STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent, Case No. C10 H-192

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

David J. Masson, General Counsel, for Respondent

Nacht, Roumel, Salvatore, Blanchard, & Walker, P.C., by Nicholas Roumel, for Charging Party

DECISION AND ORDER

On February 16, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, the University of Michigan (Employer) did not violate Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), when it unilaterally installed a hidden surveillance camera and instituted a change in the dress code. The ALJ found the use of the hidden camera in an area that was not a changing area and was not authorized for employee breaks is within management's right to supervise its employees during work time. The ALJ recommended that the charge filed by the University of Michigan Skilled Trades Union be dismissed. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On March 11, 2011, Charging Party filed its exceptions. After being granted an extension of time, Respondent filed a brief in support of the ALJ's Decision and Recommended Order on April 25, 2011.

In its exceptions, Charging Party contends that the ALJ erred by holding that Respondent had no duty to bargain over the installation of the hidden surveillance camera. Charging Party argues that the ALJ erred by refusing to follow National Labor Relations Board (NLRB or Board) precedent finding that the use of video surveillance is a mandatory subject of bargaining. Respondent agrees with the ALJ's Decision and

Recommended Order and asserts that the right to utilize a hidden camera is encompassed by the inherent management right to control its property and supervise employees. Respondent also argues that the NLRB precedent cited by Charging Party is distinguishable from the present matter as the Board cases dealt with the surveillance of authorized work and break areas and not the creation and use of an unauthorized break area, as in this instance. Finally, Respondent argues that the dispute is covered by the parties' collective bargaining agreement as the parties have already memorialized an agreement covering audio and video recordings.

Upon examining the record carefully and thoroughly, we find Charging Party's exceptions lack merit.

Factual Summary:

The material facts are not in dispute. During a routine inspection, a fire marshal discovered an unauthorized room with a locked door had been constructed in a university building. The room contained a table, chairs, a refrigerator, a microwave, a TV and numerous other items of personal property. The room was not an approved break area and Respondent had not authorized its construction.

Respondent installed a hidden camera in the room and recorded the activities of two employees who were observed spending several hours per day sleeping or watching movies in the room. The two employees were terminated for misconduct.

Charging Party asserts that there was a duty to bargain with regard to the installation of the hidden camera. Respondent contends that it had the managerial right to install the camera.

Discussion and Conclusions of Law:

Charging Party relies on federal precedent in support of its argument that the ALJ erred by failing to find that Respondent had a duty to bargain over the installation of video surveillance before conducting secret surveillance of the employee activity in the unauthorized room. Charging Party contends that *Colgate-Palmolive Co*, 323 NLRB 515 (1997); *Brewers and Maltster's, Local No. 6 v NLRB*, 414 F3d 36 (DC Cir 2005); and *National Steel Corp* v NLRB, 324 F3d 928 (CA 7, 2003) each require the Employer to bargain before installing a surveillance camera. The ALJ disagreed with the reasoning of the cases cited by Charging Party. However, we find it unnecessary to resolve this conflict because we find this matter distinguishable from the cases on which Charging Party relies.

In *Colgate-Palmolive Co*, 323 NLRB 515 (1997) the employer had installed hidden video cameras in employee restrooms and a fitness center. In *Anheuser Busch, Inc*. 342 NLRB 560 (2004) affirmed in part sub nom *Brewers and Maltsters, Local Union No. 6 v NLRB*, 414 F3d 36 (D.C. Cir 2005) and remanded to *Anheuser-Busch, Inc*, 351 NLRB 644, (2007), the hidden cameras were installed in areas where employees

performed their assigned duties or were permitted to take breaks. In both instances the NLRB determined that the employer had a duty to bargain over the installation of the cameras. Similarly, in *National Steel Corp* v NLRB, 324 F3d 928 (CA 7, 2003) despite the employer's prior long-term use of surveillance cameras, the NLRB found the employer had a duty to bargain after the union requested that the parties engage in bargaining before the placement of any additional surveillance cameras.

In the aforementioned cases, the NLRB or the reviewing courts found matters to be mandatory bargaining subjects where those matters were "germane to the working environment and outside the scope of management decisions lying at the core of entrepreneurial control." *In re National Steel Corp,* 335 NLRB 747 (2001), quoting *Colgate-Palmolive Co,* at 515. In *Brewers and Maltsters*, the DC Circuit Court of Appeals adopted the same rationale in affirming the NLRB's finding that the employer had a duty to bargain over hidden surveillance cameras. There, the court pointed out that although the camera was in the working environment, rather than a restroom or fitness room as in *Colgate-Palmolive*, the matter could not be said to be free of privacy concerns and had the potential to affect the job security of employees. *Brewers and Maltsters* at 43.

Although we are often guided by federal precedent in interpreting PERA, this Commission is not bound to follow its "every turn and twist**.**" *Northpointe Behavioral Healthcare Systems,* 1997 MERC Lab Op 530; *Marquette Co Health Dep't*, 1993 MERC Lab Op 901. In this case, we see no need for guidance from federal precedent as the facts in this matter are clearly distinguishable from those in the cases cited by Charging Party.

In each of the three cases relied on by Charging Party, the hidden cameras were in locations considered to be part of the working environment and were placed where they would record the activities of employees who were legitimately at those locations. Here, Respondent installed a single camera for the limited and temporary purpose of discovering two specific things: the identity of persons frequenting a room that had been surreptitiously constructed without Respondent's knowledge or consent; and the nature of the activities occurring in that room. The room was located in an area in which employees did not perform assigned duties and did not otherwise frequent or occupy with the Respondent's approval or acquiescence. The employees caught by Respondent's camera, unlike those in *Colgate-Palmolive*, had no legitimate expectation of privacy. Unlike the bargaining unit employees in *Brewers and Maltsters*, and *National Steel*, Charging Party's unit members were not assigned or authorized to be in the room where the camera was located. The activities that took place in the hidden room were neither relevant nor connected to the job responsibilities of Charging Party's bargaining unit members. The hidden room was not part of the "working environment" for Charging Party's bargaining unit members. Here, unlike circumstances in the three NLRB cases, the record reflects that the employees constructed an unauthorized hidden room for the purpose of engaging in surreptitious leisure activities during the time when they were supposed to be working. We agree with the ALJ that the Employer's use of a hidden camera in an area that is not part of the working environment is within management's

right to supervise its employees during work time. Therefore, the installation of the hidden camera did not violate Section 10(1)(e) of PERA.

In these limited circumstances, we find that Respondent did not breach its statutory duty to bargain. We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case.

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

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

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

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent, Case No. C10 H-192

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nicholas Roumel, for the Charging Party

David J. Masson, for the Respondent

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, 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). The following findings of fact and conclusions of law are based on the pleadings filed by the parties, a series of joint exhibits, the undisputed facts, and the transcript of the oral argument held on December 16, 2010.

The Unfair Labor Practice Charge and the Position of the Parties:

On August 3, 2010, a Charge was filed in this matter against the University of Michigan (Employer or U of M) by the University of Michigan Skilled Trades Union (Union). The Charge asserts that the Employer acted unlawfully by unilaterally changing certain conditions of employment.

The bargaining unit includes some 500 workers in various trades, including in particular relevance to this dispute, HVAC trades in the U of M Hospital and electricians campus-wide. The first portion of the Charge asserted that the Employer, as to some classifications at the U of M Hospital, had instituted a change in work uniforms from a policy allowing the crew to wear short or long sleeve poly-cotton blend shirts to a new policy requiring long sleeve 100% cotton shirts. The second portion of the Charge asserted that the Employer had announced, but had not actually implemented, a similar change to requiring

long sleeve 100% cotton shirts and fire-rated pants for all electricians campus-wide.[1] The third portion of the Charge asserts that the Employer acted unlawfully in secretly video taping employees engaged in alleged misconduct on the Employer's premises, without first negotiating with the Union over the use of surreptitious cameras. The material factual allegations by the Union were not disputed by the Employer. The parties stipulated to a series of thirteen joint exhibits, which included the current collective bargaining agreement between the parties; documents related to the video surveillance dispute; minutes of the joint safety committee spanning a period of multiple years beginning in 2004; and various drafts of an electrical safety program work rule related to the change in uniforms dispute.

In April 2010, the employer implemented a change in the uniforms worn by the hospital based HVAC employees from a policy allowing the crew to wear short or long sleeve poly-cotton blend shirts to a new policy requiring long sleeve 100% cotton shirts. It is undisputed that the change had been extensively discussed by a joint safety committee, beginning in 2004, with drafts of the policy promulgated in March and April of 2009 and with the final version issued in June of 2009. Upon implementation of the change at the hospital, the Union demanded bargaining. The Employer's position is that there was no duty to bargain as the parties had already fulfilled their bargaining obligation by agreeing to Article 39-2 of the collective bargaining agreement which provides:

> A central safety and health committee, CSHC, of the University, including union representatives, shall meet once a month for a regularly-scheduled meeting, to discuss safety and health issues, and develop and implement programs related to safety and health.

The Employer further relied on a broad management's rights clause which was in part relied on in a prior Commission decision arising from an earlier dispute over the institution of a change in work uniforms, *University of Michigan (Building Trades)*, 1987 MERC Lab Op 1043. That decision dismissed a charge where the change in uniforms had been reviewed by mutual consent by a similar joint labor-management committee where the Union had agreed, at least in principle, to the change in uniforms.

It is undisputed that the safety committee in fact repeatedly met and discussed the proposed change in uniforms. In the committee meetings the Employer's position, with seeming support from the committee, was that long sleeved 100% cotton shirts gave employees working on electrical equipment better protection against potential burns from electrical arcs. The collective bargaining agreement provides no express mechanism for determining a consensus or majority decision of the safety committee.

Also in April 2010, two HVAC mechanics were terminated for misconduct based on surreptitious video surveillance. It is undisputed that the U of M fire marshal on a routine

[1] That portion of the Charge related to the announced, but not yet implemented, change as to electricians' uniforms campus-wide is severed from this matter and given the new Case # C10 H-192-A. That matter will be held in abeyance pending a request for a hearing date from the parties. The parties have a dispute as to when that claim arose, such that the Employer has asserted, and reserved, a statute of limitations defense, which must be resolved when and if that dispute ripens.

inspection discovered, and reported, that an unauthorized room had been built in a university building. A particle board wall with a locked door had been constructed and an exterior window had been covered over. The room contained a table, several chairs, a refrigerator, a microwave, a calendar, a basketball, some video games and a small TV, and some work related tools and supplies. It was undisputed that this was not an authorized break area and that the Employer had not authorized the building out of the room. There is no claim that any employees had a reasonable expectation of privacy in the surreptitiously created room.

The Employer installed concealed cameras which recorded a video image of activities in the room by two employees. Joint Exhibit 5 summarized the activities observed in the room, which included several hours per day of sleeping or watching movies. The two employees were terminated, with both discharge grievance cases pending in arbitration at the time of the hearing on this Charge.

The Union asserts that there was a duty to bargain prior to the installation of the concealed camera, but did not seek individual relief in this case for the discharged employees, leaving that question to the arbitrator. U of M asserts that it was within its managerial rights in placing a camera, concealed or otherwise, on its own premises.

On the day set for trial, the Employer moved for summary dismissal.

Discussion and Conclusions of Law:

Oral argument on the motion for summary disposition was held on December 16, 2010. After considering the arguments made by the parties, I concluded that there were no legitimate issues of material fact in either case and that a decision on summary disposition in favor of the Respondents was appropriate pursuant to Commission Rule R 423.165 (1). See also, *Oakland Univ (AAUP)*, 23 MPER 86 (2010); *Detroit Public Schools*, 22 MPER 19 (2009); and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party had failed to state valid claims under PERA. The substantive portion of my findings of fact and conclusions of law are set forth below[2]:

Video Surveillance

The video surveillance dispute is addressed at pages 40-50 of the transcript, wherein I held:

> JUDGE O'CONNOR: On the video surveillance issue, there's no material dispute of fact. . . . that means . . . there may be some collateral disputes of fact, but there's nothing central to the question. In essence, the employer found evidence of the use of a portion of one of its buildings for a seemingly unauthorized purpose. I think everybody concedes it was being used as a casual break area that hadn't been authorized. The employer

[2] The transcript excerpt reproduced herein contains typographical corrections and other minor edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

installed secret cameras, observed a couple of employees in the area, and imposed discipline based on that observation.

The sole legal question for me, because the facts are not in dispute, I have to decide it on the law, is a novel question for MERC ultimately. And it is: Did the University have a duty to bargain with the Union over the decision to place concealed cameras in a portion of its work premises where employees might congregate, but which was not an established restroom or changing area? The Union already essentially briefed this as part of its charge; provided me with the case law, which I appreciated. I'm familiar with it, but it helps. The employer came here today prepared to argue that same case law. There was no need for an evidentiary hearing, no need to take testimony, because there aren't any disputes about what happened; the dispute is whether it was proper.

I had reviewed the case law in advance, I've heard the argument of counsel, and I'm prepared to issue a decision on the record today. A written decision will follow. . . [a bench opinion] speeds the process for the parties, frankly, and I know that the parties are anxious, not just about this prior event, but about what they do next, and about what they do in the future, and that is an important concern.

Now, as the Union accurately argues, the *Central Michigan University* [*Faculty Assn. v Central Michigan University*, 404 Mich 268 (1978)] case, and the case law consistent with it, holds that MERC takes a broad view of the duty to bargain in the public sector. The Commission turns sort of a jaundiced eye to claims to place something outside the realm of bargaining. On that question, the employer has relied on . . . its management rights clause, which is fairly broad. We are cautious about finding a waiver of the duty to bargain based on management rights clause language.

The employer additionally [relies on] the memorandum of understanding number six, about audio and video recordings. Now, it is clear that that memorandum of understanding was focused on a very particular type of event; a conversation between employee and supervisor. But it addresses the topic of audio and video recordings, and the employer relies on the *Port Huron* [*Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich. 309, 317-321 (1996)], decision and our line of cases which [hold that] if an issue is covered by collective bargaining language, MERC will typically leave . . . disputes regarding that topic to the arbitration and grievance process. Our role as administrative law judges is limited to issues that fall in the realm of an unfair labor practice charge, which not every dispute is. Some disputes . . . are what we would call mere contract disputes. Not that they're not important, but really that they're not ours to resolve.

This dispute, with the combination of the memorandum of understanding number six on audio and video recordings, and the zipper waiver clause, I think is likely subject to the analysis properly that the topic of video recording in the workplace is covered by the collective bargaining agreement already, and that this dispute should probably be before an arbitrator, rather than an ALJ. But I didn't take testimony on the question, and the scope of bargaining over the audio and video recording could be disputed, and regardless, I think it's important for the parties that I address the principal question, which is whether in general, the installation of hidden surveillance cameras is a mandatory subject of bargaining. That is the core of this charge, . . . it's the core of both parties' positions.

The Union asserts that the installation of surreptitious video recording is a mandatory subject of bargaining; the employer asserts it is not. The employer--both sides rely on the same NLRB case law. The employer seeks to distinguish it--the NLRB case law, and forthrightly argues that regardless, the employer's position is the NLRB was wrong in that case law.

In *Colgate-Palmolive Company* [323 NLRB 515 (1997)] and in *Anheuser Busch, Inc.*, [342 NLRB 560 (2004)] the National Labor Relations Board held that employers had a duty to bargain over the installation of hidden surveillance cameras. In *Colgate*, the Board likened it to physical examinations, drug testing, and polygraph examinations that had previously been found to be mandatory subjects of bargaining; that all of those were tools, investigatory methods, and that therefore they had to be bargained over. The NLRB rejected the employer's argument in *Colgate* of an inherent managerial right to install cameras, and found that the decision to install the cameras didn't involve a basic entrepreneurial decision by the employer for the basic scope of the business. The Board also rejected the employer's argument that requiring it to bargain before installing a hidden camera would defeat the purpose of installing hidden cameras. In . . . *Colgate*, the union discovered the cameras--the employees discovered them and reported them to the union, and the union demanded bargaining, and the employer refused to bargain. The Board held that the employer acted unlawfully in doing so. In *Anheuser Busch*, which is a fairly close corollary to this case factually in some ways; there's a break area, the employer thinks there's misconduct going on in that area; they install cameras; they discipline a bunch of people . . . for smoking weed . . . Anyway, employees at *Anheuser Busch* were disciplined based on what was observed in that break area, and in that case, it was a proper break area, with a sort of annex of casually proper break area. And the analysis was essentially the same as in *Colgate-Palmolive.*

The Commission, as both sides recognize, has not ruled directly on the question of whether an employer is required to bargain under PERA over the installation of hidden surveillance cameras. The Commission has followed . . . the lead of the NLRB in holding that an employer has an obligation to

bargain over drug and alcohol testing as methods for investigating employee misconduct as in *City of Detroit and Senior Accountants Association*, 1989 MERC Lab Op 788, with which Mr. Masson and I are both intimately familiar, having been involved in that litigation. And while the NLRB found those circumstances to be corollary, the physical exam, the drug testing, and the video taping, I find this situation of video taping to be materially different.

Physical exams and drug testing are extraordinarily personally intrusive. The use of polygraph exams really isn't an issue under PERA, because it's barred in the workplace under Michigan law anyway, in part for reasons which would otherwise make it bargainable, because there are real issues about the methodology and the reliability of polygraph testing, which is also true as to physical exams and drug testing. If you send someone for a drug test, there are issues related to what kind of drug test, by whom, with what parameters, and what is done with the test results. I find that that's materially different than videoing a scene, in general.

Here, the employer in essence peeked into what was supposed to be an empty room and observed employees there who the employer asserts had no business being there. It's not really relevant for purposes of this hearing who's right about what the guys were doing in the room; the question is should the employer have been peeking . . . And I do not see how surreptitious surveillance by an employer of activity on its own premises results in a duty to bargain, at least where, as in this case, there's no reasonable expectation of privacy. This wasn't a restroom or an established changing area, or as we get in firefighter cases, a sleeping area, where there might be different issues. That's not before me; I'm not deciding it. But where there's no expectation of privacy, I do not see a surreptitious camera as being much different [than] an open camera. It is the University of Michigan campus. They have cameras on doorways. They probably have cameras on the exteriors of buildings. [I]t's not unusual. If any of you came up in the elevator, there was a camera on you as you came up in this building today. It's sort of semi-concealed. You have to not be . . . paying attention to not notice it, but it's in the ceiling. There's no suggestion [here] of audio surveillance, or that the surveillance was initiated because of protected union activity. That could be an issue in a new union organizing drive if you suddenly put in cameras. But that's not before me. The surveillance wasn't done inside an on-site union office, which can also be an issue.

MERC does generally impose a broad duty to bargain; however, it does not strike me that the surreptitious observation by camera is functionally different than if the employer had drilled a peephole in the wall, or hid a supervisor in the ceiling panels, or simply had a supervisor sneak up on the room and pop in unexpectedly. The result would be the same. The employer gets to observe what happened in the room on its premises.

It does strike me as an inherent management right to look over an employee's shoulder while they're supposed to be working, for the precise purpose of supervising; that is to see to it that they are in fact working, and not engaged in misconduct.

I disagree with the holdings of the NLRB in those two cases, and in this decision, I would urge that the Commission reject those two decisions.[3] I would not find, and I do not find any duty to bargain in advance, as held by the NLRB, over the fact that the employer was planning, either physically or via video, to sneak up on employees who are on employer time to try and catch them smoking weed in the storage closet or drinking beer in the warehouse. I do not think an employer is obliged to give warning that it is tracking work output or performance in work areas. Again, this did not involve surveillance of employees on their own time, or at their homes. We've had issues of that sort.

I also disagree with the NLRB's finding . . . that requiring an employer to give notice to the union of an intent to engage in surveillance does not defeat the purpose of surveillance . . . I think it ignores the reality of the workplace to hold that an employer has to warn employees "we might catch you if you're engaged in misconduct and we're about to sneak up on you". I think it makes no sense.

For the reasons discussed above, I conclude that the Charging Party has failed to state a claim upon which relief can be granted under PERA regarding the video surveillance issue, and therefore the Respondent's motion for summary disposition is granted.

Change in Uniforms

The change in uniforms dispute is addressed at pages 96-103 of the transcript, wherein I held:

[3] 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. *Kent County*, 21 MPER 61, 221 (2008); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537; *Marquette Co. Health Dep't*, 1993 MERC Lab Op 901, 906. Indeed, there are several issues over which PERA and the NLRA differ or where MERC has not followed Board changes in position. The chief example of that is the right of private sector employees to strike, which affects many of the policies adopted by the NLRB, but is not recognized under PERA. *Rockwell v. Crestwood Bd. of Ed*, 393 Mich 616 (1975). See also e.g. *West Branch-Rose City Ed. Assn.*, 17 MPER 25 (2004) (The Commission noted differences in the NLRB's position on union implementation of window periods for employees wishing to end their union membership.) See also *Seventeenth District Court (Redford Twp.)*, 19 MPER 88 (2006) and *Michigan Technological Univ.*, 20 MPER 36 (2007) (no exceptions), discussing the Commission's continued application of the *Midwest Piping/Shea Chemical* principle of employer neutrality after the Board expressly overruled *Shea Chemical*, in *RCA Del Caribe*, 262 NLRB 963 (1982).

JUDGE O'CONNOR: I've heard the arguments of counsel, and I want to address a couple issues.

First, there was some argument about the degree of notice to the Union and the timeliness of any objection by the Union to the change. And I'm operating on the basis that the employer has reserved the question of any statute of limitations issue [as to the severed portion of the Charge]. So I'm not really going to address that question. What I'm going to try to do is address the core question. And the core question for me . . . is was there a duty to bargain, and was it violated . . . The question before me is not was the change in clothing a good idea, a bad idea, the best idea, an okay but not so great idea. That's not before me. . .

The facts here, at least the salient facts, I don't think are in dispute in terms of the process. And the process the parties agreed to is embodied in contract Article 39-2, which is that the parties agreed to set up a safety and health committee which was supposed to meet monthly, and it appears that it did meet at least regularly, because the minutes are in the record. And it's supposed to "discuss safety and health issues and develop and *implement* programs related to safety and health" (emphasis added). And with that language, and I'll discuss the facts a little more, I'm constrained to find under the *Port Huron* decision and that line of cases, that there is a duty to bargain about health and safety issues, but that based on this contract language, the parties have bargained over health and safety issues, and they have set up their own system of resolving disputes about health and safety issues. And that system is the health and safety committee that meets and makes decisions and doesn't just make recommendations, but *implements* health and safety concerns. And that makes sense on a day-to-day basis, because you want a . . . system that's flexible and quickly responsive to a newly-recognized hazard in the workplace. You don't want to wait three years and renegotiate the contract about what kind of hardware, what kind of safety equipment you should have. It makes perfect sense to have a system where a committee meets, it makes a decision, and it implements the decision. And that is what you agreed to do, which doesn't mean that there might not be defects in compliance with that article. The union has arguments about whether it really knew back in June of '09 of the promulgation of what is now Exhibit 12, or whether it really understood the extent to which management thought it was applying to something. But defects in the contractually agreed upon mechanism are contract disputes, and not properly before me. They really are issues to be resolved under the collective bargaining agreement.

Now, part of the discussion and argument today was over whether the change in the clothing, which Exhibit 12 refers to as "basic work clothing for electrically qualified workers", and it uses that phrase, and I'm looking at the chart, which is Appendix D to Exhibit 12, and it uses the phrase "basic work clothing", and then defines it for level A risk as the natural fiber long sleeve

shirts and long pants and whatnot. Then under Level B and C, which are higher risk levels, heightened hazard levels, it again refers to the basic work clothing of level A, plus you need additional things for level B and C. But the phrase "basic work clothing" is clearly a term of art that all the parties use and understand and know what it means. And the minutes of May 2nd of 2008 make clear as to--and it's throughout the minutes, really, that the parties discussed the wisdom and desirability of switching to long sleeved shirts, and in particular on May 2nd of '08, the minutes say it was decided [by the committee] that the decision on "basic work clothing" would be left to be made by the general foreman/management for each area. That's a significant transfer of authority or designation of who's going to make a final decision as to a particular and frankly narrow issue.

[A] significant part of the dispute here is the shift from an already required uniform of poly cotton short sleeved or optional long sleeved shirts to cotton, and it is clear that both parties agree that the question of 100 percent cotton clothing is an electrical safety issue in an arc or potential arc situation. It minimizes the risks or hazards or extensiveness of the burn risk. And that doesn't mean that the employer gets to make unilateral decisions, but it does mean that this seems to clearly factually fall under Article 39-2 of the collective bargaining agreement that says safety issues go to that committee.

The Union's argument that the wearing of long sleeves, and I note the acknowledgment and the evidence in the minutes, that there seemingly is an understanding that you can roll up your sleeves, but that the wearing of long sleeves can be a heat issue, a heatstroke issue, which is similarly a safety issue that goes to the safety committee, and went to the safety committee, was addressed in the safety committee, and again, I'm not expressing any opinion about whether it was properly resolved in the safety committee. But it went there and it was discussed there, which is what the contract says the parties were supposed to do in terms of their duty to bargain.

I'm not persuaded by . . . the argument that it's merely a change in dress code. You have record evidence of multiple years of discussion of the question of long sleeved shirts being a safety-related issue. The fact that you have disagreements about when and where it's a safety issue, when and where it's the best idea, doesn't alter the fact that the parties spent much energy discussing it as a safety issue, in the safety committee. And again, I go back to the *Port Huron* decision and its progeny, which instruct that where a contract covers a topic, the parties have bargained. And that is the duty under the statute, to bargain and reach a resolution.

As to the argument regarding the theory that it's a change in dress code, rather than basic work uniform, I would similarly find that that would be a *de minimis* change. If it were a mere change in dress code from short sleeve to long sleeve shirts, and that's the only thing that were before me, I would

find that that's a *de minimis* change in working conditions, and not one [for which a remedy should be ordered].

That's not to detract from the theory that it's a heat and health and safety issue, but I've separately addressed that. The parties have separately addressed the safety issue. And I do note that the minutes reflect very specifically that a consensus was reached in June of '09, the standards would be issued. And it appears undisputed that the standards were issued. There's a dispute about whether the Union understood fully what the employer understood as to the issuance of those, but it is clear that the safety committee addressed these questions, and that is the bargained-for agreement: that [the safety committee] would address those questions.

It doesn't mean that I'm making any finding, because it's not my place to make a finding, as to whether the right outcome occurred from the safety committee. But in terms of the duty to bargain, I find that it has been fulfilled by the parties reaching the collective bargaining agreement, paragraph 39-2, and to the extent that there's any dispute about compliance with 39-2, nothing has been raised here today which suggests anything other than a bona fide dispute as to compliance with 39-2, which again requires that I leave this to contractual remedies. And I'm therefore granting the employer's motion to dismiss as to the change in work clothing issue.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The Charge is dismissed, with the exception of that portion which was severed for separate handling.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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

Dated: February 16, 2011