STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent,

Case No. C09 A-002

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

David J. Masson, Esq., Assistant General Counsel, for Respondent

Nicholas Roumel, Esq., for Charging Party

DECISION AND ORDER

On April 16, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motion for Summary Disposition in the above matter finding that Respondent, University of Michigan (Employer), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by allowing its departments and schools to choose whether to use skilled trades bargaining unit employees or outside contractors for their maintenance work. The bargaining unit employees are represented by Charging Party, University of Michigan Skilled Trades Union (Union). The ALJ also found that Respondent did not interfere with the bargaining unit members' exercise of their rights under Section 9 of PERA by maintaining its method of calculating the recharge rates that departments and schools are charged for maintenance services and for providing accurate information on its procurement website regarding the charge for in-house maintenance services. The ALJ concluded that there was no genuine issue of material fact and that summary dismissal of the charge is appropriate under Rules 165(1) and (2)(f) of the Commission's General Rules, 2002 AACS, R 423.165(1) and (2)(f).

The Decision and Recommended Order on Motion for Summary Disposition was served on the interested parties in accordance with Section 16 of PERA. Charging Party filed

exceptions to the ALJ's Decision on May 11, 2009. After receiving an extension of time to file a response to the exceptions, Respondent filed a Brief in Support of the Decision and Recommended Order of the ALJ on June 5, 2009.

In its exceptions, Charging Party asserts that the ALJ misapplied the law and misinterpreted one of its claims against the Employer. Charging Party argues that there is a "double standard" and that the recharge rates charged by Respondent are inherently inequitable – that the rates are calculated differently to the benefit of outside contractors and to the Union's detriment. Charging Party also asserts that Respondent does not have a free speech right to place false and misleading financial information on its website. Charging Party claims that the ALJ minimized its argument to a complaint that the recharge rates are inflated and do not reflect the actual cost of services. Charging Party asserts that the issue is not whether Respondent uses outside labor, but that Respondent "is improperly promoting outside labor at the expense of the Union and that this conduct violates . . .PERA." Finally, Charging Party asserts that there is sufficient evidence of an unfair labor practice to warrant a hearing.

In its Brief in Support of the ALJ's Decision and Recommended Order, Respondent argues that its decision to utilize subcontractors does not interfere with Union rights and that the accuracy of the information on the Employer's website should not be reviewed by the Commission. Respondent further argues that this is an issue of contract interpretation and is one for arbitration and, finally, that any harm to the unit is de minimus and speculative.

We have reviewed Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the factual findings of the ALJ and repeat them only as necessary here. By the parties' collective bargaining agreement, Respondent has an unrestricted right to employ outside contractors to perform work that is also performed by employees who are members of Charging Party's skilled trades bargaining unit. Respondent publishes on its internal website procurement information as to the services that can be performed by Charging Party's members as well as by outside vendors and contractors. It also publishes cost information to be considered by its subsidiary schools and departments to whom it has delegated procurement authority. Schools and departments receive an internal budget, and they may purchase maintenance or facility-related services via that website within those parameters.

During the 2008-2011 contract negotiations, Respondent's long-standing use of contract vendors and its method of calculating "recharge" rates for the services of its tradesmen were subjects of dispute. The parties' previous agreements had been silent on the issue of subcontracting, and Respondent had utilized outside contract vendors for some years. In the 2008-2011 agreement the parties' ratified specific language regarding Respondent's use of contract vendors. During those contract negotiations, Respondent had sought to eliminate the painter classification, maintaining that the painters' costs were too high and not competitive in the market and that it would be more efficient to contract with outside vendors. Charging Party agreed to freeze the painter's base wage, and Respondent agreed not to eliminate the

classification during the contract term. The parties continued to argue over the calculation of recharge rates after execution of the 2008-2011 contract.

Discussion and Conclusions of Law:

Charging Party does not dispute Respondent's right to engage the services of outside vendors and contractors, but objects to Respondent's use of its internal website to promote this purchasing practice. Charging Party argues that Respondent's publication of cost information interferes with its right to exist and compete with those vendors.

Respondent has the authority under the collective bargaining agreement to decide the contractors that will provide services to its department and schools, while purchasing authority has been delegated to those entities. Because Respondent's website information is published to its own departments and schools, the website is used to inform those subsidiary departments and schools of the available internal and external resources when procuring certain services. The internal choices include members of Charging Party's bargaining unit. Because Respondent has the contractual right to employ outside vendors and contractors, informing its departments and schools of available resources and their cost does not violate PERA. The Commission has consistently held that an employer satisfies its bargaining obligation by entering into a contract that specifies the circumstances under which subcontracting may occur; there is nothing in the parties' contract that prohibits the Employer's conduct in this case. Any dispute regarding the contract clause, therefore, must be resolved through the agreed-upon grievance or other dispute resolution procedures. *Central Michigan Univ*, 1995 MERC Lab Op 113; *Village of Constantine*, 1991 MERC Lab Op 467; *City of Muskegon*, 1984 MERC Lab Op 857.

Charging Party also objects to the method by which the costs of in-house services are calculated. It claims that rates for services performed by internal resources are calculated differently from rates for external resources, to the benefit of outside vendors and contractors and to the detriment of its own members. Assuming this claim to be true, any inequity would also deprive Respondent's own subsidiary departments and schools of the ability to make informed choices. Such a practice, while unwise, does not constitute a PERA violation – especially in view of the undisputed circumstances here, including the fact that this same formula for calculating recharge rates has been utilized for many years.

We agree that Respondent did not interfere with employees' Section 9 rights by its long-standing practice of calculating recharge rates or by informing its departments and schools of the rates charged by outside contractors and in-house personnel for performance of maintenance services.

We have considered all other arguments of the parties and conclude that they would not change the result in this case.

ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

UNIVERSITY OF MICHIGAN,
Public Employer-Respondent,

Case No. C09 A-002

-and-

UNIVERSITY OF MICHIGAN SKILLED TRADES UNION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

David Masson, Esq., for Respondent

Nicholas Roumell, Esq., for Charging Party

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

On January 8, 2009, the University of Michigan Skilled Trades Union filed the above charge against the University of Michigan alleging a violation of Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The charge was amended on February 2, 2009. The charge, as amended, alleges that since on or about December 8, 2008, Respondent has interfered with the exercise of its employees' rights under Section 9 of PERA by encouraging its various schools and departments, by means of information provided on Respondent's internal procurement website, to use outside contractors rather than bargaining unit employees to perform unit work. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On February 26, 2009, Respondent filed a motion for summary disposition under Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, asserting that there are no material facts in dispute and that the charge should be dismissed as a matter of law. Charging Party filed a response opposing the motion on April 2, 2009. Based on the facts set forth in Charging Parties' pleadings viewed in their most favorable light, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party alleges that Respondent's internal procurement website: (1) discriminates against Charging Party by unfairly promoting its competition; (2) interferes with the administration of Charging Party by allowing Respondent to justify arguments to reduce or eliminate the bargaining unit based on economic reasons; (3) discourages membership in Charging Party by placing economic pressure upon its members; and (4) discourages or interferes with Charging Party's right of mutual aid and protection.

Facts:

Background

Charging Party represents a bargaining unit of skilled trades employees of Respondent, including painters. Respondent, a large university, purchases goods and services from many different entities. Some years ago, although Charging Party does not know when, Respondent began utilizing outside contractors for services also provided by members of Charging Party's unit. At some point, the use of contractors became a matter of dispute between the parties. However, until the parties' most recent collective bargaining agreement, the parties' contracts were silent on the issues of subcontracting and the use of outside labor. In their 2008-2011 agreement, executed by the parties on November 4, 2008, the parties added the following provisions dealing with contracted labor:

> Section 1-4. Contract vendor labor are [sic] employees of third party contractors utilized by the University to augment the regular and temporary workforce, and they are not subject to the work duration limitations [for temporary employees] stated in paragraphs 1-3 above.
>
> Section 11-6. Overtime work will not be assigned to "temporary help" or "contract vendor labor" until it has been offered to all employees in the same unit of distribution who are available to perform the work.
>
> Section 21-1 (2). Temporary help and contract vendor labor, in whatever sequence the University finds least disruptive to operations, and then probationary employees in an affected classification within a seniority group, shall be laid off first.

During negotiations for the 2008-2011 agreement, Respondent proposed to eliminate or phase out the painter classification. Respondent asserted that painters' costs were not competitive with the local market, and that it would be more efficient to have contractors do this work. The parties eventually agreed that the painters, unlike some other classifications, would not receive an increase in their base wage under the new contract, and Respondent agreed not to eliminate the classification during the term of this contract.

Individual schools and departments within Respondent "purchase" maintenance and other facility-related services through a website operated by Respondent's procurement department. The school or department then receives an internal budget charge for the cost of the service.

During the 2008-2011 contract negotiations, Charging Party took issue with Respondent's long-standing method of calculating "recharge" rates for the services of its tradesmen. Charging Party argued that the recharge rates, as presently calculated, improperly included elements of administrative overhead and double counted the cost of sick time. It maintained that Respondent's method of calculating recharge rates overstated the actual cost of using its own tradesmen as opposed to outside contractors. Respondent did not agree to change its formula for calculating recharge rates, and the parties continued to argue over this issue after the 2008-2011 contract was executed.

The "U-Manage Facilities Services Program"

On or about December 8, 2008, Respondent sent the following e-mail to members of the University community.

> We are pleased to announce the new Facilities & Operations U-Manage Facilities Services Program. This program was established as a joint effort between Facilities and Operations, Procurement Services, Human Resources and the academic units to serve the needs of customers across campus. The U-Manage program is designed to give users additional vendor choices and management tools while remaining in compliance with University policies and building/safety regulations. The U-Manage program choices include the University's own internal service providers (AEC Interior Design Services, Plant Construction Services, and Plant Material and Moving Services) and external suppliers under contract with the University (through Procurement Services – University contracts). The following services are available through the U-Manage program:
>
> 1. Painting
> 2. Interior design
> 3. Moving Services
> 4. Floor Covering
> 5. Security Services
>
> Please note that University faculty and staff should consult with their individual school or departmental facility manager prior to ordering facilities-related services to ensure compliance with unit standards. Only U-Manage approved suppliers may be used for services listed above.
>
> We invite you to visit the Facilities and Operations website … to learn more about U-Manage. You will find information about the program, downloadable checklists for project management, contact information for University Compliance Departments, and links to the Procurement Services University contract pages for the suppliers in the U-Manage program.

Departments and schools looking for painting services on the above website are provided with four links – one to a page describing the painting services provided by Charging Party's members in Respondent's plant construction services department, and three to pages for outside contractors. The page for the construction services department includes links to forms to obtain estimates and request that work be done. The contractors' pages indicate whom to contact to obtain estimates. The website also explains how to order and bill for contractors' services.

Discussion and Conclusions of Law:

In its motion for summary disposition, Respondent argues that the parties' collective bargaining agreement gives it the right to utilize third party contractors to perform bargaining unit work. It asserts that to the extent that Charging Party is alleging that the information contained in the purchasing website has somehow resulted in subcontracting decisions that violate the collective bargaining agreement, its proper remedy is through the grievance procedure. Respondent cites *Village of Constantine,* 1991 MERC Lab Op 467 and *City of Battle Creek,* 1994 MERC Lab Op 914 for the well-established proposition that when the parties have negotiated contract language expressly dealing with subcontracting, they have satisfied their duty to bargain during the term of the contract. See also *Village of Romeo,* 2000 MERC Lab Op 296 and *City of Muskegon,* 1984 MERC Lab Op 857. Respondent also asserts that Charging Party is improperly seeking to have the Commission censor an internal University website that provides information regarding subcontracting decisions that Respondent has the contractual right to make.

In its response to the motion, Charging Party denies that it is alleging that Respondent is improperly using outside contractors. According to Charging Party, it is not Respondent's use of contractors, but its improper promotion of outside labor at the expense of Charging Party's members, that constitutes the unfair labor practice. It also asserts that Respondent's free speech arguments for its website are misplaced because an employer has no right to engage in speech which interferes with, restrains, or coerces employees in the exercise of their rights guaranteed by the Act, citing *Local 79 SEIU v Lapeer General Hosp*, 111 Mich App 441, 448 (1981).

There appear to be at least two separate actions by Respondent that form the basis of the charge in this case. The first is Respondent's decision to allow its departments and schools to choose, on its procurement website, whether to use outside contractors or Respondent's employees for their painting needs. The second is Respondent's refusal to change its method of calculating the recharge rates departments and schools are charged for employee services.

As noted above, Charging Party does not assert that Respondent has improperly subcontracted work. In fact, in its pleadings Charging Party apparently concedes Respondent's point that Respondent has a virtually unrestricted right under the contract to subcontract unit work. If that is the case, Respondent's decision to give its departments the choice of using either in-house labor or contractors would appear to benefit, rather than harm, Charging Party's unit.

Respondent commonly refers to its departments and schools as the "customers" of Respondent's facilities and operations department. In fact, the departments and schools and the

facilities and operations department are all part of a single entity. The departments and schools decide what maintenance services they want to pay for from their budgets. However, the departments and schools do not have the ability to choose who provides these services unless Respondent gives them that option. Clearly, it is Respondent, and not the departments and schools on an individual basis, that ultimately decides whether contractors will be used to do the work of Charging Party's members. It is also Respondent, according to the pleadings, which has demanded from Charging Party that the costs of providing maintenance services through its members be competitive with the costs of purchasing those services from contractors. Contrary to what Charging Party appears to argue, while Section 9 protects employees' right to take collective action to protect their bargaining unit and positions within it, it does not insulate employees from economic pressure in the form of demands by their employer for lower costs, something that is part of the normal give and take of collective bargaining. As Charging Party points out, the U-Manage program may result in more subcontracting and less work for Respondent's painters, and Respondent may cite this fact as a reason to eliminate or phase out the painter classification at the end of the contract. However, if Respondent has the right to increase its use of contractors during the contract term, its means of exercising that right – in this case, by giving its departments and schools a choice to use subcontractors - is irrelevant.

The second part of the charge addresses Respondent's recharge rates. For purposes of this motion, I must assume that Charging Party is right in stating that recharge rates are inflated and do not reflect the actual cost of services. However, Charging Party does not state a claim under PERA merely by asserting that these rates are unfair. Charging Party acknowledges that Respondent has used the same formula for calculating recharge rates for many years. I am unable to conclude that Respondent interfered with its employees' exercise of their Section 9 rights by continuing to calculate its recharge rates as it has in the past or by accurately informing its departments and schools, on the procurement website, what they will be charged for in-house maintenance services.

Based on the discussion and conclusions of law set forth above, I find that there are no genuine issues of material fact in this case, and that summary dismissal of the charge is appropriate under Rules 165(1) and 2(f) of the Commission's General Rules, 2002 AACS, R 423.165. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____