STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C99 I-168

-and-

ST. CLAIR COUNTY EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
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APPEARANCES:

Scott C. Moeller, Esq., Director of Legal Services, for Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for Charging Party

Amicus Curiae: Mark H. Cousens, Esq., for the Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO and the Service Employees International Union, Local 516M

DECISION AND ORDER

On October 31, 2000, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Dismissal in the above matter finding that Charging Party St. Clair County Education Association, MEA/NEA, failed to state a claim under Section 10 of the Public Employment Relations Act (hereafter "PERA"), 1965 PA 379 as amended, MCL 423.210, and recommending that the Commission dismiss the unfair labor practice charge and complaint. The charge alleged that Respondent St. Clair County Intermediate School District (ISD) violated its duty to bargain in good faith by unilaterally eliminating bargaining unit work through subcontracting. Charging Party asserts that this action was part of an effort to undermine its role as the exclusive bargaining agent and diminish the rights of its members under PERA.

On December 11, 2000, Charging Party filed timely exceptions to the Decision and Recommended Order of the ALJ. The ISD filed a timely brief in support of the ALJ's decision on December 21, 2000. In addition, the Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO and the Service Employees International Union, Local 516M moved for leave to file a brief as amicus curiae in support of Charging Party's exceptions on January 11, 2001.

Respondent filed objections to the motion for leave to file the amicus curiae brief on January 16, 2001. This case involves matters of significant public interest to the parties. Therefore, consistent with our authority under Section 16(a) of PERA, the motion for leave to file the amicus curiae brief of the Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO and the Service Employees International Union, Local 516M is granted and the brief is hereby received. See *Detroit Board of Education*, 1994 MERC Lab Op 462, 466.

Charging Party represents a bargaining unit consisting of professional teaching personnel employed by Respondent, including individuals employed at the ISD's Technical Education Center. During the period 1997-1998, Respondent authorized the creation of two public school academies, the Academy for Plastics Manufacturing Technology and the Health Careers Academy, and began transferring certain vocational educational programs from the Technical Education Center ("Tech Center") to those academies. On September 8, 1999, the Union filed an unfair labor practice charge alleging that this constituted a transfer of bargaining unit work in violation of Sections 9, 10(1)(a), (c) and (e) and 15(1) of PERA. On February 22, 2000, Respondent filed a motion for summary dismissal alleging, in part, that the unfair labor practice charge failed to state a claim under PERA. Following oral argument on the motion, the ALJ issued an order recommending dismissal of the charge.

The primary argument of both Charging Party and the amicus curiae is that the ISD's "transfer" of bargaining unit work from the Tech Center constituted subcontracting giving rise to a mandatory duty to bargain under Section 10(1)(e) of PERA. It is well-settled that an employer has a statutory obligation to bargain in good faith over mandatory subjects of bargaining. *DPOA v. Detroit*, 391 Mich 44 (1974). The subcontracting of bargaining unit work is generally a mandatory subject of bargaining under PERA. *Van Buren Public Schools v Wayne Circuit Judge*, 61 Mich App 6 (1975). But see Section 15(3)(f) and (4) of PERA, MCL 423.215(3) (f) and (4) (prohibits bargaining with respect to a public school employer's decision to contract with a third party for noninstructional support services). A public employer has the duty to bargain over the subcontracting of bargaining unit work where (1) the subcontracting does not alter the employer's basic operation; (2) there is no significant capital investment or recoupment; (3) the public employer's freedom to manage would not be significantly abridged by a bargaining obligation; and (4) the dispute is amenable to resolution through the collective bargaining process. *Bay City Education Assn v Bay City Public Schools*, 430 Mich 370 (1988); *Lakewood School District Bd of Ed*, 1990 MERC Lab Op 81, 85.

In dismissing the charge, the ALJ did not directly address whether the ISD's decision to "transfer" bargaining unit work constituted subcontracting. Rather, the ALJ held that Respondent was in fact prohibited from bargaining over the "transfer" of unit work to the public school academies based upon subsections 15(3) and (4) of PERA. Those subsections, which the Legislature added to the Act in 1994, provide, in pertinent part:

> (3) Collective bargaining between a public school employer and bargaining representative of its employees shall not include any of the following subjects:

> (e) The decision whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies under part 6a of Act No. 451 of the Public Acts of 1976, being section 380.501 to 380.507 of the Michigan Compiled Laws, or the granting of a leave of absence to an employee of a school district to participate in a public school academy.
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> (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 purpose of this act, are within the sole authority of the public school employer to decide.

The ALJ held that the decision to authorize an academy necessarily includes the programs that the academy will offer and the work the academy employees will perform. Both Charging Party and the amicus curiae argue that this interpretation of Section 15(3)(e) of PERA was erroneous. We agree. A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *People v McIntire,* 461 Mich 147, 153 (1999); *Coleman v Gurwin*, 443 Mich 59, 65 (1993). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and judicial construction is neither required nor permitted. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995); *Unisys Corporation v Commissioner of Insurance*, 236 Mich App 686 (1999). By its terms, Section 15(3)(e) prohibits bargaining over only two areas: a public school employer's decision to authorize a public school academy, and the granting of a leave of absence to an employee of a school district to teach in such an academy. In finding an unexpressed legislative intent to prohibit bargaining over the transfer of unit work to a public school academy under Part 6A of the School Code, the ALJ ignored the plain text of Section 15(3)(e) and improperly substituted her own judgment for that of the Legislature.

Even assuming *arguendo* that the meaning of Section 15(3)(e) is ambiguous and, thus, subject to interpretation, we reject the ALJ's analysis of that subsection. While it is true that Section 502 of the Revised School Code, MCL 580.501 *et seq.*, specifically includes intermediate school boards, as well as the boards of K to 12 districts, among the bodies permitted to authorize public school academies, it does not necessarily follow that academy employees will perform work which was previously performed by employees of the authorizing school district. It is just as likely that the public school academies will offer programs and services not previously available within the district, and that they will employ individuals outside of the district to perform those services. That fact that Section 502 of the Revised School Code also permits community and state colleges to act as authorizing bodies strongly suggests that the ALJ's interpretation of Section 15(3)(e) was erroneous. It is doubtful that the programs and services offered by a public school academy would ever duplicate the curriculum offered by a community or state college. Therefore, we reject the ALJ's conclusion that Section 15(3)(e) of PERA prohibits a public school employer from bargaining over the transfer of bargaining unit work to an academy authorized by it under Part 6A of the Revised School Code.

When determining the extent of an employer's bargaining obligation, the facts of each case must be carefully examined. *Fibreboard Paper Products Corp v NLRB*, 379 US 203; 57 LRRM 2609 (1964); *Bay City Education Assn*, *supra*, 430 Mich at 377. We find that resolution of this issue should be made only after the development of a full record. Accordingly, we remand to the ALJ for the purpose of determining whether the ISD's decision to "transfer" bargaining unit work to the public school academies constituted subcontracting in violation of PERA. Because the ALJ's dismissal of the Union's Section 10(1)(a) allegation was premised upon her erroneous conclusion that the Legislature authorized this unilateral transfer of work, we remand on that issue as well. Remand is also appropriate with respect to Charging Party's assertion that the ISD engaged in a course of action intended to diminish the rights of the Union and its members. While the charge did not make specific reference to any direct evidence of animus or hostility, it is well-established that discriminatory motivation may be inferred from the totality of the circumstances and may even be established in the absence of direct evidence. See e.g. *North Central Comm Mental Health*, 1988 MERC Lab Op 427; *Residential Systems*, 1991 MERC Lab Op 394, 405. Here, the Union should have been given the opportunity to present evidence in support of its assertion that the ISD violated Section 10(1)(c) of PERA.[1] Finally, the ALJ shall, on remand, consider Respondent's assertion that the charge was not timely filed.

[1] At oral argument on the motion to dismiss, counsel for Charging Party indicated that he would present evidence that the superintendent made various statements from which an unlawful intent could be inferred. The ALJ disregarded these statements on the ground they were not mentioned in either the charge or the Union's response to the motion to dismiss. The Commission has never held the parties in unfair labor practice cases to the rules of pleading used in judicial proceedings. See e.g. *Detroit Downtown Travelodge*, 1967 MERC Lab Op 443, 445-446. Moreover, Rule 54(1) of the General Rules and Regulations of the Employment Relations Commission, R 423.454(1), expressly provides that any charge may be amended "before, during, or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process." Thus, the fact that Charging Party first made reference to the superintendent's statements at oral argument should not preclude the ALJ from considering this evidence.

ORDER

We hereby remand to the ALJ for hearing and the issuance of findings of fact, conclusions of law, and a supplemental recommended order. Following service of the supplemental order on the parties, the provisions of R 423.466 through R 423.470 of the Commission's Rules and Regulations shall be applicable.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Chair

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Harry W. Bishop, Member

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C. Barry Ott, Member

DATED:

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ST.CLAIR COUNTY INTERMEDIATE
SCHOOL DISTRICT,
Respondent-Public Employer,

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ST.CLAIR COUNTY EDUCATION
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APPEARANCES:

Scott C. Moeller, Esq., Director of Legal Services, for the Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
ON
MOTION FOR SUMMARY DISMISSAL

The charge in this case was filed by the St. Clair County Education Association, MEA/NEA, against the St. Clair Intermediate School District under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10). On February 22, 2000, Respondent filed a motion for summary dismissal. Oral argument on this motion was held at Detroit, Michigan, on March 9, 2000, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based on the facts set out in the charge as amended; the pleadings, including the exhibits and affidavits attached to the briefs in support of and in opposition to the motion to dismiss; and the arguments made on the record on March 9, I make the following conclusions of law and recommend that the Commission issue the following order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of professional teaching personnel employed by the St.Clair County Intermediate School District (ISD). On September 8, 1999, it filed a charge against the ISD alleging that it had authorized public school academies pursuant to MCL 380.511, *et seq.*, and then repeatedly transferred existing ISD positions to these academies. According to the charge, Respondent authorized the Academy for Plastics Manufacturing Technology (Plastics Academy) in 1997, and the Health Careers Academy (Health Academy) in March 1999. The charge alleged that by transferring bargaining unit work to these academies, Respondent unlawfully coerced its employees in the exercise of their rights under Section 9 of PERA. The charge also alleged that Respondent transferred the work for the purpose of diminishing Charging Party's bargaining unit, and that Respondent therefore violated Section 10(1)(c) of the Act. Finally, the charge alleged that Respondent unilaterally subcontracted bargaining unit work in violation of Section 10(1)(e) of the Act.

In response to a motion filed by Respondent, Charging Party filed a bill of particulars on October 18, and a supplement on November 1, 1999. In these documents Charging Party listed the positions it alleged to have been unlawfully transferred:

Position	Date of Transfer	Academy
Metal Machining Tech Instructor	1997-98 school year	Plastics
Hydraulics/Fluid Power, a/k/a Industrial Equipment Maintenance and Repair Instructor	1998-99 " "	Plastics
Medical Technology Instructor(3)	1999-2000 " "	Health
Student Services Caseworker	1999-2000 " "	Unknown
Welding Technology Instructor	Uncertain	Plastics
Drafting/CAD Instructor	Uncertain	Plastics2

As noted above, Respondent filed a motion for summary disposition on February 22, 2000. Charging Party filed a response to this motion, accompanied by affidavits, on March 3, 2000.

On April 7, 2000, Charging Party filed an amended charge alleging that on or about March 30, 2000, Respondent posted notices of six vacant positions for the 2000-2001 school year. According to Charging Party, all six positions had previously been included in Charging Party's bargaining unit. Charging Party alleged that Respondent intended to transfer these positions to the academies. The positions were:

Position	Academy
Academic Support Instructor	Plastics
Case Manager/Support Services (Counselor)	Plastics3
Academic Support Instructor	Health
Business Services & Technology Instructor	Unspecified
Electronics Instructor	Unspecified
Food Service & Culinary Arts Instructor	Unspecified

On May 8, 2000, Respondent filed an answer denying the allegations and asserting that the allegations did not raise any new issues.

2 In an affidavit attached to its motion for summary dismissal, Respondent maintains that this position is still part of a program operated by the ISD.

3 In an affidavit attached to its response to the motion for summary disposition, Charging Party asserts that the case worker is employed by the Health Careers Academy, although she is responsible for recruiting and enrolling students in courses taught by the ISD and the Plastics Academy as well.

Charging Party filed a second amended charge on June 21, 2000. Charging Party alleged that on May 23, 2000, Respondent posted as vacant another position which had been previously included in Charging Party's bargaining unit. This position was:

Marketing Instructor Unspecified

In its second amended charge, Charging Party also asserted that Respondent had acknowledged that positions had been removed from the unit in its answers to grievances filed by Charging Party over the postings for the Business Services & Technology Instructor, Electronics Instructor, Food Service & Culinary Arts Instructor, and Marketing Instructor positions. In its answer to the amended charge, Respondent admitted that it did not consider these positions to be part of Charging Party's unit.

The Motion for Summary Dismissal:

Respondent argues that the charge should be dismissed without a hearing for three reasons. First, according to Respondent, the charge is untimely under Section 16(a) of PERA. Second, Respondent argues that the charge fails to state a claim of a violation of PERA. Finally, Respondent points to a previous Commission decision involving these same parties, *St.Clair ISD and the Academy for Plastics Manufacturing Technology*, 1999 MERC Lab Op 38, currently pending before the Court of Appeals. Respondent maintains that the decision in that case bars the instant charge under the principles of res judicata or estoppel by judgment.

Charging Party admits that the Respondent's authorization of the Plastics Academy and the transfer of the metal machining and hydraulics positions to that academy occurred more than six months prior to the filing of the charge. According to Charging Party, allegations relating to these events were included in its charge as background to support its claim that the ISD is engaging in a continuing process of subcontracting bargaining unit work with the intent and/or effect of diminishing the bargaining unit.

The charge alleges that Respondent committed unfair labor practices by transferring various positions to the Plastics and Health academies. There is no dispute that some of these positions were transferred within six months of the filing of the charge. The charge, therefore, cannot be dismissed as untimely.

I conclude, however, that, accepting all facts alleged by Charging Party as true, Charging Party has failed to state a claim under PERA.

Charging Party first alleges that Respondent violated Section 10(1)(e) of PERA by unilaterally transferring bargaining unit work to its academies. Charging Party asserts that material issues of fact exist regarding the nature of the relationship between Respondent and the academies. Charging Party attached to its response to the motion for summary dismissal several affidavits by Allan Baker, a counselor employed by Respondent at the St. Clair County Technical Education Center, and copies of the 1999 and 2000 course catalogs for the Tech Center. In his affidavits, Baker states that instructional services and counseling services previously performed exclusively by members of Charging Party's unit are now being provided, in whole or in part, by non-unit employees of the academies. He also states that certain employees of the academies provide services to students enrolled in ISD programs as well as students enrolled in both academy programs. According to these affidavits, Respondent still recruits students for programs now deemed academy programs in the same manner as it did when these programs were ISD programs. Although designated as academy programs, academy programs are included in the Tech Center catalogs.

I find no material dispute between the parties regarding the facts pertaining to the relationship between the Plastics and Health Academies and the Respondent. The parties agree that

certain vocational educational programs which were once part of the ISD's program at its Tech Center are now part of the Plastics and Health Academies. They agree that Respondent considers the Health or Plastics Academies to be the employer of positions which were formerly included in Charging Party's bargaining unit. The parties also do not dispute that Respondent is a "public school employer"as defined in Section 1(1)(g) of PERA, or that the Plastics and Health Academies are "public school academies" under Part 6A of the School Code. Charging Party does not contend that Respondent had a duty to bargain with Charging Party over its decision to act as an authorizing body for the Plastics or the Health Academy.

Respondent asserts that under Sections 15(3)(e) and (4) of PERA, it has no duty to bargain over the transfer of bargaining unit work from the ISD to the Plastics and Health Academies. Charging Party argues that nothing in these sections gives Respondent the right to unilaterally subcontract or transfer bargaining unit work to an academy.

Subsections 15(3)(e) and (4) of PERA were added by the legislature to PERA in 1994:

> (3) Collective bargaining between a public school employer and bargaining representative of its employees shall not include any of the following subjects:
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> (e) The decision of whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies under part 6a of Act No. 451 of the Public Acts of 1976, being section 380.501 to 380.507 of the Michigan Compiled Laws, or the granting of a leave of absence to an employee of a school district to participate in a public school academy.
> . . .
>
> (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 purpose of this act, are within the sole authority of the public school employer to decide.

Section 15(3)(e) of PERA explicitly addresses only two subjects: a public school employer's decision to authorize an academy, and its decision to grant a teacher a leave of absence to teach in an academy. Language so explicit would normally exclude a broader interpretation, under the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another). However, where the legislative intent is clear, the language of the statute must be interpreted in accord with that intent if possible. Here, Section 502 of the Revised School Code, MCL 580.502, MSA 15.4502, specifically includes intermediate school boards, as well as the boards of K-12 districts, among the bodies permitted to authorize public school academies. K-12 districts are not restricted by Section 6A of the School Code from authorizing academies to operate elementary schools within their districts, and intermediate school boards are not restricted by the Code from authorizing academies to offer instructional programs which the intermediate school district previously offered. Whenever a K-12 or intermediate school district so acts, academy employees will perform work which was previously performed by employees of the authorizing K-12 or intermediate school district. This is, in my view, clearly what the legislature anticipated when it added Part6A to the Revised School Code. Moreover, if the employees of a K-12 or intermediate school district are organized into bargaining units, employees of an academy authorized to operate within that district will very likely perform work which was previously performed exclusively by members of a bargaining unit.

With knowledge of the above, the legislature amended PERA to prohibit bargaining between a public school employer and its unions over a decision to authorize an academy. I find that the decision to authorize an academy necessarily includes the programs that academy will offer and the work that academy employees will perform. Since these decisions cannot be separated, I conclude that Section 15(3)(e) of PERA prohibits a public school employer from bargaining over the transfer

of bargaining unit work to an academy authorized by it under Part 6A of the School Code. As a result, I conclude that Charging Party has failed to allege facts which would support a finding that Respondent violated its duty to bargain in this case.4

I also agree with Respondent that Charging Party has failed to state a claim under Section 10(1)(a) of PERA. Section 10(1)(a) of PERA does not require proof of unlawful motive; conduct which is inherently destructive of important employee rights may violate that section. *City of Detroit (FD),* 1982 MERC Lab Op 1220. See also *NLRB v Erie Resistor Corp.*, 373 US 22, (1963). In this case, whenever Respondent transfers positions to its academies, work is removed from the bargaining unit. Moreover, because employees of the Health and Plastics Academies are not, at least at present, represented by a bargaining agent, no one has an obligation to bargain over the terms and conditions of the employees doing the work. However, since I find that the legislature has authorized an intermediate school board to unilaterally transfer work to academies, I do not believe that Respondent's conduct can be deemed inherently destructive of employee rights under Section 9 of PERA even if Respondent transfers more and more of its programs to academies.

I also conclude that Charging Party has failed to state a claim under Section 10(1)(c) of PERA. These are the facts alleged: Respondent authorized the Plastics Academy and transferred bargaining unit work to that entity. Thereafter, Respondent authorized a second academy, the Health Academy. Respondent transferred more bargaining unit work to both academies.5 These facts are simply not sufficient to support a finding that Respondent's motive for transferring the work was to discourage union activity. Charging Party maintains that under *Smith v Lansing School District*, 428 Mich 248 (1987), the Commission is required on a motion for summary judgment to accept as true Charging Party's allegation that Respondent's purpose in transferring the work was to diminish the bargaining unit. I disagree. *Smith* affirmed the power of the Commission to dismiss a charge without a hearing where no material facts are in dispute. If there is a material dispute of fact, summary disposition is not appropriate. However, even if Respondent's motive for transferring work to the academies is considered to be an issue of fact, Charging Party has alleged no underlying facts here from which a fact-finder could reasonably conclude that Respondent's motive was unlawful. I find that under these circumstances an evidentiary hearing would be pointless.

For reasons set out above, I conclude that, viewing all facts alleged by Charging Party in their most favorable light, Charging Party has failed to state a claim of a violation under Section 10(1)(a), 10(1)(c) or 10(1)(e) of PERA. For this reason, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety.

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4 I would not necessarily have reached this conclusion in the absence of Sections 15(3)(e) and (4) of PERA. Respondent asserts that its had no duty to bargain under the holding of *Bay City Ed Assoc v Bay City Public Schools*, 430 Mich 370 (1988). Respondent argues that like the local school district's decision to give up providing special education programs in *Bay City*, Respondent's decision to eliminate certain vocational education programs was analogous to the partial closing of a business. According to Charging Party, however, Respondent's actions here were more similar to a subcontracting. I agree with Charging Party, but I believe that the Court's holding actually rests on its analysis of other factors not present here.

5 During oral argument, Charging Party's counsel said in response to a question that Charging Party intended to present evidence at the hearing that Respondent's superintendent had stated that he intended to "academize" programs, or and move them from the bargaining unit, and that he intended to "deplete" the vocational programs run by the ISD. However, these statements were not mentioned in either the charge or Charging Party's response to the Respondent's motion to dismiss.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: