STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COLDWATER COMMUNITY SCHOOLS,
Respondent-Public Employer,

Case No. C98 F-125

-and-

GMP INTERNATIONAL UNION, LOCAL 120-B,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun, Maatsch and Nordberg, P.C., by Martha J. Marcero, Esq., for Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by John G. Adam, Esq., for Charging Party

DECISION AND ORDER

On January 27, 2000, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above case, finding that Respondent Coldwater Community Schools did not violate Section 10(1) of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379, as amended, MCL 423.210(1); MSA 17.455(10)(1), by refusing to bargain in good faith with Charging Party GMP International Union, Local 12 or by subcontracting out bargaining unit work. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. On February 14, 2000, Charging Party filed timely exceptions to the ALJ's decision. Respondent filed a timely brief in support of the Decision and Recommended Order on March 7, 2000.

Background:

Charging Party represents twenty-three cafeteria employees of the Employer's food service program. In the fall of 1997, the Employer was faced with cutting programs in order to reduce deficit spending. At a Board of Education meeting on November 17, 1997, the Board voted to investigate privatizing the food service program for the 1998-1999 school year. The collective bargaining agreement between the Union and the Employer was set to expire on July 31, 1998. Beginning in February of 1998, the parties met six times in an attempt to negotiate a new contract. During these negotiations, the Employer's chief negotiator, assistant superintendent Gary Barker, told the Union

that the Board would privatize the food service program if a collective bargaining agreement was not reached by the middle of May. On May 12, 1988, the parties reached a tentative agreement which the Board unanimously rejected in a closed session.

On June 4, 1988, the parties met again in a seventh attempt to negotiate a new agreement. The parties discussed a couple items of concern, but did not come to a new agreement. At some point during the meeting, Bruce Smith, the international representative for the Union, asserted that Barker did not have the authority to reach an agreement with the Union. For this reason, Smith told Barker that the Union wanted a joint meeting with the entire Board. Smith indicated that the Union could meet with the Board on June 16, 19, and 22.

The day after the June 8, 1998, Board meeting, Barker informed Smith that the Board would not meet with the Union because Barker was its spokesperson. However, Barker indicated that he was still willing to meet with the Union and he proposed the three dates in June previously suggested by the Union. Smith told Barker that he was considering filing an unfair labor practice charge based upon the Board's failure to meet with the Union, and because the Board was not providing a negotiator who had the authority to reach an agreement. On June 11, 1998, the Union filed a charge alleging that the Employer violated PERA by failing to bargain in good faith and engaging in regressive bargaining.

Sometime prior to June 29, 1998, Superintendent William Chinery drafted a memo giving background information about the food service program. The memo stated that the Union had been informed that the Employer would privatize the program if the parties did not reach a contract by June 29, 1998. The memo recommended that the Board direct central office administrators to initiate contract negotiations with Canteen Service Company to privatize the food service program.

At the June 29, 1998, Board meeting, the Board voted to begin the process of privatizing the food service program. The Board cited the severe economic condition of the school district as the reason for its decision. On July 1, 1998, Smith sent Superintendent Chinery a letter requesting a contract negotiation session as soon as possible. In response, Superintendent Chinery sent Smith a letter that same day which confirmed the vote to privatize but did not mention further negotiations.

On July 23, 1998, the Union amended its charge to allege that the Employer had bargained in bad faith by sending a negotiator to the bargaining table who lacked the authority to reach an agreement, by refusing to meet and bargain after rejecting the tentative agreement, and by reverting to its original proposal. The Union also alleged that the Employer had unlawfully refused to meet and bargain after the Union filed its charge and that the Employer's decision to subcontract was motivated by the filing of the charge. The Union requested a make whole order, including but not limited to, requiring the Employer to bargain in good faith and to cease and desist from privatizing the food service program until it remedied the unfair labor practices. On August 17, 1998, the Board awarded the food service program contract to Canteen.

The matter went before the ALJ in a hearing held in Lansing on May 11, 1999. The ALJ

concluded that Barker had adequate authority to negotiate on behalf of the Board and that there was no evidence of bad faith bargaining on the part of the Employer. The ALJ also held that the Employer did not retaliate against Charging Party for the filing of the unfair labor practice charge since it was the Union which stopped negotiations after its request to meet with the entire Board was refused, and because privatization was an issue between the parties which dated back to 1995. Accordingly, the ALJ recommended dismissal of the charges.

Discussion and Conclusions of Law:

We agree with the ALJ that the assistant superintendent, Barker, had adequate authority to bargain on behalf of the Employer. The Union argues that Barker conceded to the Union's representative, Smith, that he did not know what it would take to reach a settlement, and that this statement constituted an admission that he lacked such authority. While Barker may not have known the Board's bottom line, the record establishes that he was aware of the particular issues which the Board wanted addressed during negotiations on a successor contract, and that he conveyed that information to the Union. At the June 4, 1998, meeting, Barker told Smith that the Board had specific concerns, including the removal of a section of the expiring contract, changes in the health insurance plan, and a reduction in the number of hours at which part time employees become eligible for benefits. It is undisputed that the Union addressed only one of these concerns by agreeing to a $10 co-pay on prescription drug coverage. Accordingly, we reject the Union's suggestion that the Employer used Barker to frustrate the bargaining process and avoid reaching an agreement.

Next, the Union argues that the Employer violated PERA by refusing to bargain after the filing of the unfair labor practice charge in this matter. The Union refers to various statements made by the Employer's agents in support of this claim, including Barker's remark to a local newspaper that the unfair labor practice charge stopped negotiations, an admission from Barker to Smith that the Employer could no longer hold negotiations once a charge had been filed, and an assertion by a Board member at the August 17, 1998, meeting that the parties' collective bargaining agreement mandated that the Employer stop negotiating once the Union filed a charge. The Union also cites the recommendation memo which the Employer prepared in advance of the June 29, 1998, meeting. That document states, "Tentative dates were established to meet again. They were June 16, 19 and 22. However, on June 10 an unfair labor practice was filed by the Union with MERC."

While these statements cast some doubt on the Employer's willingness to continue bargaining following the filing of the unfair labor practice charge, the simple fact is that it was the Union which was ultimately responsible for the breakdown in negotiations. On June 4, 1998, Smith told Barker that he wanted to meet with the Board as a whole. After that request was denied, the Union refused to engage in further discussions with the Employer's representative. At the hearing, Barker testified that he was willing to continue negotiating with the Union, and Charging Party presented no evidence to the contrary. It is well-established that a union may not demand to bargain directly with the governing body instead of with its designated representative. *Ferris State Univ*, 1998 MERC Lab Op 226, 254. *See also Gibraltar Public Schools*, 1994 MERC Lab Op 625, 632. Although Smith subsequently wrote to the superintendent in an attempt to schedule further negotiations, this letter

was sent to the Employer after the Board had already voted to private the food service program. Given the Union's inaction throughout the previous month, we find nothing unlawful about the Employer's conduct with respect to the negotiations.

The Union also argues that it was the filing of the unfair labor practice charge which precipitated the Employer's decision to subcontract the food service program. Section 15(3)(f) of PERA makes subcontracting with third parties for one or more noninstructional support services, or the effects thereof, an illegal subject of bargaining. While the parties to a collective bargaining agreement may discuss illegal subjects of bargaining, a contract provision that embodies an illegal subject of bargaining is unenforceable. *Michigan State AFL-CIO* v *MERC*, 453 Mich 362, 380, n 9, citing *Detroit Police Officers Assn v Detroit*, 391 Mich 44, 54-55 (1974). This does not mean, however, that an Employer is free to take action concerning an illegal subject of bargaining for a discriminatory reason. In *Parchment School District*, 2000 MERC Lab Op ___ (no exceptions), our ALJ held that subcontracting in retaliation for exercising collective bargaining rights under PERA constitutes an unfair labor practice, and we agree with this conclusion.[1] See also *City of Detroit*, 1994 MERC Lab Op 450 (action within the legitimate authority of the public employer may not be deemed unlawful absent proof of retaliatory motivation). Nevertheless, the record contains no evidence of any discriminatory intent on the part of the Employer in this case.

In support of its contention that the decision to subcontract was unlawful, the Union once again relies on various remarks allegedly made by the Employer's representatives. After carefully reviewing these statements, we fail to see how they establish that the Employer's motive in this case was unlawful. Moreover, the record wholly supports the ALJ's finding that the Employer had been considering privatization for some time prior to the filing of the charge. The Employer initially privatized management of the food service program in 1995. The program was facing an additional projected deficit in the fall of 1997, and the Employer had already cut over $560,000 in various programs for that year. At the November 17, 1997, meeting, the Board voted to direct the administration to investigate privatizing the remainder of the food service program. During negotiations on a successor contract, the Employer's chief negotiator told the Union that the Board would privatize the food service program if a collective bargaining agreement was not reached by the middle of May. Based on this evidence, we agree with the ALJ's conclusion that the decision to subcontract was not made in retaliation for the filing of the charge.

We have considered the Union's remaining arguments and find that they do not merit a change in the result of this case.

ORDER

Pursuant to Section 16 of PERA, we hereby adopt the recommended order of the ALJ as our order in this case.

---

[3] We express no opinion, however, as to the appropriateness of the remedial order issued by the ALJ in *Parchment*.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Maris Stella Swift, Commission Chair

_____

Harry W. Bishop, Commission Member

_____

C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COLDWATER COMMUNITY SCHOOLS
Respondent - Public Employer

Case No. C98 F-125

- and -

GMP INTERNATIONAL UNION, LOCAL 120-B
Charging Party - Labor Organization
_____/

APPEARANCES:

For the Public Employer: Thrun, Maatsch and Nordberg, P.C.
by Martha J. Marcero, Esq.

For the Labor Organization: Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.
by John G. Adam, Esq.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 *et seq.*, MSA 17.455(10) *et seq.*, this case was heard in Detroit, Michigan on May 11, 1999, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). The proceeding was based upon an unfair labor practice (ULP) charge filed by the GMP International Union, Local 120-B (Union) against the Coldwater Community Schools (Employer) on June 11, 1998. Based upon the record and briefs filed by July 12, 1999, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

In a June 10, 1998, charge, the Union alleged that the Employer violated PERA by failing to bargain in good faith over the terms of a new agreement and by engaging in regressive bargaining. In response to the Employer's request for a Bill of Particulars, on July 23, 1998, the Union amended the charge as follows:

> 1. The Employer has violated the Act by bargaining in bad faith because its negotiator lacked authority and because the Employer, after rejecting a tentative agreement

reached May 12, thereafter refused to meet and bargain with the Union. While refusing to meet, the Employer has notified the Union that it has reverted to its original proposal.

2. In addition, the Employer refused to meet and bargain because the Union filed a ULP charge . . . on June 10, 1998.

3. The Employer has also violated the Act because its decision to subcontract, made June 29, was motivated by the Union's ULP charge . . . It is unlawful to subcontract, even if subcontracting is a prohibited subject under the 1994 amendments to PERA, MCLA 423.215, if the reason is retaliation for filing a ULP. PERA makes it illegal for an employer to discriminate because the Union has instituted proceedings under the Act.

On August 10, 1998, I denied the Employer's motion to dismiss the charge.

Finding of Facts:

The Union is the exclusive bargaining representative for twenty-three (23) cafeteria workers employed by Coldwater Community Schools. The parties' latest collective bargaining agreement expired July 31, 1998. They commenced bargaining for a successor contract on February 9, 1998. International representative Bruce Smith and assistant superintendent Garreth Barker were chief spokespersons for the Union and the Employer, respectively.

Privatization has been a principal issue facing the parties for a number of years. In 1995, Canteen Corporation began to manage the Employer's food service operation, and in 1997, voted to investigate privatization of the non-supervisory portion for the 1998-99 school year. Smith regularly attended Board and advisory committee meetings and addressed the Board whenever privatization was discussed. In January 1998, the superintendent of schools met with all union presidents to discuss privatization, among other things. The parties also frequently discussed privatization during bargaining sessions. Barker explained to Smith that the Board would privatize its food service operation if no agreement were reached by mid-May 1998. The Union was also told that if an agreement were reached, the Employer would not privatize.

On May 12, 1998, the parties reached a tentative agreement. However, it was unanimously rejected by the Board of Education. During a June 4 bargaining session, Barker told the Union that he had been "thoroughly beaten up" by the Board and no one spoke in favor of the tentative agreement. Barker told Smith that although he did not know the Board's bottom line, the Board wanted to delete a contract provision regarding farming out unit work, and concessions on health insurance eligibility and on the co-pay amount for prescription coverage. Smith responded by stating that he wanted a legal opinion on deleting the farming out provision, agreed to a $10 co-pay for prescription coverage, but was unwilling to increase the number of hours employees worked per week to qualify for health insurance coverage. Smith told Barker it was clear he (Barker) did not have authority to reach an agreement and he (Smith) wanted a joint meeting with the Board so people would be at the table with authority to make a decision and tell them what it would take to reach an agreement. Smith proposed to meet with the Board on June 16, 19, or 22 1998.

During the Board's June 8 meeting, the Board rejected the Union's request. The next day, Barker told Smith the Board would not bargain with the Union because he (Barker) was their spokesperson. Barker also told Smith that he was available to meet on the three dates Smith had proposed to meet with the Board. Smith, however, did not agree to meet with Barker, but told Barker that the Union was considering filing an unfair labor practice charge for "failure to meet and the fact that they were not providing individuals at the table to make a decision so we could reach an agreement." The charge was filed on June 11, two days later.

A few days before the Board's next meeting on June 29 meeting, Smith learned that privatizing the school lunch program was an agenda item. Pertinent parts of the Board's action document read:

> Pursuant to the Board of Education meeting held May 18, 1998 a meeting was held with the Cafeteria Bargaining Unit on June 4. They were informed that individual members of the Board had expressed concerns about the proposed tentative agreement and what those concerns were:
>
> * * *
>
> They were further informed that if a contract was not ready for approval at the June 29, 1998 Board of Education Meeting, the school lunch program would be privatized, i.e., Canteen would both manage the program and hire the employees.
>
> Tentative dates were established to meet again. They were June 16, 19 and 22.
>
> However, on June 10 an unfair labor practice was filed by the Union with MERC.
>
> The Board of Education's Labor Attorney, Martha Marcero, was contacted regarding the significance of the ULP. Her reply was that it "would not stop the Board of Education from doing what it must do."

Smith attended the June 29 meeting and protested the Board's plan to privatize. The Board, however, passed a resolution to initiate negotiations with Canteen Corporation for a contract, effective August 1, 1999.

On June 30, the day after the Board's vote, Barker was quoted in the *Daily Herald*, the local newspaper, as saying the ULP charge stopped negotiation, and that action, combined with cost considerations stopped negotiations, prompted the Board to vote for privatization. Barker, however, testified that he did not say the ULP stopped negotiations. Rather, he claimed he was misquoted, and the article should have stated that, "the charge had been filed, but they still had three dates to negotiate." The next day, July 1, in a letter to the superintendent and the Board vice chairperson, Smith requested a "contact negotiation session [on either July 6, July 9, or July 13, 1998] with you and/or your designated representatives(s) . . . in a position of authority to reach an agreement." The superintendent respondent to Smith's letter, by stating that the Board had voted to privatize the food

service program at midnight July 31, and further communications should be directed to its attorney.[2]

On August 17, 1998, the Board of Education voted to privatize its non-supervisory food service operation. Monthly, Canteen Corporation bills the Employer for wages and other expenses, monthly.[3] Prior to the vote, the Board vice chairperson articulated his reasons for supporting privatization by stating that negotiations were at a standstill because the parties' contract provided they could not go forward when an unfair labor practice charge was pending.[4] Shortly thereafter, all members of the Union bargaining unit were laid off.

Conclusions of Law:

In 1994, Section 15 of PERA was amended to prohibit a public school employer and a bargaining representative from bargaining over the Employer's decision to contract with a third party for non-instructional support services; procedures for obtaining the contract; the identity of the third party; or the impact of the contract on individual employees or the bargaining unit. MCL 423.215(3)(f); MSA 17.455(15)(f). The Union concedes that under Section 15(f) a public school employer can privatize "non-instructional support services" without bargaining, but contends the statute does not apply because the Employer "engaged in a sham privatization or subcontracting since the Employer uses Canteen as a payroll agent." The relevance of this argument is unclear. The charge does not address this assertion, and Barker's testimony that Canteen bills the Employer for wages and expenses is the only evidence on the record regarding the sub-contract.

According to the Union, even if Section 15(f) applies, the Employer engaged in bad faith bargaining *before* it voted to privatize because: (1) the Employer's negotiator lacked authority and the Employer refused to bargain during June or July, despite repeated requests; (2) the Employer refused to meet because the Union filed an unfair labor practice charge on June 10; and (3) the Employer's decision to subcontract was motivated by, and in retaliation for filing the charge.

The Union claims that the Employer's negotiator lacked authority because during the June 5 bargaining session, Barker admitted he did not know what the Board wanted to reach an agreement, made no final offer, and simply suggested going back to the initial proposal. I find that Barker's inability to tell the Union the Board's bottom line does not mean that he lacked authority to negotiate. It is well-settled that parties are not required to clothe negotiating teams with authority to enter into binding agreements without further ratification. *Farwell Schools*, 1985 MERC Lab Op 948. No matter what agreements the parties agents reach at the bargaining table, the agreements are still subject to ratification by the principals. The concept of ratification implies that principals have the right to reject tentative agreements, although they must do so in good faith. *City of Hamtramck*, 1975

---

[2]Contrary to the superintendent's assertion, the Board's vote on June 29 was merely to initiate contract negotiations with Canteen.

[3]The Employer did not respond to the Union's request for details of the contract with Canteen Corporation.

[4]There is nothing in the contract, however, which states that negotiations stop when a charge is filed.

MERC Lab Op 723, 733; *Genesee County*, 1982 MERC Lab Op 84, 97. I find no evidence of bad faith bargaining in this case. The Employer's negotiator never suggested going back to the Employer's initial proposal as suggested by the Union. Rather, the Union, after being told of the Board's reasons for rejecting the tentative agreement, refused to agree to concessions demanded by the Employer and insisted on meeting with the entire Board or representatives "in a position of authority to reach an agreement."

The Union's second contention is that the Employer refused to bargain after June 10 because its officials decided that the unfair labor practice charge stopped negotiations.[5] As noted above, however, it was the Union's agents who stopped negotiations. Even if the Board were obligated to bargain with the Union, the Board decided on June 8, three days *before* the charge was filed, that it would not bargain with the Union. Thereafter, the Union never made a request to bargain with the Employer's agent. Compare *Gibraltar Schools*, 1994 MERC Lab Op 625.

Finally, the Union claims the Employer violated Sections 10(1)(a) or (c) or (d) of PERA by refusing to bargain, subcontracting, and making public remarks blaming the ULP charge for stopping negotiations and subcontracting. The Union observes that employers cannot restrain, coerce, or retaliate against employees for exercising their right to "institute proceedings." This argument requires little comment. First, the Employer did not suddenly decide to subcontract after the charge was filed. Privatization had been an issue between the parties since at least 1995, when the Employer sub-contracted the management of its food service operation to Canteen Corporation. Two years later in 1997, the Employer created an advisory committee investigate privatizing the non-supervisory portion of its food service operation. Smith all advisory committee meetings and addressed the Board whenever privatization was discussed. Even during negotiations for a successor contract, the Union was expressly told that if an agreement were not reached by mid-May 1998, the Board would privatize. Thus, I find no direct or circumstantial evidence to support the Union's claim that the Employer's privatization decision was motivated by the charge.

Compare *Benzie County*, 1986 MERC Lab Op 55, where the employer admitted its layoff of eight unit members was directly related to the transfer of funds from the sheriff's payroll account to pay the costs of Act 312 arbitration. There, in rejecting the union's retaliation claim, the Commission observed that an employer's exercise of its inherent right to determine the size of its workforce and allocate its resources did not give rise to an inference of discriminatory motive under PERA. See also *Branch County*, 1989 MERC Lab Op 642.

Based on the above discussion, I find that the Employer did not violate PERA by refusing the Union's request to meet with its governing body or deciding to privatize its food service operation. All other arguments raised by the parties have been carefully considered and do not warrant a change in the result. I recommend that the Commission issue the following order:

Recommended Order

The unfair labor practice charge is hereby dismissed.

---

[5]The charge was filed on June 11, 1998.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____