STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVIISION

In the Matter of:

BENTON HARBOR AREA SCHOOLS,
Public Employer-Respondent

-and- Case No. C01 D-75

BENTON HARBOR SERVICE EMPLOYEES ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party
_____/

APPEARANCES:

Miller, Johnson, Snell & Cummiskey, PLC, by Gary A. Chamberlin, Esq., and Craig A. Mutch, Esq.

White, Schneider, Baird, Young & Chiodini, P.C., by J. Matthew Serra, Esq., and Jeffrey S. Donahue, Esq.

DECISION AND ORDER

On March 8, 2002, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Benton Harbor Area Schools, did not violate its duty to bargain in good faith pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ also found that Charging Party failed to make out a prima facie case that Respondent's subcontracting decision violated PERA. The ALJ recommended that the charges be dismissed in their entireties. On April 1, 2002, Charging Party, Benton Harbor Service Employees Association, MEA/NEA, filed a timely brief that included exceptions to the ALJ's Decision and Recommended Order and a brief in support. On May 8, 2002, Respondent filed a timely brief in support of the Decision and Recommended Order of the ALJ.

The facts of this case were accurately set forth in the ALJ's Decision and Recommended Order and will be repeated only as necessary here. Charging Party is the exclusive bargaining representative for Respondent's transportation, custodial, food service, security, and maintenance personnel. The parties' 1998-2001 collective bargaining agreement scheduled a wage re-opener in the contract's third year. During the wage re-opener negotiations, it was tentatively agreed that the bus drivers' wage schedule would provide that $.10 per hour would be added for each certification required for the position (i.e. CPR, CDL License). It was also agreed, tentatively, that $.10 per hour would be added to the security personnel's wage schedule for each

certification required for the position (CPR License). The language initialed for the food service personnel contained no premium pay language.[1]

Charging Party's Chief Spokesperson telephoned the Assistant School Superintendent, Respondent's bargaining team member, and advised her of the omission of premium pay in the food service wage schedule. The Assistant Superintendent then prepared a new food service wage schedule which provided that the food service workers would receive premium pay for both CDL and CPR certification. This revision was initialed by both Charging Party and Respondent, and was part of the tentative agreement ratified by Charging Party on March 29, 2001.

At its April 17, 2001 meeting, the Board of Education considered the tentative agreement. Prior to the meeting, Respondent's bargaining representative and School Superintendent Williams prepared and signed a Staff Report recommending Board ratification. At the meeting, a discussion arose among the Board members over the provision regarding premium pay for CPR certification, which resulted in Williams stating that the Board should ratify the agreement without the aforementioned provision. She also stated that they weren't going to "play around with that phrase." Following this discussion, the Board rejected the agreement. On April 24, 2001, Charging Party filed an unfair labor practice charge alleging that Respondent violated its duty to bargain in good faith when its superintendent made disparaging remarks at the Board of Education meeting that caused the Board to reject the tentative agreement. Charging Party also filed an amended charge on July 5, 2001, alleging that Respondent violated Section 10(1)(a) and (c) of PERA when it decided to subcontract its food service operations. The ALJ found that the Superintendent's remarks at the Board meeting regarding the parties' tentative agreement did not evidence bad faith, and that the record failed to show any other evidence that Respondent bargained in bad faith with respect to the agreement. She also concluded that Charging Party failed to make out a prima facie case showing that Respondent's decision to subcontract its food service operations violated PERA.

On exception, Charging Party alleges that the ALJ erred when she ordered dismissal of the charges.[2] In support of this assertion, Charging Party cites a portion of the transcript of the Board meeting and alleges that based on Superintendent Williams' "disparaging remarks," the Board turned down a motion to ratify the tentative agreement. We disagree. As noted in the seminal Michigan Supreme Court case outlining the primary obligation of the parties to a collective bargaining relationship, that duty is to meet and confer in good faith. See *DPOA v City of Detroit*, 391 Mich 44, 53 (1974). The precise meaning of the duty of good faith bargaining has not been rigidly defined in case law. Instead, in a refusal to bargain case such as this, we must look to the overall conduct of a party to determine if he or she "has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement." See *City of Springfield*, 1999 MERC Lab Op 399, citing *DPOA*, *supra*.

Our review of the record and, particularly, of the Board's discussion at its meeting, indicate that the Board did not ratify the agreement because its members were confused about

[1] Respondent's Chief Spokesperson testified that omission of this language was an oversight.
[2] Charging Party did not except to the ALJ's recommendation to dismiss the subcontracting allegation; thus, any exception to this conclusion and recommended order is considered waived. See MERC Rule 423.176(5).

which employees were required to be trained in CPR and, hence, would become eligible for premium pay. As the ALJ noted, they were uncertain as to the precise cost impact of ratifying this language. The ALJ correctly concluded and the record indicates that, at no time during the negotiations, did the parties intend to extend premium pay for CPR training to food service employees. While Charging Party correctly states in its exceptions that neither party sought to change the contract language providing CDL premium pay to food service workers, the dispute in this case centers around premium pay to food service workers for required CPR (not CDL) training. There was never any discussion concerning CPR training and/or CPR premium pay for food service workers during negotiations. It was only when the Assistant Superintendent and the Superintendent (who was not a member of the bargaining team) prepared the Staff Agreement that pay for CPR training was mentioned. This clearly was a mistake, and it was one that was not realized by the Superintendent until the discussion at the Board meeting, which contributed to, if not resulted in, the confusion.

In support of the aforementioned exception, Charging Party also cites to *Springfield,* in which case we found that the employer's actions, taken as a whole, were inconsistent with a sincere desire to reach an agreement, and that the employer was using the ratification process to frustrate the bargaining procedure and avoid reaching agreement. The facts of that case, however, bear little similarity to this case. In *Springfield,* following rejection of two tentative agreements, the employer's chief negotiator notified the union of the specific provisions with which the council disagreed. Although the union proceeded to make concessions, the employer nonetheless rejected the subsequent tentative agreements.

That is hardly the situation in the instant case. The parties admitted that, during negotiations, there was never any discussion concerning CPR training and/or CPR premium pay for food service personnel. Adding this language to the food service wage schedule was a mistake that was not realized until the item was considered at the Board meeting. It was the confusion surrounding this issue, and not the Superintendent's comments, which resulted in the Board's failure to ratify the tentative agreement. Our precedent makes clear that where no actual meeting of the minds takes place, the parties cannot be required to ratify, execute, or implement a contract. See *Genesee County Board of Commissioners*, 1982 MERC Lab Op 84. Moreover, when disagreement as to the meaning of certain language in the tentative agreement becomes apparent, a party is justified in refusing to ratify the agreement. See e.g. *City of Fraser*, 1977 MERC Lab Op 838 (no exceptions) (no meeting of the minds took place where, prior to contract execution, parties disagreed as to meaning of the word "days").

Next, Charging Party contends on exception that the ALJ erred when she did not draw an adverse inference from the fact that Respondent's Superintendent and its Assistant Superintendent were present at the hearing, but neither was called by Respondent to testify. In our view, however, the best evidence of what occurred at the Board meeting and during the negotiations is the tape and the transcript, which were admitted into the record by Charging Party, as well as the exhibits and record testimony. As noted, our review of the entire record leads us to conclude that the Board was confused as to which, if any, employees were required to receive CPR training and, hence, would become eligible for $.10 per hour additional pay. There was no reason for Respondent's witnesses to testify as to what they meant when their precise words and actions were set forth both on the tape and elsewhere in the record.

Charging Party further argues on exception that the ALJ's comment that the Superintendent's intent prior to the meeting did not evidence a deliberate attempt to criticize the agreement changes the result in this case. As noted, a determination as to whether a party is bargaining in good faith requires a review of overall conduct to reach an accurate conclusion as to whether a party is approaching negotiations with a sincere desire to reach an agreement. See *City of Springfield, supra*. We find that the ALJ was doing precisely this when she concluded that there was no evidence that, prior to the meeting, the Superintendent intended to criticize the agreement so that the contract would not be ratified. The ALJ did not conclude that a finding of pre-meditated intent was necessary to prove a failure to satisfy the duty to bargain in good faith; the ALJ was simply examining the Superintendent's conduct to determine whether she might have had reason to delay or disparage the tentative agreement, as Charging Party alleges.

We have reviewed Charging Party's remaining exceptions and find that they do not warrant a change in the result. We, therefore, adopt the ALJ's Decision and Recommended Order as our order in this case.

ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated:_____

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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 and 423.216, this case was heard in Lansing, Michigan on August 24, 2001, 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 or before October 3, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Benton Harbor Service Employees Association, MEA/NEA, filed this charge against the Benton Harbor Area Schools on April 24, 2001. The charge was amended on July 5, 2001. Charging Party represents a bargaining unit of transportation, custodial, food service, security, and maintenance employees of the Benton Harbor Area Schools. In the April 24 charge, Charging Party alleged that Respondent violated its duty to bargain in good faith when its superintendent made disparaging remarks about the parties' tentative wage re-opener agreement at a meeting of Respondent's School Board on April 17, 2001. According to Charging Party,

these remarks caused the Board to reject the tentative agreement. In the amended charge, Charging Party alleged that Respondent violated Sections 10(1)(a) & (c) of PERA when it decided on June 27, 2001 to subcontract its food service operations. According to Charging Party, Respondent was motivated by animus against the Charging Party and the desire to retaliate against it for filing the original charge.

Facts:

Wage Re-Opener Negotiations and the School Board's Rejection of the Tentative Agreement

The parties' 1998-2001 collective bargaining agreement contained a wage re-opener for the third year of the contract. The parties began negotiating this wage re-opener on October 31, 2000. Craig Mutch served as Respondent's chief spokesman. Respondent's bargaining team also included Assistant Superintendent Nora Jefferson. Respondent's superintendent, Renee Williams, was not a part of the bargaining team. Cheryl Melvin, MEA UniServ Director, headed Charging Party's bargaining team.

The parties' contract had separate wage schedules for each of the five employee groups in the unit: maintenance, custodial, transportation, food service, and security. The maintenance schedule provided premium pay for the possession of certain licenses and certifications. In addition, both the bus drivers' and food service wage schedules included this language:

> For each certification required for these positions (i.e. CDL License), $.10/hr will be added to wage schedule.

Food service drivers were required by Respondent to have a CDL (commercial driver's license). They were the only food service employees who actually received the $.10/hr premium.

No employee in the unit received additional pay for having a CPR (cardio-pulmonary resuscitation) certificate.

At the first bargaining session, Charging Party proposed to increase the CDL premium from $.10 to $.60 per hour. Respondent's November 29 proposal kept the CDL premium at $.10/hr, but added $.10 per hour for "appropriate CPR certification" for bus drivers. Mutch testified that Respondent recognized that its wage rates for bus drivers were not competitive. Mutch believed at the time that bus drivers were required to be certified in CPR. Mutch testified that the purpose of Respondent's proposal was to give the bus drivers a bit more money, while keeping the percentage increase in the base rate the same for all groups. Charging Party's counter-proposal included a $.50 per hour premium for "each certification included as a job duty." While the parties were discussing this proposal, Mutch asked Charging Party's bargaining team which classifications were required to have CPR certification. He was told that both bus drivers and security guards needed CPR certificates.

The parties met with a mediator on March 20, 2001. The parties reached a tentative agreement, and Mutch and Melvin initialed wage schedules for each of the five employee groups for the 2000-2001 school year. The bus drivers' wage schedule included this language:

> For each certification required for these positions (i.e. CPR, CDL License), $.10/hr will be added to wage schedule.

The security employees' wage schedule stated:

> For each certification required for these positions (i.e., CPR license), $.10/hr will be added to wage schedule.

There was no premium pay language on the food service wage schedule initialed by the parties.

Mutch testified that on March 20 Respondent agreed to give both the bus drivers and security personnel an extra $.10/hr for possessing CPR certification if Respondent required it. He testified that this is how he described the tentative agreement to Williams. The parties did not discuss premium pay for food service employees on March 20. However, Mutch testified that the parties did not intend to remove the $.10/hr premium for a CDL from the food service schedule. He admitted that the omission of that language from the initialed agreement was simply an oversight.

On March 28, Melvin phoned Jefferson and pointed out that the food service wage schedule in the tentative agreement did not include the premium pay language that previous food service wage schedules had contained. Jefferson prepared a new food service wage schedule. For reasons not explained by the record, it had the same premium pay language as the wage schedule for the bus drivers in the tentative agreement. That is, the document Jefferson prepared gave food service employees premium pay both for a CDL and for CPR certification. Both Jefferson and Melvin initialed the new food service wage schedule. This document was part of the tentative agreement ratified by Charging Party's membership on March 29.

Prior to School Board meeting of April 17, 2001, Jefferson and Williams prepared and signed a "staff report" recommending that the Board ratify the tentative agreement. The staff report stated, in part, "The Board's negotiators and the service employee representatives have reached an agreement of a 3% wage increase plus .10 for CPR if required."

A tape of the Board's discussion of the tentative agreement on April 17 and a transcript of this tape were admitted into evidence by agreement of the parties. Mutch was not present at this meeting. The record indicates that Jefferson began the discussion by describing the agreement as it had been summed up in the staff report. A Board member immediately asked if the 10 cents meant that employees would have to be certified in CPR. A second Board member replied, "this is only if it is required, not that it is required." The tape reflects that at this point

both Jefferson and Superintendent Williams began speaking at the same time, and one of them said, "We are taking that phrase out of this report [sic]." Several Board members began talking at once. A Board member can be heard asking Williams which employees were required to have CPR certification. Williams said that it was not required for anyone, even though employees were given CPR training, and that Respondent "would not pay them (the employees) for this." A Board member asked Williams if the Board should ratify the agreement, and Williams said yes, but "without the $.10." The Board's attorney reminded the Board that they had to either ratify the whole agreement or reject it and return to the table to renegotiate the part they wanted to remove. At this point, Steve Mitchell, Respondent's Director of Facilities and Operations, told the Board that CPR was not required for any of the "service" employees who reported to him. Board members again began talking at the same time. Williams can be heard on the tape saying, "That's why we are not going to play around with that phrase." When the role was called, two members voted to approve the tentative agreement. One voted to reject, and two Board members abstained. By the rules of the Board, the agreement was rejected.

The Subcontracting of Food Services

Prior to the 2001-2002 school year, Respondent employed a private company, ARAMARK Corporation, to manage its food service operation. Under this contract Respondent employed the nonsupervisory food service employees. During the 2000-2001 school year, food service produced an operating loss for Respondent of about $85,000.

On March 27, 2001, Respondent held a pre-bid meeting in which it requested bids for food services for the school year 2001-2002. Vendors were allowed to submit two bids – one with the vendor supplying the labor, and one with the vendor using Respondent's employees. Three vendors, including ARAMARK, expressed interest in submitting bids.

Respondent did not inform Charging Party that it was considering subcontracting its entire food service operation. On April 10, ARAMARK submitted two bids: a bid of $2,252,123 for a contract using Respondent's employees, and a bid of $1,976,253 for a contract with labor supplied by ARAMARK. Jefferson and Williams prepared a brief written document for Respondent's Board recommending that it accept ARAMARK's bid to take over the entire operation. The recommendation stated simply that the Board must adopt a balanced budget, and that management had identified food service labor as an area where cost reductions could be made.

The subcontract was placed on the agenda for the Board meeting of June 27, 2001. Respondent did not notify Charging Party that this item was to be discussed. Melvin, however, was at the meeting. The first part of the meeting was devoted to the budget, and it was noted that a line item had been adjusted to reflect savings that would be incurred by outsourcing food service. The Board's discussion was followed by a public comment period during which Melvin asked the Board to at least give the Union an opportunity to discuss the subcontracting with it before making a decision. During a break in the meeting, Melvin approached Williams privately. She said, "I am shocked and surprised at this. What is going on here?" Williams replied, "You should be working and concentrating your efforts on the people that have direct instructional impact." When the meeting reconvened, the Board voted unanimously to subcontract its entire

food service operation to ARAMARK effective August 6, 2001, under the condition that "food service labor salaries not be reduced in the first year of ARAMARK employment." ARAMARK and Respondent subsequently entered into a contract for the 2001-2002 school year, and Respondent laid off its food service employees.

Discussion and Conclusions of Law:

According to Charging Party, Superintendent Williams' "open disparagement" of the tentative agreement at the April 17, 2001 Board meeting, after allegedly actively participating in negotiating that agreement, demonstrates that Respondent acted in bad faith.

Charging Party defends the addition of the CPR language to the food service wage schedule, on the premise that Williams' remarks were directed at this provision. According to Charging Party, the fact that Jefferson prepared the amended language and initialed it indicates that the parties intended the food service wage schedule to include premium pay for CPR certification. I disagree. Both parties admit that on March 20 they inadvertently initialed a food service wage schedule that omitted the CDL premium pay language that had been part of previous food service wage schedules. To correct this mistake, on March 28 Jefferson prepared, and Jefferson and Melvin initialed, a food service wage schedule that provided premium pay for both a CDL and CPR certification. However, there is no evidence that the parties ever agreed to add CPR language to the food service schedule, and no indication that this was other than another mistake.

Moreover, according to the tape and transcript of the April 17 Board meeting, the Board did not reject the tentative agreement simply because it included a CPR premium for food service employees. The record indicates that on March 20 Mutch told Williams that under the tentative agreement an employee – any employee - would receive premium pay for a CPR certificate or a CDL only if Respondent required these documents.[3] When the agreement was brought before the Board on April 17, a Board member asked if the agreement meant that CPR certification would be required. In the following discussion it became obvious that there was no consensus on the meaning of the tentative agreement and/or who would actually receive premium pay for CPR training. During this discussion Williams expressed her view that the fact that employees were given training in CPR did not mean that CPR certification was a job requirement, and the Director of Facilities and Operations said that he didn't consider CPR certification mandatory for any service employee. Nothing in the record suggests that Williams intended, before the meeting began, to criticize the tentative agreement. Rather, the record indicates that Williams changed her mind after it became apparent there were ambiguities in the language. I find no evidence that Williams, or any the member of Respondent's Board,

[3] Since the abbreviation "i.e." means "that is," *Webster's New Collegiate Dictionary*, G & C Merriam Co., Springfield, Mass., 1980, the plain meaning of the language would seem to be that employees were required to have a CDL or CPR certification. However, Mutch's statement was consistent with the parties' previous interpretation of similar language. For example, only food service drivers were paid a premium for a CDL since they were the only food service employees who were required to have one.

deliberately sought to delay agreement or acted in any way inconsistent with its duty to bargain in good faith.

The amended charge alleges that Respondent's decision to subcontract violated Section 10(1)(a) & (c) of PERA because it was motivated by animus toward the union and by a desire to retaliate against Charging Party's members because Charging Party had filed an unfair labor practice charge.

Where it is alleged that an employer's action was motivated by animus toward a union or unions, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the employer's decision. Elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA include union animus or hostility towards the exercise of protected rights, and suspicious timing or other evidence that protected activity was a motivating factor in the allegedly discriminatory action. If a prima facie is established, the burden shifts to the employer to produce evidence that the same action would have taken place even in the absence of the protected conduct. *MESPA v Evart Public Schools*, 125 Mich App 71, 74 (1982); *City of Grand Rapids (Fire Dept)*, 1998 MERC Lab Op 703, 706.

Charging Party asserts that Respondent's decision to subcontract was motivated, in part, by the filing of the instant charge. However, the charge was not filed until April 24, 2001. The record established that Respondent was at least considering subcontracting its entire food service operation on March 27, 2001, when it requested bids from vendors. This was very shortly after the parties reached a tentative agreement on wages for the 2001-2002 school year. However, the fact that protected activity is closely followed by an allegedly discriminatory act is not sufficient to establish a prima facie case of discrimination under Section 10(1)(c) of PERA. There must also be evidence of illegal motivation or a causal nexus between the protected activity and the alleged discrimination. *Univ of Michigan*, 2001 MERC Lab Op 40,43; *Plainwell SD*, 1989 MERC Lab Op 464, 466. Here, Charging Party relies upon the statement made by Superintendent Williams to Melvin at the June 27, 2001 Board meeting. Williams said, "You should be working and concentrating your efforts on the people that have direct instructional impact." According to Charging Party, Williams meant that Charging Party shouldn't represent the food service employees. However, Williams made this remark in response to Melvin's expression of dismay at the subcontracting, and after Melvin had publicly asked Respondent to discuss the matter with Charging Party. Given the circumstances of the conversation, I find that Williams could simply have been brusquely reminding Melvin that Charging Party had no right to bargain over the subcontracting of non-instructional employees' work.[4] I find Williams' isolated remark insufficient to establish that hostility toward Charging Party, its activities, or the protected activities of its members, was a motivating factor in Respondent's decision to subcontract its food service operation. [5]

[4] Under Section 15(3)(f) of PERA, MCL 423.215, a public employer has no duty to bargain over a decision to subcontract non-instructional support services or the impact of the contract on individual employees or the bargaining unit.

[5] Both parties' in their briefs discuss my decision in *Parchment SD*, 2000 MERC Lab Op 110, in which I found that the Employer's decision to subcontract its food service operation violated Section 10(1)(c) of PERA. Many facts distinguish this case from Parchment, not the least of

Charging Party also argues that Respondent failed to provide evidence that it will save any significant amount of money by subcontracting the food service work. Since Charging Party failed to meet its burden of showing that the subcontracting was motivated at least in part by union animus, Respondent had no obligation to produce evidence justifying its decision.

Based on the findings of fact and conclusions of law set forth above, I conclude that the remarks made by Superintendent Williams about the parties' tentative agreement at the School Board's April 17, 2001 meeting did not evidence bad faith, and that the record failed to show any other evidence that Respondent bargained in bad faith with respect to this agreement. I also conclude that Charging Party failed to make out a prima face case that Respondent's June 27, 2001 decision to subcontract its food service operations violated Section 10(1)(a) or (c) of PERA. I therefore recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____

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which is the fact that in *Parchment* the Employer's assistant superintendent told its Board, at a public meeting, that even if there had not been cost savings from the subcontracting he would have recommended it anyway because of the number of pending grievances concerning food service employees.