause. The Union did not directly respond to the order for a more definite statement of the Charge. The Union likewise effectively ignored the directive that it provide "a concise and specific description of the relief requested for each claimed violation of the Act." Nevertheless, it was clear that a significant part of the dispute related to the Union's perception that bargaining unit patrol officers were being trained in skills that would arguably allow them to be ordered to perform work in the future that is more akin to the work of the higher ranked non-bargaining unit police detectives. The detective's union had not objected to the training.

Despite the February 9 letter, it remained unclear just what PERA violation the Union was attempting to assert. It still appeared that the gravamen of the Union's claim, to the extent that it was discernable, was a mere contract dispute over the right of the Employer to send employees for job-related training. In the hope that the Employer could perhaps shed light on the dispute, the Employer was asked to file a reply to the Union's response to the order. The Employer, after seeking and being granted several extensions of time, filed a brief supported by a facially competent affidavit of fact by Corrigan O'Donohue, Deputy Chief of Police.

The affidavit of O'Donohue asserted that: (1) the training in question concerned evidence scene processing which is taught in the basic police academy; (2) training has never been restricted by the collective bargaining agreement; (3) the duties covered by the training are normal responsibilities of police patrol officers; (4) the decision of who is trained and what training is provided has always been a decision made unilaterally by the Department; (5) evidence taken at accident scenes is primarily handled by patrol officers; and (6) patrol officers and detectives have overlapping responsibilities regarding investigations at accident scenes.

Attached to the Employer's response, and referenced in the O'Donohue affidavit, was the collective bargaining agreement between the parties. The article on training in its entirety provides:

> **Section 28.0-TRAINING ASSIGNMENTS**
> 28.1- Both the Employer and the Association recognize the value of on-the-job training. Such training is to be encouraged and shall reflect the policies and procedures of the Department, while not being limited to same. The employee being trained will continue to receive his/her current rate of pay.

There is additionally a broad and specific management rights clause, which, in relevant part, provides:

> **Section 6.0- MANAGEMENT RIGHTS**
> 6.1- The City hereby reserves to itself . . . the right:
> * * *
> (e) To hire, assign and layoff employees. . . ;
> (f) To direct the work force, assign work and determine the number of employees assigned to various operations;
> (g) To establish, combine, or discontinue job classifications and prescribe and assign job duties, content and classification . . . ;

The contractual grievance procedure, at Section 10.0, concludes in binding arbitration. There is no claim made here that the Employer has refused any effort to utilize the grievance machinery.

By a letter of April 10, 2009, from the administrative law judge, the Union was offered an additional opportunity to plead its claim. In that letter, it was noted that the Employer's response had asserted that:

1. There is specific contract language covering the topic of such training;
2. The duties in question are common to police officers generally and appropriate to classifications in both units;
3. No contractual grievances have been filed by either unit;
4. The police officers unit was in the midst of an Act 312 arbitration during the pendency of the training dispute and that the issue could have been, and was not, raised there;
5. The current contract has a grievance procedure ending in binding arbitration.

The Union was expressly cautioned in the letter of April 10 that "*The Employer's response is seemingly straightforward and is supported by a facially competent affidavit*." The letter closed with:

> I did want to offer the Union the opportunity to withdraw the Charge or to file a similarly straightforward and factually specific explanation of how the alleged conduct violates the Act. It does not appear to me that anything was raised by the Charge, or the Union's reply to the Order, other than a routine

contract issue over which there is at best a bona fide dispute and an available and binding grievance procedure.

The Union, after being granted another requested extension of time, filed a timely response. That response, unlike the Employer's, was not supported by an affidavit. Despite disclaimers to the contrary, the focus of the Union's concern appeared to remain the question of when and under what circumstances the Employer could provide its police officers with advanced training related to evidence collection and handling.

Discussion and Conclusions of Law:

PERA does not regulate all aspects of the employment relationship. While every workplace dispute, and every dispute over the proper application of contract language, involves some possibility of alleging that a "change in conditions of employment" has occurred, not every garden-variety workplace disagreement can properly be asserted as an unfair labor practice charge. The allegations in the present charge, read in the light most favorable to Charging Party, appear to state no more than a breach of contract claim. The Commission has the authority to interpret the terms of a collective bargaining agreement only where necessary to determine whether a party has breached its statutory obligations. *University of Michigan*, 1971 MERC Lab Op 994, 996. However, in the ordinary course, where the terms and conditions of employment are covered by a collective bargaining agreement, the parties are left to pursue contract remedies. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich. 309, 317-321 (1996); *St Clair Co Road Comm*, 1992 MERC Lab Op 533.

Here, the core dispute is over whether the Employer properly sent some employees to a training session and then whether certain work was, or might in the future be, assigned to those employees.[2] The Commission has consistently held that public employers have a management prerogative to assign job duties and responsibilities that do not exceed the compass of the employees' normal job duties. *City of Westland*, 1988 MERC Lab Op 853. In addition to that general proposition, the Employer has cited to specific contract articles that on their face seem to support the Employer's claim that it has contractually reserved the right to determine what training is needed, who needs it, and when and how it is to be provided.[3] Similarly, the Employer cites to specific contract articles that on their face seem to support the Employer's claim that it has reserved to itself the authority to assign duties to particular classifications of employees and to change those assignments. Additionally, the Employer's arguments are supported by an unopposed affidavit of fact that asserts that the Employer has previously and consistently exercised such claimed powers.

[2] It is clear from the Union's several responses that most, if not virtually the entirety, of the Union's articulated concern is with hypothetical future events which the Union asserts may flow from the fact that some training was provided that increased the skill level of some employees.

[3] See also, the analysis of the administrative law judge regarding training in *Leoni Twp*, 22 MPER__ (May 20, 2009) (no exceptions).

While the Union may be able to articulate a dispute with the Employer over the proper application of that contract language, that dispute is an ordinary question of contract interpretation that can only be properly resolved by an arbitrator. There are no allegations made which, if proved, would support a finding of a repudiation of the collective bargaining agreement terms or of the duty to bargain. Rather, it is apparent that the parties have bargained over the topics in dispute and the Union has a contractual remedy for the claim that the contract language is not being properly applied. The Employer has articulated, and supported by sworn affidavit, a facially credible explanation in support of its claim of a contractual right to act in the manner it did. The Commission does not take jurisdiction over bona fide disputes over the interpretation of contract language when the parties have agreed to final and binding arbitration to resolve such disputes. *Lapeer County (40th Judicial Circuit Court)*, 2000 MERC Lab Op 350.

Furthermore, the Charge, and the several letters filed in response to the order to show cause, used oblique phrasing, atypical sentence structure, and convoluted legalese which made it difficult to discern just what claim the Union was attempting to make and which seemed more an effort at obfuscation intended to preclude resolution of the dispute rather than illumination. It is not sufficient for a party simply to announce a position and then leave it up to the forum to discover and rationalize the basis for the claims, or unravel and elaborate for the party its arguments, and then search for authority to either sustain or reject the position. See, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The claims asserted appear to set forth, at most, a possible dispute over the proper application of existing contractual language, a dispute over which the Commission obviously lacks jurisdiction. I further find that the failure of the Union to appropriately counter the factual affidavit of O'Donohue leaves no genuine dispute of material fact warranting the holding of an evidentiary hearing. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charge be dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____