STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

- and - Case No. C04 F-152

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Miller, Johnson, Snell & Cummiskey, PLC, by Craig A. Mutch, Esq., for Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for Charging Party

DECISION AND ORDER

On November 7, 2005, Administrative Law Judge (ALJ) Julia Stern issued her Decision and Recommended Order finding that Charging Party Amalgamated Transit Union, Local 836, failed to establish that Respondent, Interurban Transit Partnership (Interurban), violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e). The ALJ found that Respondent did not refuse to bargain with Charging Party over the subcontracting of unit work and, with respect to that issue, the charge was untimely because it was not filed within six months of the unilateral change. Further, the ALJ concluded that the Commission's decision in a prior case, Case No. C01 K-220,[1] did not control the issue. The ALJ also found that Respondent did not violate PERA by prematurely declaring impasse on the issue of subcontracting bargaining unit work and recommended that the charge be dismissed.

The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. On November 30, 2005, Charging Party was granted an extension of time in which to file its exceptions to the ALJ's decision, and its exceptions were filed on December 29, 2005. After receiving an extension of time on January 9, 2006, Respondent filed a brief in support of the ALJ's Decision and Recommended Order on February 10, 2006.

1 Case No. C01 K-220 is discussed in more detail in the factual summary that follows.

In its exceptions, Charging Party alleges that the ALJ erred in finding that the charge regarding subcontracting was untimely and in finding that the 2003 subcontracting was not prohibited by the Commission decision in Case No. C01 K-220. Charging Party excepts to the ALJ's findings that Respondent never refused to bargain in good faith, that Charging Party and Respondent met and exchanged bargaining proposals, and that Respondent did not violate PERA by prematurely declaring impasse on the subcontracting issue. Charging Party also contends that the ALJ erred in recommending that the charge be dismissed. For the reasons stated below, we find Charging Party's exceptions to be without merit.

Factual Summary

We adopt the ALJ's findings of fact, which were set forth fully in the ALJ's Decision and Recommended Order and need not be repeated in detail here. Briefly, Interurban provides public transit services in the City of Grand Rapids. Charging Party represents a bargaining unit consisting of Respondent's non-supervisory employees, including drivers. Interurban provided a "deviated line-haul" service called Passenger Adaptive Suburban Shuttle (PASS), the routes of which were driven by members of the bargaining unit represented by Charging Party.

In October 2001, Interurban's Board of Directors voted to abolish PASS services on weekends and during nighttime hours, and to refer patrons to an on-demand shuttle service known as Go!Bus, operated by a private company under contract with Respondent. Prior to this change, Go!Bus services had been available only to disabled persons and senior citizens. Charging Party made a demand to bargain over the subcontracting of the bargaining unit's work. Following Respondent's refusal to bargain over the matter, Charging Party filed the charge in Case No. C01 K-220. In that case, Charging Party alleged that Respondent violated its duty to bargain over the subcontracting of bargaining unit work. In addition to asserting that it had not subcontracted the work, Respondent maintained that it had no duty to bargain because the work had not been performed exclusively by members of Charging Party's unit. An ALJ issued a Decision and Recommended Order in that case on July 13, 2003, finding that Respondent unlawfully refused to bargain over its decision to subcontract the work and recommending that we order Respondent to cease and desist from subcontracting bargaining unit work without first giving Charging Party notice and an opportunity to demand bargaining. Following the Commission's review of Respondent's exceptions to the ALJ's decision, the Commission issued a Decision and Order on June 30, 2004 affirming the ALJ's findings and conclusions. The Commission adopted the ALJ's recommended order with the modification that Respondent also be required to restore the status quo that existed prior to Respondent's unlawful actions, and make bargaining unit members whole for all losses attributable to such unlawful actions. See *Interurban Transit Partnership*, 17 MPER 40 (2004). The Commission's decision was affirmed on appeal in *Interurban Transit Partnership v Amalgamated Transit Union*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2006 (Docket No. 256796).

In the summer of 2003, Respondent decided that there was insufficient demand for PASS services on weekdays and decided to eliminate the remaining PASS services and again refer

patrons to the Go!Bus service.[2] On August 8, 2003, Charging Party demanded bargaining over the subcontracting issue, but did not specifically request that the parties meet and did not suggest a meeting date. While Respondent did not specifically respond to Charging Party's August 8, 2003 demand, the issue of subcontracting was discussed later in August and Respondent requested a written proposal from Charging Party. Subsequently, the parties discussed Charging Party's written proposal, which suggested that PASS runs be continued and that they be performed by Charging Party's bargaining unit members. Respondent asked Charging Party if the lower paratransit wage rate would be acceptable for the employees performing the PASS work. Charging Party indicated that it would not be acceptable unless that rate was raised to the coach-operators rate that employees performing PASS runs received at that time. Respondent later informed Charging Party that it would not accept Charging Party's proposal. Neither Charging Party nor Respondent offered further written proposals and neither attempted to schedule a formal bargaining session.

Respondent eliminated the remaining PASS service effective September 8, 2003. The parties agreed to arbitrate the decision to subcontract the weekday PASS services, and selected an arbitrator and a date for the arbitration. However, there was confusion between the parties as to whether the grievance over the subcontracting or the grievance over another matter was the subject of the arbitration. On May 14, 2004, the parties convened for the arbitration and briefly discussed the subcontracting issue. During this discussion, Respondent took the position that the parties had bargained to an impasse.

Charging Party filed the charge in this matter on June 9, 2004.

Discussion and Conclusions of Law

On exception, Charging Party argues that the ALJ erred in finding that the Charge regarding subcontracting was untimely. To be timely under Section 16(a) of PERA, a charge must be filed within six months of the date the charging party knows or has reason to know of the unfair labor practice. *Wines v Huntington Woods*, 97 Mich App 86 (1980). When a charge alleges a unilateral change in terms and conditions of employment, the statute of limitations runs from the date the employer announces the decision. *Detroit (Dep't of Water and Sewerage)*, 1990 MERC Lab Op 400, 404; *Tuscola Intermediate Sch Dist*, 1985 MERC Lab Op 123, 125. Therefore, Charging Party was obliged to file its charge alleging that the subcontracting constituted an unlawful unilateral change within six months of the date that the Employer announced the change. The Employer's decision was effective September 8, 2003, thus, the limitations period began on, or before, that date.[3] To be timely, the Charge should have been filed before February 8, 2004. Since the Charge in this matter was filed on June 9, 2004, the charge that Respondent committed an unfair labor practice by eliminating the remaining PASS

2 The parties have stipulated that the PASS services in question were of the same kind as the night and weekend services that were the subject of the Commission's Order in Case No. C01 K-220.

3 While the exact date of the Employer's announcement is not set forth in the record, Charging Party's brief in support of its exceptions indicates that the Employer announced the decision in August 2003. At the very latest, Charging Party knew, or should have known, of the Employer's decision by the date it became effective.

services without first giving Charging Party notice and an opportunity to demand bargaining was untimely.

Charging Party also excepts to the ALJ's finding that, at the time the daytime PASS work was subcontracted, there was no outstanding order requiring Respondent to bargain over the subcontracting. Charging Party argues that the 2003 subcontracting was prohibited by the Commission decision in Case No. C01 K-220. We disagree. The subcontracting of PASS work in 2001 and the subcontracting of the remaining work in 2003 were separate events involving separate decisions by Respondent and requiring separate notices to Charging Party. Respondent's failure in each event to provide Charging Party with notice of its decision and the opportunity to demand bargaining served as the basis for separate charges, which were required to be filed within six months of Respondent's decision. Additionally, as noted by the ALJ, the ALJ's Decision and Recommended Order in Case No. C01 K-220 was not a final order and the Commission's Decision in that case had not been issued at the time of the 2003 subcontracting.

In addressing Charging Party's allegation that Respondent breached its duty to bargain, the record supports the ALJ's finding that Respondent never refused to bargain or to meet. We cannot require parties to agree or to make concessions, and their failure to do so is not, *by itself*, sufficient to establish a failure to bargain in good faith. See *Grand Rapids Public Museum*, 17 MPER 58 (2004). We also agree with the ALJ's conclusion that Respondent did not violate its duty to bargain in good faith when it prematurely declared an impasse, because there is no evidence that Respondent refused to meet after impasse was declared or that Charging Party made a request to meet. Accordingly, we affirm the ALJ's decision that Charging Party failed to establish that Respondent violated its duty to bargain in good faith pursuant to Section 10(1)(e) of PERA.

ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Miller, Johnson, Snell & Cummiskey, PLC, by Craig A. Mutch, Esq., for the Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Lansing, Michigan on February 16, 2005, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before April 15, 2005, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On June 9, 2004, the Amalgamated Transit Union, Local 836, filed this charge against the Interurban Transit Partnership. Respondent provides public transit services in the City of Grand Rapids and adjoining areas. Charging Party represents a bargaining unit consisting of Respondent's nonsupervisory employees, including drivers. The charge alleges that Respondent violated Section 10(1)(e) of PERA by refusing to bargain over the subcontracting of unit work in violation of the Commission's order in a previous case, Case No. C01 K-220. Charging Party also alleges that Respondent violated its duty to bargain by prematurely declaring that the parties had reached impasse on the subcontracting issue on May 14, 2004.

Facts:

Until September 2003, Respondent's transportation services included a "deviated line-haul" service called Passenger Adaptive Suburban Shuttle (PASS).[4] Charging Party's members drove PASS runs. On October 24, 2001, Respondent's Board of Directors voted to abolish the PASS service on weekends and during nighttime hours, and to refer patrons seeking to use the PASS service during those hours to an on-demand shuttle service, known as Go!Bus, operated by a private company under contract with Respondent. Prior to the implementation of this change on December 2, 2001, the Go!Bus service had been available only to disabled and senior citizens. On October 29, 2001, Charging Party made a demand to bargain over the subcontracting of bargaining unit work. On November 15, 2001, Respondent refused, asserting that it was not subcontracting the work but eliminating it.

On November 2, 2001, Charging Party filed the unfair labor practice charge in Case No. C01 K-220, alleging that Respondent violated its duty to bargain over the subcontracting of the PASS work. In addition to asserting that it had not subcontracted the work, Respondent maintained that it had no duty to bargain because the work had not been performed exclusively by members of Charging Party's unit. On July 13, 2003, a Commission administrative law judge issued a decision and recommended order finding that Respondent unlawfully refused to bargain over its decision to subcontract the work. Respondent filed timely exceptions to the administrative law judge's decision. On June 30, 2004, the Commission affirmed the findings and conclusions of the administrative law judge. See *Interurban Transit Partnership*, 17 MPER 40 (2004). Respondent filed an appeal with the Court of Appeals. The appeal remains pending.

Both the administrative law judge's recommended order and the order of the Commission directed Respondent to:

> 1. Cease and desist from subcontracting work previously performed exclusively by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.
>
> 2. On demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.
>
> 3. Cease and desist from further subcontracting of the bargaining unit work, pending satisfaction of the obligation to bargain.

During the summer of 2003, Respondent concluded that there was insufficient demand

[4] The PASS service and its history are described in detail in the administrative law judge's decision in Case No. C01 K-220, infra.

for daytime PASS service on weekdays. It decided to eliminate the remaining PASS services and direct patrons to the Go!Bus service. The parties stipulated at the hearing that the these PASS services were of the same kind as the night and weekend services that were the subject of the Commission's order in Case No. C01 K-220, and that the final disposition of whether that bargaining unit work was subcontracted and whether that subcontracting was a mandatory subject would also apply to the facts of this dispute.

Sometime before August 2003, Charging Party's president, Juanita Merritt, learned of Respondent's plans for the PASS service in an informal conversation with Respondent's operations manager, Brian Pouget. Shortly thereafter, on August 8, 2003, Merritt sent Respondent a written demand to bargain. Respondent did not formally respond to the demand, and it never indicated to Charging Party that it had changed its position that it had no legal duty to bargain over the subcontracting/elimination of PASS work. Neither party made any effort to arrange for formal negotiation sessions. However, during August, Merritt, Charging Party's recording secretary, Steve Clapp, and Pouget had discussions and at least one prearranged meeting about the daytime PASS service. During one of these discussions, Merritt told Pouget that Charging Party wanted the PASS service to stay and wanted its members to operate it. Pouget then suggested that she prepare a written proposal and give it to him. Shortly thereafter, Merritt gave him a written proposal demanding that Charging Party's members be allowed to continue driving PASS runs. The parties' collective bargaining agreement provides one hourly rate for coach operators and another for drivers of paratransit vehicles. PASS drivers were considered coach operators and were paid that rate. After Merritt gave Pouget her proposal, he asked her if bargaining unit employees would be willing to accept the paratransit rate to drive PASS runs. Merritt said no, unless Respondent was willing to bring the paratransit rate up to the coach operator rate. Several days later, Pouget told Merritt that Charging Party's proposal was not acceptable and that Respondent was going ahead with its plans.

Effective September 8, 2003, Respondent eliminated the remaining PASS service and directed patrons to the Go!Bus service operated by the private contractor. On September 3 and September 9, Charging Party filed grievances alleging that Respondent had violated the contract by failing to post PASS runs for bid and challenging Respondent's subcontracting of the PASS work as violation of the contract. On November 18, Charging Party made a written demand to arbitrate the subcontracting grievance. Sometime thereafter, the parties' respective counsels selected an arbitrator and an arbitration date of May 14, 2004. However, Charging Party believed that they had agreed to arbitrate the posting grievance while Respondent thought the scheduled arbitration concerned the subcontracting grievance.

Merritt drafted a letter to Pouget, dated November 11, 2003, again demanding to bargain over the subcontracting of the PASS work. Merritt testified that she believed that the letter was sent, but Pouget denied receiving it. The letter did not propose that the parties meet.

On the morning of May 14, 2004, the parties convened for the arbitration hearing and discovered that they had prepared to arbitrate different grievances. The parties then briefly discussed the subcontracting issue. In the course of the discussion, Mutch told Charging Party that it was Respondent's position that the parties had bargained to impasse over the alleged

subcontracting of the daytime PASS work in August 2003. Merritt was shocked by this statement. On June 2, 2004, Merritt sent Respondent a letter stating:

> On May 14, 2004 you informed ATU Local 836 that you are at an impasse on the issue of PASS (Passenger Adaptive Suburban Service) work being performed by private contractor instead of ATU Local 836. Please be advised that ATU Local 836 is filing an unfair labor practice complaint with MERC (Michigan Employment Relations Commission.)

Discussion and Conclusions of Law:

Section 16(a) of PERA prohibits the Commission from remedying any unfair labor practice occurring more than six months prior to the filing of the charge with the commission and the service of a copy thereof on the charged party. In a motion for summary disposition, and again at the beginning of the hearing, Respondent moved to dismiss as untimely the allegation that that it refused to bargain over its decision to subcontract daytime PASS service, and the allegation that it unlawfully implemented that decision on September 8, 2003. I ruled at the hearing that Charging Party's allegation that Respondent unlawfully subcontracted the work without satisfying its obligation to bargain was untimely. I noted that the alleged unilateral change occurred on or before September 8, 2003, and that the charge was not filed within six months of that date.

In its post-hearing brief, Charging Party asserts it was unnecessary for it to file a separate charge over the September 2003 subcontracting because the Commission's order in Case No. C01 K-220 barred Respondent from unilaterally subcontracting PASS work. I disagree. In September 2003, the Commission had not yet issued its order directing Respondent to bargain on demand and to cease and desist from further subcontracting of the work without satisfying its obligation to bargain.[5] At the time Respondent subcontracted the daytime PASS work, there was no outstanding order requiring it to bargain over its earlier subcontracting. I find, moreover, that the subcontracting of PASS work in 2001 and the subcontracting of the remaining work in September 2003 were separate events constituting separate unfair labor practices. I conclude that, under Section 16(a), Charging Party was obliged to file its charge alleging that the subcontracting constituted an unlawful unilateral change within six months of September 8, 2003 and that the instant charge was, therefore, untimely as to this allegation.

I also conclude that the record does not establish that Respondent refused to bargain over the subcontracting of the daytime PASS work. Respondent did not respond to Charging Party's August 8, 2003 demand to bargain. However, it never refused to bargain or to meet, and, after the August 8 demand, Pouget and Merritt discussed the issue and even briefly exchanged

[5] Under Section 16(b) of PERA, if the evidence in an unfair labor practice case is presented to an examiner designated by the Commission, the examiner must issue a proposed report and recommended order and serve it on the parties. If exceptions to the recommended order are not filed within twenty days after service, the recommended order becomes the order of the Commission and becomes effective as prescribed. If either party files timely exceptions, however, the examiner's recommended order does not become an order of the Commission unless and until the Commission specifically adopts it.

proposals. Despite Charging Party's written bargaining demands, it never attempted to schedule formal bargaining meetings. It seems evident from statements in Charging Party's brief that it did not try to schedule meetings because it assumed that Respondent would not bargain in good faith until the Court of Appeals resolved the issue of Respondent's obligation to bargain in Case No. C01 K-220.

Finally, I conclude that Respondent did not violate its duty to bargain in good faith when Mutch stated on May 14, 2004 that the parties had reached impasse. As the administrative law judge noted in *Kentwood Pub Schs*, 17 MPER 67 (2004), a party's declaration of impasse, even if premature, does not establish bad faith if the party continues to meet. I find it unnecessary to determine whether the parties were in fact at impasse when Mutch made his statement because there is no evidence that Respondent refused to meet after May 14, 2004.

In sum, I find that Charging Party's allegation that Respondent unilaterally subcontracted bargaining unit work in September 2003 was untimely under Section 16(a) of PERA. I find that Charging Party failed to establish that Respondent refused to bargain over the subcontracting of the daytime PASS work, and I conclude that Respondent did not violate Section 10(1)(e) of the Act by stating on May 14, 2004 that the parties had reached impasse on this issue. In accord with these findings, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____