STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:
BEDFORD PUBLIC SCHOOLS,
Respondent–Public Employer,

Case No. C04 I-250

- and -

BEDFORD EDUCATION ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Collins & Blaha, P.C. by Gary D. Collins, Esq., for the Public Employer

White, Scheider, Young & Chiodini, P.C., by Michael M. Shoudy, Esq., for the Labor Organization

DECISION AND ORDER

On December 7, 2005, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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EMPLOYMENT RELATIONS COMMISSION
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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

This case was heard in Detroit, Michigan, on April 25, 2005, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based on the record and post-hearing briefs filed by July 14, 2005, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charge:

On September 24, 2004, Charging Party filed an unfair labor practice charge alleging that Respondent violated Section 10(1)(e) of PERA by subcontracting bargaining unit work without first giving it notice and an opportunity to collectively bargain.

Findings of Fact:

Charging Party represents a bargaining unit of all certificated and professional personnel including teachers, counselors, librarians and nurses employed by Respondent. Charging Party and Respondent were parties to a collective bargaining agreement that expired on June 30, 2004. Article 3, A.3 of the agreement gives Respondent the right to:

> Direct the working force, including the right to establish and/or eliminate positions, to hire, evaluate, promote, suspend, discharge employees, transfer employees, assign work or duties to employees, determine the size of the work force, and to lay-off employees.

The agreement also contains Extra Duty Schedules B and B-1. Schedule B covers athletic programs and sets forth responsibilities for coaches. It also lists positions, salaries, and in some cases, designates the optimum number of positions to be filled if personnel and monies are available. Schedule B also provides that:

> All extra-curricular assignments are non-tenure positions and no individual shall have an expectancy of employment in any extra-curricular position from one year to the next. Personnel files on extra-curricular positions shall be kept separate from personnel files on teaching positions.

Schedule B-1 covers extracurricular activities such as music, plays and driver training. It also lists positions, salaries and, in some cases, designates the number of positions that bargaining unit members can fill if personnel and monies are available. Schedule B-1, however, does not include a limitation on the number of driver education teacher positions.

Some teachers in Charging Party's bargaining unit supplemented their salaries by teaching driver education as extra-duty assignments. The $23.14 hourly rate that Respondent paid them counted toward their earnings for retirement purposes. For over twenty years, teacher and bargaining unit member Med Barr, Sr., was chairperson of the driver education program.

In January 2004, the Michigan Department of Education notified local school districts, including Respondent, that funding for driver education programs would be eliminated. Immediately thereafter, Barr approached Respondent about offering driver education through its Community Education program, a component of the Bedford Public Schools that is self-funded and which offers fee-for-service activities. According to Jon White, Respondent's acting superintendent some extra-curricular activities such as art, music and recreational programs, were developed through Community Education, during the 1980's because of financial difficulties.

On July 9, 2004, Respondent's Director of Community Education entered into an agreement with Medlin DE, Inc., a company formed by Barr, who retired from the school district when the 2003-2004 school year ended, and his wife to provide driver education instructors to the Community Education program. The basic operation of the driver education program did not change. Medlin DE, Inc., uses cars owned and maintained by Respondent and employs the same instructors who taught drivers' education before the program was subcontracted. The instructors are paid the same hourly rate, $23.14, that is set forth in the collective bargaining agreement between Charging Party and Respondent. However, Medlin DE, Inc., does not make contributions to the teachers' retirement fund on wages paid to driver education teachers, as Respondent did.

After the driver education program was subcontracted to Medlin DE, Inc., Respondent has raised the fees that students pay to participate in the program.

Respondent's Assistant Superintendent of Personnel Wes Berger testified that in April 2004, during his monthly meeting with Charging Party's President Coleen Jan, he told her that driver education would be operated through Community Education. According to Berger, Jan responded that Respondent did not have the right to remove the program and that the positions should be in Charging Party's bargaining unit. According to Berger, he explained to Jan that the extra-duty driver training positions were "annual, at-will, year-to-year contracts." Jan, however, testified that she did not recall being told that the driver education program would be transferred to Community Education and she did not find out that it had been subcontracted to Medlin DE, Inc. until the summer of 2004 while she was teaching summer school.

On July 19, 2004, Charging Party sent Respondent a demand to bargain the impact of the decision to transfer the driver education program to Community Education. Respondent did not formally respond to the bargaining demand, but, according to Jan, Berger told her that Respondent "looked at it as an opportunity to out-source, which is why we [Charging Party] did not bring it up" in negotiations for a successor contract.1

Conclusions of Law:

Charging Party argues that Respondent violated Section 10(1)(e) of PERA by subcontracting the driver education work without notice and an opportunity to bargain. It is well settled that under PERA, a public employer is obligated to bargain over a decision to replace bargaining unit employees with a subcontractor to perform the same work under similar conditions. *Van Buren Pub Schs* v *Wayne Circuit Judge*, 61 Mich App 6 (1975); *Detroit Police Officers Association of MI* v *City of Detroit*, 424 Mich 79 (1987); See also *DPOA* v *City of Detroit*, 391 Mich 44, 54 (1974); *City of Highland Park*, 17 MPER 86 (2004). The duty to bargain arises if: (1) the employer's basis operations are not altered by the subcontracting; (2) capital recovery or investment is not significant; (3) managerial discretion is not seriously hampered by the duty to bargain; and (4) collective bargaining is an appropriate means for resolving the issue. *Van Buren*, *supra*, at 28, applying *Fiberboard*, 379 US 203; *Highland Park*, *supra*, *St Clair Intermed Sch Dst*, 2001 MERC Lab Op 218.

Here, Respondent's did not alter its basis operations and its subcontracting decision did not involve capital recovery or investment. Respondent continues to provide drivers' training to its students, albeit by using a subcontractor who not only uses cars owned and maintained by Respondent, but the same instructors. Neither has its managerial discretion been seriously hampered. The drivers' training program is operated in the same manner as before and Respondent has exercised its discretion to raise fees that students pay to participate in the program.

1As of the date of the hearing, they were still engaged in bargaining.

I find no merit to any of several defenses raised by Respondent. It cites a number of Commission cases, including *Ecorse Pub Schs*, 1990 MERC Lab Op 22; *Charter Township of Meridian*, 1990 MERC Lab Op 153; *Leelanau Co Bd of Comm*, 1988 MERC Lab Op 590, among others, for the view that Charging Party waived its right to bargain because it did not make a timely bargaining demand after it knew of Respondent's intent to discontinue operating the driver education program. According to Respondent, Berger told Charging Party president Jan during an April 2004 monthly meeting that Respondent intended to subcontract the driver education program, but Charging Party did not make a bargaining demand until July 19, 2004, three months later. The record does not support Respondent's assertion.

Berger testified that during the April 2004 meeting with Jan, he told her that drivers' education would be operated through Community Education, which is an arm of the District. There is no evidence on the record that Berger disclosed to Jan that it would be subcontracted to a third party. According to Jan, she learned that the driver education program had been subcontracted during the summer of 2004 while she was teaching summer school. Even if Berger's version of the events were credited, I find that his statement to Jan that the driver education program would be transferred to Community Education was insufficient notice to her of Respondent's intent to subcontract the program to a third party. I, therefore, find that the bargaining demand made by Charging Party on July 19, 2004, shortly after Jan learned that the driver education program had been subcontracted, was timely.

Respondent also claims that it did not have a duty to bargain with Charging Party because the matter is covered by the collective bargaining agreement and Charging Party has, therefore, exercised its right to bargain. For this view, Respondent points to a provision in Schedule B of the agreement which states that all extra-curricular assignments are non-tenure and individuals do not have an expectancy of employment from one year to the next. Respondent also claims that Schedules B and B-1 set forth the number of positions that can be filled if personnel and monies are available. Finally, Respondent relies on language in the agreement's management rights clause to support its right to direct the work force and to establish and/or eliminate positions. I find no merit to these assertions.

First, the driver's training teacher position is included in Schedule B-1 of the agreement. Schedule B-1 does not contain a provision regarding teachers' expectation of employment from year to year or one that limits the number of driver education positions that can be filled. Even if the agreement "covers" or contains a waiver of Charging Party's right to bargain over subcontracting driver education teacher positions, a waiver of bargaining rights based on contract language does not continue after the contract expires. In other words, contract language, by itself, is not a term or condition of employment and does not survive the expiration of the agreement in which it is contained. *Eighth Judicial Dist Ct (Kalamazoo Co)*, 18 MPER 21; *City of Lansing*, 1989 MERC Lab Op 1055, 1059; *Capac Comm Schs*, 1984 MERC Lab Op 1095. See also *Wayne State Univ*, 1987 MERC Lab Op 899, 902. In this case, the collective bargaining agreement

expired on June 30, 2004, and Respondent did not enter into its contract with Medlin DE, Inc., until July 9, 2004.

Similarly, I find that Charging Party did not waive its bargaining rights because of the parties' past practice, as Respondent contends. There is no evidence in this record of any prior practice of subcontracting programs to an outside entity. Rather, the record shows that in the 1980's a number of programs were developed through Community Education, a division of Bedford Schools.

I have carefully considered all other arguments advanced by the parties and conclude that they do not warrant a change in the result. Based on the above discussion, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

Respondent Bedford Public Schools and its officers and its officers and agents are hereby ordered to:

1. Cease and desist from subcontracting work previously performed exclusively by members of Bedford Education Association, MEA/NEA, the exclusive bargaining agent of its employees, without giving the labor organization notice and opportunity to demand bargaining at a time when bargaining would be meaningful.

2. Restore the status quo that existed prior to Respondent's unlawful actions and make bargaining unit members whole for all losses attributable to the unlawful subcontracting.[2]

3. On demand, bargain with the Bedford Education Association over any decision to transfer or subcontract bargaining unit work.

4. Cease from further subcontracting of bargaining unit work until it satisfies its obligation to bargain.

5. Post, for 30 consecutive days, the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

2This order does not prohibit Respondent from continuing the driver education program's self-funded status.

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before an Administrative Law Judge of the Michigan Employment Relations Commission, the **Bedford Public Schools**, a public employer under the **Michigan Public Employment Relations Act**, was found to have committed an unfair labor practice in violation of this Act. Based upon an order of the Commission, we hereby notify our employees that:

> **WE WILL NOT** subcontract work previously performed exclusively by members of the Bedford Education Association, MEA/NEA, the duly certified bargaining agent of its employees, without giving the labor organization notice and an opportunity to demand bargaining at a time when bargaining would be meaningful.
>
> **WE WILL** restore the status quo that existed prior to our unlawful actions and make bargaining unit members whole for all losses cause by out unlawful actions.3
>
> **WE WILL**, on demand, bargain with the Bedford Education Association over any decision to transfer or subcontract work previously performed exclusively by its members.
>
> **WE WILL** cease from engaging in further subcontracting of bargaining unit work until we satisfy our bargaining obligation.

All of our employees are free to engage in lawful, concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid or protection as provided by Section 9 of the Public Employment Relations Act.

BEDFORD PUBLIC SCHOOLS

BY: _____

TITLE: _____

Dated: _____

This notice must remain posted for 30 consecutive days. Respondent shall take reasonable steps to prevent the removal or defacement of the notice. Questions about this notice shall be directed to the Michigan

3This order does not prohibit Respondent from continuing the drivers' education program's self-fund status.

Employment Relations Commission, 3026 W. Grand Blvd, Ste. 2-750, Box 02988, Detroit, MI 48202. Telephone: (313) 456-3510.