STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GRAND RAPIDS EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION (GRESPA), MEA/NEA,
Labor Organization-Respondent,

Case No: CU07 K-059

-and-

GRAND RAPIDS PUBLIC SCHOOLS,
Public Employer-Charging Party.
_____/

APPEARANCES:

Kalniz, Iorio & Feldstein, Co, LPA, by Fillipe S. Iorio, Esq. and Krista Durchik, Esq., for the Respondent

Clark Hill PLC, by Marshall W. Grate, Esq., and Barbara A. Ruga, Esq., for the Charging Party

DECISION AND ORDER

On May 2, 2008, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Summary Disposition 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. On October 13, 2009, the Commission received a letter from Charging Party indicating that it now believes the matter to be moot and requesting that the charge be withdrawn. Charging Party's 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

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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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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISPOSITION

On November 26, 2007, the Grand Rapids Public Schools (the Employer) filed the charge in the above case against the Grand Rapids Educational Support Personnel Association (GRESPA), MEA/NEA, (the Union) alleging that the Union violated its duty to bargain in good faith under Section 10(3)(c) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by demanding that the Employer arbitrate a grievance over its subcontracting of transportation services, a matter allegedly made a prohibited subject of bargaining by Sections 15(3)(f) and (4) of PERA. The relief sought in the charge includes an order directing the Union to cease and desist from pursuing binding contractual arbitration over a prohibited subject. The charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission.

On February 7, 2008, the Union filed a motion for summary dismissal asserting that the charge was untimely filed under Section 16(a) of PERA because the grievance was filed on May 6, 2005, more than two years before the charge was filed. The Union also asserts that the Commission lacks jurisdiction to determine the arbitrability of the grievance, and that the charge

is barred by principles of res judicata or collateral estoppel. On February 11, 2008, the Employer filed its own motion for summary disposition. The Employer alleges that by insisting on arbitrating this grievance, the Union is, in effect, demanding to bargain over a prohibited/illegal subject in violation of Section 10(3) (c) of PERA. It maintains that the Union should be found to be guilty of bargaining in bad faith by "using the grievance procedure to unlawfully expand the scope of the public employer's bargaining obligation." The Employer asserts that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law

Both parties filed briefs in opposition to the other's motions. On February 22, 2008, I held oral argument. Based on the uncontested facts and arguments set forth in the pleadings and at oral argument, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

The Subcontracting

The Union represents a bargaining unit of nonsupervisory employees of the Grand Rapids Public Schools. Until June 2005, the unit consisted of nonsupervisory bus mechanics, bus drivers, permanent substitute drivers, dispatchers, planners, food service employees, custodians, maintenance employees, supply clerks, and skilled trades employees. The Employer and Union were parties to a collective bargaining agreement covering this unit that expired on June 30, 2006. The collective bargaining agreement contained a grievance procedure culminating in binding arbitration.

On April 18, 2005, the Employer's Board of Education passed a resolution approving the subcontracting of its transportation services to a private company, Dean Transportation, Inc. (Dean). The contract between the Employer and Dean, effective June 10, 2005, was approved by the Board on May 16, 2005. Approximately 170 employees were laid off as a result of the Employer's contract with Dean.

The Grievance

The parties' collective bargaining agreement did not contain any explicit reference to subcontracting or outsourcing. On May 6, 2005, the Union filed a grievance asserting that the subcontracting violated eight sections of the parties' collective bargaining agreement. The contract provisions alleged to have been violated by the Employer included the following:

> Article 1(B). Recognition of Obligations
>
> The Board and Association recognize their mutual obligation to bargain collectively with respect to hours, wages, and fringe benefits and conditions of employment. . .
>
> Article 2. Recognition of Bargaining Unit

> The Board recognizes the Association as the sole and exclusive bargaining representative for all GRESPA employees . . . The Board agrees to meet with the Association to negotiate the effects resulting from the transfer of employees' job functions, or positions.

The Union argued that the last sentence of Article 2 obligated the Employer to negotiate the effects of the subcontracting.

Article 5(C). Administrative Staff

> In meeting [its] responsibilities, the Board acts through its administrative staff. Such responsibilities include, without being limited to … the maintenance of school buildings and equipment; the hiring, transfer, assignment, supervision, discipline, promotion and termination of employees . . . .

The Union argued that the Employer's assignment of equipment and disciplinary authority to Dean violated this section.

Article 14(E). Problem Solving

> The parties agree to utilize Interest Based Strategies as a problem solving tool.

The Union agued that the Employer was obligated to use Interest Based Strategies to resolve the economic problems leading to the Employer's decision to subcontract its transportation services.

On July 15, the Employer issued a written response to the grievance that addressed the specific contractual claims, but also asserted that the matters covered by the grievance were not grievable because they involved a prohibited subject of bargaining. On July 18, the Union amended the grievance to allege that the subcontracting also violated the duration, wage and fringe benefit, seniority, and the hours of work clauses in the contract, and that the subcontracting constituted a breach of the contract's no-lockout clause. In its response to the Employer's grievance answer, the Union stated:

> GRESPA/MEA responds that GRPS' actions constitute a violation of the Articles previously mention and the contract as a whole as GRPA has in effect repudiated, voided, and/or terminated the terms of the collective bargaining agreement that it negotiated in 2004. The parties' collective bargaining agreement is effective until June 30, 2006. By terminating the employment of bus drivers, mechanics, etc., GRPS has denied these employees the rights as guaranteed in the collective bargaining agreement and effectively locked them out in violation of the contract.

Arbitration

The Union submitted the grievance to the American Arbitration Association (AAA) for selection of an arbitrator in accord with the parties' contractual grievance procedure. The

Employer participated in the selection of the arbitrator, although it indicated in a letter to the AAA in October 2005 that it intended to raise arbitrability as a defense. On September 28, 2005, the AAA assigned arbitrator Paul Glendon to hear the grievance. In April 2006, the Employer filed a motion with the arbitrator asking that the grievance be summarily dismissed. The Union asserted that the arbitrator lacked authority to issue an award without conducting a hearing. Glendon disagreed, and, on June 21, 2006, issued an award concluding that the grievance was not arbitrable. Glendon noted that the parties' collective bargaining agreement did not contain any provision explicitly addressing the outsourcing of noninstructional support services. He rejected the Union's argument that the numerous provisions cited in the grievance, taken as a whole, constituted an implicit agreement to prohibit the outsourcing of unit work. Glendon also concluded that the parties could not have negotiated such an agreement because the plain language of Section 15(3) (f) of PERA prohibited it. He rejected the Union's argument that the Employer had in effect terminated the contract, noting that its terms remained in effect for the unit members who continued to be employees of the Employer.

The Union filed suit to vacate Glendon's award in the Kent County Circuit Court. The Employer filed a motion for summary dismissal. Among other arguments, the Employer asserted that that an implied or express restriction against subcontracting in the contract was unenforceable under PERA. On February 1, 2007, the Court vacated the award. The Court concluded that the arbitrator lacked authority to issue any decision without holding a hearing. It did not decide whether the grievance was arbitrable on the face of the contract, or whether an award finding that the contract prohibited outsourcing would conflict with PERA.[1] The Court remanded the dispute to the arbitrator for a hearing. In June 2007, the parties selected the date of December 11, 2007 for a hearing before Glendon. On November 26, 2007, the Employer filed the instant unfair labor practice charge. A day of hearing was held before Glendon as scheduled on December 11. A second day of hearing was scheduled for April 29, 2008.

Discussion and Conclusions of Law:

For reasons discussed more fully below, I agree with the Union that the charge was not timely filed under Section 16(a) and thus must be dismissed. However, this charge raises novel issues. Because the Commission may not agree with me on the timeliness of the charge, I will indicate how I believe it should rule on the other issues raised by the charge.

Effect of Sections 15(3) (f) and (4) on the Parties' Contractual Obligations

Section 15 of PERA requires a public employer to bargain collectively with the representatives of its employees with respect to "wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising under the agreement." The Commission and the courts developed a body of case law interpreting the phrase "wages, hours and other terms and conditions of employment." However, until PERA was amended by 1994 PA 112, the statute did not explicitly exclude any topic from the bargaining obligation. Section 15, as amended by 1994 PA 112, now includes the following provisions:

[1] One of the issues the Court stated specifically that it was not deciding was whether the arbitrator had the authority to consider external law, i.e. PERA, in making his decision as to arbitrability.

(2) A public school employer has the responsibility, authority and right to manage and direct on behalf of the public the operations and activities of the public schools under its control.

(3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

* * *

(f) 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.

(4) The matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

Unions representing public school employees brought a lawsuit challenging the constitutionality of the 1994 PA 112 amendments. One of the questions raised in the lawsuit was what the Legislature meant when it said that the topics set out in subsection 15(3) were "prohibited" subjects of bargaining, since that term had not previously been used by the Commission in defining the bargaining obligation under Section 15. The plaintiffs argued that the Legislature intended to prohibit all discussion of these topics, and asserted that this violated public school employees' freedom of speech. The Supreme Court, however, rejected this interpretation of the statutory language. It held instead that a "prohibited" subject of bargaining was synonymous with an "illegal" subject as that term had been used in previous case law. *Michigan State AFL-CIO v MERC,* 453 Mich 362, 380 (1996). The Court cited *Police Officers Ass'n v Detroit,* 391 Mich 44 (1974), which adopted for PERA the federal practice of classifying all bargaining subjects as mandatory, permissive or illegal. Both permissive and illegal subjects fall outside the scope of "wages, hours, and working conditions" over which parties are obligated to bargain. However, the parties may bargain by mutual agreement over a permissive subject and incorporate their agreement in a collective bargaining agreement. Illegal subjects of bargaining are those which are unlawful or inconsistent with the basic policy of the collective bargaining statute. *Eddy Potash, Inc,* 331 NLRB 552, 559 (2000). The parties are not explicitly forbidden from discussing an illegal subject, but a contract provision embodying an illegal subject is unenforceable. *Detroit Police Officers Ass'n,* at 54-55, n 6; *Michigan State AFL-CIO,* at 380, n 9.

The issue before the Court in *Michigan State AFL-CIO* was the constitutionality of the 194 PA 112 amendments, not the enforceability of a contract provision. However, the Court's conclusion that the Legislature intended to make the matters set out in subsection 15(3) "illegal" subjects of bargaining, as that term had been used in previous case law, was not mere dicta but was, in fact, necessary to its holding on the constitutional issue.

Since the "decision of whether or not to contract with a third party for 1 or more noninstructional support services" is a prohibited subject of bargaining, under the Court's interpretation of PERA a public school employer cannot enter into an enforceable agreement with a union that explicitly restricts the employer's right to outsource such services. As arbitrator Glendon noted in his June 21, 2006 award, it follows that a public school employer also cannot enter into an enforceable agreement which implicitly restricts its right to outsource noninstructional support services. There is no dispute in this case that the Employer is a public school employer, that transportation services outsourced to Dean constituted noninstructional support services, and that the Employer entered into a bona fide contract with a third party for these services.[2] It is clear from the facts that the Union seeks an interpretation of its collective bargaining agreement that would prohibit the Employer from outsourcing noninstructional support work. I find, as did arbitrator Glendon, that such an interpretation would conflict with subsections 15(3) (f) and (4).

Commission Jurisdiction

The more difficult question in this case is what role, if any, the Commission has in this dispute. The Union asserts that the Commission lacks jurisdiction to determine that its grievance is not arbitrable. It argues that the courts, not the Commission, have the authority to determine arbitrability. It cites *Kaleva-Norman-Dickson Sch Dist v Kaleva-Norman-Dickson Sch Teachers Assn,* 393 Mich 583, 591 (1975), in which the Court stated that the question of whether a particular dispute was arbitrable was for the courts. It is not true, however, that the Commission lacks jurisdiction to determine arbitrability. To the contrary, it is well established that the Commission has jurisdiction to make a finding on the threshold arbitrability of a grievance when necessary to determine whether a party has committed an unfair labor practice. The Commission has consistently held that a party's refusal to arbitrate a grievance under an existing contract is a violation of its duty to bargain in good faith unless the contract clearly and unmistakably excludes the grievance from arbitration, although it has emphasized that the question of arbitrability under the contract is ultimately to be decided by the arbitrator and/or the courts. *Ludington Area Schs,* 1976 MERC Lab Op 985; *Hurley Hospital*, 1973 MERC Lab Op 584; *Livingston County Sheriff*, 1985 MERC Lab Op 650 (no exceptions); and *Grand Traverse Medical Care Facility,* 1993 MERC Lab Op 671 (no exceptions). The Commission's authority to order a party to arbitrate a contractual grievance was upheld in *Mt Clemens Fire Fighters Union, Local 838, IAFF v City of Mt Clemens,* 58 Mich App 635 (1975).

Moreover, "arbitrability", i.e., whether the parties' collective bargaining agreement encompassed the dispute, is not the issue in this unfair labor practice proceeding. The Employer asserts that the Union has committed an unfair labor practice by insisting on the arbitration of a grievance concerning a matter made a prohibited subject of bargaining by subsections Section 15(3) and 14. This is a statutory, not a contractual, claim. The Commission has exclusive jurisdiction to determine whether an unfair labor practice has been committed under Section 10 of PERA. *Rockwell v Crestwood Sch Dist,* 393 Mich 616 (1975); *Lamphere Schs v Lamphere Fed of Teachers,* 400 Mich 105 (1977).

[2] The Union has not asserted during the course of this dispute that the Employer's contract with Dean was merely a "paper" contract, i.e., a subterfuge to rid itself of the obligation to bargain while the Employer continued to retain control over the employees doing the work.

The Employer argues that by demanding arbitration of this grievance, the Union is effectively demanding to bargain over an illegal subject of bargaining. "Effectively" is the key word here, as the Union has not proposed or demanded that the Employer enter into a contract provision restricting its right to subcontract. As noted, above, until the 1994 PA112 amendments were no "prohibited subjects of bargaining" under PERA, and few Commission cases involving illegal subjects of bargaining. The Commission has adopted, in dicta, the Supreme Court's holding that a contract provision covering a subject set out in subsection 15(3) is unenforceable. See *Grand Haven Pub Schs,* 19 MPER 82 (2006); *Parchment Sch Dist*, 2000 MERC Lab Op 110, 116 (no exceptions) and the Commission's comments on its remedial order in *Gibraltar Sch Dist*, 1995 MERC Lab Op 522,531 n 2. However, the Commission has not directly addressed the question of whether a public school employer or union violates its duty to bargain in good faith by attempting to enforce through the grievance procedure a contract provision or provisions made unenforceable by subsections 15(3) and (4).

I agree with the Employer that the Commission should find such conduct to constitute an unfair labor practice. The Commission has traditionally determined the rights and obligations of parties under Section 15 of PERA in the context of unfair labor practice proceedings. For example, the Commission has held that it is a violation of the duty to bargain in good faith for a party to submit a proposal on a nonmandatory subject of bargaining to compulsory interest arbitration under Act 312, and the courts have affirmed the Commission's authority to order a party to cease and desist from submitting a permissive proposal to an Act 312 panel. See e.g., *Jackson Fire Fighters Ass'n* v *City of Jackson,* 227 Mich App 520, 525 (1998); *Oak Park Pub Safety Officers Ass'n v City of Oak Park,* 277 Mich App 317. When a party demands to arbitrate a grievance involving a contract provision which the other party alleges is made unenforceable by subsections 15(3) and (4) of PERA, there are likely to be both issues of contract interpretation and issues of statutory interpretation. I believe that the Commission is the appropriate agency to decide the statutory issue, i.e., to determine whether PERA, in fact, makes that provision unenforceable. I also believe that a finding that a party's attempt to enforce an illegal provision is a violation of its duty to bargain in good faith under Section 10 is a proper exercise of the Commission's jurisdiction.

Res Judicata and Collateral Estoppel

The Union also argues that this charge is barred by the doctrines of res judicata and/or collateral estoppel because of the decision of the Kent County Circuit Court vacating arbitrator Glendon's award and remanding to him for a hearing. It quotes the Supreme Court's recent restatement of the res judicata doctrine in *Washington v Sinai Hospital of Greater Detroit,* 478 Mich 412, 418 (2007):

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been resolved in the first.

The doctrine of collateral estoppel bars relitigation of an issue in a new action arising between the same parties when the earlier proceeding results in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. *Leahy v Orion Twp,* 269 Mich App 527, 530 (2006).

I find that neither collateral estoppel nor res judicata apply in this case. First, the "cause of action" in the case before me is a claim that the Union committed an unfair labor practice under Section 10(3) of PERA. This claim was not and could not have been decided by the Circuit Court. Secondly, the Circuit Court did not actually rule on any of the issues raised by the charge, including whether a contractual limitation on the Employer's right to decide to subcontract the transportation work would be unenforceable under subsections 15(3)(f) and (4) of PERA.

Timeliness of the Charge

Although I agree with the Employer that the Union committed an unfair labor practice by attempting to enforce through the grievance procedure a legally unenforceable provision, I agree with the Union that the charge in this case was untimely filed under Section 16(a) of PERA. Section 16(a) prohibits the Commission from remedying any unfair labor practice occurring more than six months prior to the filing of the charge and its service upon the charged party. The Union filed the grievance in this case in 2005, and demanded to arbitrate it before September 28, 2005. The unfair labor practice charge was not filed until more than two years later, on November 26, 2007. The Employer asserts that the charge is timely under a "continuing violation" theory, while the Union maintains that the Commission does not recognize such a theory.

In *City of Adrian*, 1970 MERC Lab Op 579, 581, the Commission adopted the holding of the US Supreme Court in *Local Lodge No 1424 v NLRB (Bryan Mfg)* 362 Mich 411 (1960), rejecting "the doctrine of continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge." The Commission found that a union's charge that the employer had unlawfully negotiated individual wage rates with employees was untimely even though the employer continued to pay employees these rates. In *Bryan,* the Supreme Court was called upon to interpret Section 10(b) of the National Labor Relations Act (NLRA), 29 USC 151 *et seq*, which is identical in wording to Section 16(a). The specific issue before the Court in *Bryan* was the application of Section 10(b) to a union security clause that was illegal because it was executed between a local union and employer at a time when the union did not represent a majority of the employees. The charges were not filed with the National Labor Relations Board (the Board) until ten months after the execution of the agreement. The Board had held that the continued enforcement of the illegal agreement was an unfair labor practice not barred by Section 10(b). The Supreme Court disagreed. It held that, as a general matter, a contract illegally negotiated and executed more than six months before filing of the charge is beyond the reach of the charge and cannot be found unlawful even though the contract is maintained and enforced during the six months preceding the charge. It noted that in the case before it, the enforcement of the contract within the 10(b) period could be found to be an unfair labor practice only through reliance on an earlier unfair labor practice occurring outside the 10(b) period.

Following the reasoning of *Bryan*, the Commission has refused to find a "continuing

violation" where the only conduct occurring within six months of the filing of the charge was the employer's continued refusal to remove information allegedly placed unlawfully in charging party's personnel file, *Washtenaw Co* 19 MPER 63 (2006). The Commission has also held that a an unlawful unilateral change in terms and conditions of employment does not constitute a "continuing violation," and is untimely if filed more than six months after the union knows or should have known of the violation even if the changed condition remains in effect. *Lapeer Co*, 19 MPER 45 (2006); *City of Detroit (Dep't of Pub Works),* 2000 MERC Lab Op 149.

As the Employer points out, the Commission has held that when an employer refuses to meet and enter into an agreement over a mandatory subject of bargaining, the six month statute of limitations began to run from the employer's most recent refusal. In *Spring Lake Pub Schs,* 1988 MERC Lab Op 362, a case relied upon by the Employer, the Commission held that when the employer refused to meet and enter into a written agreement on an evaluation procedure, the statute began to run from the union's last demand to bargain within the six month period, not the employer's first refusal to bargain a year earlier. In that case, however, since the lawfulness of the employer's refusal to bargain over the evaluation procedure within the six months preceding the charge in *Spring Lake* did not depend on conduct occurring outside the statutory period, each refusal constituted a separate unfair labor practice, not a "continuing violation."

The *Bryan* Court distinguished cases involving facially unlawful contract clauses. When a contract clause is illegal on its face, a party's filing of a grievance to enforce that clause constitutes a separate unfair labor practice, even though the illegal clause was negotiated outside the statutory time period. See *NLRB v Local 1131*,777 F2d 1131, 1133 (CA 6, 1985) (grievance filed to enforce a contract provision that unlawfully granted superseniority to union officers constituted a separate unfair labor practice).[3] Similarly, in *Warren Con Schs,* 19 MPER 37 (2006), the Commission held that the union and employer violated Sections 10(1)(a) and (c) and Sections 10(30(a)(i) and 10(3)(b) of PERA when they enforced a superseniority clause unlawful on its face within six months of the filing of the charge by displacing the charging party from his position, even though the unlawful clause had been agreed to more than six months before the charge was filed.

In the instant case, the grievance was filed and the arbitration demand made in 2005, more than two years before the charge was filed. The Union did nothing in the six months prior to the filing of the charge except continue to pursue arbitration. If the violation in this case was the Union's attempt to enforce contract provisions which, according to the Union, prohibited the Employer from outsourcing work, the "inception of the violation" clearly occurred more than six months prior to date the charge was filed. The six-month period under Section 16(a) begins to

[3] The Board and courts have also held that any attempt to enforce or reaffirm the validity of a "hot cargo" provision illegal under Section 8(e) of the NLRA within the six months prior to the filing of the charge constitutes a separate unfair labor practice. For example, a union's serving of a subpoena upon the employer and a request to obtain additional information in order to pursue its grievance within the six months prior to the filing of the charge constituted an unlawful "reaffirmation" of the illegal clause in *NLRB v Central Pennsylvania Regional Counsel of Carpen*ters, 352 F3d 831, 834 (CA 3, 2003). See also *Bricklayers and Stone Masons Union, Local No 2 v NLRB,* 562 F2d 775, 783 (CA DC). I agree with the Union, however, that these cases are not applicable to the instant dispute because they involve a statutory provision, Section 8(e), that has no parallel in PERA.

run when the charging party knows, or should have known, of the alleged violation. *City of Detroit*, 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836. There is no dispute that the Employer knew by the fall of 2005 that the Union was demanding that it arbitrate this grievance.

The Employer cites *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125 in support of its argument that pursuing arbitration over an illegal subject of bargaining constitutes a "continuing violation." In *Jackson*, the employer filed an unfair labor practice alleging that the union was violating its duty to bargain in good faith by submitting a bargaining proposal covering a nonmandatory subject of bargaining to Act 312 arbitration. The charge was not filed until almost two years after the filing of the petition for Act 312 arbitration. The administrative law judge, referring to the union's conduct as a "continuing violation" concluded that the charge was not untimely. She also cited *Spring Lake Pub Schs¸ supra*, and *City of Detroit¸* 1974 MERC Lab Op 470, in which the Commission held that each refusal by an employer to bargain over promotional procedures constituted a separate unfair labor practice. The union filed exceptions to the administrative law judge's finding that its manning proposal was not a mandatory subject of bargaining, but not to her finding that the charge was timely.

I do not believe that *Jackson* supports the Employer's claim that its charge as timely. First, the Commission in *Jackson* did not rule on whether the charge was timely, since no exception was filed to the administrative law judge's finding on this issue. Second, shortly before the charge in *Jackson* was filed, the union demanded that the employer bargain over its staffing policy and rescind changes it had made to that policy. Finally, the unfair labor practice in *Jackson* was the union's insistence that the parties' new collective bargaining agreement include a proposal on a nonmandatory subject of bargaining. In this case, however, the Union never demanded that the Employer bargain over subcontracting or agree to a contract clause that restricted its right to do so. Here, the alleged unfair labor practice here is the Union's attempt to enforce existing contract clauses through binding arbitration as provided in the parties' existing contract. I conclude that this unfair labor practice occurred either when the Union filed its grievance or when it demanded arbitration, both of which occurred more than six months before the charge was filed. Since the Employer knew of these acts at the time they occurred, its charge was untimely under Section 16(a). In accord with this finding, I conclude that the Union's motion for summary disposition should be granted and the Employer's denied, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____