STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT
(DEPARTMENT OF TRANSPORTATION),
Respondent-Public Employer,

Case No. C98 B-25

-and-

AMALGAMATED TRANSIT UNION, LOCAL 26,
Charging Party-Labor Organization,

-and-

ATC/VANCOM,
Interested Party.
_____/

APPEARANCES:

City of Detroit Law Department, by David J. Masson, Esq., for the Respondent

Mark H. Cousens, Esq., for the Charging Party

McMahon, Berger, Hanna, Linihan, Cody & McCarthy, by James N. Foster, Jr., Esq., for the Interested Party

DECISION AND ORDER

On July 28, 1998, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order

for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

_____
Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

For the Respondent: David J. Masson, Esq. City of Detroit Law Department

For the Charging Party: Mark H. Cousens, Esq.

For the Interested Party: McMahon, Berger, Hanna, Linihan, Cody & McCarthy, by James N. Foster, Jr., Esq.

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

This case was heard at Detroit, Michigan on April 8, 1998, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. This hearing was conducted pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 & 423.216, MSA 17.455(10) & 17.455(16). Based upon the entire record, including post-hearing briefs filed by the parties on or before June 2, 1998, I make the following findings of fact, conclusions of law, and recommended order:

The Unfair Labor Practice Charge:

The charge was filed on February 17, 1998, by the Amalgamated Transit Union, Local 26, against the City of Detroit, Department of Transportation. Charging Party represents a bargaining unit

of "line haul" bus drivers employed by the Respondent. The charge alleges that Respondent violated its duty to bargain with Charging Party by unilaterally entering into a subcontract with ATC/Vancom, a private contractor, to provide public transportation services of a type known as paratransit. However, at the hearing Charging Party changed the theory of its charge. Charging Party now alleges that Respondent violated PERA by repudiating an agreement with Charging Party to bargain over the assignment of the paratransit work to employees represented by the Charging Party.[1]

ATC/Vancom moved to intervene in this matter on March 23, 1998. Its motion was opposed by the Charging Party. I denied the motion in an order dated April 2, 1998. However, I designated ATC/Vancom as an interested party, giving it the right to automatically receive copies of all pleadings and orders. At the hearing, I denied ATC/Vancom's motion for reconsideration of my order denying it intervenor status. ATC/Vancom then sought, and was allowed, to make an offer of proof.[2]

Findings of Fact:

A paratransit system provides transportation on demand to elderly and disabled citizens. Eligible individuals call a special number and provide information identifying themselves as eligible to use the service. An appropriate vehicle picks them up at their homes, takes them to their destinations, and carries them home. Since January 1997, Respondent, as the operator of an urban bus system, has been required to maintain a paratransit system by the federal Americans with Disabilities Act. Residents of the City of Detroit did, in fact, have access to paratransit services prior to January 1997. For approximately 20 years, Respondent had agreements with the Southeastern Michigan Transportation Authority (SEMTA), and later with its successor, the Suburban Mobility Authority for Regional Transportation (SMART), to provide paratransit services within the City. Throughout this

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[1] On July 24, 1998, after the close of the hearing and the filing of briefs, Charging Party moved to amend its request for relief to ask that the Commission order Respondent to terminate its contract with ATC/Vancom. According to the motion, on July 21, 1998 the Court of Appeals vacated the injunction issued by the Circuit Court prohibiting Respondent from finalizing the contract. Charging Party's motion is granted

[2] This offer of proof was as follows: (1) that after ATC/Vancom commenced providing paratransit services in the City of Detroit in January 1997, its employees were advised that they were free to join any labor organization they wanted; (2) that both AFSCME and the Teamsters Union openly campaigned to organize these employees; (3) that after a petition for a representation election was filed by the Teamsters with the National Labor Relations Board (NLRB), ATC/Vancom voluntarily recognized that union as the bargaining agent of its Detroit employees on June 23, 1997, after an impartial card check showed that the Teamsters had majority support; (3) that an employee of ATC/Vancom had regular discussions with Charging Party's representatives, and that through these discussions Charging Party knew, as early as April 1997, that ATC/Vancom was proposing a five year contract with Respondent; (4) that due to the start-up costs of providing these services, the only way ATC/Vancom would have agreed to begin providing paratransit services to Respondent would be on Respondent's agreement to a contract of at least five years duration; and (5) that no employee of Respondent was ever laid off or lost any work as a result of ATC/Vancom's actions.

period, Respondent did not operate a paratransit system using its own employees.

The Director of Respondent's Department of Transportation, Al Martin, concluded in 1995 that Respondent ought to end its arrangement with SMART. Sometime in late 1995 or early 1996, Martin approached Kent Bishaw, then Charging Party's president, with a proposal to bring the paratransit services "in-house." Martin proposed to Bishaw that the work be performed by part-time employees represented by Charging Party. Under Martin's proposal, the paratransit drivers would be part-time employees receiving part-time benefits, and would do paratransit work only. However, as positions opened up for full-time line haul drivers, paratransit drivers would be eligible to move into these vacancies. Martin and Charging Party's executive board discussed the paratransit issue at their monthly labor-management meetings over a period of about four months. At the end of this period, Charging Party rejected Martin's proposal. Charging Party had never represented part-time employees and was uncertain whether it wished to do so. However, the parties agreed that they would take up the subject again in January 1998. In the meantime, Charging Party would consider how it might accommodate part-time employees, and Respondent would seek out a new subcontractor for the work. Martin indicated that he would attempt to negotiate a subcontract for a two-year term.

At the time of these discussions the parties had no collective bargaining agreement. The parties' previous written contract had expired, and in June 1995 Respondent had implemented its final contract offer after the parties had reached impasse. Throughout most of 1996 the parties were actively engaged in negotiations for a new agreement. Respondent's Labor Relations Director, Roger Cheek, was the chief spokesperson at these negotiations. Martin was not a member of Respondent's bargaining team. In March or April 1996, Respondent presented Charging Party with a contract proposal identified as Initiative No. 7. This proposal read as follows:

> RE: JOINT LABOR/MANAGEMENT REVIEW OF CONTRACTING-OUT SITUATIONS
>
> The parties agree that the City of Detroit shall have the right to subcontract out Paratransit and On Demand Response transportation services.
>
> The parties agree to form a labor/management team to audit, when appropriate, the financial impact of any such transportation services contracts entered by the City. Any such audits and their results shall not, however, require the termination or suspension of the operation of any sub-contracts.

In May 1996, while the above proposal was still on the table, Bishaw wrote to Martin about the paratransit issue. There was no evidence presented at the hearing regarding the contents of this letter. However, Martin replied by letter dated May 15, 1996:

> This letter is in response to (1) our previous conversation concerning demand-responsive transit service and (2) your letter to me, received on Monday, May 13, 1996.

> I am taking this opportunity to clarify any confusion that may exist concerning DDOT's desire and intention to provide increased demand-responsive small bus service in the City of Detroit. Historically DDOT has contracted the aforementioned demand-responsive small bus service to SEMTA, which later became SMART. It is my belief that a change in the existing contractual arrangement will mean improved and increased demand-responsive bus service. It has been my desire to secure the cooperation of Local 26 AFL-CIO Amalgamated Transit Union in providing this service with part-time DDOT employees. Unfortunately, I am unable to secure your cooperation in this endeavor, and consequently, must accept your proposal to continue to provide this service through a contractual arrangement. We will advertise for a prospective transit provider and we will propose a two-year contract.
>
> You have requested that we discuss this issue with you again in January of 1998 and we have agreed to such discussion. If there are any questions concerning this issue, please don't hesitate to contact me.

There was no follow-up exchange of correspondence between Martin and Bishaw. However, at a negotiating session held shortly thereafter, Cheek mentioned that Martin had agreed to Charging Party's request that the parties discuss the paratransit issue again in January 1998.

At a negotiating session held on June 17, 1996, Charging Party presented the following proposal:

> 1. Current bargaining will not address the subject of paratransit or the Department's resumption of control of this service.
>
> 2. The absence of bargaining on this subject is not a waiver by either party of the right to bargain regarding the impact of the Department's resumption of control of this service.
>
> 3. The Union may elect to bargain the impact of the Department's resumption of control of this service by giving notice to the Department of the Union's wish to bargain. Such notice must be given on or before January 10, 1998.
>
> If such notice is not given by either party on or before January 10, 1998, the City of Detroit shall have the right to continue to subcontract out paratransit and on demand responsive transportation services until either party serves notice on the other to bargain the said subject.
>
> 4. Upon the Union's submission of this notice, the parties will begin bargaining as mandated by law.
>
> 5. The passage of time between the ratification of a collective bargaining agreement and the giving of notice will not prejudice any party's rights with respect to bargaining.

Martin did not see this proposal. He testified that he was told that the paratransit issue was being discussed at the bargaining table, but did not know the details of the discussion.

Neither party agreed to the other's proposals as set forth above. In August 1996, both proposals were withdrawn. In November 1996, the parties approved a written agreement which adopted the existing terms and conditions of employment as imposed by Respondent in 1995, with some specified modifications. This agreement, which expired on June 30, 1997, made no reference to paratransit.

Meanwhile, on September 30, 1996, Respondent issued a request for proposals (RFP) from contractors interested in providing paratransit services. The RFP did not mention the length of the proposed contract. Respondent received proposals from two contractors. It selected ATC/Vancom, a private corporation. Respondent entered into an emergency temporary contract with ATC/Vancom, and ATC/Vancom began providing paratransit services on January 25, 1997. In negotiating the terms of its long-term contract with ATC/Vancom, Respondent initially proposed a two-year agreement. Because of the cost, however, Respondent eventually agreed to a five-year contract. The term of this contract was to be August 1, 1997 to July 30, 2002.

In September 1997, Charging Party discovered, by accident, that the ATC/Vancom contract had a five-year term. At this time, Martin had signed the contract, but it had not yet been approved by Respondent's City Council and therefore was not final. Charging Party complained to the City Council that Martin had agreed that the subcontract would be only a two-year agreement, and had promised that Respondent would begin negotiating with it in January 1998. In response to these complaints, the City Council delayed action on the contract. On December 19, 1997, Charging Party made a formal demand to bargain "on the D-DOT Para-Transit Service." In January 1998, a member of the City Council's staff met with Charging Party representatives and Martin to attempt to resolve the issue, without success. On February 9, Charging Party Executive Board Member Johnny Hudnall delivered a written proposal to Martin. Among other points, Charging Party proposed that the Respondent begin providing paratransit services with its own employees immediately; that paratransit work be performed by full-time drivers from Charging Party's unit currently on disabled status rather than by part-timers; and that when necessary, line haul drivers be allowed to operate the paratransit service. Martin rejected this proposal, but told Hudnall that after the ATC/Vancom contract expired, Respondent would agree to use in-house part-time drivers.

Around February 25, 1998, the parties discussed the issue at a regular bargaining session at which Martin was not present. They were again unable to agree. At the conclusion of this meeting, Respondent stated that the subcontracting of this work was not a mandatory subject of bargaining, and that therefore it would not agree to further discussions. Thereafter, Respondent's City Council indicated that it was prepared to approve the contract with ATC/Vancom. However, after the filing of the charge in this case, Charging Party obtained a circuit court injunction prohibiting the City Council from finalizing the contract. This injunction was apparently vacated by the Court of Appeals on July 21, 1998. See fn 1. At the time of the unfair labor practice hearing on April 8, 1998, ATC/Vancom was still providing paratransit services under the terms of the emergency contract, and Respondent and Charging Party were engaged in bargaining for a new contract to replace the agreement which expired in June 1997.

Discussion and Conclusions of Law:

Respondent relies on *City of Southfield Police Officers Assoc. v City of Southfield*, 433 Mich 168 (1989), in arguing that it had no duty to bargain over the decision to subcontract the paratransit work because this work had not previously been performed exclusively by members of Charging Party's unit. Secondly, Respondent argues that the fact that the parties discussed using bargaining unit members to provide paratransit services, both at the bargaining table and in separate discussions with Martin, did not convert this topic from a permissive to a mandatory subject of bargaining. *Local 1277, AFSCME v City of Center Line*, 414 Mich 642, n5 (1982); *Swartz Creek Community Schools*, 1994 MERC Lab Op 223, 226.

I agree with Respondent on both points. The provision of paratransit services was not bargaining unit work, and therefore Respondent had no statutory obligation to bargain with Charging Party about the subcontracting of this work. In its brief, however, Charging Party argues instead that Martin's May 15, 1996, letter to Bishaw constituted a binding agreement between the parties, and that Respondent violated its duty to bargain in good faith by repudiating this agreement.

The first question raised by Charging Party's argument is whether Martin's May 15 letter was a binding agreement. Charging Party argues that the essential element of an agreement is a meeting of the minds, and that there was a meeting of the minds in this case. According to Charging Party, Respondent got the chance to rid itself of the SMART contract and to subcontract, and Charging Party got the opportunity to bargain the paratransit services at an agreed date in the future. According to Charging Party, the fact that Respondent withdrew its bargaining proposal concerning the subcontracting of paratransit services demonstrates that the parties intended to abide by the terms of the agreement summarized in Martin's May 15 letter.

Respondent asserts, however, that Martin had no authority to enter into an agreement binding the City. It points out that Respondent's City Charter clearly provides that the labor relations director is responsible for the negotiation of collective bargaining contracts. Moreover, according to Respondent, during 1996, labor negotiations were taking place between the parties and Charging Party was aware that Roger Cheek, the labor relations director, was the chief spokesman in these negotiations. While Bishaw was discussing paratransit with Martin, who was not a participant in the negotiations, Respondent had a proposal on the subcontracting of paratransit services on the bargaining table. Even if Cheek mentioned Martin's agreement to discuss the issue again in January 1998 at the bargaining table after Martin's May 15 letter, the fact that Cheek did not alter Respondent's table proposal indicated that he did not consider the issue resolved. Furthermore, on June 17, Charging Party presented Respondent's bargaining team with a paratransit proposal. According to Respondent, if Charging Party had believed that the parties already had a binding agreement in Martin's May 15 letter, there would have been no need for this proposal. In August 1996, both parties withdrew their proposals and later entered into an agreement which did not mention paratransit. According to Respondent, this course of events indicates that the parties left the paratransit issue unresolved.

Respondent also points out that Respondent's City Charter also clearly provides that all collective bargaining contracts must be ratified by the City Council. It argues, again, that Charging

Party was clearly aware of this provision. Respondent also notes that the Commission has repeatedly held that, except in those rare instances where the equitable doctrine of estoppel must be applied, under PERA, a collective bargaining agreement must be ratified by the governing body of a public employer in order to be binding. *City of Pontiac*, 1992 MERC Lab Op 245; *City of Detroit*, 1992 MERC Lab Op 145; *Buena Vista School District*, 1982 MERC Lab Op 1031; *Genesee County Board of Commissioners*, 1982 MERC Lab Op 84. Respondent argues that there are no facts to support an estoppel argument here. In fact, Respondent did not receive any benefit as a result of the May 15 letter; the agreement of Charging Party to allow Respondent to subcontract was not a benefit since Respondent was already free to do so.

I agree with Respondent. Under Respondent's City Charter, the labor relations director must agree to, and the City Council must approve, any agreement between the City and its unions. Even if Charging Party had an agreement with Martin, Martin did not have the authority under Respondent's City Charter to make an agreement which would bind Respondent. Charging Party knew, or should have known, this fact. The fact that Charging Party made a proposal at the bargaining table concerning future bargaining over paratransit after it had received Martin's May 15 letter suggests that it did realize that its agreement with Martin was not sufficient. Charging Party asserts that the Charter provisions are not relevant where the parties have agreed upon another method for approval, and that "neither Martin nor Bishaw required that their principals endorse or approve the May agreement." There is, however, absolutely no evidence in this record that Respondent, i.e., the labor relations director and the City Council, agreed to give Martin the authority to enter into a binding agreement without their approval.

Charging Party also argues that this case is nearly identical to *Taylor Public Schools*, 1994 MERC Lab Op 285. It is not. In that case, the Commission found that the Employer violated its duty to bargain when it violated the terms of a consent order approved by the circuit court which provided that all outstanding disputes over the terms of its new contract with the Union would be submitted to binding arbitration. While the Employer in that case argued that it had no obligation to arbitrate disputes over a permissive subject of bargaining, there was no dispute over the authority of the persons signing the consent agreement or the binding nature of that agreement.

In summary, I find that Martin's May 15 letter did not constitute a binding collective bargaining agreement because Martin had no authority to enter into such an agreement with the Charging Party. I conclude that this finding by itself is sufficient to justify a recommendation that the charge be dismissed.

However, I also agree with Respondent that it did comply with the promises made in Martin's May 15, 1996 letter. Martin did not promise Charging Party that Respondent would enter into a new subcontract with a two-year term. Martin's May 15 letter states, "we will propose a two-year contract." The record indicates that Respondent did initially propose to ATC/Vancom that the contract be for a two-year term, but could not reach agreement with it on that basis. Martin's May 15 letter also indicated that Respondent would "discuss the issue again in January 1998. According to Charging Party, the May 15 "agreement" requires the parties to meet and bargain. Presumably,Charging Party means that Martin agreed to bargain over the paratransit work as if it were a mandatory subject of bargaining. That is, Martin obligated Respondent to bargain with Charging Party in good faith until

reaching either impasse or agreement, and to refrain from taking unilateral action until these obligations were satisfied. Although "discuss" and "bargain" are generally synonymous in collective bargaining parlance, Martin clearly did not agree to assume the obligation of bargaining with Charging Party over the performance of paratransit work as if that were a mandatory subject of bargaining. In fact, the parties did discuss the issue in January and February 1998.

In accord with the discussion set forth above, I find that Martin's May 15, 1996, letter to Charging Party representative Bishaw did not constitute a collective bargaining agreement binding on Respondent. For that reason, I conclude that Respondent did not violate its duty to bargain under Section 10(1)(e) when it refused to engage in further discussions with Charging Party over the provision of paratransit services and attempted to finalize its contract with ATC/Vancom for these services. I also conclude that Respondent complied with any promises made by Martin in this letter. For these reasons, I recommend that the Commission issue the following order pursuant to Section 16(b) of PERA:

Recommended Order

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia Cardno Stern
Administrative Law Judge

Dated: _____