STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PARCHMENT SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C98 L-248

-and-

KALAMAZOO COUNTY EDUCATION ASSOC.,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, by Richard D. Fries, Esq., for Respondent

White, Przybylowicz, Schneider & Baird, by Douglas V. Wilcox, Esq., for Charging Party

DECISION AND ORDER

On January 28, 2000, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
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APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, by Richard D. Fries, Esq., for the Respondent

White, Przybylowicz, Schneider & Baird, by Douglas V. Wilcox, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Lansing Michigan on May 27, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on July 12, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The charge was filed on December 22, 1998, by the Kalamazoo County Education Association against the Parchment School District, and was amended on May 20, 1999. Charging Party represents a bargaining unit of custodial, maintenance, food service, and transportation employees employed by the Respondent. The charge, as amended, alleges that on November 2, 1998, Respondent unlawfully decided to subcontract its food service operation and terminate its food service employees in retaliation for their union and other activities protected by PERA, specifically their filing of grievances under the parties' collective bargaining agreement.

Facts:

In November 1998 Respondent employed approximately 35 food service employees. These employees were part of a bargaining unit represented by the Charging Party which also included custodial, maintenance, and transportation employees. The total number of employees in the bargaining unit was approximately 60.

The record indicates that over the years Respondent has gone back and forth between managing its cafeteria operation itself and employing a private contractor to manage it. Until the subcontracting which is the subject of the charge, however, Respondent always employed the cooks and other employees actually providing services. Respondent's food service operation has shown an operating deficit every year since 1982.

During the 1995-96 school year, Respondent was managing its food service operation itself. Food service generated an operating deficit of approximately $50,000 during the fiscal year ending June 1996. Sometime in the latter half of 1996, Respondent's Board formed an ad hoc food service committee to review possible options for reducing costs and, hopefully, eliminating the operating deficit. In January 1997, Respondent's food service director presented the committee with a proposal from a private contractor to take over the management of the food service operation. Under this proposal, hot lunch would be provided only at the high and middle schools; the contractor would supply box lunches for the elementary schools. The proposal required the layoff of some bargaining unit members. The net savings, according to the proposal, would be about $16,000 per year. The committee concluded that the proposal had the potential for causing labor unrest, left too many unanswered questions, and did not justify its net annual savings of $16,000. Shortly thereafter, the food service director was reassigned and the position was left vacant.

On January 30, 1997, the Board's personnel committee held a meeting. Chuck Carpenter, Respondent's assistant superintendent, spoke at that meeting. Carpenter's responsibilities for the District include both finances and labor relations. The official meeting minutes reflect the following remarks by Carpenter and by Dick Patterson, a Board member:

> Chuck said that reductions in the food service staff totaling seven hours per day have been implemented. He estimated a saving of over $8,000 annually. The reductions have been grieved and it appears the employees are balking at the new schedules. Chuck will keep the Board informed.
>
> Dick said that it could reach a point where the District should subcontract with Canteen or a similar company and replace the entire staff.

Sometime after this meeting Respondent settled the grievance by reinstating the previous work schedule and paying back pay to the employees affected.

The food service operating deficit for the fiscal year ending June 1997 was approximately $76,000. In the spring of 1997, Respondent solicited bids from private contractors to assume the management of its cafeteria operations. Respondent asked each bidder to affirm that it would have the ability to take over the District's entire food service operations if asked to do so in the future. During the summer of 1997, Respondent contracted with Nutrition Services, Inc. to manage its food service operation beginning with the 1997-98 school year. This contract was for management services only.

The grievance procedure contained in the parties' collective bargaining agreement provides that before a written grievance is filed, a meeting must first be held between the employee and his or her union representative and the employee's supervisor. After NSI became the manager of Respondent's food service operation, Joy Tourney, the food service manager employed by NSI, represented Respondent in Level 1 meetings involving food service employees. Tourney was also

usually present, along with Carpenter, at Level 2 and Level 3 grievance meetings. During the 1997-98 school year Charging Party's bargaining unit filed 10 to 12 grievances. All but one was filed by a food service employee.

One of the first Level 1 meetings Tourney attended involved a complaint by an assistant cook that she had been asked to serve food, work which was out of her classification. The first meeting on this complaint took place in September 1997. At this meeting Tourney told Charging Party steward Denise Roach that she (Tourney) hated unions, because without a union there would be no job classifications and she could tell anybody to do what she wanted them to do. At another Level 1 meeting, in October 1997, Tourney told Roach that she was tired of all the grievances Roach was filing, and that the union was getting in the way of her doing her job.

NSI's performance was reviewed by the Board's finance committee at its December 11, 1997 meeting. Carpenter informed the committee that the current operating deficit for the fiscal year beginning June 1997 was approximately $23,000. He went on to say that NSI had been handicapped by the fact that staffing levels (per the grievance settlement) had to be maintained for the year, but that he anticipated that the deficit would decrease in the future based on suggestions from NSI. Board member Patrick Krause suggested that Respondent consider turning the entire program over to a food service management company. Carpenter replied that it had been discussed and that it was an option.

The food service operating deficit for the fiscal year ending June 1998 was approximately $50,000. NSI's management contract was renewed for the 1998-99 school year. However, at the beginning of the year, the Board's personnel committee asked Carpenter to review the feasibility of turning over its entire food service operation to NSI. On September 25, Carpenter prepared a memo for the Board which contained the following analysis:

> Nutrition Services has estimated a labor savings of $30,703.[1] Part of this cost would be offset by an increase in their administrative fee of $6,700. The net savings would therefore be $24,003.
>
> I estimate I conservatively spend an average of two hours per week on the personnel aspect of Food Service. This would include formal negotiation, mediation, grievances, arbitrations and general personnel matters. The amount of my salary estimated to be dedicated to Food Services is $4,000.
>
> Other costs in 1997-98 associated with Food Service:
>
> - Actual Attorney Fees (1997-1998) $1,161
> - Payroll Costs 2,500
> - Worker's Compensation 6,750

[1] According to the record, approximately $24,000 of these savings represented contributions to the school employees retirement fund that NSI, as a private employer, would not have to make on behalf of its employees.

> The total potential savings, recognizing that some labor savings are "on paper" only, would be $39,914.

At a Board meeting on November 2, 1998, Carpenter recommended that the Board authorize him to enter into a contract with NSI to take over the District's entire food service operation. The minutes reflect the following discussion:

> Jon (Heasley, a Board member) asked if the move was purely financial. Chuck responded that though there is a financial incentive, he would probably recommend it anyway. Currently six grievances are pending, five from Food Service, with two headed for arbitration. John asked if it would be possible to gain control internally. Chuck responded he has done so over the years bit by bit, but every change, reduction or modification has been met with grievances. For the most part, the District has prevailed but it is a time consuming and expensive process. He believes the timing and opportunity are such that the move would be highly appropriate and beneficial to the District.
>
> Gary (Shaw, a Board member) said he was inclined to support it. There needs to be improvement. Kathy (Creek, another Board member) agreed. Bruce (Bushouse, Board member) added that his kids now enjoy hot lunch. NSI has made improvements; there is a positive history, and he believed the time was right.
>
> By consensus, the Board authorized the administration to inform the union of its intent to privatize the Food Service program. Formal action, if necessary, will be taken at the November Board meeting.

At the hearing in this case, Carpenter explained that by "financial incentive," he meant the cost savings NSI had estimated. When he said that he would recommend the contract even without this, he meant that the administrative time saved by not having to deal with grievances and other personnel matters would generate enough cost savings to justify the contract.

On November 6, 1998, Carpenter informed Union representative Susan Hughes that the Board had decided to privatize the food service program. In response to Hughes' question whether there would be an opportunity to discuss the situation later, Carpenter replied that the decision had already been made. Carpenter then gave Hughes a letter indicating that effective July 1, 1999 the Board would no longer employ anyone in a food service classification except lunchroom supervisors.[2] On November 11, Carpenter sent a letter to food service employees indicating that they would be laid off effective the day after their last workday of the 1998-99 school year.

The record indicates that at on this date Respondent was in good general fiscal health, was experiencing increased enrollment, and had a positive general fund balance.

Discussion and Conclusions of Law:

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[2] Between 10 and 20 of Respondent's 35 food service employees held this title. Lunchroom supervisors continue to be employed by Respondent as part of Charging Party's bargaining unit.

Effect of 1994 Amendments on an Inquiry into Respondent's Motives

Respondent argues that Section 15 of PERA, MCL 423.215, MSA 17.455(15), as amended by the legislature in 1994, forecloses inquiry into its motives for subcontracting its food service operations.

Prior to the 1994 amendments, Sections 10(1)(e) and 15 of PERA had long been interpreted by the Commission and the Courts as requiring public employers to bargain in good faith over decisions to subcontract to private employers work previously performed by employees represented by a union. See *Van Buren Public Schools v Wayne Circuit Judge*, 61 Mich App 6 (1975), *aff'g* 1973 MERC Lab Op 714. In 1994, the legislature added a number of provisions applicable to public school employers to the statute, including the following:

> Section 15(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
> . . .
>
> > (f) the decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party; or the impact of the contract on individual employees or the bargaining unit.
>
> (4) The matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

In *Michigan State AFL-CIO v MERC*, 212 Mich App 472, 484-488 (1995), the Court of Appeals found these amendments to be constitutional. In doing so, it adopted the Wayne County Circuit Court's interpretation of the amendments to Section 15(3). The courts concluded that in using the term "prohibited subjects," the legislature had intended to make the matters therein illegal subjects of bargaining, as those terms of art are generally understood. That is, the courts held that under Sections 15(3) & (4) a school district and a union are not forbidden to discuss these matters. Rather, a school district can never be found to have committed an unfair labor practice by refusing to bargain over them, and these matters can never become part of a collective bargaining agreement.

In *Colon Community Schools*, 1997 MERC Lab Op 1, an administrative law judge for the Commission held that Section 15(3)(f) did not release a school district from its duty to bargain over the transfer of noninstructional support services work from employees represented by a union to other employees of the school district. The administrative law judge found, however, that the school district had fulfilled its duty to bargain. The administrative law judge also found that the evidence did not support a finding that the transfer was motivated by the employees' union activities in violation of Section 10(1)(c) of the Act. The Respondent in that case, however, did not argue that Section 15(3)(f) barred the Commission from finding that the transfer of work was discriminatorily motivated. This is, therefore, an issue of first impression.

Respondent argues that the legislative history of Section 15(3)(f) indicates that the provision

was intended to insulate school employers from liability for making certain decisions about management of the district and to thereby "put management of schools back in the hands of the community and their board representatives." *House Bill 5128 Legislative Analysis* (4-27-94). Therefore, Respondent argues, Section 15(3)(f) was enacted to permit the very action taken in the present case, i.e., a subcontracting which allowed the school district to contain costs by getting out of the food service business and focus instead on providing direct educational services to the community. According to Respondent, by this charge the Union seeks to penalize or restrict it from acting upon the very considerations, cost and efficient use of administrative resources, that the legislature sought to preserve.

When initially enacted, PERA was patterned on the National Labor Relations Act (NLRA) 29 USC §150, *et seq.* Neither the NLRA nor PERA, in its original form, explicitly makes any issues "illegal" subjects of bargaining, and few have been held to fall into that category. [3]

Neither this Commission, prior to the 1994 PERA amendments, nor the National Labor Relations Board (NLRB), which enforces the NLRA, have held any type of subcontracting to be an illegal subject of bargaining. In general, subcontracting is a mandatory subject of bargaining under both statutes. The NLRB, however, holds that the subcontracting of work is a permissive subject of bargaining if it is a "core entrepreneurial decision arising from a fundamental change in the direction of the corporate enterprise." However, the NLRB has held an employer's subcontracting decision cannot be a legitimate entrepreneurial decision exempt from the duty to bargain if anti-union considerations are at the heart of the alleged fundamental change. *Westchester Lace, Inc.*, 326 NLRB No.19 (1998); see also, *Joy Recovery Technology Corp,* 320 NLRB 356 fn. 3 (1995), *enf'd* 134 F.3rd 1307 (7th Cir, 1998); *Delta Carbonate*, 307 NLRB 118 (1992). That is, if the NLRB concludes that a subcontracting decision is motivated by the employees' union activities, it will find the employer to have violated both Section 8(a)(5) of the NLRA, the good faith bargaining section, and Section 8(a)(3), the discrimination section of the statute.[4]

Other states have interpreted their public employee collective bargaining laws to make subcontracting a "nonnegotiable" subject of bargaining. In *Local 95 IFPTE, AFL-CIO v State of New Jersey*, 88 N.J.893 (1982), the New Jersey Supreme Court held that a public employer's decision to subcontract based either on fiscal considerations, or on the manner in which services should be provided, was a matter of general public concern which was inappropriate to place on the bargaining table. More recently, the Florida Public Employee Relations Commission (FPER)

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[3] Under both statutes, issues are divided into "mandatory," "permissive," and "illegal" subjects of bargaining. An employer or union is not required to bargain over a permissive subject, but a permissive subject may be made the subject of a binding agreement between the parties.

[4] In "*Automatic" Sprinkler Corp v NLRB*, 120 F.3d 612,620 (6th Cir, 1997), *cert denied* 523 US 1106 (1998), the 6th Circuit refused to enforce an NLRB order and held that an employer's exercise of its *contractual* right to subcontract did not constitute a violation of Section 8(a)(3), even if the Board was correct in concluding that the subcontracting was motivated by anti-union considerations. The Board continues to hold to the contrary, however, and the *Automatic Sprinkler* decision was criticized by the Eighth Circuit in *Reno Hilton Resorts v NLRB*, 196 F.3rd 1275 (8th Cir, 1999). The Court in *Reno* opined that unless a contract indicates that the union has clearly and explicitly waived its right to bring a charge of anti-union discrimination, there is nothing to preclude a finding that the subcontracting violated Section 8(a)(3).

held that a public employer's right as stated in the Florida statute to "determine unilaterally the purpose of its constituent agencies . . . and exercise control over its organization and operations," encompassed the right to unilaterally subcontract its services. *Hillsborough Area Regional Transit Authority*, 24 FPER ¶29,247 (1998).

Both the New Jersey Public Employment Relations Commission and the FPER, have held, nevertheless, that the subcontracting of work because of the employees' union activities is unlawful under their statutes. *Dennis Twp Bd of Ed*, 12 NJPER ¶17,005 (1985); *Middletown Twp Bd of Ed*, 25 NJPER ¶30,189 (1999); *Canaveral Port Authority*, 25 FPER ¶29,247 (1998).

In 1996, the Illinois legislature amended the Illinois Educational Labor Relations Act. The Illinois amendments include language essentially identical to Section 15(3)(f) of PERA. The Illinois statute states, in part:

> Section 4.5 Prohibited subjects of collective bargaining. (a) Notwithstanding the existence of any other provision in this Act or other law, collective bargaining between an educational employer whose territorial boundaries are coterminous with those of a city having a population in excess of 500,000 and an exclusive representative of its employees shall not include any of the following subjects:
>
> . . . (2) Decisions to contract with a third party for one or more services otherwise performed by employees in a bargaining unit, the procedures for obtaining such contract or the identity of the third party, and the impact of these decisions on individual employees or the bargaining unit.

The Illinois Educational Labor Relations Board (IELRB) has held that nothing in the above language allows employment discrimination based on union or other protected concerted activity. *Chicago Bd of Ed*, 13 PERI ¶1108 (1997); *Chicago Reform Board of Trustees*, 14 PERI ¶1062 (1998). In *Chicago Reform Bd*, an administrative law judge explained the Board's reasoning:

> Section 4.5 makes many formerly mandatory subjects of bargaining prohibited subjects of bargaining for (the District) and Chicago City Colleges and their unions. However, nothing in the language of Section 4.5 allows employment discrimination based upon union or other protected concerted activity . . .
>
> Section 4.5 of the Act does not allow the District to engage in intentional discrimination against employees who engage in union activity, or other activity protected under Section 3 of the Act, anymore than it permits the employer to intentionally discriminate on the basis of race, age, gender, or national origin. Therefore, while Section 4.5 of the Act relieves the district of the duty to bargain over a number of subjects, and specifically allows the District to make the unilateral decision to subcontract and layoff employees, the District's decision-making process must be neutral with respect to its employees' union activities . . . Employees who have engaged in union and other protected concerted activity must not be discriminated against. In short, although the district is not required to bargain over subcontracting and the impact of subcontracting on unit employees, nothing in Section 4.5 insulates the District from liability for any acts of intentional discrimination against employees due to their union activity.

The Commission has long held that the discharge of employees pursuant to a decision to subcontract may constitute a violation of Sections 10(1)(a) & (c) of PERA if the employer's motive is to discourage or encourage union activity. In *City of Flint (Law Dept)*, 1973 MERC Lab Op 625, the Commission held that the Employer unlawfully discriminated against its employees when it decided to subcontract the work of its law department after its attorneys voted to join a union. The Commission found that the Employer's stated motives, to save money and to have its legal work done more effectively, were mere pretexts. In *Galesburg-Augusta CS*, 1973 MERC Lab Op 963, a Commission administrative law judge found that the Employer violated Section 10(1)(a) & (c) of PERA when it subcontracted its food service operations and discharged its employees. In that case, the Employer had told the Union during contract negotiations that it was considering subcontracting food services, but that it had not yet made a decision. It also told the Union that the Union should show the Employer that the present employees could do the work more cheaply than it had been done. The Union refused, and the Employer entered into a subcontract with a private contractor who substituted student employees for the discharged bargaining unit members

Like my colleague in Illinois, I find nothing in the almost identical language of Sections15(3)(f) or15(4) of PERA indicating that our legislature intended to allow a public school employer to use subcontracting as the means of retaliating against school support staff because they have exercised their rights under Section 9 of the Act. Under the amended statute, it is easier, quicker, and less cumbersome for a public school employer to make legitimate decisions about the subcontracting of noninstructional work. In amending the statute, however, the legislature did not remove public school support staff employees from the Act. The legislature did not make it unlawful for public school support staff employees to engage in collective bargaining, and it did not act to abrogate the protections for engaging in such activity provided in the Act. Respondent's position, that Section 15 forecloses inquiry into its motives for subcontracting its food service operations, is untenable because it would effectively erase all those protections. For example, under Respondent's interpretation of the statute, a public school employer could lawfully subcontract noninstructional work after informing its staff that it would do so unless they rid themselves of their collective bargaining representative. Without a more explicit indication that this was what the legislature intended, I cannot agree that Sections 15(3) and (4) free a public school employer to engage in what would otherwise be clearly unlawful discrimination under the statute.

Respondent's Decision to Subcontract its Food Services

Respondent asserts that its decision to subcontract turned upon lawful budgetary considerations rather than upon any intent to discriminate or retaliate against employees because of their union activities. The elements of a prima facie case of unlawful discrimination under Section 10(1)(a) or (c) of PERA are: (1) union or other protected concerted activity or activities; (2) employer knowledge of this activity; (3) employer animus toward the union or hostility toward the protected activities; (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. *University of Michigan*, 1990 MERC Lab Op 272,288; *Kenowa Hills PS*, 1993 MERC Lab Op 637,640-641; *Louisiana Homes*, 1994 MERC Lab Op 1069, 1079.

Charging Party and Respondent disagree about whether the evidence shows animus by Respondent toward the grievance filing activity of Charging Party's members. Charging Party cites the following: the anti-union statements made by NSI Food Service Manager Joy Tourney during the fall of 1997; Carpenter's comment at the January 30, 1997, Board personnel committee meeting that grievances had been filed over Respondent's implementation of reductions in food service employee

hours, and a remark by committee member Patterson at this meeting that "it could reach a point" where the District should subcontract and replace the entire staff; Carpenter's explicit mention of time spent by himself on negotiations and grievance arbitration matters relating to food service employees, and attorney fees paid by the District in connection with these matters, in his September 1998 memo to the Board analyzing possible savings from subcontracting food services; and Carpenter's explanation to the Board of his recommendation that it enter into a subcontract with NSI for the entire food service operation, as recorded in the minutes of the Board's November 2, 1998 meeting.

Respondent argues that Carpenter's statements regarding the filing of grievances, and his own and others' time spent processing these grievances, concern only the administrative costs of retaining control over the food service operation, and thus reflect only legitimate budgetary concerns rather than animus toward the employees' protected activities. Respondent also cites Charging Party's admission that its relationship with Respondent over the years has been amicable.

In order to show "animus" sufficient to make out a prima facie case of unlawful discrimination, Charging Party does not have to demonstrate that Respondent or its agents have a violent, irrational hatred of unions. Irritation at a particular union act can suffice, if the evidence indicates that this irritation leads the Employer to take adverse action against employees. The fact that an Employer's desire to rid itself of unionized employees is based at least in part on valid economic considerations does preclude a finding of animus.[5] I find the anti-union statements made by NSI agent Tourney to be irrelevant, since she was not an employer of the Respondent, and there is no evidence that her opinions influenced the Board's subcontracting decision. However, I find that during the 1997-98 and 1998-99 school years Carpenter came to view Charging Party's grievances as an obstruction to a more efficient food service operation. I also find that Carpenter saw these grievances as taking up an undue amount of his and Respondent's attorneys' time. I draw this second conclusion from the fact that Carpenter, in his September 25, 1998 analysis of potential cost savings from subcontracting the food service operation, listed the costs of grievance administration as separate items rather than lumping them together with other administrative costs which Respondent would save by subcontracting the work. Based on these findings, I conclude that Charging Party has established a prima facie case that Respondent's November 1998 subcontracting decision was motivated in part by hostility toward the food service employees because they had filed so many recent grievances.

Once a charging party establishes a prima facie case, the burden then shifts to the employer to produce evidence of a lawful motive and evidence that it would have taken the same course of

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[5]In *Calatrello v "Automatic" Sprinkler Corp.*, 55 F.3d 208 (6th Cir, 1995), the Court found that statements by the employer that its purposes in subcontracting were, in part, to "avoid being signatory to any union contract, pay its demands and work rules," to "eliminate costs associated with union grievances," and to "reduce administration costs associated with union labor" indicated that reasonable cause existed to believe that the employer's subcontracting plan violated Section 8(a)(3) of the NLRA for purposes of determining whether an injunction should be issued against the employer under Section 10(j) of that Act. The Court noted that "anti-union animus is no less anti-union animus simply because it springs from serious economic considerations. Indeed, . . . in the majority of cases where employers commit unfair labor practices . . . , the employer's break the law primarily out of concern for their economic welfare," citing *NLRB v C.J.R. Transfer, Inc.* 936 F.2d 279,283 (6th Cir, 1991). The Sixth Circuit later concluded that the employer did not violate Section 8(a)(3) because it had a contractual right to subcontract the work. See fn.4, *supra.*

action even if the protected activity had not occurred. *MESPA v Evart PS*, 125 Mich App 71, 74 (1983). If the evidence indicates that the unlawful motive was the sole cause for the employer's action, i.e., the employer's stated lawful reasons were mere pretexts, then the charging party has met its burden of proof. If the employer establishes that it was motivated in part by legitimate considerations, the charging party bears the additional burden of showing that unlawful motives were the "but for" cause of the employer's decision.

Respondent argues that its decision to subcontract its food service operations was motivated by its concern over that operation's operating deficit, while Charging Party contends that this was a mere pretext. In support of its position, Respondent points out that the Board first manifested its concern over the continuing deficit several years before deciding to subcontract. It notes that the Board made numerous attempts to cut costs, including contracting with NSI to manage the operation, before it decided to subcontract the whole operation. It also points to Carpenter's September 1998 memo estimating the savings to result from subcontracting. In support of its pretext argument, Charging Party argues that the record shows that Respondent was in excellent overall fiscal health in 1998. It also points out that Respondent's food service operation has consistently run an operating deficit since 1982.

I find that Respondent's concerns with the economics of its food service operation were not mere pretext. The fact that the cafeterias had been running an operating deficit for many years does not mean that Respondent would have no reason to be concerned about this. While Respondent was in sufficiently good fiscal health to be able to cover these operating deficits with transfers from its general fund, the existence of these deficits was a legitimate matter of concern. In fact, Respondent was concerned, as indicated by the fact that in 1996 the Board formed a committee to address this problem. The record also shows that the Board considered subcontracting the entire food service operation to be an option through 1997 and up to the date it decided to so contract with NSI.

An employer's legitimate desire to achieve cost savings does not become unlawful simply because the employer's costs have recently risen due to some union action. In *P.W. Supermarkets, Inc.*, 269 NLRB 839 (1984), the Board held that an employer's decision to subcontract work performed by two employees, precipitated by a grievance settlement which increased their rate of pay, was not unlawful under Section 8(a)(3) of the Act. Similarly, in *Benzie County*, 1986 MERC Lab Op 55, the Commission held that an employer's decision to lay off police officers which was precipitated by an Act 312 award increasing their pay did not violate Section 10(1)(c) of the Act.

I find in this case that the Employer's decision to subcontract its food service operation was motivated both by a legitimate desire to attain cost savings, and a desire to rid itself of the burden of dealing with the union over the many grievances the food service employees continued to file. Which of these was the "but for" reason for the Board's decision? Although this determination depends on a weighing of the evidence as a whole, the conversation recorded in the minutes of the November 1998 Board meeting is obviously relevant:

> Jon (Heasley, a Board member) asked if the move was purely financial. Chuck responded that though there is a financial incentive, he would probably recommend it anyway. Currently six grievances are pending, five from Food Service, with two headed for arbitration. John asked if it would be possible to gain control internally. Chuck responded he has done so over the years bit by bit, but every change, reduction or modification has been met with grievances. For the most part, the District has

prevailed but it is a time consuming and expensive process. He believes the timing and opportunity are such that the move would be highly appropriate and beneficial to the District.

I conclude that by his remarks at this meeting, Carpenter revealed that his desire to get rid of the union and its grievances was the predominate reason he recommended that the Board act immediately to subcontract its entire food service operation to NSI. Carpenter's recommendation was accepted by the Board without challenge. I also note that the record does not indicate that Carpenter or the Board sought out bids from companies other than NSI in the fall of 1998. This suggests to me that Respondent was more interested in making a speedy decision, and thereby rendering the pending grievances moot, than in the overall savings to be achieved from the subcontracting. For these reasons, I conclude that but for the plethora of food service employee grievances and Respondent's desire to rid itself of these grievances, Respondent would not have decided to subcontract its food service operation in November 1998. In accord with the findings of fact, discussion and conclusions of law set forth above, I find that Respondent violated Section 10(1)(a) & (c) when it subcontracted its food service operation and laid off employees employed therein. I will, therefore, recommend to the Commission that it issue the following order:

RECOMMENDED ORDER

The Parchment School District, its officers and agents, are hereby ordered to:

1. Cease and desist from discharging or in any other way discriminating against employees because they have exercised their right under Section 9 of PERA to organize together to form, join or assist the Kalamazoo County Education Association or any other labor organization, to engage in lawful concerted activities, including the filing of grievances under a collective bargaining agreement, for the purpose of collective negotiation or other mutual aid or protection, or to negotiate or bargain collectively with their public employer through representatives of their own free choice.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Offer all food service employees who were laid off effective July 1, 1999 immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

   b. Make the above employees whole for any loss of wages or benefits they have suffered as a result of the unlawful discrimination against them by payment to them of monies in the amount that they would have earned had their employment continued, beginning with their date of layoff and ending on the date they either return to work or refuse an unconditional offer of reinstatement, less interim earnings but including interest at the rate of 5% per annum as provided in MCL §438.31, MSA §19.15(1), computed quarterly.

   c. On request, bargain with the Kalamazoo County Education

Association concerning the terms and conditions of employees providing food services to the Parchment School District

d. Post the attached notice to employees at all places where notices to employees are customarily posted for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the Parchment School District has been found to have committed an unfair labor practice in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order**:**

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT, discharge or in any other way discriminate against employees because they have exercised their right under Section 9 of PERA to organize together to form, join or assist the Kalamazoo County Education Association or any other labor organization, to engage in lawful concerted activities, including the filing of grievances under a collective bargaining agreement, for the purpose of collective negotiation or other mutual aid or protection, or to negotiate or bargain collectively with their public employer through representatives of their own free choice.

WE WILL, offer all food service employees who were laid off effective July 1, 1999, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

WE WILL, make the above employees whole for any loss of wages they have suffered as a result of the unlawful discrimination against them by payment to them of monies in the amount that they would have earned had their employment continued, beginning on July 1, 1999 and ending on the date they either return to work or refuse an unconditional offer of reinstatement, less interim earnings but including interest at the rate of 5% per annum, computed quarterly.

WE WILL, on request, bargain with the Kalamazoo County Education Association concerning the terms and conditions of employees providing food services to the Parchment School District.

PARCHMENT SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Michigan Plaza Building, 14th Floor, 1200 6th Street, Detroit, Michigan 48226. Telephone: (313) 256-3540