STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY AIRPORT AUTHORITY,
Public Employer-Respondent,

Case No. C13 B-037
-and- Docket No. 13-000234-MERC

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 953,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Nemeth Law, P.C., by Clifford Hammond, for Respondent

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND ORDER

On October 24, 2014, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition in the above matter finding that Charging Party Michigan AFSCME Council 25, Local 953 (Union) did not state a claim upon which relief can be granted under § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Respondent Wayne County Airport Authority did not repudiate the parties' contract in violation of § 10(1)(e) of PERA when it refused to provide the Union president with paid time off to conduct union business. She held that the dispute concerned the interpretation of the collective bargaining agreement and was, therefore, not the proper subject of an unfair labor practice charge. The ALJ recommended that the charge be dismissed in its entirety. The Decision and Recommended Order on Summary Disposition was served on the interested parties in accordance with § 16 of PERA.

On November 25, 2014, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. After receiving an extension of time, Respondent filed its brief in support of the ALJ's Decision and Recommended Order on January 5, 2015.

In its exceptions, Charging Party argues that the ALJ erred by failing to conclude that Respondent's long standing approval of paid union release time was a past practice which became a term and condition of employment that could not be unilaterally altered or changed without first providing an opportunity to bargain.

In its Brief in Support of the ALJ's Decision, Respondent contends that the ALJ made no errors in her findings of fact and conclusions of law and the Commission should affirm the ALJ and dismiss the unfair labor practice charge.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts as found by the ALJ and repeat them here only as necessary.

The collective bargaining agreement in effect between Charging Party and Respondent, at the time of the alleged unilateral change, included a grievance procedure ending in binding arbitration.

The agreement also specifically provided that the Local President may request and be granted paid time off to present grievances. Article 9.16 of the agreement provided:

> The President or Vice President of the Local Union elected or designated as head of the WCAA bargaining unit who is an employee of the WCAA may request and be granted time off without loss of pay to present grievances involving the interpretation or application of this Agreement to the Division of Labor Relations or appropriate management representative as outlined in the grievance procedure.

Article 9.18 of the agreement provided:

> Whenever the President or Vice President is required to perform administrative duties limited to internal Union business or functions, he or she may be granted time off without compensation but without loss of such benefits to which he or she would otherwise be entitled. Requests for such time off without compensation may be granted upon prior notice to and approval of the Labor Relations Director or designee.

Bradley Manley had been the local vice-president and acting committeeperson before he became union president sometime in July 2012. The record reveals that Manley was granted paid union release time to conduct union business on 25 occasions between February 2012 and August 26, 2012. Many of these requests occurred before Manley became the Local President in July 2012. Some of the union business for which he requested paid time off as the union vice president/committeeperson included: grievance investigation, processing, moving grievances, attending hearings/arbitrations, and meeting with human resources. Manley submitted two requests for paid release time on August 26, 2012; one for August 27 and one for August 30. The August 27 request was denied with the notation that unpaid release time would be granted if requested. Of the eight hours requested for August 30, paid release time was denied for over six hours. The union business described in the denied requests included investigating and processing grievances, preparing for negotiations, and meeting with human resources.

Charging Party concedes that the explicit language of the collective bargaining agreement did not unambiguously require Respondent to grant Manley paid time off to perform all the union duties covered by his August 26 requests.

Discussion and Conclusions of Law:

Charging Party argues that the ALJ erred in finding that Respondent did not violate § 10(1)(e) of PERA when it refused to grant the Local President's request for paid time off to conduct union business.

Under § 15(1), a public employer has a duty to bargain in good faith over mandatory subjects of bargaining. *Wayne County*, 29 MPER 1 (2015). § 10(1)(e) makes it an unfair labor practice for a public employer to refuse to satisfy this duty. MCL 423.210. Mandatory subjects of bargaining are subjects that have a significant or material impact on wages, hours, and other terms and conditions of employment. *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215 (1982). Paid time to engage in union activities during working hours by an elected union representative has been established as a mandatory subject of bargaining. *United Auto Workers, Local 6888 v Central Michigan University*, 217 Mich App 136; 550 NW2d 835 (1996); *Southfield Public Schools*, 25 MPER 38 (2011). A public employer who makes a unilateral change to a mandatory subject of bargaining breaches its duty to bargain. *Garden City Public Schools*, 28 MPER 63 (2015). We will find an unfair labor practice based on an alleged breach of contract only where the charging party is able to show that the respondent has repudiated the agreement. *University of Michigan*, 1988 MERC Lab Op 204; *City of Detroit*, 22 MPER 11 (2009). Repudiation exists only when: (1) the contract breach is substantial and has a significant impact on the bargaining unit; and (2) no bona fide dispute over interpretation of the contract is involved. *Wayne County*. We have repeatedly held that there is no breach of the duty to bargain under § 10(1)(e) where the provisions of the collective bargaining agreement may reasonably be relied on for the actions taken by the parties. *Wayne County*.

Charging Party argues that Respondent's history of granting Manley's release time requests established a past practice that became a new term of their agreement, which Respondent then repudiated by unilaterally altering without providing Charging Party an opportunity to bargain. It is true, past practice may create a term or condition of employment that cannot be altered unilaterally. *Southfield Public Schools*, 25 MPER 38 (2011). The nature of the past practice, its duration, and the reasonable expectations of the parties are factors considered in determining whether the past practice has become a term of employment. *Id*. However, the Michigan Supreme Court in *Macomb Co v AFSCME Council 25*, 494 Mich 65; 833 NW2d 225 (2013), explained that it is necessary for courts and this Commission to recognize the difference between an unfair labor practice complaint and an arbitrable disagreement over the terms of a collective bargaining agreement. *Id.* at 81. The Court held further that an arbitrator, not this Commission, is ordinarily best equipped to decide whether a past practice has matured into a new term or condition of employment. *Id.* at 82.

Respondent contends that Article 9.16 identifies that the parties intended that paid time off would be granted only for presenting grievances and unpaid time off for all other administrative duties limited to internal union business or functions, as provided in Article 9.18.

Respondent argues that since the agreement contains provisions covering paid and unpaid union release time, upon which it reasonably relied in denying Manley's requests, this Commission lacks jurisdiction over this issue of contract interpretation.

Respondent is correct that this Commission will not exercise jurisdiction where a charge involves a good faith dispute regarding contract interpretation if the parties have in place a mandatory procedure for binding dispute resolution. *Garden City Public Schools*. "A good faith dispute over contract interpretation exists where the provisions of the collective bargaining agreement cover the matter in dispute and such provisions may reasonably be relied on for the actions taken by the parties." *Id.* The Michigan Supreme Court explained in *Macomb Co*, that when a charging party claims that a respondent has failed to bargain over a mandatory subject of bargaining, this Commission must determine whether the agreement covers the dispute. *Macomb Co* at 80. If the agreement covers the term or condition in dispute then the details and enforceability are left to arbitration. *Id.* When the parties have in place a separate grievance or arbitration process, as Respondent and Charging Party do, our review of a collective bargaining agreement in the context of a refusal to bargain claim is limited to determining whether the agreement covers the subject of the claim. *Id.* at 81. It is not necessary for a subject to be specifically mentioned by an agreement in order to be covered by it. *County of Wayne v Michigan AFSCME Council 25*, unpublished opinion per curiam of the Court of Appeals, issued October, 9, 2014 (Docket No. 312708), p 3; 2014 WL 5066057, 3 (Mich App 2014) citing *Port Huron*, 452 Mich at 322 n 16. In the instant case, Articles 9.16 and 9.18 of the collective bargaining agreement specifically provide that the President or Vice President of the Local Union may request paid or unpaid time off to conduct union business, which is the exact subject of this dispute. We agree with the ALJ that since there is a bona fide dispute over whether the contract language required Respondent to grant the requests, Respondent did not repudiate the collective bargaining agreement when it denied the requests at issue.

Based on our review of the parties' arguments, it is clear that each party can reasonably rely on the contract language to support their position. The parties have a good faith dispute over contract interpretation which must be resolved through arbitration. Finally, whether Respondent's conduct established a past practice that created a new term or condition of employment must also be resolved through arbitration. *Macomb Co* at 82.

We have carefully examined all other issues raised by Charging Party in its exceptions and find that they would not change the results. Accordingly, we affirm the ALJ's decision and issue the following Order:

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 27, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE COUNTY AIRPORT AUTHORITY,
Public Employer-Respondent,

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MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 953,
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APPEARANCES:

Nemeth Burwell, P.C., by Clifford Hammond, for Respondent

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On February 26, 2013, Michigan AFSCME Council 25 and its affiliated Local 953, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Wayne County Airport Authority pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

The hearing was adjourned without date while the parties attempted to settle their dispute during negotiations for a new collective bargaining agreement. On July 29, 2014, after both parties had ratified the new agreement, but the instant dispute remained unresolved, Respondent filed a motion for summary disposition. Charging Party filed a brief opposing the motion on August 8, 2014. Based on facts set out in the charge and pleadings and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge alleges that Respondent violated §§10(1)(a) and (e) of PERA when, on August 27, 2012, it refused the requests of Local 953 President Bradley Manley for paid time off to conduct certain types of union business. Charging Party asserts that paid time off for the local president to perform these duties was a term and condition of employment established by past

practice. It alleges that Respondent repudiated the parties' collective bargaining agreement and unilaterally altered a condition of employment by refusing to grant Manley's requests. It also alleges that Respondent unlawfully interfered with Manley's rights under §9 of PERA to engage in union activity.

Facts:

Background

Respondent was created in 2002 as a public airport authority pursuant to 2002 PA 90, MCL 259.108 et seq, which also transferred jurisdiction over Detroit Metropolitan Airport from Wayne County to Respondent. Per §119 of PA 90, Respondent was required to recognize and bargain with the representatives of the bargaining units of County employees who became Respondent's employees after the transfer, and was bound by any existing collective bargaining agreement covering these employees for the remainder of the term of the agreement. PA 90 further provided that "the authority shall honor all obligations of a public sector employer after the expiration of any collective bargaining agreement with respect to transferring employees."

AFSCME Local 101 represented a bargaining unit of County employees in 2002 and, after Respondent was created, became the bargaining representative for a unit of Respondent's employees. Local 101 continued to also represent a unit of County employees. In 2009, Respondent and Local 101 entered into a collective bargaining agreement covering the term December 1, 2007, through November 30, 2011. In July 2011, they entered into an agreement to extend the contract past its expiration date on a day-to-day basis while they negotiated a successor. The extended agreement was still in effect in July 2012, when Local 953 succeeded Local 101 as the bargaining representative for the unit of Respondent's employees.

The president of Local 101 between August 2009 and July 2012 was Thomas Richards, who is an employee of Wayne County. Sometime in July 2012, shortly after Local 953 replaced Local 101 as the representative of the unit of Respondent's employees, Bradley Manley became the president of the new Local 953. Prior to the formation of Local 953, Manley had the titles of vice-president and acting committeeperson for Local 101.

The Collective Bargaining Agreement

The 2007-2011 collective bargaining agreement between Respondent and Local 101 was extended on a day-to-day basis by agreement beyond its November 30, 2011, expiration date, and remained in effect at the time of the alleged unilateral change in August 2012. In addition to a grievance procedure ending in binding arbitration, the 2007-2011 agreement included these provisions:

Article 9.08

> Stewards, during their work hours, without loss of time or pay, may investigate reported grievances within their designated areas and present said grievances to the Employer or the appropriate management representative. Before entering upon

such union business, stewards shall give such notice to and receive approval from the designated supervisor, or in his or her absence, the designated alternate supervisor . . .

Article 9.12

Committee persons may investigate and process a reported employee grievance at the appropriate management level without loss of time or pay if the area steward is unable to resolve the alleged complaint with the immediate supervisor. Before entering upon such union business, committeepersons shall give notice to and receive approval from the appropriate management representative for release from their work assignment for such time as may be necessary to conduct union business. Approval shall not be unreasonably withheld, nor shall this provision be abused. Any alleged abuse by either party will be a proper subject for a special conference, as provided by this Agreement.

Article 9.16

The President or Vice President of the Local Union elected or designated as head of the WCAA bargaining unit who is an employee of the WCAA may request and be granted time off without loss of pay to present grievances involving the interpretation or application of this Agreement to the Division of Labor Relations or appropriate management representative as outlined in the grievance procedure. [Emphasis added].

Article 9.18

Whenever the President or Vice President is required to perform administrative duties limited to internal Union business or functions, he or she may be granted time off without compensation but without loss of such benefits to which he or she would otherwise be entitled. Requests for such time off without compensation may be granted upon prior notice and approval of the Labor Relations Director or designee.

The Past Practice and Alleged Unfair Labor Practice

Charging Party asserts, in both its charge and its brief in opposition to the motion for summary disposition, that "the local president's position has always been a fully-released president position." In its motion, Respondent asserted that this was not the case. Neither party supported its assertions with affidavits or other evidence. I note, however, that Charging Party attached to its pleadings a series of requests from Manley for paid time off for union business made after he had become the president of Local 953. The fact that Manley requested this time off suggests that he did not expect to be fully released from his normal work duties when he assumed the presidency of the local.

Charging Party also asserts that "the employer has always in the past allowed the local president paid release time to address any and all union business" even though, it admits, the literal language of the collective bargaining agreement may not have required this. Respondent disputed the existence of this past practice. In response, Charging Party attached a series of approved requests made by Manley for paid time off to conduct union business between February 2012 and August 26, 2012,

According to these documents, until about mid-May 2012, Respondent used a form request for union business release time that required the union representative to provide only the general nature of the union business, in addition to where the representative was going and the times he would be absent from work. On or about May 23, 2012, Respondent began using a new form that asked for more specific information. It included the following:

2. Nature of Union Business (check one)

____ Grievance processing. State grievance number(s) and business being conducted (hearing, processing, appeal to arbitration, etc.)

_____ Grievance investigation. State general nature of need for release time (i.e. meet with employee, department representative, etc.)

_____ Negotiations

_____ Arbitration hearing. State arbitration case #

_____ Discipline hearing

_____ Other (provide explanation)

3. Name of person(s) with whom you are meeting (if applicable).

Between February 17, 2012 and July 2, 2012, Manley requested and was granted paid time off for union business on nineteen separate occasions. On his request forms, Manley listed his position as Vice-President/Committeeperson. On forms prior to May 23, 2012, Manley described his union business as "grievance investigation/processing/moving grievances." One form describes the union business as "grievance/hearing/arb/investigation," and another reads, "grievance processing/investigation/meeting with human resources." Four of these requests were made after May 23, 2012 using the new forms. On all four requests, Manley checked the boxes for both grievance processing and grievance investigation, and on one, in the "other" box, he wrote "prep for meeting."

On August 12, 2012, after Manley had become Local 953 president, he submitted a request to his supervisor for eight hours union release time on August 13 in which he listed his union business as follows:

Grievance processing. Hearing, L.C. Smith [Terminal]

Grievance Investigation. 8-39B-85, para [sic] contract compliances, all Step 4 cases
Negotiations. Prep
Other. All hearings and matters concerning 953
Name of person with whom you are meeting. [Director of Labor Relations] Lynda [Racey]

On August 12, Manley submitted another request for eight hours union release time on August 14 which listed the union business as:

Grievance investigation. 861B, all Step 4 cases, para [sic], all other that applies
Negotiations. 12?
Other. All other hearings and matters concerning 953 including painter trainee review.

On August 12, Manley submitted a third request for eight hours release time on August 15 which listed the union business as:

Grievance processing. All cases moved to Step 4 863B.
Grievance investigation. Para
Other: All other contract compliance and hearings and matters concerning 953.

On August 12, Manley submitted a fourth request for seven hours release time on August 16 which listed the union business as:

Grievance processing. Arbitration. All cases moved to Step 4, contract compliance
Grievance investigation. Para
Other. Meeting with human resources. All matters such a hearing and matters concerning Local 953.
Name of person with whom you are meeting. Lynda (special meeting)

On August 21, Manley submitted a request for eight hours release time on August 22 which listed the union business as:

Grievance processing. Arbitration. 883-886 and others.
Grievance investigation. Airport
Negotiations

On August 22, Manley submitted a request for eight hours release time on August 23 which listed the union business as:

Grievance processing. 895-893 891 and others
Grievance investigation. Airport

All of the above requests were approved by Manley's supervisor without comment.

On August 26, Manley submitted a request for eight hours release time on August 27. The union business was listed as:

Grievance processing. Processing, appeal to arbitration. 895-893 and others.
Grievance investigation. Airport
Negotiations. Prep
Other. Painters trainee.

On August 27, the form was returned to Manley with the notation that the request for paid release time pursuant to Article 9.16 was denied, but that unpaid release time would be granted pursuant to Article 9.18 if requested.

On August 26, Manley also submitted a request for eight hours release time on August 30 which listed the union business as:

Grievance processing. Processing, appeal to arbitration. 891-896 and others
Other. Grievance hearing Smith
Name of Persons with whom you are meeting. Human Resources.

Manley listed the location of the union business as: 6 ¾ hours Downtown. 1 ¼ hour Smith.

On August 30, Manley's supervisor returned the form with a notation that only the union business time at Smith was approved.

The Parties' 2011-2015 Collective Bargaining Agreement

In October 2013, the parties entered into a new collective bargaining agreement covering the term December 1, 2011, through September 30, 2015. Article 9.16 of this agreement reads as follows:

> The President or Vice President of the Local Union elected or designated as head of the WCAA bargaining unit who is an employee of the WCAA may request and be granted time off without loss of pay to present grievances involving the interpretation or application of this Agreement to the Division of Labor Relations or appropriate management representative as outlined in the grievance procedure.
>
> The President of the Local Union may also request and be granted time off without loss of pay to attend the following:
>
> Any meeting called by management where his/her attendance is requested.
> Special conferences
> Step #2 – as needed
> Step #3 – as needed
> Arbitration hearings – as needed
>
> Negotiation Preparation – up to 4 hours per week at off-site Union office if necessary, when collective bargaining negotiations are ongoing for a successor CBA

Scheduled Negotiation sessions – to include 1 hour prep with bargaining committee immediately preceding negotiations.

Discussion and Conclusions of Law:

The Commission has long held that while the investigation of grievances is clearly activity protected by PERA, PERA does not protect the right of employees to engage in union business on an employer's time. *City of Detroit Dept of Transportation*, 1990 MERC Lab Op 254. Although the union and the employer may agree to paid or unpaid release time for union officers, this is a negotiated benefit and not a right guaranteed by the Act. *Fairview Medical Care Facility*, 1981 MERC Lab Op 1048, 1059; *Cassopolis Pub Schs*, 1987 MERC Lab Op 571, 579. As a consequence, an employer does not interfere with the rights of its employees under Section 9 of PERA by policing the union release provisions of its contract. *City of Grand Rapids*, 1980 MERC Lab Op 18, 27. I conclude that Charging Party's allegation that Respondent interfered with Manley's exercise of his §9 rights by refusing to approve his August 26, 2012, requests for paid release time does not state a claim upon which relief can be granted under PERA.

Respondent argues that Charging Party's refusal to bargain allegations should be dismissed as moot because, in October 2013, the parties entered into a new collective bargaining agreement which clearly defines the types of union business for which the local president and vice president are to be granted paid time off. The facts as alleged in the charge, however, do not indicate whether Manley took time off to attend to union business for which he was not paid between August 27, 2012 and the date of the new agreement. I conclude, therefore, that summary dismissal of the charge as moot is not appropriate.

On August 27 and August 30, 2012, Respondent denied Local 953 President Manley's request for paid release time to investigate and process grievances and prepare for negotiations. Charging Party asserts that paid release time for the local president/vice president to attend to any and all union business was an established past practice which had become incorporated into the parties' collective bargaining agreement and/or had become an established term and condition of employment independent of the contract. It argues that Respondent violated its duty to bargain in good faith by denying Manley's August 27 and August 30 requests for paid release time.

Where there is a collective bargaining agreement covering the subject matter of a dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the contract controls and no PERA issue is present. Under such circumstances, the details and enforceability of the contract provisions covering the term or condition in dispute are left to arbitration. *Macomb County v AFSCME Council 25, Locals 411 and 893*, 494 Mich 65, 80 (2013); *Port Huron Ed Ass ' n v Port Huron Area Sch Dist*, 452 Mich 309, 321 (1996).

In the instant case, the parties' 2007-2011 collective bargaining agreement included provisions addressing the right of Charging Party representatives, including stewards,

committeepersons, the local vice-president, and the local president, to paid time off for the purpose of conducting union business. This agreement, including its grievance arbitration provision, was extended by agreement of the parties and was in effect in August 2012. Article 9.16 provided that the local president and vice-president would be granted paid time off to "present grievances." As Charging Party admits, Article 9.16 did not unambiguously require Respondent to grant Manley paid time off to perform all the union duties covered by his August 26, 2012 requests. Since there was at least a bona fide dispute over whether the contract language required Respondent to grant these requests, I find that Respondent did not repudiate the collective bargaining agreement when it denied these requests. *Plymouth-Canton Cmty Schs*, 1988 MERC Lab Op 894; *Gibraltar Sch Dist*, 18 MPER 20 (2005).

A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. *Amalgamated Transit Union v Southeastern Michigan Transportation Authority,* 437 Mich 441, 454 (1991). In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. *Amalgamated,* at 454, *Port Huron* at 325. Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. *Amalgamated,* at 454–455, *Port Huron,* at 325. However, where there is express language in the collective bargaining agreement that conflicts with the practice, a higher standard of proof is required to establish that the past practice has become a term or condition of employment. In that case, the unambiguous language controls unless the past practice is so widely acknowledged and mutually accepted that it creates an amendment to the contract. *Port Huron,* at 326-329. The party that seeks to overcome unambiguous contract language "must show the parties had meeting of the minds with respect to the new terms or conditions so that there was an agreement to modify the contract." *Macomb Co* at 81-82.

Respondent both asserts that Article 9.16 unambiguously allowed Respondent to deny Manley's August 26, 2012, requests and denies that there was a past practice of paying the local president to attend to any and all types of union business. It notes that from 2009 to Manley's election as president of Local 953 in July 2012, the "local president" was Local 101 President Thomas Richards, an employee of Wayne County. It argues that the seven paid release days granted to Manley between the time he became Local 953 president and August 27, 2012 did not establish that the parties mutually agreed to modify the unambiguous language of Article 9.16.

The matter in dispute, the right of the Local 953 president to paid time off to perform union business, was clearly covered by Article 9.16 of the parties' collective bargaining agreement. Respondent relied upon this provision in denying Manley's August 27, 2012, requests for paid time off. The collective bargaining agreement included a grievance procedure ending in binding arbitration. Under these circumstances, as noted above, the contract controlled and, per the parties' agreement, any unresolved questions about the meaning or enforceability of Article 9.16 were to be resolved by an arbitrator. As the Court stated in *Macomb Co,* when there is unambiguous contract language which conflicts with a past practice, an arbitrator is ordinarily the proper party to determine whether the parties have mutually agreed to modify this language through past practice. Id at 82. I find that an arbitrator, and not the Commission, was also the proper party to resolve the dispute over whether Article 9.16 was, in fact, ambiguous. If the dispute had been submitted to an arbitrator, his or first task would have been to determine

whether the language of Article 9.16 was ambiguous. If the arbitrator concluded that the language was ambiguous, the arbitrator could then have appropriately considered external factors such as the parties' past practice and bargaining history in determining the parties' intent. However, if the arbitrator concluded that the language unambiguously gave Respondent the right to deny Manley's August 26, 2012 requests, his or her task would then have been to determining whether the parties, through their past practice, had agreed to amend the contract.

I conclude that the parties' dispute in this case was a dispute over the interpretation of their collective bargaining agreement and was not the proper subject of an unfair labor practice charge. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 24, 2014