STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INNOVATIVE TEACHING SOLUTIONS, INC,
Employer-Respondent,

-and- Case No. C06 J-235

ADVANCED EDUCATIONAL STAFFING, INC,
Employer-Respondent,

-and-

OLD REDFORD ACADEMY,
Interested Party,

-and-

LYNNETTE C. DEPREZ AND TODD DOUGHTY,
Individual Charging Parties.
_____/

APPEARANCES:

Butzel Long P.C., by Robert A Boonin, Esq., for Respondents

Miller Cohen, P.L.C., by Robert D. Fetter, Esq., for the Individual Charging Parties

DECISION AND ORDER

On June 12, 2008, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216 and/or Sections 16 and 23 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.16 and 423.23.. On November 5, 2008, the Commission received a notice of withdrawal from Charging Parties requesting that the charge be withdrawn. Charging Parties' request is

hereby approved. This Decision and Order, and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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Individual Charging Parties.
_____/

APPEARANCES:

Dennis W. Cleary, Esq., for Respondent Innovative Teaching Solutions, Inc.

Kara L. Rosso, Esq. for Respondent Advanced Educational Staffing, Inc.

Collins and Blaha, PC, by Joseph B. Urban, Esq., for Old Redford Academy

Miller Cohen, PLLC, by Eric I. Frankie, Esq., for the Charging Parties

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 13 and 23 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.1, or Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, this case was heard at Detroit, Michigan on January 30 and June 28, 2007, before Administrative Law Judge Julia C. Stern for the State Office of Administrative Hearings and Rules, acting for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by all four parties on October

11, 2007, I make the following findings of fact, conclusions of law, and recommended order.[1]

The Unfair Labor Practice Charge, Background, and Positions of the Parties:

On October 2, 2006, Lynnette C. DePrez filed the instant unfair labor practice charge against Innovative Teaching Solutions, Inc. (ITS) alleging that it unlawfully discharged her or refused to renew her teaching contract because she testified against it in an unfair labor practice proceeding. On January 3, 2007, the charge was amended to add Todd Doughty as a second Charging Party. Doughty also alleges that ITS unlawfully discharged or refused to renew his contract because he testified as a witness in an unfair labor practice proceeding.

DePrez and Doughty were employed as teachers at Old Redford Academy (ORA or the Academy) until June 2006, when their contracts for the 2005-2006 school year expired. ORA is a public school academy chartered by Central Michigan University (CMU) under part 6A of the Revised School Code, MCL 380.501 et seq. ITS, a for-profit Michigan corporation, has a contract with ORA under which ITS operates the three schools comprising the Academy.

On December 13, 2005, Kelli Childs, Melanie Cain, Marie Prainito, and Tammy Willinger-Frederick, all former teachers at the Academy, filed an unfair labor practice charge with the Michigan Employment Relations Commission against ITS (Case No. C05 L-306, hereinafter the Childs ULP or Childs case), alleging that it discharged them in October 2005 because of their union and other protected concerted activities. Because of uncertainty about which agency had jurisdiction, Cain also filed an unfair practice charge against ITS with the National Labor Relations Board (NLRB). On February 18, 2006, the Regional Director for Region 7 of the NLRB dismissed Cain's charge on the basis that ITS was administered by individuals responsible to public officials at ORA and was, therefore, a political subdivision exempt from NLRB jurisdiction under Section 2(1) of the National Labor Relations Act (NLRA), 29 USC 151 et seq.

The Childs case was consolidated with another charge filed against ITS by a discharged teacher, Domenick Risola (Case No. C06 E-124) in May 2006. The consolidated case was heard by me on July 13, July 14, August 10, and November 6, 2006. Doughty and DePrez testified as witnesses for the charging parties in that case on July 13 and 14, respectively.[2]

Effective July 1, 2006, ITS and Advanced Educational Staffing (AES), also a for-profit Michigan corporation, entered into a "client service agreement" pursuant to which AES provided the Academy with employees, including teachers. Many of ITS' employees were hired by AES. However, AES did not offer a contract to either DePrez or Doughty.

On October 30, 2006, ITS filed a motion for summary disposition of the instant charge on the basis that it did not discharge DePrez. Rather, according to ITS, it ceased to be DePrez's employer after her teaching contract expired at the end of the 2005-2006 school year and ITS

[1] Old Redford Academy and Innovative Teaching Solutions, Inc. filed a joint brief.

[2] On April 11, 2008, I issued a decision and recommended order concluding that ITS unlawfully discharged Childs, Prainito, Willinger-Frederick and Risola because of their union or other concerted protected activities. This case is currently pending before the Commission on exceptions.

decided to lease employees from AES. On November 14, 2006, I denied ITS' motion. I indicated that that I would take evidence at the hearing as to what entity or entities were DePrez's employer(s) at the time of the alleged unfair labor practice. I then added both AES and ORA as parties to the case.

Both ORA and ITS assert that ORA was never Doughty or DePrez's employer and should not be a respondent in this case. Both AES and ITS assert that AES has been the sole employer of Academy employees since June 2006. AES maintains that that it did not know that Doughty and DePrez had testified or intended to testify in a Commission proceeding at the time it decided not to hire them, and that it made this decision because of their criminal records.

Findings of Fact:

Relationship Between ORA and ITS

As noted above, ORA is a public school academy within the meaning of the Michigan School Code. As required by law, ORA has a governing board. ITS' president, and only corporate officer, is Melvin Smith. Although Smith was instrumental in the founding of the Academy and the establishment of ORA, no officer or agent of ITS sits on the ORA board. At the time of the hearing, ITS' sole corporate purpose was the provision of services to the Academy.

ITS and ORA have had a management agreement since 1999. The agreement in effect when the alleged discrimination took place in 2006 was entered into in August 2004. The term of the agreement between ORA and ITS is five years. However, the agreement is terminable at will by either party after three years and ORA may terminate the contract at any time if ITS fails to account for its expenditures or pay Academy operating costs; fails to substantially follow policies, budget, procedures, rules, regulations or curriculum duly adopted by ORA's board of directors (the Board); fails to abide by and meet the educational goals as set forth in the contract; or employs or subcontracts teachers in violation of law or the agreement.

The management agreement states that the Board is to approve educational goals, curriculum, methods of pupil assessment, admissions policy and criteria, school calendar and school day schedule, age and grade range of pupils to be enrolled, instructional programs, and methods to be used to monitor compliance with performance of targeted educational outcomes for the Academy. The duties of ITS are set out in Article III, Section 3 of the management agreement:

> Specific Duties. ITS shall be responsible for all of the management, operation, administration and education at the Academy, subject to the direction and approval of the Board, as included in the Contract. Such duties include, but are not limited to:
>
> a. Implementation and administration of the Educational Program [approved by the Board], including administration of any and all extra-curricular and co-curricular activities and programs approved by the Board.

b. Selection and acquisition of instructional materials, equipment and supplies as directed by the Board.

c. Hiring, management and supervision of all personnel, including provision of professional development for all instructional personnel and the personnel functions outlined in Article IX of this Agreement.

d. Operation and maintenance of the school building to the extent consistent with any and all leases pertaining to the Academy site, and the installation of technology integral to the school design as approved by the Board;

e. Management of all aspects of the business administration of the Academy as approved by the Board;

f. Any provision of transportation or food service for the Academy as the Board decides shall be implemented pursuant to the Contract;

g. Any other function necessary or expedient for the administration of the Academy and implementation of the Educational Program, with the direction and approval of the Board.

ITS is permitted to subcontract services it provides to the Academy only as specifically permitted and approved by the Board.

Under Article IX of the management agreement, ITS has the responsibility to determine staffing levels and to select evaluate, assign, discipline and transfer personnel, "consistent with state and federal law and consistent with the parameters adopted and included within the Educational Program." Except as specified in the agreement or "as subcontracted by ITS" all teaching and nonteaching staff are to be employees of ITS. The management agreement states that ITS must consult with the Board prior to hiring a principal. ITS must also remove a principal at any time, and a teacher at the end of the school year, if the Board is dissatisfied with his or her performance. ITS sets the compensation of its employees, but must inform the Board at least once yearly of the levels of compensation and fringe benefits provided to employees assigned to the Academy.

ITS recommends rules, regulations and procedures to be adopted by the Board. Once these rules and procedures are approved by the Board, ITS is responsible for implementing them through its own employees or those of its subcontractors. ITS is also responsible and accountable to the Board for student academic performance and must provide information to the Board regarding student achievement on a quarterly basis.

Pursuant to the School Code, the Academy receives student state aid revenues from the State of Michigan through CMU. Although state aid is the primary source of the Academy's funding, ORA and ITS also solicit and receive grant monies and donations which are deposited in ORA's accounts and become ORA's property. ITS prepares a projected annual budget for the

Academy which it submits to the Board each year at least sixty days before ORA is required to submit its budget to CMU. The agreement also provides that the Academy will reimburses ITS for its costs, consistent with the annual budget approved by the Board, including salaries of ITS employees performing work at the Academy, curriculum and instructional materials, books, computer and other equipment, software, supplies, food service, transportation, special education, and psychological and medical services. Per Article V of the management agreement, ITS also receives an annual management fee of ten percent of ORA's gross monthly student state aid revenues. ITS is required to submit a statement of monthly costs to the Board at least five days prior to the Board's regularly scheduled monthly meeting and to submit a detailed statements of ongoing expenditures and revenues for the Board's approval at each monthly Board meeting.

ORA has certain reporting and record keeping requirements under the School Code. The agreement states that ITS and its subcontractors shall keep and retain records as required by law. ITS is responsible for maintaining the confidentiality of personnel and student records and for policing and maintaining records, including student educational and financial records, as required by law. ITS is also responsible for providing periodic reports on operations and student performance to CMU and to the State of Michigan, as well as to the Board.

Relationship Between ITS and AES

During the 2005-2006 school year, Melvin Smith of ITS was busy with the construction of an elementary school to replace the building leased by the Academy for that purpose. In March 2006, the Michigan Education Association filed a petition for representation election with the Commission seeking to represent Academy teachers employed by ITS. The MEA was certified as bargaining representative for this unit in May 2006.

Raymond and Scott Smith, the brothers of Smith's wife Karon, had operated a business together for many years. In the spring of 2006, Melvin Smith entered into an arrangement with his wife and her brothers to take over human resources and labor relations functions for the Academy. Karon, Raymond and Scott Smith then incorporated as AES. On May 6, 2006, ORA's board passed a resolution allowing ITS to subcontract instructional personnel and personnel tasks related to instructional staff to AES. AES, through Karon Smith, and ITS, through Melvin Smith, then entered into a "client service agreement" effective June 30, 2006. AES also hired Andria Love, ITS' former personnel director, as AES' human resources manager.

The term of the client service agreement between AES and ITS was one year, with the agreement to be automatically renewed for additional one-year periods unless either party provided notice of termination thirty days prior to the renewal date. In this contract, AES agrees to lease to ITS certain employees, listed by name in an attachment, and to oversee all human resource functions for any ITS employee who is not a leased employee. The list of leased employees is subject to ITS' final approval, and ITS retains the right to reject or return to AES any employee it deems unacceptable.

The contract between ITS and AES also contains the following provision:

> Direction and Control – Leased Employees. The parties agree that only Advanced has the right, subject to the approval and control of ITS and Old Redford Academy, and subject to the limitations described below, to exercise direction and control relating to the management of safety risks and labor matters at work site locations. Advanced shall retain the final decision to (1) hire, fire, discipline and direct and regulate and supervise all working conditions and labor policies; (b) establish all wages benefits, salaries, bonuses or advancements; (c) conduct safety inspections of Client's equipment and work site; and set and administer employment and safety policies; and (d) facilitate collective bargaining relationships between it and labor unions representing the Leased Employees and contract administration in connection therewith. The discretion exercised by Advanced in this connection must be in keeping with the health and safety regulations as they are applied to the leased employees and as modified from time to time as well as the rules promulgated by Central Michigan University, if any, in connection with its public school charter agreement with Old Redford Academy. All expenditures in connection with the leased employees must be done within the budget constraints of Old Redford Academy which are imposed by the amount of funds received by the Academy from the State of Michigan in connection with its charter.

Under the contract, AES pays the employees' wages and fringe benefits, taxes, worker's compensation, and unemployment taxes, and ITS reimburses AES in full for these costs. In addition, AES received an administrative fee paid by ITS from the management fee ITS receives from ORA. ITS sets the parameters for teacher salaries, while AES determines the actual compensation to be paid to individual teachers.

AES recruits, screens, interviews, and hires all new Academy employees. However, ITS is responsible for evaluating employee performance. According to AES representative Raymond Smith, ITS makes recommendations to AES regarding the discipline and termination of employees. AES then conducts an investigation. Raymond Smith testified that if AES concludes that the facts are as ITS asserts, AES adopts ITS' recommendation and terminates or disciplines the employee.

Lynnette DePrez

DePrez was hired by ITS to teach English at the Academy's new high school in the fall of 2004. As required by law, DePrez was fingerprinted and signed releases for professional misconduct and criminal background searches before she was hired. About six months before she was hired by ITS, DePrez had been arrested for assault. According to DePrez, she and her son got into an argument when he refused to leave her house, and her son filed a complaint that was dropped when he refused to testify against her. ITS' application form did not require DePrez to report her arrest, and she did not do so. The criminal background search ITS requested for DePrez in 2004 showed no arrests or convictions.

In June 2005, ITS offered DePrez a teaching contract for the following school year. ITS asked DePrez for another set of fingerprints and permission to do another criminal background search. On July 6, 2005, ITS received a computer printout indicating that DePrez had been arrested on February 5, 2004 for aggravated assault on a police officer. The printout did not show the disposition of the charges. Although DePrez had been convicted of an unrelated misdemeanor in February 2005, this conviction did not show up on her criminal history report. ITS did not bring the result of the search to DePrez's attention or discuss it with her. DePrez signed a new contract with ITS and, in September 2005, was promoted to head of the high school's English department.

In December 2005, Childs, Prainito, Cain, and Willinger-Frederick filed the Childs ULP. Neither this charge nor the charge filed by Domenick Risola in May 2006 mentioned DePrez by name. However, in the late spring of 2005, ITS filed a motion for a more definite statement of these charges. Thereafter, Childs and Cain approached current and former Academy teachers and asked them if they would be willing testify at their hearing. DePrez agreed to testify. In charging parties' response to the motion for more definite statement, filed on June 9, 2006, they asserted that DePrez had participated, along with Melanie Cain, in calling unions and talking to other teachers about union representation in the fall of 2005.

The 2005-2006 school year ended for Academy teachers on about June 10, 2006. Teachers were given a packet with a letter explaining that the Academy was changing management companies and that they would have to reapply for employment with AES. Danielle Jackson, the building administrator/principal of the high school, told DePrez not to worry because this was just a formality. The packet contained employment applications for AES, forms for criminal background checks, drug screening and tuberculosis testing, and tax withholding forms. There was a letter from AES stating that it was conducting a "closed job fair," i.e., a job fair only for current Academy teachers, on June 15 and 16. Teachers with last names at the beginning of the alphabet were to come on Thursday, June 15 and those with last names at the end of the alphabet on Friday, June 16. They were instructed to bring their applications and were told that AES would have contracts on site for them to sign.

DePrez called Andria Love, ITS' personnel director and later AES' director of human resources, and was given permission to come to the fair on June 16 instead of 15. Among the individuals collecting paperwork and checking files for AES at the job fair was Sherida Gary, ITS' director of instruction. Laboratory employees did blood and urine tests on site, and applicants were interviewed by an AES representative and handed contracts to sign that were conditioned on their passing criminal background and reference checks. DePrez was interviewed by Raymond Smith. DePrez and Raymond Smith had met before, and Raymond Smith complemented her teaching. However, Smith discovered that he did not have DePrez's contract among his papers. After a search failed to turn up DePrez's contract, Karon Smith told her to come back to the job fair on Monday and that she would have DePrez's contract ready for her. When DePrez returned on Monday, however, neither her contract nor Karon Smith was there. During the next month, DePrez left several messages for Karon Smith but was unable to speak to her.

DePrez testified at the unfair labor practice hearing in the Childs ULP on July 14, 2006. Melvin Smith was the only current or former ITS representative who attended this hearing. According to Smith, his wife Karon knew that an unfair labor practice charge had been filed against ITS and that he was attending hearings on these charges on July 13 and 14. However, he testified that he did not tell his wife that either DePrez or Doughty had testified at this hearing. Raymond Smith, the only AES representative who testified at the hearing in the instant case, denied even knowing of the existence of the Childs ULP until sometime after the summer of 2006.

During cross-examination by ITS' attorney at the July 14 hearing, DePrez was asked if she had been convicted of felonious assault upon a police officer. DePrez said she had not. Shortly after the July 14 hearing, DePrez reached Karon Smith on the phone. Smith told her that she was still investigating DePrez's paperwork. On July 25, DePrez sent Karon Smith a certified letter asking for a response regarding her contract by August 5. DePrez also called Raymond Smith several times and left messages. DePrez did not hear from Karon Smith. However, Raymond Smith returned her call on August 16. He told her that AES could not offer her a contract because of her criminal history. DePrez asked him what he meant, but Smith said he did not know the details. DePrez described the circumstances of her February 2005 misdemeanor conviction to Raymond Smith on the phone. He told her that he would relay this to Karon Smith and get back to DePrez if there was any change. DePrez did not hear again from AES, ITS or any of the Smiths until after she filed her unfair labor practice charge.

Sometime between the incorporation of AES in the spring of 2006 and August 2006, AES had published an employee handbook. The handbook included the following policy:

> AES strives to provide the safest possible environment for students, visitors, faculty staff and physical resources. As required by state law and in an effort to maintain a safe environment, AES shall conduct criminal background checks on all applicants and employees. *It is the policy of AES not to employ or to continue the employment of professional or administrative personnel who may be deemed unsuited for service due to arrest and/or criminal convictions*. This policy applies to individual applicants who are new to Old Redford Academy as well as current employees seeking to apply for transfer or promotion to other positions. AES reserves the right to determine the suitability of all individuals seeking employment at Old Redford Academy. *AES, in its discretion, may refuse to hire anyone who has been arrested of a crime, who has been convicted of a crime, or who has criminal charges pending.*
>
> In determining suitability for employment where there is a record of arrest or criminal conviction or pending criminal charges, consideration shall be given to such issues as:
>
> The specific duties of the position;
>
> The number of offenses and circumstances of each;

How long ago the conviction occurred;

The applicant's record since the conviction;

The accuracy of the explanation of the nature and circumstances of the conviction as stated by the applicant on the employment application.

[Emphasis added]

Raymond Smith testified that it was AES' policy not to employ or continue the employment of any professional or administrative individual who had either an arrest or a conviction in their background. Smith also testified that when the criminal background results came back on each applicant for employment in the summer of 2006, a panel of AES representatives, including Karon Smith, himself, and Andria Love, met to discuss the severity of the crime. Then, according to Smith, the employee was contacted to make them aware of the findings in their background check, and the decision was then made whether to hire them. According to Smith, Karon Smith made the final decision. Raymond Smith testified that eleven former ITS employees, including DePrez and Doughty, were not hired by AES because of criminal background findings. However, he did not provide any details regarding the criminal history of any of the other nine individuals.

Raymond Smith testified that AES did not hire DePrez because the criminal background search it requested in June 2006 indicated that she had been charged with assaulting her son with a knife and instructing her dog to attack a police officer. Smith testified that AES believes that it is in the best interest of the students to make sure that individuals who have demonstrated a propensity for violence or loss of control are not placed in a classroom. DePrez admitted that she had been drinking at the time of the incident with her son. However, she testified that, to her knowledge, she had not been charged with assaulting a police officer, and that she had no knowledge of these other allegations. Smith did not explain how he came to know these details.
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Todd Doughty

Todd Doughty was hired by ITS in the fall of 2004 as a Title I teacher at the Academy's middle school. In 1991, Doughty had been convicted of obstructing a police officer in California. In February 2004, the conviction was formally expunged from his record. In 1993, he was arrested for being under the influence of a controlled substance but was not charged. Doughty told ITS about his conviction and the fact that it had been expunged before it hired him. As noted above, ITS did not ask about arrests, and Doughty did not tell ITS about his 1993 arrest.

Doughty signed a contract with ITS to teach again in the 2005-2006 school year. At the end of September 2005, Doughty accepted the administrative position of dean of students at the Academy's high school. When Doughty became dean of students at the high school on October 1, 2005, Rachel Grandison was the high school building administrator. During the two weeks of his tenure as dean, Doughty and Grandison had a conversation in which Grandison made what Doughty interpreted as a threat to terminate teachers because they were complaining about her directives. When Doughty told Grandison that the teachers felt that she was creating a hostile

atmosphere, Grandison angrily accused Doughty of disloyalty and later attempted to reprimand him. Shortly thereafter, Doughty asked and was granted permission to return to his middle school teaching position. These incidents were described in the Childs ULP charge and Doughty was mentioned by name.

Near the end of the school year 2005-2006 school year, Doughty, like DePrez, received a packet containing an application for employment with AES and other pre-hire documents, along with instructions to attend a closed job fair on June 15 and 16. Because Doughty was planning to be out of town that week, he called Love and asked her what to do. Love told him to contact her when he returned and that she would take care of it. On June 19, Doughty went to AES' offices and gave his application and other paperwork to Love. On June 23, he telephoned Karon Smith and asked about his contract. She told him that AES would be in contact with him when it finished screening his application. On June 30, Doughty received a letter from Karon Smith stating that AES was still reviewing his application.

On July 13, Doughty testified at the unfair labor practice hearing in the Childs ULP. He testified about his conversation with DePrez in October 2005 and Grandison's reaction. On cross-examination, ITS' counsel questioned Doughty about his 1991 criminal conviction and asked him if he had been convicted of driving under the influence of a controlled substance in 1993. Doughty said that the former had been expunged and that he had been arrested for, but not convicted of, the latter.

On August 2 or 3, Doughty called Karon Smith again to inquire about his contract. She said his application was still under review because there was an issue with his criminal background. Doughty asked her if she needed a copy of the order expunging his 1991 conviction, and Smith said yes. Doughty mailed one to her. Around August 14 or 15, Doughty received a call from Raymond Smith. Smith told Doughty that AES was not going to offer him a contract because of his criminal record. Doughty told Smith that ITS knew about his record, and Smith said that AES had different standards. Doughty asked if AES had a written policy and if he could receive a copy if this policy. Smith said he would send the policy to Doughty. Doughty did not hear from any of the Smiths or AES after that conversation.

In January 2007, Doughty submitted a request to AES for his personnel file. He received a single document entitled "FBI Fingerprint Search Response" indicating that it had been requested by ITS on or before March 30, 2006. This record search showed Doughty's conviction for obstructing/resisting a police officer in 1991, although not the fact that it had been expunged from his record. It also indicated that he had been arrested for using or being under the influence of a controlled substance in 1993; the record showed no disposition of that charge.

Raymond Smith testified that Doughty was not hired by AES because he had a conviction that involved obstruction of a police officer and also an arrest for possession of an illegal substance. Smith testified that it was AES' policy not to place individuals who had demonstrated a propensity for violence or loss of control in a classroom.

Discussion and Conclusions of Law:

Standing

Doughty and DePrez initially filed charges against ITS alleging that it terminated them because they had given testimony in the Childs ULP. Their charges, therefore, alleged violations of Section 10(1) (d) of PERA or 16(5) of the LMA.[3] After ITS denied responsibility and AES was added as a party, Doughty and DePrez alleged that if AES was to be considered a separate entity, it committed an unfair labor practice by refusing to hire them because of their testimony against ITS. All three Respondents argue that DePrez and Doughy lack standing to file this charge because, in the summer of 2006, they were employed by neither ITS nor AES and were not, therefore, "public employees" within the meaning of PERA. Respondents rely on *Washtenaw Co,* 18 MPER 40 (2005), in which the Commission held that the respondent public employer could not be found guilty of violating Sections 10(1) (a) or 10(1) (d) of PERA because the charging party was not a "public employee" as defined by PERA at the time of the alleged unfair labor practices.

Section 10(1)(a) of PERA and Section 16(1) prohibit employers from interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 10 of PERA and Section 8 of the LMA, respectively. It is well established that an individual who asserts that he has been unlawfully terminated by his employer because of the exercise of his statutory rights is an "employee" under these statutes for the purposes of challenging his termination. As noted by the Commission, the charging party in *Washtenaw Co* had not been employed by respondent for more than two years before he filed his charge. Moreover, his previous charge alleging that his termination by the respondent was unlawful had been dismissed by the Commission. I find no merit to ITS' argument that DePrez and Doughty lack standing to file a charge alleging that ITS terminated them in violation of PERA or the LMA.

Job applicants may also be "employees" under the LMA and PERA. For example, Sections 10(1) (c) of PERA and Section 16(3) of the LMA explicitly protect job applicants by making it unlawful for an employer to refuse to hire individuals to encourage or discourage union activity. Section 10(1) (d) of PERA and Section 16(5) of the LMA, like Section 8(a)(4) of the National Labor Relations Act (NLRA), 29 USC 151 et seq, prohibit discrimination against employees because they have instituted proceedings or given testimony under their respective statutes. Although the Commission has not had the occasion to address this issue, the National Labor Relations Board (NLRB) has long held that the protections of Section 8(a)(4) of the NLRA extend to job applicants. *General Services, Inc,* 229 NLRB 940, 943 (1977); *Stationary Engineers, Local 39*, 346 NLRB No. 34 (2006). For example, in *Lamar Creamery Co*, 115 NLRB 1113 (1956), enfd 246 F2d 8 (CA 5, 1957), the NLRB held that an employer violated Section 8(a)(4) by refusing to hire an individual because he had previously given testimony in an NLRB proceeding against his former employer, another local employer with no formal ties to the respondent. As it explained in *General Services,* the NLRB's position is that Section 8(a)(4) must be interpreted liberally to keep the NLRB's processes open to individuals who wish to

[3] Sections 10(1) (d) of PERA and 16(5) of the LMA make it unlawful for an employer to "discriminate against an employee because he has given testimony or instituted proceedings under this act."

initiate unfair labor practice proceedings so that the NLRB can perform its statutory functions. I find that this reasoning applies also to PERA, the LMA, and the Commission's processes. I conclude, therefore, that DePrez and Doughty had standing, as job applicants, to bring charges alleging that AES refused to hire them because they testified in an unfair labor practice proceeding against ITS.

Employer Status of ORA

As noted above, both ITS and ORA assert that the ORA was never Doughty or DePrez's employer and, therefore, should not be a respondent in this case. ORA and ITS made this same argument in the unfair labor practice proceeding in the Childs ULP, in which ORA was made an interested party but not a respondent. I held in that case that I would not take evidence on whether ORA was an employer of the charging parties in that case, but would leave the issue to the compliance stage of the proceeding if necessary. On the record made in the instant case, I find that ITS and ORA are not joint employers of Academy teachers.

Under PERA, the term “employer” means an entity that has the power and responsibility to: (1) select and engage the employee, (2) pay the wages, (3) dismiss the employee, and (4) control the employee's conduct, including the method by which the employee carries out his or her work. *Wayne Co Civil Service Comm v Wayne Co Bd. of Supervisors*, 22 Mich App 287, 294 (1970), rev'd in part on other grounds 384 Mich 363 (1971); *St Clair Co Prosecutor v AFSCME*, 425 Mich 204, 288 (1986). Entities are joint employers under PERA when they share authority over employees and their terms and conditions of employment. *Louisiana Homes*, at 192-193. In order to be considered a joint employer, an entity must exercise independent control over the terms of the employment relationship. *St Clair County Intermediate School Dist v St Clair County Ed Ass'n*, 245 Mich App 498, 516 (2001).

Under the management agreement between ORA and ITS, ORA retains control over educational policy, including educational goals, curriculum, methods of pupil assessment, admissions policy and criteria, school calendar and school day schedule, age and grade range of pupils to be enrolled, instructional programs, and methods to be used to monitor compliance with performance of targeted educational outcomes. However, ITS has the sole responsibility and authority to determine staffing levels and to select and hire personnel, subject only to the requirement in the management agreement that it "consult" with ORA regarding the hiring of principals. ITS need not seek ORA's approval before hiring an employee. In *Louisiana Homes*, the State of Michigan had role in setting hiring qualifications, but there is no indication in the record that ORA has any such role. Although ORA has the right to demand that ITS remove a principal from his or her assignment at any time and a teacher at the end of the school year, ITS has the authority to terminate any employee at any time without ORA's approval. Neither ITS nor ORA ultimately "pay the wages" of Academy employees, since these funds come primarily from state aid paid to ORA on a per pupil basis. By statute, ORA is responsible to its authorizing body and to the State for this money, and ORA's Board not only approves the Academy's budget but monitors its expenditures on a monthly basis. However, ITS drafts the budget for the Board's approval, including determining the amount to be set aside for employee compensation. By contrast, the budget of the contractor in *Louisiana Homes* was by the State based on the State's assessment of its staffing needs. ITS also drafts rules and regulations for the school, even though

ORA must approve them. Finally, ITS is solely responsible for assigning, evaluating, disciplining, transferring and otherwise supervising and managing teachers and other Academy employees. There is no evidence that ORA's Board exercises any authority over, or plays any regular role in, the day-to-day management of the school. I conclude that while ORA is ultimately responsible for the Academy's operations, it has not retained sufficient independent control over the terms and conditions of the Academy's employees to be deemed a joint employer with ITS. Accordingly, I conclude ORA should not be a respondent in this case.

Employer Status of ITS

Employee leasing arrangements are common in the private sector. The NLRB finds a joint employer relationship for labor relations purposes when the employer to whom the employees are leased has a meaningful affect on hiring, firing, discipline, supervision and the direction of employees. *TLI Inc,* 271 NLRB 798 (1984); *Branch International Services*, 327 NLRB 209, 219 (1998).

Here, the evidence establishes that AES and ITS share control over the hiring, firing, discipline, supervision and other terms and conditions of employment of Academy employees. AES interviews and hires employees and the agreement between AES and ITS gives AES the right to make the "final decision" on hiring, as well as termination and discipline. However, under the agreement, ITS also retains the right to reject or return to AES any employee it deems unacceptable. Since either party can veto the decision of the other, ITS and AES clearly share control over hiring and termination decisions. As indicated by the testimony of Raymond Smith, ITS also has significant input into disciplinary decisions and is responsible for evaluating employee performance. ITS – the entity that prepares the Academy's budget - sets the parameters for teacher salaries. I find that ITS and AES are joint employers, for labor relations purposes, of the employees leased to ITS by AES.

Refusal to Retain or Hire DePrez and Doughty

In order to establish a prima facie case of discrimination under Section 10(1) (c) of PERA, a charging party must show an adverse employment action and the following: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551- 552. Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Schs*, 125 Mich App 71, 74 (1983); *Wright Line, a Division of Wright Line, Inc.*, 662 F2d 899 (CA 1, 1981). This framework is also used to analyze alleged violations Section 8(a) (4) of the NLRA, and, by analogy, violations of Section 10(1) (d) of PERA or 16(5) of the LMA. *Newcor, Inc*, 351 NLRB No. 54, n 4 (2007). That is, the Charging Parties must establish discriminatory motivation by proving the existence of activity protected under these sections, the Respondents' knowledge of that activity, and the Respondents' animus against that activity.

Respondent AES denies that it knew that DePrez and Doughty intended to or had testified in the Childs ULP proceeding when it decided not to hire them. I find, for reasons set forth below, that the record does not support this claim. The charges in the Childs case were filed in December 2005 and May 2006. Doughty was mentioned by name in the December 2005 charge, and DePrez was mentioned by name in the Childs charging parties' response to ITS' motion for a more definite statement. By the third week of June 2006, when AES was accepting applications from Academy teachers for the following school year, ITS knew or had reason to suspect that DePrez and Doughty were involved with the charging parties in that case and might appear as witnesses at that hearing. ITS and AES are small private corporations owned by members of the same family and dedicated to the same purpose – providing services to the Academy. As the record here indicates, ITS and AES assert joint control over Academy employees. In addition to the family relationships among the Smiths, Andria Love, ITS' personnel director during the 2006-2006 school year, became AES' human resources director. As personnel director for ITS, Love presumably knew of Doughty and DePrez's involvement in the Childs case. However, AES failed to call Love as a witness to testify regarding her knowledge. It also failed to call Karon Smith, Melvin Smith's wife and officer of AES. While Melvin Smith testified specifically that he did not tell his wife that DePrez and Doughty had testified in the Childs unfair labor practice case, he did not deny discussing that case with her or Love. The Commission has held that an adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she may reasonably be assumed to be favorably disposed to the party. *Co of Ionia and 64A Dist Court*, 1999 MERC Lab Op 523, 526; *Northpointe Behavioral Healthcare Systems*, at 541. I conclude that an adverse inference should be drawn from AES' failure to call Karon Smith and Love that they knew that DePrez and Doughty intended to or did testify in the Child case.

Charging Parties also have the burden of showing employer animus against their protected activity, in this case their testimony in the Childs ULP. In the absence of direct evidence, inferences of animus and discriminatory motive may be drawn from circumstantial evidence, including the pretextual nature of the reasons offered for the alleged discriminatory actions. *City of Adrian,* 17 MPER 83 (2004) (no exceptions*); Washington Nursing Home, Inc,* 321 NLRB 366, 375 (1996); *Tubular Corp of America*, 337 NLRB 99 (2001); *Fluor Daniel, Inc*, 304 NLRB 970 (1991).

In the late spring of 2006, as Doughty and DePrez were preparing to testify in the Childs ULP, ITS and AES arranged for AES to become an employer of Academy employees and to lease them to ITS. Sometime around this time, AES adopted a written policy which stated that not only criminal convictions and pending charges, but arrests not leading to a conviction, would be considered in deciding whom to hire. ITS did not consider arrest records in deciding whom to hire.[4] Both Doughty and DePrez had arrest records but no convictions; DePrez had been convicted of a misdemeanor but AES apparently did not know about it since it did not appear on her record, and Doughty's 1991 conviction had been expunged from his record.

AES signed contracts in June 2006 with most Academy employees conditioned on their passing the background check. However, it did not offer conditional contracts to DePrez or Doughty. In August 2006, after they had testified in the Childs matter, both DePrez and Doughty

[4] See MCL 37.2205a.

were finally informed that AES would not hire them because of their criminal records. Neither, however, was shown the results of the criminal background checks, told what in their backgrounds had caused AES to refuse to hire them, or given an opportunity to correct any inaccurate information. While Raymond Smith testified that AES' policy was not to hire any individual with an arrest record for a professional or administrative position, the written policy stated only that AES would not hire any individual "deemed unfit for service" in a professional or administrative job due to arrests or criminal convictions, and set out a list of factors to be considered in making this determination. According to AES, it refused to hire nine other former ITS employees because of their criminal records, but nothing in the record indicated that AES refused to hire anyone other than Doughty or DePrez who only an arrest record. Based on the evidence above, I conclude that the reason AES gave for refusing to hire Doughty and DePrez – the fact that they had been arrested – was a pretext. I find that the real reason for AES' refusal to hire them was their testimony or intent to testify against ITS in the Childs case. I conclude, therefore, that AES' refusal to hire Doughty and DePrez violated Section 16(5) of the LMA or Section 10(1) (d) of PERA.

As discussed above, I have also found that AES and ITS are joint employers of Academy employees. Since there is no evidence that ITS made any effort to prevent AES' unlawful actions, I conclude that ITS and AES should be held jointly liable for the unfair labor practice. See *Capitol EMI Music, Inc*, 311 NLRB 997, 1000 (1993). I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondents Innovative Teaching Solutions, Inc., and Advanced Educational Staffing, Inc., their agents, co-employers and successors, are hereby ordered to:

1. Cease and desist from refusing to retain or hire employees because they have testified or intend to testify in proceedings before the Michigan Employment Relations Commission.

2. Take the following affirmative actions to effectuate the purposes of the LMA or PERA:

a. Within fourteen days of the date of this order, offer Lynnette DePrez and Todd Doughty unconditional reinstatement to teaching positions at Old Redford Academy that they would have held in the absence of the unlawful discrimination against them, including all rights and privileges they would have enjoyed had Respondents not unlawfully refused to hire or rehire them.

b. Make Lynnette DePrez and Todd Doughty whole for any loss of pay they may have suffered as a result of the discrimination against them by paying them the amounts they would have earned in wages and benefits from the beginning of the 2006-2007 school year to the date of their reinstatements or rejections of Respondents' unconditional offers of reinstatement, minus

any interim earnings, plus interest on the amounts owed at the statutory rate of six percent (6%) computed annually.

3. Post the attached notice on the premises of Old Redford Academy, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____