STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TROY SCHOOL DISTRICT,
Public Employer,

Case No. R08 A-017

-and-

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 547,
Labor Organization-Petitioner,

-and-

TROY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA,
Labor Organization-Incumbent Union.
_____/

APPEARANCES:

Jasen M. Witt, Esq., Assistant Superintendent, Human Resources, Troy School District, for the Employer

Law Offices of J. Douglas Korney, by J. Douglas Korney, Esq., for the Petitioner

Law Offices of Lee & Corell, by Michael K. Lee, Esq., for the Incumbent Union

DECISION AND ORDER DISMISSING PETITION

On February 19, 2008, the International Union of Operating Engineers, Local 547, AFL-CIO (Petitioner), filed a petition for a representation election pursuant to Section 12 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.212. Petitioner seeks to represent a bargaining unit of full-time and regular part-time custodial and maintenance employees of the Troy School District. These employees are currently part of a unit represented by the Troy Educational Support Personnel Association, MEA/NEA (the Incumbent Union). This unit, as defined in the recognition clause of the contract between the Employer and the Incumbent Union expiring on June 30, 2008, consists of the following:

> All. . . nonsupervisory custodial, maintenance, transportation and Food service employees, including middle and elementary school head custodians, all

maintenance employees, head cooks, para-educators, campus security, but excluding all supervisors, noon aides, summer seasonal employees working less than sixty (60) days, substitutes, and part-time employees working less than twelve and one half (12.5) hours per week.

The Incumbent Union and the Employer were unwilling to consent to an election pursuant to the petition, and the matter was assigned for hearing to Julia C. Stern, Administrative Law Judge for the State Office of Administrative Hearings and Rules. On April 21, 2008, the Incumbent Union filed a motion to dismiss the petition, arguing that the petition inappropriately seeks to fragment an existing appropriate unit. On May 7, 2008, Petitioner filed a response in opposition to the motion. Petitioner asserts that its petition is appropriate because at least one group of employees in the existing unit, the paraeducators, has an extreme divergence of interest from the remaining employees due to the fact that the Employer arguably cannot privatize or subcontract the paraeducators' work to a third party without first bargaining to impasse with their bargaining representative. Neither party requested oral argument on the motion to dismiss.

Discussion and Conclusions of Law:

It is our obligation under Section 13 of PERA to determine the unit appropriate for collective bargaining. In *Hotel Olds v State Labor Mediation Bd,* 333 Mich 382, 387 (1952), the Supreme Court held that in designating bargaining units as appropriate, a primary objective of the Commission is to create the largest unit that, in the circumstances of the particular case, is most compatible with the effectuation of the purposes of the law and that includes in a single unit all common interests. Closely related to the objective of creating the largest possible unit of employees sharing a community of interest is our longstanding policy of refusing to allow the fragmentation of a unit for which there is an established history of bargaining, unless the unit as currently constituted is per se inappropriate or the party seeking severance can demonstrate that there is an "extreme divergence of interests" among the employees in the existing unit. *Wayne Co Airport Police Dep't*, 2001 MERC Lab Op 163, 167; *Dearborn Pub Sch*, 1990 MERC Lab Op 513, 517; *Kent Co Cmty Hosp*, 1989 MERC Lab Op 1105, 1109-110. That is, we do not permit a group of employees to sever from their existing unit without a compelling reason, even if a unit consisting solely of these employees would have been found appropriate in the absence of a prior bargaining history. *Dearborn Pub Sch; Taylor Bd of Ed*, 1983 MERC Lab Op 708, 710-711.

Since the early days of PERA, we have held that a unit of all nonsupervisory "nonteaching" employees in a K-12 school district is presumptively appropriate. See *South Redford Sch Dist*, 1966 MERC Lab Op 160; *Flushing Cmty Sch*, 1969 MERC Lab Op 401. We have also held that teaching aides or paraprofessionals who instruct or supervise children under the direction of a certified teacher can be appropriately included in bargaining units with other "nonteaching" employees, including food service employees, clerical employees, and bus drivers. *Grass Lake Cmty Sch*, 1976 MERC 757; *Copper Co Intermediate Sch Dist*, 1979 MERC Lab Op 666; *Kalkaska Pub Sch*, 1980 MERC Lab Op 96; *Van Buren Pub Sch*, 1990 MERC Lab Op 691; *Clarkston Cmty Sch*, 1993 MERC Lab Op 29.

Petitioner argues, however, that an extreme divergence of interests has existed between paraprofessionals and other support employees of a school district since 1994, when PERA was amended to make a public school employer's decision to contract with a third party for "noninstructional support services" a prohibited subject of bargaining. A public employer's decision to terminate its employees and hire a private subcontractor to do the same work is generally a mandatory subject of bargaining under PERA. *Detroit Police Officers Ass'n v Detroit*, 428 Mich 79, 92 (1987). However, Section 15(3)(f) and (4) of the Act now make the subcontracting of unit work a prohibited subject of bargaining in some instances. Section 15 (3)(f) provides that collective bargaining between a public school employer and a union representing its employees cannot include the following subjects:

> The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract; or the identity of the third party, or the impact of the contract on individual employees or the bargaining unit.

We have not had the occasion to decide whether the term "noninstructional support services," as used in Section 15(3)(f), includes noncertified employees who instruct children under the supervision of a certified teacher. However, at least one circuit court has held that teacher aides in a K-12 school district provide "instructional" support services, and, therefore, PERA does not prohibit bargaining over the privatization of their work.[1] A copy of this Clare County Circuit Court decision involved employees of the Harrison Community Schools and was attached by Petitioner to its Response to Incumbent Union's Motion for Summary Disposition. The court decision resulted from an application for a temporary restraining order filed by the Harrison Educational Support Personnel Association, MEA/NEA, which, like the Incumbent Union, is an affiliate of the Michigan Education Association. For purposes of this motion, we assume that the paraeducators in the Incumbent Union's bargaining unit are "instructional" and that the other employees in the unit are "noninstructional" support employees under Section 15(3)(f).

However, we do not agree with Petitioner that Section 15(3)(f) provides a compelling reason to allow the custodial and maintenance employees in the Incumbent Union's existing unit to form a separate unit. Interpreting Section 15(3) and (4) of PERA, the Supreme Court in *Michigan State AFL-CIO v MERC*, 453 Mich 362, 380 (1996), held that a "prohibited" subject of bargaining, as that term was used in the 1994 amendments to PERA, was synonymous with an "illegal" subject, as that term had been used in previous case law. An employer is not required to bargain to impasse or agreement before taking unilateral action on an illegal subject of bargaining, and, although the parties to a collective bargaining relationship are not explicitly forbidden from discussing an illegal subject, a contract provision embodying an illegal subject is unenforceable. *Michigan State AFL-CIO*, at 380, n 9; *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55, n 6 (1974). If the services provided by paraeducators in Incumbent Union's unit are not covered by Section 15(3)(f), the Employer has a duty to bargain to impasse or agreement before privatizing their services. In addition, their bargaining representative can insist to impasse on contract provisions that limit the Employer's right to privatize. Conflicts within

[1] See *Harrison Ed Support Personnel Ass'n, MEA/NEA v Harrison Cmty Sch Bd of Ed*, unpublished opinion of the Clare County Circuit Court, decided July 26, 2007 (Docket No. 07-900381-CL).

the unit might arise if paraeducators place a priority on bargaining contract provisions restricting or limiting the Employer's right to privatize their work, since other unit employees would have no interest in a restriction that would be unenforceable as to the work they perform. However, the requirement that employees within the same bargaining unit have a community of interest does not mean that they must have identical interests. Different groups within a unit often have different bargaining priorities. For example, the ability to bid on a job assignment may be important to one group and of no relevance to another, and a group of younger employees may place a higher priority on maintaining wage levels and a lower priority on retirement benefits. Petitioner has not explained here why the paraeducators' presumed interest in negotiating job protection provisions creates such an extreme divergence of interests between them and noninstructional support employees that they should not in the same bargaining unit.

Petitioner draws an analogy between "mixed units" of instructional and noninstructional support employees and "mixed units" that include both employees whose contract disputes may be resolved by compulsory interest arbitration under 1969 PA 312 and employees without access to that dispute resolution procedure. Since *City of Dearborn Heights*, 1984 MERC Lab Op 1079, and its companion case, *City of Fenton*, 1984 MERC Lab Op 1086, we have recognized that access or lack of access to compulsory interest arbitration is such an important factor in how contract disputes are resolved that Act 312 eligible employees should not be placed in units with non-eligible employees and should be allowed to sever from existing mixed units when any union seeks to represent them separately. However, we have held that even a mixed unit of Act 312 eligible and noneligible employees is not per se inappropriate, and that a group of Act 312 eligible employees should not be permitted to sever from an existing mixed unit that includes other Act 312 eligible employees. *Wayne Co Airport Police Dep't*, 2001 MERC Lab Op 163. In the instant case, Petitioner is seeking to sever custodians and maintenance employees from an existing unit that, even by its own analysis, would continue to be "mixed" because it would include both instructional and noninstructional support employees. We see no reason why Petitioner should be allowed to fragment the unit in this way.

Petitioner cites our recent decision in *Oakland Co & Oakland Co Sheriff*, 20 MPER 63 (2007), in support of its claim that the custodians and maintenance employees in this case should be permitted to sever from their existing unit. *Oakland Co* involved a mixed unit of Act 312 eligible and noneligible employees. As discussed above, we have permitted Act 312 eligible employees to sever from a mixed unit when a labor organization has sought to represent them separately. In *Oakland Co*, however, the employer sought to split the unit into separate groups of Act 312 eligible and noneligible employees. Although we granted the employer's request in that case, we did not hold that all existing units consisting of Act 312 eligible and non-eligible should be split. Rather, we held that the bargaining history of the parties in *Oakland Co* indicated that the continued existence of the mixed unit in that particular case would not effectuate the purposes of the Act. Petitioner has not suggested that there are special circumstances in this case that would justify fragmenting the unit. Moreover, it has not demonstrated that an extreme divergence of interests exists among the different groups in Incumbent's support unit. We conclude that Petitioner has failed to show why its petition to sever the custodial and maintenance employees from their existing unit should be granted. In accord with the conclusions of law above, we issue the following order.

ORDER

The petition for a representation election is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION[2]

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

[2] Commission Chair Christine A. Derdarian was unable to participate in the decision in this matter.