STATE OF MICHIGAN

COURT OF APPEALS

CITY OF DETROIT,

Respondent-Appellant,

v

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 25,

Charging Party-Appellee.

UNPUBLISHED
February 14, 2008

No. 274233
MERC
LC No. 03-000029

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Respondent appeals as of right from the Michigan Employment Relations Commission's (MERC) decision and order finding that respondent committed an unfair labor practice against the charging party. We affirm.

The charging party, the Federation, filed this charge on behalf of employees in respondent's Department of Transportation (DDOT), alleging in the administrative proceedings below that respondent violated its duty to collectively bargain under MCL 423.10(1)(e) of the Public Employment Relations Act by unilaterally amending the job specifications for "general automobile mechanics." Although this challenge is relatively recent, the charge has a considerable history. In 1993, respondent amended the job specifications and required its general mechanics to possess a commercial driver's license (CDL), rather than just a standard operator's license. Respondent amended the job specifications on the basis of its interpretation of newly amended state statutes that, according to its interpretation, made the commercial licenses mandatory for all general mechanics who worked with commercial vehicles. The Federation's Local 229 filed suit in the early 1990s because respondent had suspended or terminated several general mechanics in its Department of Public Works (DPW) for their failure to obtain CDLs. Ultimately, the Wayne Circuit Court held that the majority of mechanics in the DPW were not required to possess a CDL because they were not regularly employed as drivers, rendering the new statutory amendments inapplicable to them. Afterward, an arbitrator reinstated the terminated employees and awarded back pay for all the employees that were terminated or suspended.

During the pendency of the Local 229 lawsuit, DDOT followed the other department's lead and notified its mechanics that they would be suspended if they did not obtain a CDL. Most

mechanics immediately complied. In the following years, DDOT received reports from respondent regarding the status of employees' licenses and notified its general mechanics when their CDLs expired. However, the success of Local 229's lawsuit cast serious doubt on the viability of the CDL requirement's application to DDOT's general mechanics. According to Leamon Wilson, the president of Local 312, he eventually communicated with Gail Oxendine, respondent's human resources representative to the DDOT, about the license notifications sent to DDOT mechanics. Wilson testified that after he first communicated with Oxendine in 1996 or 1997, she reportedly contacted DDOT's law department to determine the status and viability of the requirement. According to Wilson, Oxendine later reassured him that, in the wake of Local 229's successful bid to strike down the new license requirement, nobody at the DDOT would pursue discipline for a mechanic's failure to obtain a CDL.

The DDOT acted in conformity with Wilson's testimony and did not take any action against its mechanics, or even review the validity of their CDLs, until October 2002, when it suspended a mechanic for lack of a CDL. The DDOT did not first notify the Federation or allow it an opportunity to negotiate a general policy or specific provision for enforcement of the CDL requirement. The Federation asked for an opportunity to bargain about the requirement, but respondent never answered. Consequently, the Federation filed this unfair labor charge, claiming that the adopted policies of respondent and its DDOT had effectively waived the contract's initial CDL requirement, so by newly enforcing the requirement after nearly a decade of leaving it dormant, respondent actually amended the contract without first seeking mutuality of assent. In essence, it argued that respondent wrongfully denied it the opportunity to bargain over the reinstitution of the tacitly denounced provision.

After a hearing before a MERC referee and thorough consideration of the Federation's exceptions to some of the referee's findings, the MERC found that respondent had notified the charging party of the 1993 amendment to the general mechanic job specifications. However, it also found that respondent failed to enforce the CDL requirement from the time the parties entered the verbal agreement of 1996 or 1997 until the 2002 suspension. The MERC further found that respondent decided to enforce the CDL requirement in 2002 without providing notice to the Federation. The MERC concluded that the parties had a longstanding agreement to a term or condition of employment—the waiver of the CDL requirement—and that respondent could not unilaterally amend that agreement.

Respondent first challenges MERC's factual basis for determining that it initiated a longstanding practice of not enforcing the CDL requirement in the general mechanics' job description. We disagree. We will not disturb the MERC's factual findings if they are supported by competent, material, and substantial evidence. MCL 423.216(e); *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1991). In this case, Wilson's testimony established that Oxendine and members of respondent's legal staff had conceded the illegality of the CDL portion of the general mechanics' job description and affirmatively reassured Wilson that the CDL requirement was essentially void and would not be enforced. Respondent repeatedly disparages this portion of Wilson's testimony as undated and undocumented, but the testimony corresponds perfectly with the circumstances following the legal battle over the requirement and DDOT's abandonment of measures to enforce the requirement. Although the amended 1993 and 2002 job specifications indicate that general mechanics were required to possess a CDL, the record

supports the finding that respondent had initially agreed to waive that requirement during the pendency of the Local 229 lawsuit and that it did not attempt to enforce the provision for six years after the suit's adverse resolution. In light of the Wayne Circuit Court's decision that respondent could not require most general mechanics in the DPW to possess a CDL, it was natural for the Federation to believe that the DDOT's mechanics were similarly relieved from their obligation to possess a CDL. Therefore, Wilson's testimony bears all the earmarks of a reasonable and accurate account of the practical fallout from the previous lawsuit, and the MERC did not err by accepting it as true.

Nevertheless, respondent argues that the master collective bargaining agreements (CBAs) negotiated between respondent and the Federation for the periods from 1998-2001 and 2001-2005 clearly and unambiguously include CDL requirements for DDOT mechanics. We disagree. The master CBAs only provide that employees who are required by their job specifications to possess a CDL may submit a form to be reimbursed for 50 percent of their license renewal fees and 100 percent of the cost of obtaining required endorsements. There is no language that allows respondent to impose a CDL requirement on a group of employees without first negotiating with the Federation, and there is no list of which employees are required by their job specifications to possess a CDL. Finally, there is no reference specifically directing general mechanics to obtain CDLs, and no language regarding what discipline is available against employees who should possess a CDL but do not. The CBAs are simply silent on these issues. If anything, the inclusion of the CDL reimbursement language in the CBAs indicates respondent's waiver of the requirement for general mechanics, because Wilson testified that no general mechanic ever received reimbursement after obtaining a CDL. Accordingly, we reject respondent's argument that the CBAs' reimbursement provisions clearly and unambiguously settle this issue, and the MERC's factual findings rested on competent, material, and substantial evidence.

Respondent next challenges the MERC's legal determination that the agreement between Wilson and Oxendine could establish a longstanding practice between the parties that could then only be modified after providing the Federation with notice and giving it an opportunity to bargain over a "new" enforcement policy. We disagree. Because the parties' CBAs do not cover the issue and the parties' actions did not contradict any language in the CBAs, we do not hold the Federation to the stricter burden set forth in *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 325-327; 550 NW2d 228 (1996), to show that the parties' past practice created a new term or condition of employment.

Here, the Federation never mutually assented to the initial modification of the general mechanics' job description, and after respondent's loss in Wayne Circuit Court, the Federation took measures to ensure that the requirement was never enforced in the DDOT. Over the next six years, respondent consistently refrained from taking disciplinary action against the DDOT employees who failed to conform to the amended, and arguably void, job description. Respondent agreed to forego disciplinary measures and enforcement of the provision, and the agreement's validity did not depend on whether the parties officially memorialized the agreement by changing the written job specifications or otherwise reduced the agreement to writing. Instead, an agreement can be merely a tacit understanding between the parties that the practice exists and will continue. See *Amalgamated*, *supra* at 454-455. In this case, the parties expressly agreed that the job description's CDL requirement was inoperable and void, so the DDOT would not attempt, again, to require compliance with its terms. After this agreement to

suspend the CDL requirement, respondent could not reverse its position, enforce the CDL requirement, and discipline any employee for violating the provision without first notifying the Federation and negotiating those basic terms and conditions of employment. *Id*.

Put another way, respondent never established that the Federation had waived its right to bargain over respondent's initial unilateral amendment of the job descriptions. The MERC's determination regarding a union's waiver of its right to bargain is a question of fact. *Amalgamated*, *supra* at 461. In determining whether a party waived the right to bargain over a contract's terms, we consider the parties' bargaining history and their interpretation of the contract language. *Id.* at 460.

In this case, there was conflicting testimony regarding whether respondent notified the employees and the Federation of the 1993 amendment that added the CDL requirement to the job description. Nevertheless, both the hearing referee and the MERC found that Wilson reached an oral agreement with respondent's human resources director that the department would not discipline employees who failed to maintain a CDL. This agreement reflected the parties' mutual understanding that the CDL requirement in the job description was void, and that no formal negotiations were necessary to settle the issue. It would completely invalidate these findings to hold that, even though the Federation opposed and defeated respondent's blanket enforcement of a unilateral CDL requirement, the Federation tacitly acceded to respondent's unquestioned authority to institute and enforce the material alteration to the contract. Moreover, to constitute a waiver of the right to bargain, the waiver ordinarily must encompass a "specific subject." *Id.* at 462. Respondent's arguments only cite later contract negotiations that involved general citywide provisions that allowed all of respondent's employees to seek reimbursement for certain costs associated with obtaining and maintaining required licenses. Accordingly, the evidence does not reveal that the specific issue of imposing a CDL requirement on DDOT mechanics was raised, thoroughly discussed, or otherwise adequately explored during the bargaining sessions for the post-1993 CBAs. *Id*. at 461. Therefore, the MERC did not err by rejecting respondent's allegations that the Federation had waived its right to bargain.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly