STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

Case No. C99 I-168

-and-

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

APPEARANCES:

Jean G. Sturtridge, Esq., for Respondent

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

DECISION AND ORDER

On October 31, 2000, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Dismissal in the above matter. Charging Party, St. Clair County Education Association, MEA/NEA, also referred to as the Intermediate Education Association (IEA), claimed that Respondent, St. Clair County Intermediate School District, illegally subcontracted bargaining unit work to public school academies without bargaining. The ALJ recommended dismissal of the charge for failure to state a claim under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. She reasoned that because Part 6A of the Revised School Code, MCL 380.501 *et seq*., permits school districts to authorize public school academies, the legislature intended to permit the transfer of bargaining unit positions to these academies without bargaining.

Charging Party filed exceptions, and Respondent filed a brief in support of the ALJ's Decision and Recommended Order. The Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO and the Service Employees International Union, Local 516M, moved

for leave to submit, and did submit, an *amicus curiae* brief supporting Charging Party's position. Respondent filed objections to the motion for leave to file an *amicus curiae* brief.

We granted the motion to file an *amicus curiae* brief and rendered our decision holding that the ALJ misinterpreted the legislative intent of the Revised School Code. Since Section 15(3)(e) of PERA does not prohibit bargaining over a school district's decision to transfer unit work to a public school academy, the ALJ did not need to look beyond PERA. Accordingly, we remanded the case to the ALJ to determine whether Charging Party timely filed the charge, whether Respondent's transfer of bargaining unit work constituted subcontracting, whether Respondent had an obligation to bargain over the transfer of unit positions, and whether antiunion animus motivated Respondent's decision to transfer unit work to the academies. *St Clair Intermediate Sch Dist*, 2001 MERC Lab Op 218.

In a Recommended Decision and Order on Remand, the ALJ found that Charging Party timely filed the majority of its charges, that the transfer of unit work constituted subcontracting, and that Respondent was obligated to bargain over the decision to subcontract unit work. The ALJ held that the charge regarding Respondent's decision to transfer the medical technology instructor positions was untimely. The ALJ also concluded that antiunion animus did not motivate Respondent to transfer bargaining unit positions to the academies.

Respondent filed exceptions contending that the transfer of unit work was not subcontracting, that the decision to transfer the work was based on educational policy over which it had no duty to bargain, that Charging Party had not requested bargaining, and that the evidence did not support the ALJ's holding that a request to bargain would have been futile. Respondent also argues that the ALJ's bargaining remedy should not extend to work previously transferred, but only to work transferred in the future.

Charging Party filed a response to Respondent's exceptions and a brief, cross exceptions and a brief, and a motion to strike Respondent's exceptions. In its cross exceptions, Charging Party claims that it did demand bargaining over the transfer of unit work and argues that Respondent was motivated by antiunion animus. Charging Party also takes exception to the ALJ's apparent conclusion that Respondent is not required to bargain over the effects of its decision to subcontract the medical technology instructors' work.

Facts:

The facts set forth in the ALJ's Decision and Recommended Order will be summarized as necessary, with a recitation of any additional facts that are material to our decision in this matter. Respondent is responsible for providing vocational and technical training to eleventh and twelfth grade students at its Technical Education Center (TEC). In 1996, Respondent began creating public school academies pursuant to Part 6A of the Revised School Code by authorizing a plastics manufacturing technology academy. At the time, Respondent had no classes in this field. IEA president Kenneth Adams requested that Respondent bargain over the impact of that decision, but Superintendent Joseph Caimi refused, claiming that the decision was nonnegotiable. Adams approached Caimi again in 1997 to discuss his concerns over the transfer of bargaining unit work to the academy. Adams testified that Caimi stated, "if the Union got in

his way in any way at all," he would "make the entire place an academy with the stroke of his pen."

In February 1999, Respondent informed the three medical technology instructors that it was authorizing a health careers academy. The three instructors were informed that they would be laid off at the end of that academic year, but were welcome to apply for positions with the new academy. On February 8, 1999, Charging Party sent correspondence to Respondent's board of directors protesting the transfer of the positions. Respondent's board approved the application to establish the health careers academy on March 8, 1999. On May 11, 1999, during a meeting with Respondent's representatives, Charging Party's local president and its Uniserv director sought to discuss the effect of the pending transfer on the medical technology instructors. As the ALJ noted, in that meeting, Charging Party's representatives asked whether Respondent could contract with the academy to hire the three employees, and were told that was not possible. Respondent's board entered into the contract authorizing the health careers academy on June 21, 1999. Respondent and the academy entered into a Health Careers and Related Program Training Agreement on July 1, 1999, which stipulated that the academy would provide training to students in St. Clair County for $340,000.

Subsequently, Respondent has also authorized a hospitality academy and an information technology academy. It has transferred two case manager positions, two support instructor positions, and the positions of drafting/CAD instructor, school-to-work coordinator, business services and technology instructor, electronics instructor, food services and culinary arts instructor, and marketing instructor to one or another of these academies. Before the transfers, all of these positions were in Charging Party's bargaining unit.

Each academy is a Michigan nonprofit corporation with its own board of directors having authority conferred by contract with Respondent. Each contract provides that all academy employees are at-will, and the academies are prohibited from changing the at-will nature of the employment relationship.

Each academy has its own curriculum committee, but Respondent has retained the power to review and approve curriculum decisions, as well as educational goals and methods of accountability. Respondent also has the power to conduct "legal, financial, educational or other reviews or audits." The content of the programs transferred to the various academies has not been significantly altered, and the academies utilize Respondent's TEC course catalog to advertise their programs.

Each academy leases space and equipment from Respondent on a shared use basis, and Respondent provides administrative support to each academy. Respondent's Director of Career and Technical Education, Frederic C. Stanley, serves as the director of each of the academies. He testified that forty percent of Respondent's budget is allocated for the purchase of instructional services from the academies.

Charging Party repeatedly attempted to discuss the transfers and the impact of the transfers with Respondent. Charging Party also submitted a bargaining proposal to Respondent as part of its effort to prevent further transfers. Whenever Charging Party approached

Respondent to discuss a transfer, Respondent replied that it was not the employer of the transferred position or that the transfer was a nonbargainable matter of educational policy. Once transferred, the positions were posted. Some postings identified an academy as the employer, and some did not. Some postings directed that responses be addressed to Carol Klink, Coordinator of Personnel. Klink is an employee of Respondent. All of the postings directed that applications be addressed to Respondent's mailing address, all included Respondent's fax number, and all but one included Respondent's e-mail address. Thirteen TEC positions have been removed from Charging Party's bargaining unit as a result of the transfers of positions from the TEC to the academies, leaving eight to ten TEC positions in the unit.

Discussion and Conclusions of Law:

We first address Charging Party's motion to strike Respondent's exceptions. Under Rule 176(3) of the Commission's General Rules, 2002 AACS, R423.176(3), a party filing exceptions must specifically set forth those questions of procedure, fact, law, or policy to which it excepts. Rule 176(4) states, in pertinent part, that exceptions must include a title page, an index of authorities, a statement of the questions involved, and a clear and concise statement of the facts. We find that Respondent's exceptions do not fully conform to the General Rules. However, in light of the significance of the issues raised, we decline to strike Respondent's exceptions. This is not to indicate that we will exercise the same restraint in other circumstances.

Turning to the substantive issues in this matter, for reasons discussed below, we hold that Respondent subcontracted bargaining unit work, that it was required to bargain over the decision to subcontract that work, and that it has breached its duty to bargain. In *Oakland Community College*, 1971 MERC Lab Op 543, the Commission indicated that it would apply to public employers under PERA the decision of the National Labor Relations Board (NLRB or Board) under the National Labor Relations Act (NLRA) in *Fibreboard Paper Products Corp v NLRB*, 379 US 203, 224 (1964). See also *Van Buren Pub Schs*, 1973 MERC Lab Op 714, affd *Van Buren Pub Sch Dist v Wayne Circuit Judge*, 61 Mich App 6 (1975). In *Fibreboard*, the NLRB held that an employer is required to bargain over the subcontracting of bargaining unit work when certain conditions are met. In the Supreme Court's affirmance of the Board's decision, Justice Stewart's concurrence provided the following definition of subcontracting: an employer subcontracts when it substitutes "one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." *Fibreboard*, at 224.

Respondent's decision to create academies squarely fits within this definition of subcontracting. In most instances, when Respondent opened a program at an academy, it closed an identical or nearly identical program at the TEC. The number of positions filled at the academies is nearly identical to the number of bargaining unit positions lost at the TEC. The content of most of the programs/curriculum has not changed significantly, and academy employees perform the same or similar work as the former instructors at the TEC. Some positions, like the drafting/CAD instructor, teach both academy and TEC students. Support instructors also provide instruction to all students, whether enrolled in the TEC or an academy.

Respondent's decision to transfer bargaining unit positions to the academies constitutes subcontracting for other reasons as well. The academies provide educational services to the

same customer base as that served by Respondent; both share space and equipment and both advertise in the same course catalog. In summary, Respondent remains in the business of education, but has subcontracted bargaining unit positions by replacing "one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer." *Fibreboard*, at 224.

In our prior Order, we directed the ALJ to determine whether this matter falls within the Michigan Supreme Court's holding in *Bay City Ed Ass'n v Bay City Pub Schs*, 430 Mich 370 (1988). The ALJ found *Bay City* distinguishable because the Court, in that case, found a clear legislative intent to authorize local school districts to transfer its special education programs to the intermediate school district (ISD). The ALJ noted that in the present case, the Revised School Code does not suggest a legislative intent to allow the transfer of bargaining unit positions. We note that the legislature amended PERA to provide that collective bargaining in the public schools shall not include the decision to contract with a third party for *noninstructional* support services. MCL 423.215(3)(f), added by 1994 PA 112. However, the legislature did not alter the status of subcontracting as a mandatory subject of bargaining with regard to *instructional* services.

We also find *Bay City* distinguishable on other grounds. In *Bay City*, the local school district decided to contract with the ISD for special education services, thereby terminating its own special education program. The Court found this decision to be analogous to a partial closing of a business because the "local board relinquished its control over the special education programs and assumed a position on an equal footing with the other constituent districts of the ISD." *Bay City*, at 378. In the instant case, the statute authorizing academies gives the ISD ultimate control in overseeing the academies, and that control is also retained by contract.

The Court in *Bay City* noted that statutory protections existed for the security of employees in the local school district, as the legislature mandated that the ISD "'shall employ first an employee of a constituent district whose employment is discontinued.'" *Bay City*, at 379, quoting MCL 380.1742. In the present matter, the relevant statute provides no such protections.

Under *Fibreboard* and subsequent cases, employers generally have a duty to bargain over a decision to subcontract if: "1) the decision to subcontract does not alter the employer's basic operation, 2) there is no capital investment or recoupment, [and] 3) the employer's freedom to manage his business would not be significantly abridged by requiring bargaining." *Van Buren Pub Sch Dist*, 61 Mich App at 28. See also *Detroit Police Officers Ass'n v City of Detroit*, 428 Mich 79 (1985); *Interurban Transit Partnership*, 2004 MERC Lab Op ___ (Case No. C01 K-220, issued June 30, 2004). We find that these conditions are met in the instant case.

First, the subcontracting decision in this matter does not alter Respondent's basic operation. Before Respondent decided to subcontract, its primary responsibility was to provide education to students within its district. Since the subcontracting decision, Respondent is still engaged in the business of providing education to students within its district. Second, there is no capital investment or recoupment. Respondent is simply paying another entity to perform bargaining unit work. Third, Respondent's freedom to manage its business is not significantly abridged by requiring bargaining. We agree with the ALJ that "the burden on the employer [to

bargain] in this case would be no greater than the burden normally imposed by the duty to bargain over a decision to subcontract."

Respondent contends that its decision to transfer unit work is one of core entrepreneurial concern because it involves educational policy. As the ALJ noted, "Respondent did not explain the educational reasons for transferring the drafting/CAD or the academic support position to the Plastics Academy, even though these positions provide instruction to students in programs both outside and inside the Plastics Academy." Respondent states that these academies allow for a modification of the curriculum in a much quicker manner than the TEC programs. However, Respondent retains ultimate control over curriculum, and the curriculum has not significantly changed since the transfer.

The academies are located at Respondent's TEC and are under Respondent's control in a number of other respects. Frederic C. Stanley is the director of the TEC, and is also the director of all academy programs. Applications for academy positions are solicited by Respondent's personnel officer. Respondent reviews and approves curriculum decisions, educational goals, and methods of accountability and conducts "legal, financial, educational or other reviews or audits." The claim by Superintendent Caimi that Respondent has relinquished full control to the academy boards is refuted by the very contracts by which the academies are subordinated to Respondent's authority. We, therefore, find the subcontracting of bargaining unit work to the academies to be a mandatory subject of bargaining.

We also agree with Charging Party that there is sufficient evidence in the record to demonstrate that the Employer transferred the work in order to avoid the Union and to deprive employees of rights protected by Section 9 of PERA. Charging Party cites Superintendent Caimi's statement that "if the Union got in his way in any way at all," he would "make the entire place an academy with the stroke of his pen." The ALJ credited this testimony, but found that standing alone it did not establish antiunion animus. However, we view this testimony in conjunction with the contractual imposition of at-will employment which governs the status of all academy employees and which the academies are prohibited from changing. By contract, Respondent has prohibited the academies from bargaining over the issue of job security. An academy faced with a lawful bargaining demand will have to defer to the will of Respondent. Respondent repeatedly eliminated bargaining unit positions and transferred work to the academies that were not only nonunion but were prohibited from entering into just-cause employment contracts that are the *sine qua non* of unionization. In addition, Respondent has failed to offer a convincing educational or economic rationale for its actions. Accordingly, we find Respondent's actions in transferring the work of bargaining unit positions to the academies violated Section 10(1)(c) and (a) of PERA.

In its cross-exceptions, Charging Party excepts to the ALJ's finding that it failed to make a specific demand to bargain over the transfer of unit work and asserts that it did demand bargaining. The ALJ pointed out that between May 1999 and the spring of 2000, Charging Party made numerous attempts to discuss the transfers with Respondent and was repeatedly rebuffed. A sufficient demand to bargain does not have to take any particular form or contain any specific wording, as long as it is clear to the employer that a request for bargaining is being made. *Michigan State Univ*, 1993 MERC Lab Op 52, 63; see also *Royal Oak Twp*, 2001 MERC Lab Op 117 (no

exceptions); *Macomb Co*, 1998 MERC Lab Op 344 (no exceptions). We also note that the IEA proposal dated May 18, 2000, offered to extend the contract year by fifteen days and to lengthen the workday by one half hour in exchange for the Employer's agreement that "All currently existing IIEA [sic] jobs at TEC remain IEA positions for the remainder of and any extension of the current contract, i.e. 2000-2001, 2001-2002, and 2002-2003." Given Charging Party's repeated queries to Respondent about whether "there was something we could work out with respect to the loss of jobs to the academies," it should have been clear to Respondent that Charging Party was requesting bargaining over the transfers of work to the academies. See *Northern Michigan Univ*, 1989 MERC Lab Op 139. Nevertheless, Respondent continued to transfer work done by bargaining unit positions without prior notice to Charging Party and without giving Charging Party an opportunity to bargain over the transfers or their effect.

The Commission has long held that an employer seeking to make a change in a mandatory subject of bargaining must first notify the union and give the union an opportunity to bargain before implementing the change. An employer who notifies the union of its decision only after the decision becomes a *fait accompli* violates its obligation to bargain in good faith. *City of Westland*, 1987 MERC Lab Op 793, 797. We have previously held that "the obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fact accomplished when notification was received." *Intermediate Ed Ass'n/Michigan Ed Ass'n (IEA/MEA)*, 1993 MERC Lab Op 101, 106. Accordingly, we agree with the ALJ that it was futile for the IEA to demand bargaining because Respondent had already made the decision to transfer work outside of the bargaining unit by the time Charging Party learned of each transfer. See also *Bell Atlantic Corp*, 336 NLRB 1076 (2001).

Charging Party also excepts to the ALJ's determination that there is no obligation to bargain over the effects of subcontracting the medical technology instructors' work. The ALJ reasoned that the potential unfair labor practice was Respondent's actions in making the decision to subcontract the work without first giving Charging Party an opportunity to demand bargaining. The ALJ concluded that the decision had been made on or before February 1999 and that Respondent learned of the decision sometime before February 8, 1999, more than six months before the charge was filed on September 8, 1999. However, there were two matters over which bargaining could have occurred regarding the transfer of the medical technology instructors' work: the transfer itself, and the effects of the transfer. It is clear that Respondent had made the decision to transfer the work and that Charging Party knew of the decision by February 8, 1999. At that point, a bargaining demand by Charging Party would have been futile. It is evident that Charging Party recognized the futility of demanding bargaining over the transfer and, therefore, sought only to bargain over the effects of that transfer. During the May 11, 1999 meeting between the parties' representatives, Charging Party demanded bargaining over the effects of the transfer and Respondent refused to bargain. Respondent's refusal to bargain over the effects of the subcontracting was a breach of the duty to bargain. See *Local 128, AFSCME v Ishpeming*, 155 Mich App 501 (1986), lv den 428 Mich 902 (1987). This refusal to bargain occurred within six months of the date that the charge was filed. Accordingly, we find the charge was timely with respect to Respondent's refusal to bargain over the effects of the transfer of the medical technology instructors' work. We agree with the ALJ that the charge was untimely with respect to the refusal to bargain over the transfer itself.

In conclusion, we find that Respondent violated its duty to bargain under Section 10(1)(e) when it refused to bargain over the effects of subcontracting the medical technology instructors' work, and when it subcontracted the work of the drafting/CAD instructor, the academic support instructors, the case managers, the school-to-work instructors, the business services and technology instructor, the electronics instructor, the marketing instructor, and the food service and culinary arts instructor without first notifying the IEA that the transfers were being considered and giving Charging Party an opportunity to bargain before the decisions to transfer the positions were finalized. We further find that Respondent's actions in subcontracting the work of the above positions was to discourage membership in the Union and evade its obligations under PERA in violation of Section 10(1)(c) and (a) of PERA.

The Remedy

Restoration of the *status quo ante* is the standard remedy in a case where an employer has illegally subcontracted bargaining unit work. *Interurban Transit Partnership, supra; Van Buren Pub Schs, supra; cf. Lansing Fire Fighters Union v City of Lansing,* 133 Mich App 56 (1984). Such a remedy is crafted to insure meaningful collective bargaining and would typically require the employer to revoke its decision to subcontract the work, to restore the work to the bargaining unit, and to reinstate with back pay any employees affected by the unlawful subcontracting. Any lesser remedy would allow the employer to enjoy the fruits of its unlawful conduct. *Van Buren Pub Schs*, at 729.

Charging Party's September 8, 1999 charge asked that this Commission grant "injunctive relief *pendente lite* to preserve the *status quo ante* pursuant to Section 16(h); direct and require Respondent to cease and desist from such illegal conduct; and compensate Charging Party to the extent possible for the injury suffered, including the granting of costs and attorney fees." Charging Party reiterated this request for relief in its April 7, 2000 first amended charge, and in its second amended charge, filed on June 21, 2000. However, under Section 16(h) Charging Party may also seek appropriate temporary relief or a restraining order from the circuit court, and there is no indication in the record that it did so. Moreover, Charging Party did not request the restoration of the *status quo ante* in its August 5, 2002 post-hearing brief and has not taken exception to the ALJ's conclusion that "Charging Party does not seek the return of work already transferred from the bargaining unit."

In light of the egregious nature of Respondent's violations of PERA, we are loath to permit Respondent to continue to benefit from the subcontracting of these positions and find that the appropriate remedy is the restoration of the *status quo ante.* However, we recognize that the apparent change in Charging Party's requested relief may stem from changes caused by the passage of time and reluctance to further displace the individuals who are now performing the work that was illegally subcontracted. Therefore, we limit our order to require that Respondent restore to the bargaining unit those positions illegally transferred for which Charging Party makes a demand to Respondent.

We have carefully examined all other issues raised by the parties and find they would not change the result. In accordance with the conclusions of law set forth above, in order to remedy the Employer's illegal actions, we issue the following order:

ORDER

Respondent St. Clair County Intermediate School District, its officers and agents, are hereby ordered to:

1. Cease and desist from:

   a. Refusing to bargain collectively with the St. Clair County Education Association, MEA/NEA, by subcontracting or transferring bargaining unit work without giving that labor organization notice and an opportunity to demand bargaining.

   b. Discouraging membership in the aforesaid labor organization by discriminatorily subcontracting bargaining unit work or by discriminating against employees in any other manner in regard to their hire and tenure of employment or any other term and condition of employment.

   c. In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 9 of PERA.

2. Take the following affirmative action in order to effectuate the policies of the Act:

   a. Upon demand, rescind its actions of subcontracting the work performed by the drafting/CAD instructor, the academic support instructors, the case managers, the school-to-work instructors, the business services and technology instructor, the electronics instructor, the marketing instructor, and the food service and culinary arts instructor and reinstate such work as it existed prior to the unlawful subcontracting.

   b. Upon demand, offer to those employees who held the positions that were unlawfully subcontracted, and whose positions were terminated as the result of the unlawful subcontracting, unconditional reinstatement to their former or substantially equivalent positions, without prejudice to any rights or privileges previously enjoyed by them, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them by paying to them a sum of money equal to what they would have earned from the date of their termination to the date of reinstatement, less any interim earnings during that period, with interest computed at the statutory rate for money judgments as set by MCL 600.6013(8).

   c. Upon demand, bargain with the St. Clair County Education Association, MEA/NEA, with regard to wages, hours, and other terms and conditions of employment within the meaning of Section 15 of PERA, including any decision to transfer/subcontract work previously performed exclusively by members of that organization's unit and the effects of that decision, including the transfer or subcontract of work to a public school academy.

d. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all locations where notices to employees are customarily posted. Copies of the notice shall be duly signed by a representative of the St. Clair County Intermediate School District and shall remain posted for a period of thirty consecutive days. One signed copy of the notice shall be returned to the Commission and reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced, or covered by any other material.

e. Notify the Michigan Employment Relations Commission within twenty days of receipt of this Order regarding the steps that the Employer has taken to comply herewith.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, THE ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT HAS BEEN FOUND TO HAVE COMMITTED UNFAIR LABOR PRACTICES 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 transfer or subcontract bargaining unit work performed by members of the St. Clair County Education Association, MEA/NEA, without giving that labor organization notice and an opportunity to demand bargaining.

WE WILL NOT discourage membership in the aforesaid labor organization by discriminatorily subcontracting bargaining unit work.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 9 of PERA.

WE WILL, upon demand, rescind our actions of subcontracting the work performed by the drafting/CAD instructor, the academic support instructors, the case managers, the school-to-work instructors, the business services and technology instructor, the electronics instructor, the marketing instructor, and the food service and culinary arts instructor and reinstate such work as it existed prior to the unlawful subcontracting.

WE WILL, upon demand, offer to those employees who held the positions that were unlawfully subcontracted, and whose positions were terminated as the result of the unlawful subcontracting, unconditional reinstatement to their former or substantially equivalent positions, without prejudice to any rights or privileges previously enjoyed by them, and make them whole for any loss of pay they may have suffered as a result of the discrimination against them by paying to them a sum of money equal to what they would have earned from the date of their termination to the date of reinstatement, less any interim earnings during that period, with interest computed at the statutory rate for money judgments as set by MCL 600.6013(8).

WE WILL, upon demand, bargain with the St. Clair County Education Association, MEA/NEA, with regard to wages, hours, and other terms and conditions of employment within the meaning of Section 15 of PERA, including any decision to transfer/subcontract work performed exclusively by members of that organization's unit.

ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

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

Case No. C99 I-168

-and-

ST.CLAIR COUNTY EDUCATION
ASSOCIATION,
Labor Organization - Charging Party
_____/

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
OF
ADMINISTRATIVE LAW JUDGE ON REMAND

On October 31, 2000, I issued a Decision and Recommended Order recommending that the Commission grant Respondent's motion for summary disposition and dismiss the above charge pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On August 17, 2001, the Commission remanded the case to me to conduct an evidentiary hearing. I held hearings at Detroit, Michigan, on March 21 and June 12, 2002. Based upon the entire record in this matter, including post-hearing briefs filed by the parties on August 5, 2002, I make the following findings of fact, conclusions of law, and recommend that the Commission issue the order below.

I. The Charge and Background:

On September 8, 1999, the St. Clair County Education Association filed this charge against the St. Clair County Intermediate School District. Charging Party represents instructors and other professional employees of Respondent, including those employed at Respondent's vocational/technical education center (TEC). Charging Party alleges that Respondent violated its duty to bargain under Section 10(1)(e) of PERA by unilaterally subcontracting work performed by members of Charging Party's bargaining unit to public school academies authorized by

Respondent under the Public School Academies Act, MCL 380.511, et seq. Charging Party also alleges that these subcontracts violated Sections 10(1) (a) and (c) of PERA because Respondent was motivated by animus toward Charging Party. The charge was amended on April 7 and again on May 23, 2000 to cover other instances of alleged subcontracting occurring after September 8, 1999.

As noted above, on October 31, 2000, I recommended to the Commission that it grant Respondent's motion for summary dismissal. I concluded that, under Section 15(3)(e) of PERA, Respondent had no duty to bargain over a decision to transfer bargaining unit work to an academy. That section explicitly prohibits bargaining over the decision to authorize a public school academy. I concluded that Respondent could not be required to bargain over the transfer of work to an academy because the decision to authorize the academy necessarily encompassed decisions as to what programs the academy would offer and what work its employees would do. The Commission disagreed with my conclusion. I also concluded that Charging Party had failed to allege facts sufficient to support its claim that the transfers violated Section 10(1)(a) or (c) of PERA. The Commission directed me to hold an evidentiary hearing and make proposed findings on the following issues: (1) whether the charge was timely filed; (2) whether Respondent's transfer of bargaining unit work to the academies constituted subcontracting; (3) whether Respondent had an obligation to bargain over this type of decision under *Bay City Education Assn v Bay City Public Schools,* 430 Mich 370 (1988); (4) whether Respondent's decision to transfer/subcontract the work was motivated by union animus. *St.Clair Intermediate School District*, 2001 MERC Lab Op 218. Respondent also now argues that the bad faith bargaining charge should be dismissed because Charging Party did not demand to bargain over the transfers.

The instant charge is not Charging Party's first attempt to challenge Respondent's "academization" of bargaining unit work. In 1996, Respondent authorized its first academy, the Academy for Plastics Manufacturing Technology (Plastics Academy). On August 29, 1997, after Respondent had rejected its demands to bargain over the wages, hours and working conditions of Plastic Academy employees, Charging Party filed an unfair labor practice charge, Case No. C97 H-184, and a unit clarification petition, Case No. UC97 H-41. In the charge, Charging Party alleged that Respondent and the Plastics Academy were joint employers of the Academy's employees or, alternatively, that the Plastics Academy was an alter ego of Respondent. Charging Party also asserted that Respondent and the Plastics Academy could not lawfully remove a bargaining unit position, metal machining instructor, from the bargaining unit in the process of transferring it to the Plastics Academy. In the unit clarification petition, Charging Party sought an order clarifying its unit to include all teaching personnel, instructors, and vocational education specialists employed at the Plastics Academy.

In February 1999, the Commission dismissed the above charge and unit clarification petition. It held that the Plastics Academy was the sole employer of its employees, and that neither it nor Respondent ISD had a duty to bargain with Charging Party over Plastics Academy employees. *St. Clair ISD and the Academy for Plastics Manufacturing Technology*, 1999 MERC Lab Op 38. The Court of Appeals affirmed. *St. Clair Co Ed Ass'n v St. Clair Co ISD*, 245 Mich App 498 (2001).

In the instant case, Respondent asserts that its decisions to transfer programs and

positions to public school academies were educational policy decisions, not "subcontracts." It maintains, however, that under the criteria set forth in *Bay City, supra*, it had no duty to bargain even if the transfers are considered to be subcontracting. As noted above, Respondent also asserts that it had no obligation to bargain because Charging Party did not make demands to bargain over Respondent's decisions to transfer the work. Finally, Respondent denies that its motives for authorizing the academies or transferring programs to them were unlawful.

II. Findings of Fact:

Respondent provides vocational/technical education to eleventh and twelfth grade students in St. Clair County at its Technical Education Center (TEC). It also contracts with a number of employers to provide off-site training at the employers' facilities. In the spring of 1996, Respondent authorized the creation of the Plastics Academy to begin operating out of the TEC in the 1996-1997 school year. Frederic Stanley, the director of the TEC, was hired by the Plastics Academy as its director. Respondent had no program in plastics molding technology. During its first year, the Plastics Academy provided only instruction that Respondent had not offered.

On April 1, 1996, Charging Party's local president, Kenneth Adams, sent a letter to Respondent Superintendent Joseph Caimi stating, "The I.E.A. claims the right to bargain any impact on wages, hours, worker's [sic] condition, and any other contractual provisions in regard to a Charter School, or Academy at the St. Clair ISD." On April 4, 1996, Caimi responded by stating that the decision to establish the Academy was a matter of educational policy and not negotiable. He also stated that the wages, hours, and working conditions of academy employees were not negotiable. Caimi's letter pointed out that the Plastics Academy would offer a program not offered by Respondent, and that "given [the] demand to bargain and the nature of the Charter School which may be established," Respondent had no duty to bargain.

According to Adams' testimony, in the early fall of 1997, Caimi came to Adams' workplace to discuss Charging Party's concerns about Respondent's future plans for the Plastics Academy. Adams was particularly concerned about the future of the metal machine tool program at the TEC, because the current instructor was about to retire. According to Adams, he asked Caimi whether the metal program position was "going to go academy or IEA?" Adams testified that Caimi said that he had initially intended it to stay in Charging Party's bargaining unit, but that "as of late he was leaning quite heavily toward it going to an academy position." According to Adams, Caimi said that he thought the manufacturing sector of the TEC was "ripe for academy." Adams testified that Caimi said that he intended to establish academies at the TEC, but that he did not intend to take anybody out of their positions. Rather, he would wait until people retired or left. However, according to Adams, Caimi then stated that "if the Union got in his way in any way at all," he would "make the entire place an academy with the stroke of his pen." Caimi he did not recall the above conversation. Caimi denied that he ever threatened to transfer or eliminate positions if Charging Party "filed grievances." He also denied ever saying that he would transfer the TEC to academies with the stroke of a pen if Charging Party "filed grievances." The metal machine tool instructor position became a Plastics Academy position at the beginning of the following school year.

Before the 1999-2000 school year, Respondent offered a program in medical technologies at the TEC. The program had three instructors, all members of Charging Party's bargaining unit. In early February 1999, Respondent told these instructors that it was authorizing an academy, the Health Careers Academy of St. Clair County (Health Academy). The instructors were told that they would be laid off at the end of the year and encouraged to apply for jobs with the new academy.

On February 8, 1999, Charging Party's then-president G.T. Singer wrote to Respondent's Board of Education. Singer did not demand to bargain over the transfer of the positions, although he did ask the Board to keep the medical technologies instructor positions part of the intermediate school district. He argued that there was no justification for eliminating Respondent's program. Singer also complained that although Caimi had told him that the Health Academy had been under consideration for more than a year, Charging Party had never been asked to participate in the discussions. Singer expressed concern over the future of the instructors. Singer referred to the situation at the TEC as a "monster," and noted that staff at the TEC was constantly in fear of losing their jobs.

On May 11, 1999, Charging Party's local president and its UniServ director met with Respondent's representatives. Charging Party did not demand to bargain over the decision to transfer positions to the Health Academy, but sought to discuss the effect of transfers on the three medical technology instructors. Charging Party representatives asked whether Respondent could contract with the Academy to hire the three employees. Respondent replied that it had no control over what the Health Academy did.

The Health Academy began operating at the beginning of the 1999-2000 school year. Like the Plastics Academy, the Health Academy leased space in the TEC and hired Stanley as its executive director. The Health Academy offered jobs to Respondent's three medical technology instructors. Since that school year, the courses once taught in Respondent's medical technologies program have been offered by the Health Academy. When the Health Academy first began operating, its program was identical to the program operated by Respondent. Since that time, the Health Academy has split its program into three different "tracks," and instituted other modifications to the curriculum.

Between May 1999 and the spring of 2000, Charging Party's UniServ director approached Respondent several times to ask whether "there was something we could work out with respect to the loss of jobs to the academies." Each time Respondent said no, that it was not the employer, and that Charging Party would have to contact the individual academies.

On August 5, 1999, the Plastics Academy posted an opening for a drafting/CAD instructor. Before the 1999-2000 school year, Respondent employed a drafting/CAD instructor at the TEC. Since the beginning of the 1999-2000 school year, the drafting/CAD instructor employed by the Plastics Academy has taught students in programs offered by that academy and students enrolled in programs offered by Respondent.

On March 30, 2000, the Plastics Academy posted openings for two support instructors. Support instructors provided extra instruction in math and science and in language arts. The

Health Academy also posted an opening for a support instructor. Before the 2000-2001 school year, Respondent employed two support instructors at the TEC; these support instructors were part of Charging Party's bargaining unit. The Health Academy position was filled briefly. When the incumbent left, the Health Academy did not fill the position. Since the beginning of the 2000-2001 school year, support instructors employed by the Plastics Academy have provided academic support to all students attending the TEC, including students enrolled in academies operating out of the TEC, students enrolled in programs operated by Respondent, and students in employer-based training.

On March 30, 2000, the Plastics Academy and the Health Academy both posted openings for case managers. Case managers provide vocational counseling. They also serve as liaisons between the TEC, students, and the students' K-12 school districts. Before the 2000-2001 school year, Respondent employed four case managers at the TEC. These case managers were included in Charging Party's bargaining unit. Since the fall of 2000, the Plastics Academy and the Health Academy have each employed a case manager, and Respondent had employed two case managers. Whether he is employed by Respondent or by an academy, a case manager serves all students enrolled in programs at the TEC from the particular school district or districts to which he is assigned.

On March 30, 2000, postings also went up at the TEC for three positions – business services and technology instructor, electronics instructor, and food service and culinary arts instructor. Charging Party's bargaining unit included positions with these titles. Since the postings did not list an employer or indicate that employment terms were subject to the collective bargaining agreement, Charging Party filed a grievance asserting that the postings failed to comply with the requirements of the collective bargaining agreement. Respondent answered the grievance by stating that it was not the employer of these positions.

On April 6, 2000, the Health Academy posted an opening for a school-to-work coordinator. School-to-work coordinators arrange on-the-job training opportunities, including apprenticeships, job shadows and internships, arrange for and monitor employer-based programs, and perform related duties. Before the 2000-2001 school year, all school-to-work coordinators were members of Charging Party's bargaining unit. The school-to-work coordinator employed by the Health Academy performs services for Health Academy students only. Respondent employs the same number of school-to-work coordinators at the TEC that it did before September 2000.

On April 7, 2000, Charging Party amended its charge to allege that Respondent had unlawfully transferred to academies the support instructor, case manager, school-to-work coordinator, food service, culinary arts instructor, business services and technology instructor, and electronics instructor positions. On April 12, 2000, Adams (who had again become Charging Party's president) wrote to Stanley regarding the postings. Adams did not demand to bargain, but asserted that the removal of the support instructor and case manager positions from the bargaining unit represented an illegal subcontracting of bargaining unit work.

On May 15, 2000, a posting for the position of marketing instructor went up at the TEC. Like the postings of March 30, this posting did not include the name of the employer. After

Respondent informed Charging Party that this would be an academy position, Charging Party amended the charge to include this position.

On May 18, 2000, during negotiations for a new collective bargaining agreement, Charging Party presented a proposal allowing Respondent to require instructors at the TEC to work a longer day and a longer year. The proposal also included a provision stating that all currently existing IEA jobs at the TEC would remain IEA positions through the 2002-2003 school year. The parties discussed the proposal, but Respondent ultimately rejected it.

In the spring of 2000, Respondent told Charging Party that it was authorizing two new academies, the Information Technology Academy of St. Clair County (IT Academy), and the Hospitality Academy of St. Clair County (Hospitality Academy). During that summer, Charging Party's Uniserv Director had several discussions with Respondent regarding the creation of these academies. Respondent said again that it was not the employer.

In August 2000, Respondent authorized the IT and Hospitality Academies. These two academies began operating in the fall of 2000. The IT Academy became the employer of the business services and technology instructor and the electronics instructor. The Hospitality Academy became the employer of the food service and culinary arts instructor and the marketing instructor.

Respondent pays each of its four academies a fee which is negotiated annually between the academy and Respondent. This fee covers the cost of the instruction provided by the academy in the programs designated in the academy's contract with Respondent. Where applicable, it also covers instructional and instructional support services provided by academy employees to students not enrolled in the academy's programs. Each academy has a lease agreement with Respondent for use of the TEC. It also has a service agreement under which the academy pays Respondent for fiscal, data processing and administrative services. Each academy contracts separately with Stanley, director of the TEC, to serve as its administrative director.

All four academies have curriculum committees made up of board members from private industry and local colleges. All these committees regularly review the curriculum to ensure that it is current with industry standards, and that there is continuing industry demand for employees with the type of training the academy provides. The Plastics Academy's committee has taken an active role in revising the curriculum. Other academies have adopted industry-standard curricula. State regulations require Respondent to have a standing advisory panel for each of its programs to periodically review the curriculum. However, the academy boards and their curriculum committees take a more active role than the advisory panels, and the members of the academy curriculum committees tend to have more industry expertise than do members of the advisory panels.

Respondent publishes a course catalog for the TEC. This catalog is distributed to K-12 school districts within Respondent's district. The catalog includes both programs run by Respondent and programs run by the academies. In 1999-2000 and 2000-2001, the course catalog identified programs offered by the Health and Plastics Academies. The 2001-2002 catalog, however, describes the 16 programs offered at the TEC (and 22 others where the

instruction is provided entirely off-site by employers) without referring to any academy by name.

Respondent does not dispute that the content of the instruction in programs transferred to the academies has not changed significantly. According to Respondent, the main benefit offered by the academies comes from the connections established between the TEC and local industry and colleges through the participation of representatives of these institutions on the academies' boards. These connections have lead to expanded learning opportunities for students.

III. Discussion and Conclusions of Law:

A. Timeliness of the Charge

Although evidence of events dating back to 1996 was offered as background, Charging Party asserts that the first act alleged to constitute an unfair labor practice in this case was the transfer or subcontracting to the Plastics Academy of the drafting/CAD instructor position in August 1999. It maintains that it is not alleging as unlawful any conduct that occurred more than six months before the filing of the charge on September 8, 1999. For reasons set forth more fully in Section III (D) below, I conclude that Respondent's decision to transfer work performed by the medical technologies instructors to the Health Academy was made on or before February 1999, and that Respondent first learned of the alleged subcontracting of this work in that month. For that reason, I find the charge to be untimely as to this part of the charge. I agree with Charging Party that the other unfair labor practices occurred after or within six months before September 8, 1999.

B. The Transfers/Subcontracting as Violations of Section 10(1)(a) and (c)

Charging Party alleges that Respondent's transfer/subcontracting of bargaining unit work violated Section 10(1)(a) and (c) of PERA because it was motivated by anti-union animus, i.e. that Respondent's purpose was to diminish or eliminate the bargaining unit. Charging Party cites the statements allegedly made by Caimi to Adams in the fall of 1997, particularly Caimi's statement that if the union gave him any trouble he would "make the entire (TEC) an academy with the stroke of a pen." Charging Party also asserts that Respondent's refusal to bargain over these transfers of bargaining unit work indicates that Respondent's motive for transferring the work was unlawful.

I credit Adams' testimony regarding his conversation with Caimi about the creation of academies in the fall of 1997. Caimi had no recall of the specific conversation to which Adams testified. Moreover, at the hearing, Caimi did not explicitly deny threatening to make the TEC into an academy if the union caused trouble, but only if it "filed grievances." I also find Adams to be a credible witness based on his demeanor.

I conclude, however, that the evidence is not sufficient to establish a prima facie case that Respondent's motive for transferring work to its academies was unlawful. What Caimi said to Adams, initially, was that he believed that creating academies to offer the type of vocational programs that the TEC offered was a good idea. In other words, Caimi was simply telling Adams that Respondent intended to gradually transfer programs to academies. Caimi's threat was to

speed up the process if Charging Party "made trouble," i.e., if its members exercised their rights to engage in collective actual for mutual benefit under Section 9 of PERA. This statement might have constituted an independent violation of Section 10(1)(a) of the Act, even though Respondent did not carry through with Caimi's threat to turn the TEC into an academy "at the stroke of a pen." However, Caimi's statement did not amount to an admission that Respondent created the academies in order to get rid of the Union. Compare, *Parchment School District*, 2000 MERC Lab Op 110. In the absence of suspicious timing or any other indication that the transfers of work to the academies were unlawfully motivated, I conclude that there is insufficient evidence that anti-union animus was a motivating factor in Respondent's decisions.

C. Duty to Bargain over Transfer/Subcontracting of Unit Work

The Commission directed me to determine if Respondent's transfers of bargaining unit work to the academies constituted subcontracting, and whether Respondent had a duty to bargain over these transfers under *Bay City, supra.*

From the early days of PERA, the Commission has held that an employer has a duty to bargain over the subcontracting of bargaining unit work to a private contractor. See *Lenawee County Road Commission*, 1970 MERC Lab Op 913 (ALJ decision); *Davison Board of Education*, 1973 MERC Lab Op 824 (Commission decision). In *Davison* and in subsequent decisions, e.g., *Kalamazoo County*, 1990 MERC Lab Op 786, the Commission held that an employer could be required to bargain over this type of subcontracting, despite the fact that no employee lost his or her job as a direct result. The Commission reasoned that the subcontracting had an effect on terms and conditions of employment because a smaller bargaining unit meant decreased job opportunities and less job security for members of the unit.

Van Buren School District v Wayne Circuit Judge, 61 Mich App 6 (1975), is the seminal court case on the duty to bargain over subcontracting under PERA. There, the Court affirmed the Commission's finding that the employer had a duty to bargain over the decision to subcontract to a private company transportation services previously provided by members of the union's bargaining unit. The *Van Buren* Court applied to PERA the reasoning set out in *Fibreboard Paper Products Corp v National Labor Relations Board, 379* US 203 (1964). In *Fibreboard*, the employer subcontracted its maintenance services to a private company. The Court in *Van Buren* noted that, in both *Fibreboard* and *Van Buren*, employees of a private contractor were doing exactly the same work previously done by bargaining unit employees and under similar conditions. The Court also applied the three tests set out in *Fibreboard* for determining whether a particular subcontracting decision was a mandatory subject of bargaining. The Court held, first, that the subcontracting in *Van Buren* did not alter the employer's basic operation because, until the employer stopped providing transportation to all its students, it still had statutory responsibilities for the operation of its transportation system, e.g., the duty to ensure that its buses were adequately maintained. Second, the Court noted that the money the employer was owed from selling or leasing its buses to the private company were offset against the employer's payments on the contract for services. Therefore, the employer had not recouped any of its capital investment. The Court held that the fact that the private contractor promised to provide additional services, such as improved scheduling, did not distinguish the case from *Fibreboard*, since in both cases the "work to be done by those replacing the union employees

was essentially similar." Finally, the Court concluded that requiring the employer to bargain would not unduly restrict the employer's right to manage its business. The Court noted that the employer in *Van Buren* was still free, indeed obligated, to manage its transportation system.

The employer in *Van Buren* argued that it had no duty to bargain because, unlike the employer in *Fibreboard,* it subcontracted the work not to save money, but to acquire superior transportation services. Therefore, according to the employer, nothing the union could have offered at the bargaining table would have affected its decision. The Court, however, stated that it was not convinced that bargaining would have served no purpose. It said that the merits of the employer's decision to subcontract were not so clear as to eliminate the need for discussion. It noted that the union might have been able to offer an alternative or, at least, discussion of the subject would have done much to "promote industrial peace."

I find that the transfers in the instant case meet the basic definition of subcontracting under *Fibreboard* – employees of another entity performing the same work under similar conditions. Each time one of the academies created a position and Respondent eliminated one, the new position had the same duties, at least initially, as the one eliminated. [1]

I also agree with Charging Party that Respondent has not "gone out of the business" of providing vocational technical education. First, Respondent continues to offer its own vocational and technical programs. Moreover, as an authorizing body under the Public School Academy Act, Respondent is responsible for the academies' compliance with the educational goals set out in their contracts with Respondent. See MCL 380.502(4), 380.503(5)(a), and 380.507(1)(a). More significantly, Respondent and its four academies share facilities and services, advertise their programs together, and have other close links.

Respondent asserts that requiring an employer to bargain over the type of transfers that took place here would impose an unreasonable burden on an employer. According to Respondent, the employer would have to bargain with each union representing employees affected by the change.[2] According to Respondent, these unions might have different agendas. The employer's decision to transfer a program might need to be made over the summer, when bargaining representatives are not available. Respondent maintains that requiring it to bargain to agreement or impasse with each union would not be practical under these circumstances. However, the duty to bargain under PERA often imposes some constraints on an employer's freedom of action. I find that the burden on the employer in this case would be no greater than the burden normally imposed by the duty to bargain over a decision to subcontract, and would not unduly restrict Respondent's freedom to manage.

---

[1] Respondent argues that one public employer cannot "subcontract" to another. This argument is clearly too broad. For example, a municipality might chose to contract with a neighboring municipality to perform emergency medical services as an alternative to contracting with a private ambulance company for the same services.

[2] Section 15 (2)(f) of PERA relieves a public school employer of any duty to bargain over a decision to subcontract noninstructional support services, as well as the impact of that decision. Therefore, it is not clear to me with what unions other than Charging Party Respondent would have to bargain.

Respondent also argues that decisions to eliminate and/or transfer educational programs to the academies are fundamental management decisions because they involve issues of educational policy. Moreover, it asserts, a dispute over an educational policy decision is not amenable to resolution through the collective bargaining process. According to Respondent, its motive for these transfers was improvement in the quality of education, community involvement, and job opportunities for students. Therefore, according to Respondent, nothing Charging Party could have offered in the way of economic or other concessions at the bargaining table would have affected its decisions to transfer work to the academies.

Where the reasons for the employer's decision are not clear, a dispute over subcontracting can be amenable to resolution through collective bargaining even when the employer asserts that its reasons are not economic. In *Van Buren*, the Court held that the employer had a duty to bargain when "the merits of the employer's decision to subcontract were not so clear as to eliminate the need for discussion." It noted that, at least, discussion of the subject would have done much to "promote industrial peace." The Court held, in essence, that the benefits of bargaining in that case outweighed the burdens imposed on the employer.

Employer actions that clearly involve only educational policy decisions are not subject to the duty to bargain under PERA. *Bay City, supra; Central Michigan Univ. Faculty Assoc. v Central Michigan Univ.*, 404 Mich 268 (1978). In this case, Respondent offered a general educational explanation for its decision to transfer programs to academies. However, it did not provide the educational justification for all of the transfers of work. For example, Respondent did not explain the educational reasons for transferring the drafting/CAD or the academic support position to the Plastics Academy, even though these positions provide instruction to students in programs both outside and inside the Plastics Academy. I agree with Respondent that it has no duty to bargain with Charging Party over matters of educational policy. However, I find that it is not clear here that Respondent's reasons for its transfers of bargaining unit positions involved only educational policy decisions. As the Court in *Van Buren* held, where the merits of an employer's decision are not so clear as to eliminate the need for discussion, requiring the employer to bargain may promote industrial peace, i.e., may resolve the dispute, even if the Union is not able to offer a viable alternative to the subcontracting. I conclude that when the subcontracting of bargaining unit work impacts employees, the educational or other reasons for the subcontracting are not clear, and requiring bargaining would not impose an undue burden on the employer, requiring the employer to bargain may advance the purposes of the Act. In this case, years of suspicion, acrimony and litigation might have been avoided had Respondent simply given Charging Party adequate advance notice of each transfer, an opportunity to discuss it, and an explanation of the reasons for its decision. For reasons set forth above, I find that Respondent "subcontracted" bargaining unit work to public school academies it authorized. I also find that this subcontracting constituted a mandatory subject of bargaining.

The Commission also directed me to determine whether Respondent had a duty to bargain under *Bay City, supra.* I find *Bay City* distinguishable. In *Bay City,* the Supreme Court upheld the Commission's finding that a local school board's decision to terminate the operation of its special education center, and transfer the responsibility for the programs there to its intermediate school district, was neither "subcontracting" nor subject to the duty to bargain under

PERA. The Court first analyzed the section of the Michigan School Code under which the transfer had been made. The Court held that, under that statute, neither the local district nor the intermediate district could ever completely terminate its statutory obligations to special education students. It concluded that the statutory scheme contemplated cooperative decision-making and shared responsibility between the local and intermediate school district, and that the statute both authorized and anticipated the action taken by the local district.

I find no such clear statement of legislative intent to permit the transfer of bargaining unit work in the Public School Academy Act. That statute permits four types of entities to act as authorizing agents – universities, community colleges, intermediate school districts, and local (K-12) school districts. MCL 380.501 (2) (a). Public school academies cannot provide post-secondary education. MCL 380.504(4). Therefore, only K-12 and intermediate school districts have the power to authorize academies offering educational programs similar or identical to those the district itself provides. However, an intermediate school district can also authorize an academy offering instruction normally provided by a local school district, as long as the academy operates within the intermediate school district's boundaries. The Public School Academy Act does not prohibit an intermediate school district from creating a public school academy and then transferring one of the district's vocational programs to this academy. However, neither does this statute specifically authorize such action.

The Court in *Bay City* held that the local school district's decision to transfer its special education programs to the intermediate district was analogous to the partial closing of a business. Applying the balancing test used in *First National Maintenance Corp v NLRB,* 452 US 666 (1981), a partial closing case, the Court concluded that the potential harm to the local district's immediate need to exercise its managerial discretion outweighed the incremental benefit that might have been gained through employee participation in the decision. The Court held, as discussed above, that the decision in *Bay City* was not amenable to the collective bargaining process because this was not a situation where labor concessions could have alleviated the employer's economic considerations. In addition, the Court found significant the fact that there were no allegations that the transfer was motivated by anti-union animus. Finally, it noted that the legislature had provided a measure of employment security for employees involved in these statutory transfers by requiring the intermediate school district to first hire employees of the local school district whose jobs were eliminated. The Court stated, 'this case involves a fundamental change in the operation of a public employer and corresponding statutory protection for affected employees."

I conclude that even if the balancing test of *First National Maintenance* is applied to this case, Respondent's transfer of work was a mandatory subject of bargaining. As discussed above, I find that the benefits of employee participation in an employer's decisions to transfer bargaining unit work to public school academies outweigh the potential harm to the employer's ability to exercise its managerial discretion and its right to make educational policy decisions. For reasons set forth above, I conclude the Respondent's decisions to subcontract bargaining unit work to its academies were mandatory subjects of bargaining.

D. Demands to Bargain

Respondent argues that the charge should be dismissed because Charging Party never made a written or verbal request to bargain over the transfer or subcontracting of bargaining unit work to the Health Academy, the IT Academy, or the Hospitality Academy, or the transfer of work performed by the drafting/CAD instructor to the Plastics Academy.

An employer's duty to bargain is conditioned on its receipt of an appropriate request. *Local 586, Service Employees International Union v Union City,* 135 Mich App 553, lv den 421 Mich 857 (1995). *United Teachers of Flint v Flint Schools*, 158 Mich App 138 (1986). However, an employer or union has no duty to demand bargaining when it is informed of a change in a mandatory subject only after the final decision has been made, and it is clear that a request to bargain over this decision would be futile. See, e.g., *Intermediate Education Assoc/MEA and MESSA*, 1993 MERC Lab Op 101, 106; *Allendale P.S.*, 1997 MERC Lab Op 187; *City of Westland*, 1987 MERC Lab Op 793.

In early February 1999, Respondent told its medical technologies instructors that their positions would be transferred to the Health Academy. It also told them they would be laid off at the end of the school year. In my view, this announcement, and the fact that Respondent had rebuffed Charging Party's attempts to discuss the transfer of the metal machining position to the Plastics Academy the previous fall, indicate that Respondent had already made its decision to transfer the work. I would find that the transfer of the medical technology instructors' work was a *fait accompli* in February 1999, and that a demand to bargain would have been futile. In that case, however, the charge the Respondent violated its duty to bargain over this transfer is untimely, since the unfair labor practice occurred more than six months before this charge was filed in September 1999.

Charging Party asserts that it made a demand to bargain over the transfer of the medical technology instructors' work when it met with Respondent on May 11, 1999, and that Respondent rejected its demand at that meeting. However, the record indicates that Charging Party did not seek to discuss the transfer itself, but only its effects on the instructors' continued employment. There is no evidence that Charging Party ever explicitly demanded to bargain over the transfer of the medical technology instructors' work.

Charging Party did not learn of the transfer of the work of the drafting/CAD instructor to the Plastics Academy until August 5, 1999, when the job was posted. By this time, Charging Party had made numerous unsuccessful attempts to discuss the general issue of the transfers of work to the academies. I conclude that by August 5, 1999, Respondent had already made its final decision to transfer the work of the drafting/CAD instructor, and that a demand to bargain would have been futile. I reach a similar conclusion with respect to the other transfers covered by this charge. Charging Party made no specific demand to bargain over the transfer of the work performed by the academic support instructors, case managers, school-to-work instructors, business services and technology instructor, electronics instructor, marketing instructor, or food service and culinary arts instructor. However, in each case, Charging Party did not learn that Respondent was considering transferring the work until a job posting appeared on the wall in the TEC. I conclude that, in each instance, the transfer was a *fait accompli* by the time Respondent

or an academy posted the job opening, and that a demand to bargain would have been futile.[3]

Summary of Conclusions:

In sum, I make the following conclusions of law. First, except for the allegation that Respondent unlawfully transferred work performed by the medical technologies instructors, this charge was timely filed under Section 16(a) of PERA. Second, the evidence does not support a finding that Respondent transferred this work in order to get rid of the union, diminish its bargaining power, or for any other reason prohibited by Section 10(1)(a) or (c) of PERA. Third, Respondent's transfers of work to public school academies constituted subcontracting of bargaining unit work. Fourth, whether or not the transfers in this case are viewed as subcontracts, the transfers were mandatory subjects of bargaining. Fifth, by the time Charging Party learned of each transfer, Respondent had made a final decision to transfer the work, and a demand to bargain would have been futile. Finally, Respondent violated Section 10(1)(e) of PERA by unilaterally transferring/subcontracting bargaining unit work performed by the by the drafting/CAD instructor, academic support instructors, case managers, school-to-work instructors, business services and technology instructor, electronics instructor, marketing instructor, and food service and culinary arts instructor.

Remedy

Charging Party requests that the Commission issue an order to Respondent to cease and desist from its illegal conduct and to bargain in good faith with Respondent over the subcontracting of bargaining unit work. It also asks the Commission to award it attorneys' fees. Charging Party does not seek the return of work already transferred from the bargaining unit.

PERA does not authorize the award of attorneys' fees. *City of Detroit v. Goolsby,* 211 Mich App 214, 223-225, (1995), lv den 450 Mich 1020 (1996). I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent St. Clair Intermediate School District, its officers and agents, are hereby ordered to:

1. Cease and desist from transferring or subcontracting bargaining unit work performed by members of the St. Clair County Education Association without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

2. Upon demand, bargain with the above labor organization over any decision to

[3] Respondent had not actually authorized the IT or Hospitality Academies when it posted openings for the positions that ended up there. However, its response to Charging Party's grievance over these postings shows that it had already decided to transfer the work.

transfer/subcontract work previously performed exclusively by members of that organization unit, including the transfer or subcontract of work to a public school academy.

3. Cease and desist from any further transfer or subcontracting of bargaining unit work, pending satisfaction of the obligation to bargain.

4. Post the attached notice to employees in conspicuous places on the Respondent's premises, including 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 St. Clair Intermediate School District has been found to have committed unfair labor practices 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 transfer or subcontract bargaining unit work performed by members of the St. Clair County Education Association without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

WE WILL, upon demand, bargain with the above labor organization over any decision to transfer/subcontract work previously performed exclusively by members of that organization unit, including the transfer or subcontract of work to a public school academy.

ST. CLAIR COUNTY INTERMEDIATE SCHOOL DISTRICT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.