STATE OF MICHIGAN

COURT OF APPEALS

SOUTHFIELD EDUCATION ASSOCIATION, SOUTHFIELD PUBLIC SCHOOLS MICHIGAN EDUCATION SUPPORT PERSONNEL ASSOCIATION, and EDUCATIONAL SECRETARIES OF SOUTHFIELD, Charging-Parties-Appellants,	UNPUBLISHED February 5, 2004
v	No. 240050 MERC
SOUTHFIELD PUBLIC SCHOOLS, Respondent-Appellee.	LC No. 99-000011

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Charging parties Southfield Education Association, Southfield Public Schools Michigan Education Support Personnel Association, and Educational Secretaries of Southfield appeal as of right from an order entered by the Michigan Employment Relations Commission (MERC) dismissing their unfair labor practice charge against respondent Southfield Public Schools. We affirm.

We are asked to determine whether the MERC properly concluded that respondent did not violate its duty to bargain in good faith by deciding to enforce the leave policies contained in the parties' collective bargaining agreements (CBAs); thereby deviating from the permissive leave policy it had employed in the past. Because the CBAs unambiguously grant respondent discretion in granting leaves of absence, charging parties have failed to show that respondent acted contrary to the contract terms by choosing to grant all leaves. To the extent respondent may not have enforced some of its rights under the agreements, charging parties have failed to show an actual agreement to alter the agreements. For this reason, we also find that the MERC properly rejected the charging parties' claim of direct dealing.

The MERC's factual findings are conclusive when "supported by competent, material, and substantial evidence on the record considered as a whole."[1] Due deference is also afforded to the MERC's administrative expertise.[2] The MERC's legal determinations will only be set aside if they violate the constitution or a statute, or "are based on a substantial and material error of law."[3]

The parties' leave policies in this case were originally defined in June 1990 during negotiations for a CBA. Charging parties subsequently entered into CBAs with respondent in 1996. For purposes of this appeal, the 1996 agreements essentially provided that in most circumstances unpaid leaves *may* be granted or extended at respondent's discretion. It is undisputed, however, that defendant granted all leave requests and extensions from at least 1982 to 1998.

The instant controversy began when respondent sent a memorandum to its employees on July 27, 1998, informing them that it was changing its practice with regard to leaves of absence. Rather than routinely granting leaves and leave extensions, respondent stated that its permissive leave policy would be discontinued because school enrollment was increasing. The memorandum explained that leaves of absence were routinely granted in the past because school enrollment was declining and unpaid leaves helped minimize layoffs. It further stated that leaves of absence and extensions would be "granted or denied as determined by the administration." Charging parties filed an unfair labor practices charge alleging that respondent unilaterally changed the leave policies. Both the hearing referee and the MERC rejected this claim and the instant appeal followed.

Public employers are required to bargain in good faith over "wages, hours, and other terms and conditions of employment . . . ."[4] As such, once an agreement is reached between labor and management, neither may unilaterally modify its terms without the other party's consent.[5] However, it has been commonly accepted that "'[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.'"[6]

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[1] *Grandville Mun Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996).

[2] *Gogebic Community College Michigan Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342, 348-349; 632 NW2d 517 (2001).

[3] *Grandville*, *supra* at 436.

[4] MCL 423.215(1); *Gogebic*, *supra* at 349.

[5] *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 566-567; 581 NW2d 707 (1998).

[6] *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 311-312; 550 NW2d 228 (1996), quoting *Amalgamated Transit Union v Southeastern Michigan Transp Authority*, 437 Mich 441, 454; 473 NW2d 249 (1991).

Our Supreme Court provided the following guidance regarding the ability of past practices to modify the terms of an agreement:

> In order to create a term or condition of employment through past practice, the practice must be mutually accepted by both parties. *Where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be "tacit agreement that the practice would continue." However, where the agreement unambiguously covers a term of employment that conflicts with a parties' past behavior, requiring a higher standard of proof facilitates the primary goal of the [Public Employment Relations Act]—to promote collective bargaining to reduce labor-management strife.* A less stringent standard would discourage clarity in bargained terms, destabilize union-management relations, and undermine the employers' incentive to commit to clearly delineated obligations.
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> Requiring a higher standard of proof when there is express contract language to the contrary comports with previous Michigan cases regarding modification. Generally, parties are free to take from, add to, or modify an existing contract. However, in the same way a meeting of the minds is necessary to create a binding contract, so also is *a meeting of the minds necessary to modify the contract after it has been made.* A collective bargaining agreement, like any other contract, is the product of informed understanding and mutual assent. To require a party to bargain anew before enforcing a right set forth in the contract requires proof that the parties knowingly, voluntarily, and mutually agreed to new obligations.[7]

It is insufficient to merely show that a party knew or should have known that its past practices conflicted with express contract language.[8] Rather, to establish that a past practice modified the contract, a party must show that both contracting parties had a "meeting of the minds" with respect to the changes and specifically intended that the practice would replace the agreed upon term.[9] As noted in *Port Huron*, "it is the underlying agreement to modify the contract that alters the parties' obligations, not the past practice."[10]

Here, the past practice charging parties allege—approval of all leave requests—does not conflict with unambiguous contract provisions granting respondent complete discretion regarding most requests. And to the extent respondent's actions could be viewed as conflicting with these contract provisions, by the fact it ignored certain leave restrictions or created a practice of mandatory approval, we agree with the MERC that charging parties have failed to

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[7] *Port Huron, supra* at 325-327 (citations omitted, emphasis added).

[8] See *id*. at 332.

[9] *Id*. at 329.

[10] *Id*. at 329-330; see also *Gogebic, supra* at 354.

show a voluntary, knowing, and intentional agreement to modify the contract.[11] The fact that respondent refrained from denying leaves or enforcing the restrictions placed on leaves does not show that it intended to bind itself to an agreement to approve all future requests.[12]

As the MERC observed, this case is clearly distinguishable from *Detroit Police Officers Ass'n*, where our Supreme Court concluded that the charging party presented substantial evidence to show that the parties adopted their past practices as an amendment.[13] In that case the charter provided the board of trustees with the authority to determine whether an individual's disability was duty-related for retirement purposes.[14] However, the charging parties in that case presented evidence showing that the board of trustees had accepted over one hundred decisions from the medical board of review on the issue of duty-relatedness as binding.[15] The charging parties in that case also presented several forms the board of trustees created asking the medical board of review to make duty-related findings and emphasizing that these findings were final.[16]

Conversely, charging parties in this case have failed to provide any evidence showing that respondent acknowledged or intended to implement a new mandatory approval policy. Even in the July 1998 memorandum to its employees, respondent referred to the leave policy as a permissive practice and not mandatory. As noted by the MERC, and perhaps more indicative of the parties' intent, is the fact that despite a history of liberally granting leave requests, the 1990 agreement respondent negotiated with charging parties provided it with complete discretion regarding leaves and stated the responsibilities of employees on leave. These provisions were referred to in the ensuing CBAs.

We further reject charging parties' argument on appeal that the MERC applied an improper standard by adding a "tangible affirmative steps" element to their burden of proof. A review of the record shows that the MERC was merely noting a factual difference between the present case and *Detroit Police Officers Ass'n*.[17] Accordingly, we find that the MERC correctly held that charging parties failed to meet their burden of showing that respondent intended to modify the contract through its past practices.

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[11] See *Detroit Police Officers Ass'n v Detroit*, 452 Mich 339, 348-349; 551 NW2d 349 (1996).

[12] While charging parties challenge the MERC's factual finding that respondent's past practice began in 1982, we find no error requiring reversal. Even assuming that respondent had a practice of automatically granting leaves of absence before 1982, the fact remains that the parties negotiated a discretionary leave policy in 1990 and again in 1996.

[13] See *Detroit Police Officers Ass'n, supra* at 346-348.

[14] *Id*. at 341.

[15] *Id*. at 346.

[16] *Id*. at 347-348.

[17] *Id*. at 339.

We also find no merit to charging parties' claim that respondent engaged in direct dealing. Direct dealing with employees constitutes an unfair labor practice.[18] But an employer is permitted to "communicate with employees in a noncoercive manner as long as he does not engage in individual bargaining on mandatory subjects."[19] Absent the duty to negotiate, information regarding policy changes falls within the general communication permitted between employers and employees.[20] Because respondent did not have a duty to bargain over the matters contained in the July 1998 memorandum, the MERC properly rejected this claim.[21]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

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[18] See MCL 423.211; see also *Nederhood v Cadillac Malleable Iron Co*, 445 Mich 234, 251; 518 NW2d 390 (1994).

[19] *Michigan Ed Ass'n v North Dearborn Heights School Dist*, 169 Mich App 39, 46; 425 NW2d 503 (1988); see also MCL 423.210(1)(a).

[20] See *Michigan Ed Ass'n*, *supra* at 46.

[21] Respondent did not concede this issue on appeal. When a party fails to sufficiently brief an issue *raised by the other party*, we generally attempt to decide the issue. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 585; 548 NW2d 900 (1996).