STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C04 H-215

-and-

PONTIAC EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Secrest Wardle by Dennis R. Pollard, Esq., for Respondent

Law Offices of Lee & Correll, by Michael K. Lee, Esq., for Charging Party

DECISION AND ORDER

On March 10, 2009, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Respondent, Pontiac School District (Employer), violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e), by refusing to bargain over the subcontracting of work previously performed by the job classifications of occupational therapist and physical therapist, which were part of the bargaining unit represented by Charging Party, Pontiac Education Association (Union). The ALJ concluded that the work in question did not constitute noninstructional support services within the meaning of Section 15(3)(f) of PERA and, therefore, the Employer's decision to subcontract that work was not a prohibited subject of bargaining. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After receiving an extension of time, Respondent filed its exceptions to the ALJ's Decision and Recommended Order on April 24, 2009. After receiving an extension of time, Charging Party filed its brief in support of the ALJ's Decision and Recommended Order on June 8, 2009.

In its exceptions, Respondent asserts that the ALJ erred in finding that the Employer had the burden of proving that it was exempt from the duty to bargain with respect to its decision to subcontract the work performed by occupational and physical therapists. Respondent argues that the ALJ erred in failing to find that the services performed by the occupational and physical therapists constituted noninstructional support services. In addition, Respondent claims that the

ALJ erred in finding that the phrase "noninstructional support services" is ambiguous, and requires application of rules of statutory interpretation in order to establish a functional definition. Respondent contends that the ALJ erred by interpreting "noninstructional support services" to mean "support services that are not specific to the educational goals of schools," rather than the Employer's suggested interpretation "support services that do not involve imparting the curriculum to students." Respondent states that after it retained an outside contractor for an initial year to perform the services previously performed by the bargaining unit occupational and physical therapists, it sought to bargain with Charging Party over the subcontracting of those services for a second school year. Respondent asserts that the ALJ erred in failing to find that Charging Party waived its right to bargain over the issue or created an impasse between the parties by refusing to bargain over the subcontracting at that point. Finally, Respondent argues that the ALJ's recommendation that the parties be returned to status quo ante is inappropriate.

We have reviewed Respondent's exceptions and brief in support, as well as Charging Party's brief in support of the ALJ's Decision and Recommended Order, and conclude that the ALJ's decision should be affirmed.

Discussion and Conclusions of Law:

We adopt the findings of fact as stated in the ALJ's decision, except as otherwise indicated below.

We find, for the reasons stated below, that the ALJ correctly concluded that the services performed by the physical therapists and occupational therapists formerly employed by Respondent in its Special Education Department were not noninstructional support services within the meaning of Section 15(3)(f) of PERA and the Respondent's decision to subcontract those services is a mandatory subject of bargaining.

Section 15(1) of PERA spells out the mutual obligation of employers and their employees' representatives to bargain in good faith over the employees' "wages, hours, and other terms and conditions of and employment." Such issues are mandatory subjects of bargaining. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-55 (1974). Once a subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject and neither party may take unilateral action on the subject absent an impasse in negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277 (1978). As the ALJ pointed out, under PERA, the subcontracting of bargaining unit work has historically been considered to be a mandatory subject of bargaining. See *Detroit Police Officers Ass'n v Detroit*, 428 Mich 79, 92-93 (1987); *Plymouth Fire Fighters Ass'n, Local 1811 v Plymouth*, 156 Mich App 220 (1986); *Van Buren Pub Sch Dist v Wayne Circuit Judge*, 61 Mich App 6, (1975); *Interurban Transit Partnership*, 21 MPER 47 (2008). Thus, an employer considering subcontracting bargaining unit work must give the union representing the members of that bargaining unit notice and an opportunity to bargain over the matter, or the employer will be found to have violated its duty to bargain under Section 10(1)(e) of PERA.

Section 15(3)(f) of PERA is an Exception to the Rule that Subcontracting is a Mandatory Subject of Bargaining

Prior to the amendment of PERA by Act 112 of 1994, Section 15 consisted of a single paragraph containing generally the same language as what became Section 15(1) after Act 112 became effective. Act 112 inserted "Except as otherwise provided in this section" at the beginning of the second sentence of the paragraph, made the nonsubstantive changes indicated below, and added parts (2) through (4), MCL 423.215(2)–(4). At all times relevant to this matter, Section 15(1)[1] provided:

> A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. *Except as otherwise provided in this section*[2], for the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith 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*[3], and the execution of a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but *this*[4] obligation does not compel either party to agree to a proposal or require the making of a concession. (Emphasis added.)

By adding the language "Except as otherwise provided in this section," to what is now the first part of Section 15, and by adding parts (2) through (4), the Legislature created several exceptions to Commission and Court precedent affecting the duty of public school employers to bargain with the unions representing their employees. The language of Section 15(3)(f) in particular creates an exception to case law determining that subcontracting is a mandatory subject of bargaining, such that when the employer is a "public school employer" as defined by Section 1(h), subcontracting of noninstructional support services is a prohibited subject of bargaining.

Respondent contends that it is exempt from PERA's bargaining obligation under Section 15(3)(f) of PERA and is, therefore, raising that provision as an affirmative defense. Respondent asserts that the ALJ erred in finding that the Employer had the burden of proving it was exempt from the duty to bargain with respect to its decision to subcontract the work performed by occupational and physical therapists. We disagree and find, instead, that the burden is on Respondent to present evidence establishing the elements of an affirmative defense. See *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664, 741 NW2d 857, 864 (2007); *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74 (1998); *Frenchtown Charter Twp*, 2000 MERC Lab Op 397, 399; 14 MPER 32017

[1] Section 15 was amended once more by Act 201 of 2009 but the changes are not relevant to this matter.
[2] "Except as otherwise provided in this section" was added by Act 112 of 1994.
[3] Act 112 substituted "under the agreement" for "thereunder" in the earlier version of Section 15.
[4] Act 112 removed "such" from the earlier version of Section 15 and replaced it with "this."

(2000). Accordingly, we find no error in the ALJ's placement of the burden of proving that Section 15(3)(f) exempts Respondent from the general duty to bargain over its decision to subcontract the work performed by the physical therapists and occupational therapists. It is up to Respondent to show that the services performed by the therapists are noninstructional support services in order to establish its claim that it is exempt from the duty to bargain over the subcontracting of their services.

Services Provided by the Therapists are Not Noninstructional Support Services

Respondent also claims that the ALJ erred in finding that the phrase "non-instructional support services" is ambiguous, and requires the application of rules of statutory interpretation in order to establish a functional definition. In this case and in the other case raising this same issue, which we are deciding concurrently[5], the parties debate the meaning of the word "noninstructional" and have offered numerous cites to various dictionaries defining various conjugations of "instruction," or "instructional," none of which, except that offered by Respondent herein, are significantly dissimilar from the definition of "instruction" cited by the ALJ, which is "to 'give knowledge or information to; *esp*.: to impart knowledge in a systematic manner', relying on *Webster's New Collegiate Dictionary, 1980 Ed.*, G & C Merriam & Co, Springfield, MA." We see no reason to construe "instructional" as meaning anything more or less than the common dictionary definitions. See *Robertson v Daimler Chrysler Corp*, 465 Mich 732, 748, (2002). While these definitions certainly encompass the services performed by certified teachers, they are not limited to such services. Other than certified teachers, we can envision a variety of job classifications present in public schools that *might* provide instructional services or instructional support services. We find that there is at least as much ambiguity in the "support services" part of the phrase as there is in "noninstructional" and, for that reason we hesitate at this time to specifically define the phrase except by application to specific cases as they come before us.

The services exempt from the duty to bargain under Section 15(3)(f) are "noninstructional" The definition of the prefix "non" is "not." See *The American Heritage College Dictionary, Third Ed.*, (2000). Thus, in applying a standard dictionary definition, we must conclude that those services that fall under Section 15(3)(f) are services that are *not* instructional support services.

Respondent contends the ALJ erred by interpreting the phrase "noninstructional support services" to mean "support services that are not specific to the educational goals of schools," rather than the Employer's suggested interpretation "support services that do not involve imparting the curriculum to students." We find Respondent's definition of "noninstructional support services" too narrow and unsupported by the legislative history or rules of statutory construction. In support of its definition of "noninstructional support services," Respondent points to the definition of "instructional services" contained in the Michigan Revised Administrative Rules for Special Education, R340.1701(b) and (c) and to the Code of Federal Regulations, 34 CFR 300.24 subsection (a) and subpart (b)(5) and (8), which applies to services

[5] *Harrison Cmty Sch*, ___MPER___(2010), (Case No. C07 G-164, issued concurrently with this decision).

provided to children with disabilities. We agree with the ALJ that the application of the Michigan and federal regulations cited by Respondent is limited to special education services and by their terms are not applicable to the wide range of other services provided by public school employers. Respondent has pointed to nothing in PERA or in the legislative history of Section 15 to indicate that the Legislature envisioned the terminology used in Section 15(3)(f) as being defined by state or federal regulations of such limited applicability and having no connection with labor relations policy.

At this point in our review of this issue, we would not necessarily adopt the ALJ's definition finding that the phrase applies to "support services that are not specific to the educational goals of schools." As we indicated in *Harrison Cmty Sch*, ___MPER___ (2010), (Case No. C07 G-164), issued concurrently with this decision, we find it likely that the Legislature intended that the determination of whether the services are noninstructional support services would be made on a case-by-case basis in the light of the particular facts and the specific duties of the positions involved. Without defining the phrase "noninstructional support services" in this case, we can apply the plain meaning of the definition of "noninstructional" to determine that the services of the physical therapists and occupational therapists formerly employed by Respondent do not fall within that definition.

The occupational therapists and physical therapists are not certified teachers. However, they worked closely with certified teachers and other professional staff, as well as with paraprofessionals in evaluating the needs of students and providing the students with activities and tools that would assist them in the educational process. An occupational therapist and a physical therapist, who were previously employed by Respondent, testified at length about their job duties. Their testimony identified a wide range of services that they provided to assist schoolchildren in acquiring and developing skills necessary for them to achieve educational goals. As explained in detail in the ALJ's decision, the therapists would prepare activities for students to assist them in developing certain skills. In addition to working with the students on those activities, the therapists would explain those activities to the classroom teacher and paraprofessionals, so, in the therapists' absence, those employees could continue to assist the students with the activities that were designed to aid the students in acquiring skills necessary to reach their academic goals. While the therapists did not teach the core curriculum, they provided the students with training and instruction in skills necessary for them to learn those subjects taught as part of the core curriculum.

Moreover, like the ALJ, we find it particularly relevant that the request for proposals (RFP) prepared by Respondent in seeking to subcontract the services of the occupational and physical therapists stated that the services it sought to obtain from a private contractor were to include: "physical therapy/occupational therapy services" to address disabilities "that interfere with learning in the educational environment." The therapists whose services were sought under Respondent's RFP were to: plan therapy services "for each individualized education program (IEP) as a member of the multidisciplinary educational/assessment team;" to engage in "consultation and education;" and to "administer . . . therapy services within the educational environment." Accordingly, we conclude that the services Respondent sought to contract for in the RFP, and the services previously provided by the occupational therapists and physical therapists in this case, were services of an instructional nature. Whether they were instructional

services, or instructional support services, we need not decide, as they were clearly not "noninstructional support services."

No Waiver of Bargaining Rights and No Impasse
Resulted from the Parties' 2005 Correspondence

Respondent contends that after it retained an outside contractor for an initial year to perform the services previously performed by the bargaining unit occupational therapists and physical therapists, it sought to bargain with Charging Party over the subcontracting of those services for a second school year. Respondent asserts that the ALJ erred in failing to find that Charging Party waived its right to bargain over the issue or created an impasse between the parties by refusing to bargain over the subcontracting at that point. As the ALJ indicated, Respondent's actions in 2005 cannot cure its breach of the duty to bargain in 2004. Despite Charging Party's demands, Respondent refused to bargain over its decision to subcontract the therapy services until July 26, 2005, when Respondent sent Charging Party a letter informing the Union of the Employer's intention to obtain occupational and physical therapy services for the upcoming academic year through the contractor from which it had obtained such services during the previous school year. Respondent's letter invited Charging Party to engage in discussions regarding the matter, but warned that if the Union failed to contact it by the end of the following day the Employer would conclude that the Union was waiving any bargaining demand with respect to the subcontracting of the therapy services. The letter indicated no reason for demanding a reply by the next day, and none was offered by Respondent at the hearing in this matter.

By the time the July 26, 2005 letter was sent, the therapists had been laid off for several months due to the Employer's unlawful act and this matter had been pending before the ALJ for almost a year. Given Respondent's past refusal to bargain and the apparently arbitrary time constraint it chose to impose on Charging Party's reply, we must question whether the Employer's invitation to bargain was made in good faith. Respondent contended in subsequent correspondence to Charging Party, as well as in its exceptions, that the Union's failure to respond within the time period set by the Employer constituted a waiver of the Union's right to bargain. We disagree. A waiver of bargaining rights must be "clear, unmistakable and explicit." See *Interurban Transit Partnership*, 20 MPER 92 (2007). We will not infer intent to waive the right to bargain from Charging Party's failure to respond to Respondent's time-limited demand for communications.

On November 22, 2005, Respondent wrote to Charging Party again, asserting its willingness to bargain over the subcontracting of the therapists' services and over the effects of the decision to subcontract those services. Charging Party responded by letter dated December 6, 2005, in which it denied knowledge of the Employer's decision to subcontract the work done by the therapists. Charging Party's letter contended that the parties' collective bargaining agreement covering the period of September 1, 2004, through August 31, 2007, prohibited reopening the agreement to discuss the subcontracting issue, but asserted that the Union would be willing to meet with Respondent to discuss "the potential problems that are certain to arise should the Board decide to subcontract or under-employ persons to serve as OT/PT's."

Respondent wrote back to Charging Party on December 19, 2005, indicating that it considered Charging Party's response to be a waiver of its right to bargain over the subcontracting of the work performed by the therapists.

Again, we disagree with Respondent's assertion that Charging Party waived its right to bargain. Inasmuch as Charging Party indicated a willingness to meet and discuss the potential problems it anticipated from Respondent's future subcontracting plans, at worst, Charging Party's December 6 letter indicates an unwillingness to bargain over those matters it claimed to be settled by the contract under which the parties were then operating. However, without the provisions of the September 1, 2004 through August 31, 2007 collective bargaining agreement in evidence, we cannot determine whether the issue of subcontracting was covered by that contract and, therefore, relieved Charging Party of any duty to bargain over a change in contract terms sought by Respondent. See *36th District Court*, 21 MPER 19 (2008), aff'd *36th District Court v Michigan AFSCME Council*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 285123).

By the time Respondent sent its November 22, 2005 letter, the therapists had been laid off for a year and a half despite timely efforts by Charging Party to bargain over the subcontracting. We are inclined to agree with the ALJ's conclusion that this exchange of correspondence, which occurred over a year after the charge had been filed but before the hearing was held, amounted to little more than posturing for the purpose of affecting the outcome of this case. Further, contrary to Respondent's assertion, the statements in the parties' correspondence are insufficient to support a finding that the parties' positions had so solidified that further bargaining would have been futile. See *Oakland Cmty Coll*, 2001 MERC Lab Op 273, 277; 15 MPER 33006 (2001); *Wayne Co (Attorney Unit)*, 1995 MERC Lab Op 199, 203; *City of Saginaw*, 1982 MERC Lab Op 727. Accordingly, we find no merit to Respondent's argument that the parties were at impasse after the exchange of correspondence in late 2005.

Finally, in its exceptions, Respondent argues that the ALJ's recommendation that the parties be returned to status quo ante is inappropriate[6]. We disagree. As the Court explained in *Van Buren Pub Sch Dist v Wayne Circuit Judge*, 61 Mich App 6, 33 (1975), "The status quo ante remedy imposed here is designed to return the parties to the bargaining positions they were in before the unfair labor practices were engaged in, in full recognition of the fact that in order to make the duty to bargain meaningful there must be something to bargain about." Upon reinstatement of the bargaining unit positions, the parties will have the opportunity to bargain in good faith over the terms and conditions of employment of the occupational and physical therapists in an effort to reach a resolution that is acceptable to both. Failure to return the parties to the status quo would undoubtedly weaken Charging Party's bargaining position to the point that alternatives to subcontracting would not be given appropriate consideration. Without a return to the status quo ante, requiring Respondent to bargain over subcontracting would be "a useless gesture." See *Van Buren Public Sch Dist, at 36.*

Accordingly, based upon the record in this case, we find that the physical therapists and occupational therapists do not provide noninstructional support services; that Respondent had a

[6] The remedy recommended by the ALJ does not include back pay beyond January 18, 2005, pursuant to the parties' stipulation.

duty to give notice and an opportunity to bargain to Charging Party before making its decision to subcontract the services of the therapists; and by failing to do so in a timely manner, Respondent breached its duty to bargain in good faith and violated Section 10(1)(e) of PERA. We emphasize that this is a fact specific determination based on our belief that the Legislature intended this issue to be resolved on a case-by-case basis. We have carefully examined all other issues raised by the parties and find they would not change the result. In accordance with the conclusions of law set forth above, in order to remedy the Employer's illegal actions, we issue the following order:

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

-and- Case No. C04 H-215

PONTIAC EDUCATION ASSOCIATION, **CORRECTED COPY**
Labor Organization-Charging Party.
_____/

APPEARANCES:

Ann VanderLaan, for the Respondent

Michael K. Lee, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on February 14, 2007, before Doyle O'Connor, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission(MERC).[7] Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before May 7, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Positions of the Parties:

On August 26, 2004, Pontiac Education Association (the Association or Union) filed the charge in this matter, which asserts that the Pontiac School District (the District or Employer) violated the Act by its unilateral decision in May of 2004 to enter into a contract with a private vendor relating to the provision of the work of the occupational therapist and physical therapist classifications which were, until that time, in the bargaining unit represented by the Association. The Employer does not dispute that it made the unilateral decision to subcontract and that, at least initially, it refused the Association's demand to bargain over the decision to subcontract the work or over the effects of that decision. The Employer asserted the belief that the decision was a prohibited subject of bargaining under MCL 423.215 (3) & (4) (hereafter §15), premised on the

[7] This matter, filed in August of 2004, was initially scheduled for hearing on October 13, 2004, but was repeatedly adjourned at the joint request of the parties.

Employer's conclusion that the positions in question provided "noninstructional support services", as that term is used in the Act.

PERA was amended in 1994, at §15, in a manner that altered the bargaining obligations of public school employers and employee organizations, by the addition of the following relevant language:

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

Findings of Fact:

The core facts in this matter are largely not in dispute, with the Employer making the decision to enter into a contract with an outside vendor regarding the services previously provided by bargaining unit occupational and physical therapists, while refusing the Union's demand that the Employer bargain over the decision and over the effects of entering into that outside contract. At the outset of the hearing, the parties stipulated to the following facts:

1. Occupational therapists and physical therapists were in the bargaining unit and covered by a collective bargaining agreement until they were laid off in May of 2004, with a recall for a period of time in the fall of 2004;
2. The Employer in May of 2004 announced the intent to layoff and subcontract the occupational and physical therapists;
3. The Union demanded bargaining over the decision to subcontract that work;
4. The Employer refused in May or June of 2004 to bargain with the Union based on its assertion that the decision to subcontract what it alleged were noninstructional support services was a prohibited subject of bargaining;
5. It was the Union's position that the work in question was exclusively bargaining unit work prior to the decision to subcontract, other than occasional casual use of fill-in employees. It was the Employer's position that there was one physical therapist at Kennedy School as a contract employee in addition to the recognized bargaining unit employees[8];
6. The individuals affected were: Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson;
7. The parties agreed that, in the event a violation is found and a backpay remedy is ordered, a setoff would be appropriate for a brief period in the Fall of 2004, during which some or all of the affected employees were recalled and

[8] The proofs introduced by the Employer on that question persuaded me that, to the extent that the offered witness had personal knowledge, the use of a contract employee was distant in time and casual and did not alter the basic fact that the work in question was exclusively bargaining unit work.

worked, with the setoff to be based on Employer payroll records, and that a cutoff of backpay would be appropriate as of January 18, 2005 when an offer of reinstatement was made to all of the former employees;

8. The Employer asserted that no violation occurred and that no remedy was warranted. The Union requests the finding of a violation and the elimination of the subcontracting arrangement, the restoration of the seven full-time equivalent positions to the bargaining unit, posting and filling the positions without delay, a make whole remedy as to the identified individuals with the agreed upon setoffs, and an order that the Employer bargain over any decision to subcontract;
9. A pre-trial motion to dismiss was denied by Administrative Law Judge David Peltz, as there were material facts in dispute.

The decision to contract for services

It is undisputed that Pontiac Schools, like many Michigan districts, faced increasingly severe budget shortfalls. In May of 2004, the assistant superintendent, Terry Pruitt, presented the school board with a draft proposal suggesting various savings techniques, including the contracting out of the work of occupational and physical therapists. According to the District, and as supported by the testimony of Valencia Hughes, executive director of instructional improvement and special services, a major part of the savings and of the impetus to privatize were systemic inefficiencies that existed. Principal among these were the fact that the therapists were assigned to work by building, rather than roving geographically to where they might be needed on any particular day, and that therapists were not scheduled to work during school breaks and summer vacation. Of equal consideration was the District's belief, borne out by later experience, that a private contractor would do a more comprehensive and more timely job of billing the State of Michigan for services and securing Medicaid reimbursement for those services, and thereby further reduce the District's costs.

On May 12, 2004, without prior negotiations with the Union, the school board voted to authorize the layoff of all eight of the therapists, with those notices sent to the employees on May 13, 2004, announcing layoffs effective the end of the school year, with employee benefits to continue until August 31, 2004. On May 14, 2004, the District formally notified the Union of the layoffs and the intent to subcontract the work.

The District issued a request for proposals (RFP) for the 2004-2005 school year for private vendors to bid on operating the schools' system of providing occupational and physical therapy services. While the RFP recited that the successful bidder would provide "all necessary personnel", the successful bidder was required, in no less than four separate references in the RFP, to offer employment to each of the existing District-employed therapists. The RFP went so far as to list the employees by name and provide potential bidders with the home addresses, telephone numbers, and professional credentials of the individual employees.[9]

[9] It is not clear from the record that employment was in fact ever offered by the subcontractor to the Districts' laid-off therapists, with laid-off physical therapist Annmarie Kamman testifying that she had minimal telephone discussions with the contractor, but that no offer of employment was made to her.

Hughes was involved in, and testified regarding the District's rationale for, the decision to subcontract the occupational and physical therapist work. While she testified that one of the biggest reasons for the subcontracting was to secure staff who were 'highly qualified", the RFP insisted that the bidder retain the District's existing staff. The primary motivation appeared instead to be securing anticipated efficiencies, and resulting cost savings, by having the work performed by existing District employees but directed by an outside contractor. The efficiencies identified by Hughes included eliminating paid prep time for therapists and avoiding having to "go through all kinds of union stuff to get them to do stuff." The District also anticipated savings by not having to pay therapists for vacation time. A significant part of the efficiencies which were anticipated arose from the fact that the District assigned its therapists to work at particular locations, while it was expected that the contractor could move each therapist among various school buildings in the District.

The nature and duration of the contract for services

The RFP resulted in a contract between the District and the Hope Network for the 2004-2005 school year, which was not executed until November 1, 2004. While the RFP required that the contractor offer employment to the existing workforce, none of the therapists became employees of the contractor. That initial contract with Hope Network was subsequently renewed for the 2005-2006 school year.

On September 6, 2006, the District entered into a three-year contract with a different contractor, Heartland Rehabilitation Services, to provide the same services as had been provided by Hope Network. That contract expires in September of 2009.

Each of the subcontracting arrangements yielded a more efficient allocation of therapists' time, resulting in more services being provided at lower cost by fewer therapists. Additionally, the District secured significantly greater Medicaid reimbursement as a result of the contractors proving to be more efficient at regularly billing Medicaid for services provided than had been the District. Hughes estimated the original contract with Hope Network saved the District in the range of $200,000 to $300,000, with the Heartland contract resulting in savings of $400,000 to $500,000 per year.

According to Pruitt, much of the initial cost savings was a result of cuts in fringe benefit payments and the avoidance of payment to the Michigan Public School Employees Retirement System (MPSERS). Pruitt also attributed much of the cost savings to an increase in Medicaid reimbursements, as a result of more timely submission of billings by the outside contractor.

The initial Employer refusal to bargain and later offers to bargain

In May or June of 2004, the Union demanded bargaining with the District over the then already announced decision to subcontract the work. The District refused, premised on its assertion that the topic was a prohibited subject of bargaining under §15. That refusal to bargain was reiterated at an otherwise scheduled bargaining session between the parties in early August of 2004, and the Charge in this matter was filed on August 26, 2004. The case was set for hearing in October 2004, but was adjourned at the mutual request of the parties. The District's

contract with Hope Network, as noted above, was not executed until November 2004. The parties stipulated that an offer to reinstate the affected employees to employment directly with the District was made, to be effective January 18, 2005.

The Hope Network contract was set to expire June 30, 2005. On July 26, 2005, the District sent the Union a letter asserting a willingness to "discuss its intention" to renew the Hope Network contract. The letter gave the Union only one day in which to respond, with the District's letter asserting that a failure to meet that one-day deadline would be deemed a waiver of any bargaining demand or rights. Neither the letter nor the proofs explained the asserted urgency of that one-day deadline.[10] The Union did not respond within the District's one-day deadline.

In November 2005, a year and a half after the workforce had been laid off pursuant to the original subcontracting arrangement with Hope Network, the Employer again wrote to the Union asserting a demand to bargain over the decision to sub-contract the therapist positions and over the effects of that decision. The Union responded with a letter of December 6, 2005, which disingenuously asserted that the Union was unaware of any Board decision to subcontract the work, indicated an unwillingness to reopen the existing collective bargaining agreement, but which asserted that the Union was willing to meet with the Board to "discuss the potential problems which are certain to arise" if the Board decided to subcontract the work. The District's response of December 19, 2005, asserted that the Union's letter constituted a waiver of any right to bargain over the subcontracting of the unit work. Notably, the Employer's December 19, 2005, letter reversed its own earlier position and asserted instead that §15 not only authorized, but also required, negotiation between the parties over the Employer's decision to subcontract the work of the therapists.

The nature of the work performed by the occupational and physical therapists

The collective bargaining agreement between the parties recognized a bargaining unit that includes, and has long included, the occupational and physical therapists in a single unit with certified teachers. The contract expressly used the term "teacher" to refer to all employee categories covered by the contract. The contract additionally expressly asserted that it covered only those professional employees "who are directly involved with students and teachers in the instructional process".

The Employer-created job description for the physical therapist classification describes the "scope of the position" as: "Responsible for serving children with physical and neurological handicaps who need assistance in the areas of gross motor, perceptual development, life competency skills, use of adaptive equipment". Among the "major functions" described are: "serve in a consultant capacity to the students' teacher"; "serve as a member of the evaluation team"; "develop long and short term goals for students"; "work with parents to help them understand the student's physical abilities and work with them to achieve the student's maximum potential; and "other duties as assigned by the supervisor of special education".

[10] At hearing, the Employer asserted that it would present relevant testimony by the author of that letter who, nonetheless, was not called to testify.

The Employer prepared job description for the occupational therapist classification is similar in describing the "scope of position" as "Responsible for evaluation of all referred students and for developing therapy programs and procedures for students". Among the "major functions" described for the occupational therapists are: "serve as a member of the evaluation team"; "work closely with the classroom teacher and other school personnel to insure a continuation of therapeutic programs in the classroom"; "provide consultation services to classroom teachers"; "along with other staff members be responsible for. . . . daily living skills"; "assist with the assessment of. . . .employability by evaluating work habits, work personality, aptitudes, dexterity and interest by observations and use of work samples, aptitude tests and on-the-job evaluations"; "develop long and short term goals for students"; "work with parents to help them understand the student's physical abilities and work with them to achieve the student's maximum potential; and "other duties as assigned by the supervisor of special education".

The RFP for the potential replacement vendors, promulgated by the Employer, in addition to requiring the retention of existing employees, itself described the scope of work as providing forms of therapy to address deficits "that interfere with learning in the educational environment"; with the therapist to function as "a member of the multidisciplinary educational/assessment team"; with the therapists to engage in "consultation and education" and to "administer. . . therapy services within the educational environment".

Testimony was provided by two former bargaining unit therapists, one occupational and one physical, as exemplars of the work actually employed by the eight therapists. Their testimony was generally consistent with the documentary descriptions of the work.[11] It is undisputed that to hold positions as an occupational therapist or a physical therapist, an individual need not be a certified teacher. The therapists are not required to take competency tests under the federal "No Child Left Behind Act", and the therapists do not typically teach core subjects in a classroom setting.

Roseanne Bartush was formerly employed by the District as an occupational therapist for nearly twenty years. She has both a Bachelors degree in Occupational Therapy and a Masters degree in Educational Therapy. Bartush described the duties of occupational therapists as beginning with the evaluation of a student as needing special services, including the full range of involvement in Special Education. The basic work of the occupational therapists involved assisting the students in mastering life skills and in improving fine motor control necessary to succeed in the educational process. Therapists worked daily with students and had daily contacts with parents, in addition to more formal periodic progress reviews. Bartush used standardize testing for data collection and observation of her students.

In her recent years at Pontiac, Bartush herself worked with primarily pre-school and also with early school students. Bartush would work with the classroom teacher to develop goals for each individual student and to monitor progress. An example of the integration of the specialized efforts of occupational therapists and the routine education work by classroom teachers was in the manipulation of scissors. All preschoolers engage in the use of scissors with the specific

[11] There was no testimony as to any difference in the nature of the work performed after the outside contracts began.

educational goal of learning to use their muscles for fine control and to learn better eye-hand coordination. Special education students take part in similar exercises with the same goal. As Bartush explained, the educational goal of scissors use, and learning to color within the lines, is to facilitate the later effective use of pencils in penmanship and to prepare and improve eye-hand coordination for reading and writing. Bartush would work with the student to improve hand skills, and then with the classroom teacher or classroom paraprofessional to follow-up with teaching the student using the same techniques as Bartush. Bartush might additionally provide or adapt scissors to aid in their use by a particular student. Bartush would then check with the teacher and paraprofessional to determine how effectively the adaptation is working in the classroom and to monitor follow-up teaching in the classroom. Manipulation of puzzle pieces functions as a strategy to enhance reading, memory, and visual memory.

Bartush would also regularly work in the classroom, with an activity geared to a group of students. The classroom teacher and paraprofessional would work alongside Bartush in these exercises. A part of the goal was to prepare the teacher and the paraprofessional to continue the lesson throughout the week so that adequate continuity was maintained. Bartush also assisted classroom teachers in behavior management, especially with autistic students, in order to better assist the students in learning the skills necessary to function appropriately in the classroom and to help the teaching staff learn to better respond proactively in the educational environment.

In addition to classroom work, Bartush saw students in her therapy room. Those sessions were individualized and might involve such things as sensory integration exercises, designed to assist the student in returning to the classroom better prepared to receive instruction from the classroom teacher. The work might involve exercises to improve the student's balance, which might include use of a "T" stool, which would also be used in the classroom. Some students required use of a light box to view materials need for classroom work. Part of her work was in designing adaptive aids to assist students, such as affixing grasping knobs to puzzles that were being used in the classroom. She also worked on such life skills as taking off and putting on coats, to make each student as independent as possible in the school setting.

Bartush notably served as the department head for special education for ten years with twenty-five staff members, including certified teachers, working under her direction. Bartush also served on rare occasions as a substitute teacher in the classroom, although that fact appears to be more coincidental to her particular circumstances than relevant to the generally assigned duties of occupational therapists. Likewise, Bartush many years ago worked on a regular weekly basis as a classroom instructor at the high school level, but this again appears to be more coincidental to her particular circumstances than relevant to the generally assigned duties of occupational therapists.

When recalled as a rebuttal witness, Bartush gave a particularly apt description of the involvement of the occupational therapists in the educational process. As she explained it, she taught the teachers individualized strategies for teaching particular students. She taught teachers the developmental sequence, whereby, for example, a student in preschool must first learn left from right, in order to later learn to read from left to right. Bartush provided the teachers, and sometimes the entire classroom, with techniques that the teachers would not otherwise have at their disposal. Using the scissors example, Bartush explained that she would use the squeezing of

a water bottle to help teach a particular child, in the classroom setting, to master the physical coordination and technique needed to squeeze a pair of scissors. Bartush would instruct the teachers in the continuation of such instructional play activities so that continuity was maintained.

Annmarie Kamman was employed by Pontiac as a physical therapist, with a Bachelors degree in physical therapy and a Masters degree in Health Education. As a physical therapist, Kamman focused more on gross motor skills, compared to the occupational therapists focus on fine motor skills and eye-hand coordination. She would see from eight to ten students per day, generally outside the classroom setting. Her goal was to help the students learn the skills necessary to perform academic tasks, participate in classroom activities, and derive maximum educational benefit from the classroom setting. She counseled both the classroom teachers and the parents in how to follow through on particular exercises or skills development that each student needed. She would teach the classroom teachers how and when to use particular adaptive equipment with individual students. Kamman had regular weekly contact with parents.

Kamman testified that her work contributed to the instructional process by helping the student be prepared to receive instruction by being better able to sit, move, and take part in activities.

Employer witness Janice Richards is a consultant for the Intermediate School District, assigned exclusively to the Pontiac Schools. Her testimony was that rather than provide classroom instruction, the occupational and physical therapists "supported" classroom instruction. She described their work as more individualized than that of the typical classroom instructor. In reference to the Michigan Department of Education rules defining what are referred to therein as "related services", Richards expressed her opinion that the definition referred to services provided by a licensed professional that "supported the educational process for the student…directly relates to the instructional process and supports the instructional services that the teacher gives."

With the exception of the occasional use of a contracted physical therapist at one of the affected schools prior to the 2000 school year, and when regular therapists were overloaded in at least one school year between 2000 and 20005, the occupational and physical therapy work was exclusively performed by bargaining unit employees, prior to the decision to contract out all of the services.

Discussion and Conclusions of Law:

It is well settled that under PERA, a public employer is ordinarily obligated to bargain over a decision to replace bargaining unit employees with a subcontractor to perform the same work under similar conditions. *Van Buren Pub Schs* v *Wayne Circuit Judge*, 61 Mich App 6 (1975); *Detroit Police Officers Association* v *City of Detroit*, 424 Mich 79 (1987). A union has a legitimate interest in whether and when the work of its members may be assigned outside of the bargaining unit, and employers generally have a duty to bargain the diversion of work to non-unit employees and the subcontracting of work to others. *Plymouth Fire Fighters Ass'n, Local 1811 v Plymouth*, 156 Mich App 220 (1986); *Lansing Fire Fighters Union, Local 421 v Lansing*,

133 Mich App 56 (1984). Where an employer notifies the union of its decision to subcontract work only after the decision becomes a *fait accompli,* it violates its obligation to bargain in good faith. *St Clair Intermediate Sch Dist*, 17 MPER 77 (2004); *Intermediate Ed Ass'n/Michigan Ed Ass'n*, 1993 MERC Lab Op 101, 106; *City of Westland,* 1987 MERC Lab Op 793, 797; *City of Iron Mountain*, 19 MPER 29 (2006).

The appropriate standard is set out by the U.S. Supreme Court in *Fibreboard Paper Products Corp v National Labor Relations Board,* 379 US 203 (1964), holding that an employer has a duty to bargain over a decision to subcontract work previously done by bargaining unit employees under similar conditions where: (1) the employer's basic operations were not altered by the subcontracting; (2) there was no capital investment or recoupment; and (3) requiring the employer to bargain would not unduly restrict the employer's right to manage. See, *Van Buren Pub Schs* v *Wayne Circuit Judge*, 61 Mich App 6, 28 (1975), applying *Fiberboard*; *Highland Park*, 17 MPER 86 (2004); *St Clair Intermed Sch Dst*, 2001 MERC Lab Op 218.

The principal question in the present matter is whether or not the work performed by the occupational therapists and/or by the physical therapists constitutes "noninstructional support services", as addressed in the §15 amendments to PERA, such that no bargaining obligation existed, as asserted by the Employer. As the Employer seeks exemption from the ordinary obligation to bargain, it has the burden of establishing the applicability of that affirmative defense, particularly as the scope of the bargaining obligation for public employers is construed more broadly than for private sector employers because, under PERA, public employees are restricted from striking over bargaining demands. *Bay City Ed Ass'n v Bay City Public Schools*, 430 Mich 370, 375 (1988); *Detroit Police Officers Ass'n v Detroit*, 61 Mich App 487, 491 (1975), *lv den* 395 Mich 756 (1975). If a bargaining duty existed, it is undisputed that the Employer initially acted contrary to its obligations, with secondary questions related to the impact on any potential relief, if an initial violation is found, of the Employer's offers to bargain made after the work had been contracted out.[12]

The meaning of the statutory phrase "noninstructional support services"

Although the §15 amendments to PERA were adopted in 1994, there has not been an authoritative interpretation of the phrase "noninstructional support services" by the Commission. The issue was addressed by ALJ Julia Stern in her decision denying a motion for summary judgment in *Wyoming Public Schools,* C01 L-234 & CU01 L-062 (October 15, 2002). The case involved, in part, a dispute over contract language restricting the employer's ability to sub-contract the work of "teacher aides" and "paraprofessionals/paraeducators". The parties disputed whether or not "teacher aides" and "paraprofessionals/paraeducators" provided only

[12] There remains an issue apparent from the facts in this case but which was not argued by the parties and which, therefore, does not need to be resolved here. The issue is whether or not any contract with an outside entity could have qualified as an exempt contract with a third party for "noninstructional support services", under §15, where the public school's RFP seemingly required the retention of its entire existing workforce and where the contract was largely, if not exclusively, for the provision of management services related to the provision of the actual services to students by the therapists. Where the primary impact of such a contracting arrangement was not on the provision of services to students, but rather, on the future conditions of employment of the pre-existing workforce and on their entitlement to continued Union membership and representation, it may not constitute an exempt contract for services.

"noninstructional support services". Judge Stern found the phrase "noninstructional support services", as used in §15, to be ambiguous. She rejected the employer's proposed reliance on regulations promulgated by the State Department of Education, finding that those rules did not attempt any general definition of the phrase actually used in amending PERA.

In the present case, both parties refer to arguably analogous definitions of terms used in both State and Federal Department of Education regulations.[13] As did Judge Stern, I found those analogies unhelpful. Nowhere did the education department regulations use or define the phrase "noninstructional support services" used in the statutory amendment to PERA, nor is there any indication offered that the Legislature relied on the terms of those unrelated regulations when it amended §15 of PERA.

Both the Michigan and federal regulations apply only to the provision of special education services and create specific obligations in that realm. Neither set of regulations were concerned with labor relations policy. The §15 phrase "non-instructional support services" appears nowhere in education department regulations and the PERA applies to regular educational services and is not limited to the special education field. There is no rational carry-over of meaning from one venue to the other. In fact the education department regulations expressly define the term "instructional services", as used in those regulations, as only applying to services provided to students with disabilities. If that definition were relied on as authoritative under PERA, then regular education teachers would be construed under the Employer's theory as "non-instructional" because they are not exclusively involved in teaching students with disabilities. This nonsensical outcome highlights the problem with looking to unrelated statutes for clues as to legislative intent.

The principal relevance, if any, of the education department regulations is the fact that the regulations themselves are premised on the authority of the education departments to issue regulations necessary to ensure access to a free and appropriate education for students with impairments or disabilities. For special education students, the services of occupational and physical therapists are an integral part of the education process in a way that ordinary building maintenance and food services are plainly not.

Judge Stern noted that the dictionary definition of "instruction" is to "give knowledge or information to; *esp*.: to impart knowledge in a systematic manner", relying on *Webster's New Collegiate Dictionary, 1980 Ed.*, G & C Merriam & Co, Springfield, MA. Judge Stern further found that the phasing of the amendment suggested a more complex interpretation than proposed by the employer in that case:

> . . . the Legislature used two terms to describe the type of services covered by Section 15(3)(f). That is, "noninstructional" modifies the adjective "support". The term "support" is often used to refer to nonprofessional employees of a public school district. . . .the Commission considers a unit of all "support" employees in a public school to be a presumptively appropriate bargaining unit. All members of the Union's bargaining unit, including teachers aides and paraeducators, meet the

[13] Code of Federal Regulations, 34 C.F.R. §300.24; Michigan Revised Administrative Rules for Special Education R 340.1701 *et seq*.

> Commission's definition of a "support" employee. In Section 15(3)(f), the Legislature could have simply made the subcontracting of "support" services a prohibited subject of bargaining. The fact that the Legislature added the additional term, "noninstructional", suggests that the Legislature intended to draw a distinction between "instructional" and "noninstructional" support services . . . some work performed by some teacher aides and paraprofessionals fit the dictionary definition of "instructional". These aides and paraprofessionals, therefore, could be labeled "instructional support" employees.

Wyoming Public Schools, supra (citations omitted).

The Commission most recently touched on, but did not seek to authoritatively resolve, the issue in *Troy School District*, 21 MPER 37 (2008). The Commission noted that:

> We have not had occasion to decide whether the term "noninstructional support services," as used in Section 15(3)(f), includes noncertified employees who instruct children under the supervision of a certified teacher. However, at least one circuit court has held that teacher aides in a K-12 school district provide "instructional" support services, and, therefore, PERA does not prohibit bargaining over the privatization of their work. [*Harrison Ed Support Personnel Ass'n v Harrison Cmty Sch Bd of Ed*, unpublished opinion of the Clare County Circuit Court, decided July 26, 2007 (Docket No. 07-900381-CL)]. . . For purposes of this motion [to dismiss], we assume that the paraeducators in the . . . unit are "instructional" and that the other employees in the unit are "noninstructional" support employees under Section 15(3)(f).

In *Saginaw Township Community Schools*, 1998 MERC Lab Op 479, while not involving a direct interpretation of §15(3)(f), the Commission addressed issues arising from the proposed inclusion of "other instructional professionals" in a representation proceeding involving certified teachers. The Commission affirmed the inclusion of "other instructional professionals" in a unit which combined certified teachers with non-certified teachers, guidance counselors, librarians, speech and hearing therapists, school social workers, and the like. The *Saginaw* decision relied on a consistent line of MERC decisions which pre-dated the 1994 amendment to §15, including *Ferndale Bd of Ed*, 1987 MERC Lab Op 919 and *Lansing School Dist*, 1972 MERC Lab Op 264.

The mandate in interpreting a statute's language is to remain faithful to the language chosen by the Legislature. Where a glossary is provided within a statue, it must be relied upon as authoritative. *People v Thomas*, 263 Mich App 70, 73 (2004). Unfortunately, while the PERA provides a partial glossary, the terms in dispute here are not expressly defined in the statute. Lacking a glossary, we should if possible apply the common understanding of the text by applying each term's plain meaning at the time of adoption, by resorting to dictionary definitions if necessary. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 67-68 (2008).

Here the phrase in dispute is not defined in the statute or in the amending act. The phrase in question, "noninstructional support services," is not a previously used term of art nor does it appear in other related or arguably related statutes. The phrase cannot be parsed into its separate

words and subjected to dictionary definition in any meaningful way. If the goal of being faithful to the text as intended when it was adopted is to be met, then we must review the Legislative history for guidance. It is appropriate to rely on such Legislative history cautiously, and only for the purpose of resolving, rather than creating, an ambiguity. See, *In Re Certified Question (Kenneth Henes Special Projects Procurement, Marketing and Consulting Corporation v Continental Biomass Industries, Inc)*, 468 Mich 109 (2003).[14]

The Legislative history and contemporaneous understanding of the phrase "noninstructional support services"

We are fortunate in having some Legislative history to guide us in discerning the Legislature's meaning in its choice of phrases. The various versions of the amendments which ultimately were incorporated in §15 were subject to formal analysis by the House Legislative Analysis Section while the bills were still under consideration by the Legislature. Such analysis, expressly provided to aid the Legislators in their consideration of bills, is illuminating, but not controlling, as to Legislative intent.[15] Of even greater weight is the fact that several variants of the proposed amendments were weighed before the Legislature settled on a particular package of changes. See, *In Re Certified Question*, supra, at 115, n5.

Section 15 began as House Bill 5128, which, as introduced on October 14, 1993, was much broader than the amendment as ultimately adopted. The original House Bill 5128 as introduced would have made a number of significant changes to PERA regarding employees of K-12 schools.[16] See, House Legislative Analysis, HB 5128 (October 18, 1993). The bill as introduced, if adopted, would have made various public school related changes to PERA, including allowing any degreed professional employee in a school the option of not belonging to or providing financial support to a labor union; excluding certain school employees from coverage by the Act; and prohibiting bargaining by school employers on a variety of topics. The original bill would have made it unlawful to bargain over the decision whether or not to contract with a third party for noninstructional support services, which the Analysis found to include "transportation, food service, janitorial and building maintenance services, paraprofessional and teacher aides or assistance services, data processing, accounting and clerical services". See, House Legislative Analysis, HB 5128 (October 18, 1993). That original bill, however, was not adopted with the school financing plans compromise adopted on Christmas Eve of 1993.

The following year, a revised set of amendments was considered and adopted. That final version House Bill 5128 as enrolled was in some ways narrowed in scope and was designed as a complement to the new financing scheme for K-12 education. See, House Legislative Analysis,

---

[14] It is appropriate, where necessary, for MERC to examine questions of legislative intent, and "Although less deference is afforded to an agency's legal conclusions [than to its findings of fact], appellate courts have acknowledged "the MERC's expertise and judgment in the area of labor relations."" *Oakland County v Oakland County Deputy Sheriffs Association*, ___Mich App___ (CA # 280075, February 3, 2009), citing, *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323 n 18 (1996)

[15] Neither of the two formal analyses of the proposed amendments suggest any reliance on either State or federal department of education regulations in the drafting of the amendments.

[16] The impetus for the review of the PERA was passage of Public Act 145 of 1993 which essentially eliminated all school operating property taxes, left a nearly $7 billion budget shortfall for public schools, and which lead to passage of Proposal A of 1994. See, House Legislative Analysis, HB 5128 (April 27, 1994).

HB 5128 (April 27, 1994). Additional restrictions on public school bargaining were added, such as the new prohibition on an education association vetoing or overruling any agreement reached between an employer and a particular local bargaining unit. A significant new restriction on public school employee strikes was also newly added, with the final version of the bill including an expanded definition of "strike", applicable to public school employees only, to prohibit as unlawful strikes any actions or protests taken in response to an alleged unfair labor practice by a public school employer.[17] The earlier provision for degreed professional employees opting out of participating in or financially supporting a union was removed. Of significance, the provision prohibiting bargaining over the subcontracting of the still undefined "noninstructional support services" remained; however, the House Analysis greatly narrowed the described intended scope of that prohibition as covering "noninstructional support services" ". . . such as janitorial services, food service, and transportation". Gone from the Analysis was the much longer litany of services that was expressly referenced in the analysis of the earlier version of the bill as introduced the prior year.[18] The substantive change in description of the scope of the bargaining exemption, as between the two versions of the bills, is significant evidence of the Legislative understanding and intent on that question. See, *In Re Certified Question*, supra, at 115, n5.

In addition to the formal legislative history provided by the House Legislative Analysis, and by a comparison of the proposed and final amendment to the Act as it evolved in the legislative process, we can also look to contemporaneous statements by proponents. Such contemporaneous statements may be illuminating as to the contemporaneous understanding of ambiguous language; however, such pronouncements can never be presumed to be authoritative or controlling as to Legislative intent.

The Mackinac Center for Public Policy was, and remains, a major proponent of school reforms and of limitations on the bargaining obligations imposed on schools by PERA. In its contemporaneous report "*School Reforms: Lessons from Michigan*" (Mackinac Center, 1995), the Center describes the then-recently passed amendment as prohibiting bargaining over the subcontracting of the same threesome as described in the House Analysis: janitorial services, food service and transportation. See also, *"Doing More With Less: Competitive Contracting for School Support Services"*, Janet Beales (Mackinac Center, 1994). In its later *"A School Privatization Primer for Michigan School Officials, Media and Residents*", Michael D. LaFaive, (Mackinac Center, 2007), the Mackinac Center reviewed the data from its own school surveys of 2001-2006. The survey design sought data each year on the schools' subcontracting of the same threesome: janitorial services, food service, and transportation.[19]

---

[17] Under PERA, a "strike" by public employees is defined as any withholding of services "for the purpose of inducing" a change in conditions of employment and is prohibited. Under the 1994 amendments, for public school employees only, the definition of prohibited "strike" was expanded to "also include" a withholding of services "for the purpose of protesting or responding to an alleged unfair labor practice . . . committed by the public school employer." See, House Legislative Analysis, HB 5128 (April 27, 1994); MCL 423.206(1).

[18] In 2007, House Bill 4533 was introduced and, if adopted, would have rescinded the amendments to §15. The House Legislative Analysis of May 21, 2007, regarding House Bill 4533, again described the scope of the original amendment as related to the contracting out of the work of "employees such as maintenance personnel, cafeteria staff, and bus drivers. . . ."

[19] Similarly, but less contemporaneously and therefore necessarily less authoritative, the Michigan Association of School Boards and its Michigan Council of School Attorneys relied on a similar analysis of the intended scope of the amendment. In *Council News*, Spring 2005, at page 6, an article reviewed the impact of the 1994 amendment in which the same threesome is presumed to be the intended scope of the amendment on contracting out: "There are

Judge Stern's decision denying the motion to dismiss in *Wyoming Public Schools* found it significant that the Legislature did not prohibit bargaining on a decision to contract out any "support services" which was a term of art long used under PERA, but instead used the previously unknown phrase "noninstructional support services". I concur that the phrase "noninstructional support services" cannot possibly be interpreted to mean the same thing as the well-understood term "support services". Stern's decision suggests that the statutory use of the phrase "noninstructional support services" indicated that the Legislature understood or intended that in addition to traditional classroom teachers there are two types of "support services" in schools, "*instructional support services*" and "*noninstructional support services*". An equally plausible conclusion would be that the Legislature understood there to be two categories of services provided in schools: "*instructional*" and "*noninstructional support services*". Here the District argues that the Legislature did intend the two categories posted in *Wyoming Public Schools*: "*instructional support services*" and "*noninstructional support services*".

The application of the statutory phrase
"noninstructional support services" to the present dispute

I conclude that the outcome in the present case is the same regardless of whether the Legislature intended the two categories *"instructional"* and *"noninstructional support services"*, with the latter being those having nothing to do directly with instruction, or intended the two categories of "*instructional support services*" and "*noninstructional support services"*. That is, I find that the phrase "noninstructional support services" was intended to refer solely to the sorts of support services that are not specific to the educational goals of schools. They are the sort of support services that any public facility even outside the educational sphere might have: transportation, grounds & building maintenance, food service and the like. This conclusion is consistent with the Legislative history and with the contemporaneous commentary and subsequent on the intended scope of the 1994 statutory amendment.

Under either of the above formulations, I find that the occupational and physical therapist work is peculiarly and intimately linked to the educational process and therefore constitutes either "instruction" or "instructional support services" and does not constitute "noninstructional support services" as that term is used in §15, and that, therefore, a duty to bargain existed which precluded the unilateral contracting out of the positions at issue in the present case.

For the student population served, the occupational and physical therapy services are an integral, and necessary, part of the instructional process. As more fully detailed above, the work of the occupational and physical therapists ranges from direct instruction to instructional support, as described jointly by the parties in their collective bargaining agreement, by the Employer-promulgated job descriptions, the Employer's RFP seeking an outside contractor, and by the duties actually performed as described in testimony.

The collective bargaining agreement jointly drafted by the parties asserted that it covered only those professional employees "who are directly involved with students and teachers in the instructional process". The Employer-created job description for the physical therapist

---

obvious advantages to subcontracting non-instructional support services such as transportation, custodians and food services".

classification made clear that the position entails testing and assessment of students' skills and progress. The physical therapists engage in instruction of the students, at the very least as to "life skills", and further instruct the parents and classroom teachers in techniques necessary to maximize each student's educational attainment. Similarly, the occupational therapist job description makes clear that the duties include skills and progress assessment and instruction of the student, the parents, and the classroom teacher. The RFP that lead to the replacement of the employees included in its description of necessary job functions that the therapists engaged in "consultation and education" and "administer therapy services in the educational environment". The two therapists presented as exemplars, one occupational and one physical, each had masters degrees in education. One served as the department head for special education for a number of years, placing her in a leadership role over the certified classroom teachers.

As noted above, an example of the integration of the specialized efforts of occupational therapists and the routine education work by classroom teachers was in the manipulation of scissors. All preschoolers engage in the use of scissors with the specific educational goal of learning to use their muscles for fine control and to learn better eye-hand coordination. Special education students take part in similar exercises with the same goal. The educational goal of scissors use, and learning to color within the lines, is to facilitate the later effective use of pencils in penmanship and to prepare and improve eye-hand coordination for reading and writing. An occupational therapist works with the student to improve hand skills, and then with the classroom teacher or classroom paraprofessional to follow-up with teaching the student using the same techniques.

An occupational therapist also regularly works in the classroom with activities geared to a group of students. The classroom teacher and paraprofessional would work along side the occupational therapist in these exercises. A part of the goal was to train the teacher and the paraprofessional how to continue the lesson throughout the week so that adequate continuity was maintained.

Bartush gave a particularly apt description of the involvement of the occupational therapists in the educational process. As she explained it, she taught the teachers individualized strategies for teaching particular students. She taught teachers the developmental sequence, whereby, for example, a student in preschool must first learn to differentiate left from right, in order to later learn to read from left to right. Bartush provided the teachers, and sometimes the entire classroom, with techniques that the teacher would not otherwise have at their disposal. Using the scissors example, Bartush explained that she would use the squeezing of a water bottle to help teach a particular child, in the classroom setting, to master the physical coordination and technique needed to squeeze a pair of scissors. Bartush would instruct the teachers in the continuation of such instructional play activities so that continuity was maintained.

As more fully discussed above, the physical therapists worked in a similar fashion, but focused more on gross motor skills, compared to the occupational therapists focus on fine motor skills and eye-hand coordination. The goal was to help the students learn the skills necessary to perform academic tasks, participate in classroom activities, and derive maximum educational benefit from the classroom setting. The physical therapists trained and counseled both the classroom teachers and the parents in follow through on particular exercises or skills

development that each student needed. The physical therapists would teach the classroom teachers how and when to use particular adaptive equipment with individual students. The work of the physical therapists contributed to the instructional process by helping the student be prepared to receive instruction by being better able to sit, move, and take part in activities.

While other truly "noninstructional support services", such as providing heat and light or food, are important, and may be critical to the operation of the school facility, they are not intrinsically related to the educational process. Those same physical plant services would be necessary in a school districts' business office building, whereas occupational or physical therapy are not. The services provided by the occupational and physical therapists are essential to the educational process itself. Thus, the work and status of the occupational and physical therapists is not exempt, under §15, from the Employer's ordinary duty to bargain. There remains the question of whether or not the Employer violated that duty, or was otherwise excused from compliance with that duty.

The relevance of the renewed offer to bargain

Where, as here, an employer notifies the union of its decision to subcontract work only after the decision becomes a *fait accompli*, it violates its obligation to bargain in good faith. *St Clair Intermediate Sch Dist*, *supra*. The District did not notify the Union of its intent to subcontract the work until after the employees had already received their May 2004 layoff notices. That failure to give proper notice preempted any effective bargaining and violated the Act.

In June of 2005, a year after the workforce had been eliminated, the Employer announced its supposed willingness to discuss the subcontracting with the Union; however, the Employer set an arbitrary twenty-four hour deadline for the Union's response. No evidence was offered to explain the Employer's intentions regarding its June of 2005 letter, nor was any explanation offered for the short deadline. I find that the supposed offer to meet expressed in the letter of June 2005 was illusory and did not cure the Employer's earlier refusal to bargain.

In November and December of 2005, the parties exchanged a chain of correspondence, which I conclude was no more than posturing by both parties with an eye to the then scheduled February 2006 hearing on this ULP case. Regardless, the Employer's belated suggestion of a willingness to bargain under circumstances where the relevant group of employees had been long eliminated cannot cure the initial wrongful refusal. It has long been recognized that where there is no work to be performed, and no employees to come to the table, there can be no bargaining in good faith over conditions of employment as anticipated by the Act. *Van Buren Public School Dist v Wayne Circuit Judge*, 61 Mich App 6 (1975); *Detroit Salaried Physicians-UAW v Detroit*, 165 Mich App 142 (1987).

Conclusion and appropriate remedy:

In 2004, the Employer acted on the belief that it had no obligation to bargain over the decision to sub-contract unit work, premised on its reading of the Section 15 amendments to PERA. While the Employer may have acted in subjective good faith and based on its efforts to discern the Legislative intent behind these untested statutory amendments, it also chose to act at its own peril. It failed in 2004 to discuss with the Union, as it could have regardless of the applicability of the amendment, the perceived inefficiencies which it asserts it sought to address by subcontracting the work. The Employer's belated July 2005 offer to bargain, which it held open for one day only, did nothing to cure that earlier refusal to negotiate with the Union. Likewise the November-December 2005 offers to negotiate were illusory, notwithstanding the Employer's then new-found conclusion that §15 required bargaining by the parties, where the work had been contracted out for a year already, the workforce was gone, and where the Employer preceded the offer to discuss the matter by articulating its firm intent to continue the contracting out.

I find the occupational and physical therapists did not provide merely "noninstructional support services" as referenced by §15, and that therefore, the Employer violated § 10(1)(e) by refusing to bargain with the Union over the decision to remove the work of the bargaining unit occupational and physical therapists.[20] This holding is not premised on any finding of inherently bad faith conduct by the Employer, rather it is premised on a finding that the Employer made a conscious choice to refuse to bargain with the Union, which was in turn based on the Employer's misplaced (and seemingly fleeting) belief that the statutory amendments would excuse them from their ordinary bargaining obligations. The perceived improvements in efficiency that the Employer sought could have, and should have, been discussed with the Union. Had that obligation been met, the disruptions occurring from the contracting arrangement, and this litigation, could have been avoided.

The Employer, as recommended below, must take timely and appropriate steps to terminate its outside contractual arrangement, which according to the proofs is regardless scheduled to terminate in September of 2009; to offer reinstatement to the affected employees to regular employment governed by the collective bargaining agreement to be effective no later than September 2009; to post and seek to fill as bargaining unit positions any positions not filled by the return of laid off employees; to make each affected employee whole except as to the setoffs earlier stipulated to by the parties; to maintain the occupational and physical therapist positions as bargaining unit positions to the extent that the work continues to be performed[21]; and, once the preexisting *status quo* has been as nearly restored as possible, offer to bargain with the Union over any future consideration of the subcontracting of any unit work other than "noninstructional support services" such as janitorial services, food service and transportation.

Accordingly, I hereby recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

[20] I find no basis to conclude that the Employer violated §10(1)(a) or 10(1)(b) as asserted in the Charge.

[21] A public employer has the managerial right to determine the level of its workforce and to reduce the number of its employees without first bargaining with a union, unless, as here, the employer chooses to have the work continue to be performed by non-unit employees. *Village of Union* City, 1983 MERC Lab Op 510; *Pontiac Schools, ___MPER___ (Case No. C05 H-170 & C05 J-260, February 6, 2009).*

The Pontiac School District, its officers, agents, and representatives shall:

1. Cease and desist from

a. Refusing to negotiate with the MEA over the subcontracting of work performed by bargaining unit members.
b. Subcontracting the work of bargaining unit occupational and physical therapists.

2. Take the following affirmative actions necessary to effectuate the purposes of the Act

a. Terminate, effective no later than the beginning of the 2009-2010 school year, any outside contractual arrangement to provide occupational or physical therapy services in the Pontiac Schools.
b. Offer reinstatement, effective no later than the beginning of the 2009-2010 school year, to Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson as Pontiac School District-employed occupational and physical therapists.
c. Make whole Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson for all lost wages, benefits, seniority credits and the like, with a setoff for wages and benefits earned by each employee with Pontiac Schools as a result of the temporary recall to employment in the fall of 2004, and with liability for lost wages and benefits to end as of January 18, 2005, with statutory interest at the rate of 6% per annum on all sums owed in wages and benefits.
d. Post and seek to fill as bargaining unit positions any occupational and physical therapist positions not filled by the return of laid-off employees.
e. Maintain the occupational and physical therapist positions as bargaining unit positions to the extent that the work continues to be performed.
f. Once the pre-existing *status quo* has been restored by returning the work to bargaining unit employees, offer to bargain with the Union prior to any future consideration of the subcontracting of any unit work, other than regarding "noninstructional support services".

3. Post the attached notice to employees in a conspicuous place at each Pontiac Schools worksite, and post it prominently on any website maintained by Pontiac Schools for employee access, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **PONTIAC SCHOOL DISTRICT**, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Refuse to negotiate with the MEA over the subcontracting of work performed by bargaining unit members.
b. Subcontract the work of bargaining unit occupational and physical therapists.

WE WILL

a. Terminate, effective no later than the beginning of the 2009-2010 school year, any outside contractual arrangement to provide occupational or physical therapy services in the Pontiac Schools.
b. Offer reinstatement to employment, effective no later than the beginning of the 2009-2010 school year, as Pontiac School District-employed occupational and physical therapists to Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson and make each of them whole for all lost wages, benefits, seniority credits and the like, with a setoff for wages and benefits earned by each employee with Pontiac Schools as a result of the temporary recall to employment in the fall of 2004, and with liability for lost wages and benefits to end as of January 18, 2005, with statutory interest at the rate of 6% per annum on all sums owed in wages and benefits.
c. Post and seek to fill as bargaining unit positions any occupational and physical therapist positions not filled by the return of laid-off employees.
d. Maintain the occupational and physical therapist positions as bargaining unit positions to the extent that the work continues to be performed.
e. Once the preexisting *status quo* has been restored by returning the work to bargaining unit employees, offer to bargain with the Union prior to any future consideration of the subcontracting of any unit work, other than regarding "noninstructional support services".

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

PONTIAC SCHOOL DISTRICT

By:_____

Date:_____ Title:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.