STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LAKEVIEW COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C10 C-059

-and-

LAKEVIEW EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

In the Matter of:

MT. PLEASANT PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C10 E-104

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
AND ITS AFFILIATED LOCAL 2310,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Varnum L.L.P., by John Patrick White, for Lakeview Community Schools

Kalniz, Iorio & Feldstein Co, L.P.A., by Fil Iorio and Krista D. Abbott, for Lakeview Educational Support Personnel Association

Thrun Law Firm, P.C., by Donald J. Bonato, for Mt. Pleasant Public Schools

Miller Cohen, P.L.C., by Robert D. Fetter, for Michigan AFSCME Council 25 and Local 2310

Clark Hill P.L.C., by Marshall W. Grate, for Amicus Curiae Flushing Community Schools, before the Administrative Law Judge

Sachs Waldman, P. C., by Andrew Nickelhoff and Amy Bachelder, for Amici Curiae Michigan State AFL-CIO and SEIU Michigan Council, on exceptions

DECISION AND ORDER

On October 15, 2010, Administrative Law Judge (ALJ) David M. Peltz issued his

Decision and Recommended Order on Summary Disposition in the above matter finding that Charging Parties, Lakeview Educational Support Personnel Association, MEA/NEA (LESPA) and Michigan AFSCME Council 25, AFL-CIO, and its affiliated Local 2310 (AFSCME), each failed to state a claim upon which relief could be granted in their respective charges against the Respondents, Lakeview Community Schools (Lakeview) and Mt. Pleasant Public Schools (Mt. Pleasant). Following review of Charging Parties' responses to the ALJ's order to show cause why the charges should not be dismissed, Respondents' replies, and oral argument, the ALJ determined that Respondents did not breach their respective duties to bargain under §10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), when they refused to bargain over procedures for bidding on the subcontracting of noninstructional support services pursuant to §15(3)(f) of PERA. The ALJ determined that even if the contents of requests for proposals (RFP) and the process for submitting bids were not prohibited subjects of bargaining, but were permissive subjects, Respondents had no duty to bargain over those matters. The ALJ found that under §15(3)(f) of PERA, a public school employer is only obligated to provide a bargaining unit with the opportunity to bid on the contract for the noninstructional support services performed by bargaining unit members, on an equal basis with third party bidders. Additionally, the ALJ determined that the Charging Parties did not submit bids and that a proposal for a concessionary collective bargaining agreement is not a bid under §15(3)(f). He concluded that, in the absence of bids by the Charging Parties, any claim that they were denied the opportunity to bid on an equal basis with third party bidders has been waived. The ALJ recommended that the charges be dismissed in their entirety.

The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with §16 of PERA. Charging Parties requested and were each granted an extension of time to file exceptions. On November 19, 2010, AFSCME filed a motion to reopen the record. Mt. Pleasant filed its response to the motion on December 2, 2010. On December 3, 2010, LESPA filed its response to AFSCME's motion and filed its own motion to reopen the record. Exceptions to the ALJ's Decision and Recommended Order, along with supporting briefs, were filed by LESPA on December 7, 2010, and by AFSCME, on December 8, 2010. Both Charging Parties requested oral argument before the Commission. On December 10, 2010, Lakeview filed its response to LESPA's motion to reopen the record. Both Respondents requested and were granted an extension of time to file their responses to the exceptions. Mt. Pleasant filed its response to the exceptions on January 18, 2011, and Lakeview filed its response January 19, 2011. Lakeview also filed a request for oral argument. On March 18, 2011, by leave of the Commission, an amici curiae brief was filed on behalf of Michigan State AFL-CIO and SEIU Michigan State Council.

In their motions to reopen the record, AFSCME and LESPA argue that the ALJ decided the recent amendments to §15 of PERA anticipate or require that bargaining units will form their own corporations to act as "third-party contractors." Charging Parties assert that this issue was not raised in Respondents' arguments in reply to Charging Parties' responses to the ALJ's orders to show cause, nor did Respondents raise the issue in oral arguments before the ALJ. Instead, Charging Parties contend that the issue was first mentioned by the ALJ at oral argument. They assert that the ALJ's suggestion, that bargaining units incorporate and become private contractors, conflicts with the Michigan Contracts of Public Servants with Public Entities Act, 1968 PA 317, MCL 15.321 – 15.330. Further, Charging Parties contend that each Respondent

has a vendor relations policy that precludes the school district from entering into a contract with a vendor of goods or services in which any employee of the school district has a direct or indirect pecuniary or beneficial interest. They contend that the record should be reopened to admit the vendor relations policy into evidence and argue that the policy precludes them, and their members, from forming a separate corporation to submit a bid as third party contractors.

In their responses to Charging Parties' motions to reopen the record, Respondents contend that the motions should be denied because the vendor relations policies are not newly discovered and Charging Parties' motions do not meet the requirements for reopening the record under Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166. Further, Respondent Lakeview asserts that the ALJ's Decision and Recommended Order merely interpreted the meaning of the amendment to §15 of PERA and argues that neither Charging Party raised the respective vendor relations policies as their reason for failing to submit a bid.

In their separately filed exceptions, Charging Parties except to the ALJ's interpretation of §15(3)(f); they contend that he failed to follow established rules of statutory construction, and by so doing rendered the 2009 amendments to §15(3)(f) superfluous. Among other things, they argue the ALJ erred by finding that §15(3)(f) does not require bargaining over the procedures used in submitting bids and by finding that if such procedures are not prohibited subjects of bargaining, they are permissive. Both Charging Parties contend that the procedures for bidding on an equal basis are mandatory subjects of bargaining. Both Charging Parties also except to the ALJ's finding that Charging Parties failed to make a proper demand to bargain over the bidding process and allege that the Respondents received their specific written demands.

Further, Charging Parties except to the ALJ's findings that a concessionary proposal is not a bid and that by not submitting a bid, Charging Parties waived their right to argue that they did not have the opportunity to bid on an equal basis. Charging Parties allege that the RFPs and bidding requirements established by the Employers were designed for private third-party contractors and precluded the Unions from submitting bids in compliance with the RFPs. They contend that the requirements of the RFPs denied them not only the opportunity to bid on an equal basis, but the opportunity to bid at all. LESPA contends that despite the wording of Respondent Lakeview's RFP, it submitted a proposal to perform the services in question and takes exception to the ALJ's finding that it failed to submit a good faith bid.[1]

LESPA additionally argues that the ALJ erred by requiring it to show that it did not receive an opportunity to submit a bid on an equal basis. Instead, LESPA argues, based on *Pontiac Sch Dist*, 23 MPER 81 (2010), that the claim that bidding was provided on an equal basis is an affirmative defense to the charge, and it is the public school employer's burden to show that it provided the union with an opportunity to bid on an equal basis. LESPA objects to the summary dismissal of its charge without an evidentiary hearing. AFSCME agrees that summary disposition is appropriate, but contends that summary disposition should have been

[1] Lakeview disagrees with LESPA's contention that it submitted a bid; Lakeview asserts that bids in response to its RFP were due by March 1, 2010, but LESPA's proposal was not submitted until March 19.

granted in favor of Charging Parties.

In the amici curiae brief filed on behalf of Michigan State AFL-CIO and SEIU Michigan State Council, those two labor organizations argue in support of the exceptions to the ALJ's Decision and Recommended Order. The amici agree with Charging Parties that the 2009 amendment to §15(3)(f) was intended to give bargaining units the right to bargain over the procedures used by a public school employer to give the bargaining unit the equal opportunity to bid. They further contend that there are structural and practical differences between public employee bargaining units and private sector contractors that must be addressed to give bargaining units the opportunity to bid on an equal basis. The amici further contend that the ALJ's interpretation of §15(3)(f) nullifies the language of the statute giving bargaining units an equal opportunity to bid on their work.

Respondents filed separate briefs in support of the ALJ's Decision and Recommended Order. With the exception of two issues raised by Mt. Pleasant, Respondents generally agree that the ALJ correctly interpreted §15(3)(f) and properly applied it to the facts in this matter. Mt. Pleasant asserts that AFSCME filed an amended charge just before the oral argument during which the ALJ announced his bench decision,[2] which did not address the differences between the original charge and the amended charge. Mt. Pleasant contends that AFSCME's claim that it was not provided with an equal opportunity to bid must be rejected because the claim was not included in the amended charge and further contends that the claim is without merit. Mt. Pleasant disagrees with the ALJ on the procedures available to the Unions to submit their respective bids. Mt. Pleasant contends that the Unions could have submitted bids: 1) as the ALJ suggested, by submitting a bid through a business entity created by the Union or bargaining unit or through an entity acting as the bidding partner of the Union or bargaining unit; or 2) by submitting a concessionary proposal from the Union or bargaining unit.

Oral argument has been requested by both Charging Parties and by Respondent Lakeview. However, the Commission finds that oral argument will not materially assist us in deciding this case; therefore, the requests are denied. Having reviewed the record, the filings of the respective parties, and the amici curiae brief, we find the Charging Parties' motions to reopen the record and their exceptions are without merit.

Factual Summary:

In *Lakeview Community Schools*, Case No. C10 C-059, the charge and amended charge allege that on January 22, 2010, Respondent provided prospective bidders with an RFP seeking bids for student transportation services and that the RFP did not provide Charging Party with the opportunity to bid on an equal basis with others. The Charging Party bases this claim on terms of the RFP limiting the bidding process to independent contractors with five or more years of experience and requiring that the bidding company provide personnel, furnish a bond, and submit an audited financial report.

On January 25, 2010, Charging Party demanded to bargain over the terms of the bidding process; Respondent denied the request on January 28, 2010. A renewed request was made on

[2] The ALJ's bench decision formed the basis for and was incorporated into his Decision and Recommended Order.

February 8, and was denied on both February 22, and March 1, 2010. On March 19, 2010, Charging Party submitted a proposal stating that it was unable to meet certain specifications in the RFP, including the requirement that the third party bidder be a "contractor for services." Charging Party's proposal was for a collective bargaining agreement under which Respondent would continue to employ Charging Party's members to perform the services described in the RFP. On March 22, 2010, Respondent rejected the Union's proposal and voted to privatize transportation services.

In *Mt. Pleasant Public Schools*, Case No. C10 E-104, Respondent issued an RFP for cleaning services throughout the District, and Charging Party sent a letter to Respondent demanding to "negotiate the procedure to be followed in letting in bids." On March 17, 2010, Respondent denied that request. The RFP issued by this Respondent included the following provision:

> 18. Exceptions to Bid Specifications
>
> Any exceptions to the terms and conditions in this RFP or any other special consideration or condition requested or required by the Bidder shall be enunciated by the Bidder and be submitted as part of its bid, together with an explanation of the reasons such terms and conditions cannot be met. Each Bidder shall be required and expected to meet the RFP requirements in its entirety, except to the extent exceptions are expressly noted in the bid and accepted by the District as part of the award agreement and documented accordingly.[3]

In its initial unfair labor practice charge, Charging Party claimed that Respondent failed to bargain over its decision to seek bids, that Charging Party's bargaining unit was put "at an extreme disadvantage to other bidders" and that the Respondent had deprived it of the opportunity to bid on an equal basis as other bidders. On September 29, 2010, just two days before the ALJ issued his Decision and Recommended Order, Charging Party filed an amended charge alleging that Respondent had "violated PERA in many ways, including but not limited to refusing to bargain in good faith regarding the bidding procedures."

Discussion and Conclusions of Law:

Section 15 of PERA, provides that a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining. The subcontracting of bargaining unit work may constitute a mandatory subject of bargaining under PERA. See *Detroit Police Officers Ass'n v Detroit*, 428 Mich 79, 96 (1987). Whether a decision to subcontract is a mandatory subject of bargaining depends on the particular facts of the case. *Van Buren Pub Sch Dist v Wayne Co Circuit Judge*, 61 Mich App 6 (1975).

In 1994, the Legislature enacted Public Act 112, amending §15 of PERA, MCL 423.215, and providing in subsection (2) that "a public school employer has the responsibility, authority,

[3] Copies of the RFPs of both Respondents were submitted to the ALJ with Charging Parties' respective briefs and were considered as part of the record without objection by the Respondents.

and right to manage and direct on behalf of the public the operations and activities of the public schools under its control." Subsection (3) identified certain subjects, including the subcontracting of noninstructional public school support work as prohibited subjects of bargaining. This subsection provided:

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

Act 201 of 2009, effective January 2010, amended §15 again. The prohibited subjects of bargaining are now described as follows:

> (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 for noninstructional support services other than the bidding described in this subsection, or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

The goal of statutory construction is to effectuate the Legislature's intent. *Casco Twp v Secretary of State,* 472 Mich 566, 571 (2005). Every word of a statute should be given meaning and no word should be made nugatory. *People v Warren,* 462 Mich 415, 429 n. 24 (2000). Statutory provisions pertaining to a specific subject matter must be construed together, and, if possible, harmonized. *Brady v Detroi*t, 353 Mich 243, 248 (1958). A statute is enacted and is meant to be read as a whole. *Metropolitan Council 23, AFSCME* v *Oakland Co Prosecutor,* 409 Mich 299, 317-318 (1980). Any provision that is in dispute must be read in the light of the general purpose of the act. *Romeo Homes, Inc* v *Comm'r of Revenue,* 361 Mich 128, 135 (1960).

Charging Parties contend that the procedures by which they are to be given an opportunity to bid on an equal basis with others are a mandatory subject of bargaining. They reason that by exempting bidding from the prohibition against bargaining the procedures for obtaining a contract, the legislature intended that the procedures for bidding be a mandatory bargaining subject. The conundrum is that bidding is a procedure for obtaining a contract and the procedures for bidding are also the procedures for obtaining a contract over which bargaining is prohibited. If the procedures for bidding are a mandatory subject of bargaining, the prohibition against bargaining the procedures for obtaining a contract is nullified.

The 2009 amendment to Section 15 expressly prohibits bargaining over the procedures for obtaining a contract for noninstructional support services. The exemption asserted by Charging Parties does not apply to bidding in general. It applies to "the bidding described in this subsection." The bidding described in subsection 15(3)(f) is the "opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders." Giving due consideration to the general purpose of the 1994 and 2009 amendments to Section 15 of PERA, we find that the only issue to be bargained with regard to bidding is whether the bargaining unit is to be given an opportunity to bid on an equal basis as other bidders. If a public school employer fails to give the bargaining unit an opportunity to bid on an equal basis as other bidders, the prohibitions of subsection 15(f) are removed. If the bargaining unit is given an equal opportunity to bid, bargaining over other procedures for obtaining the contract, including the procedures for bidding, is prohibited.

Charging Parties contend that they were disqualified from bidding by certain requirements of the RFPs. They list minimum years of experience, the posting of a bond, and the furnishing of audited financial statements as examples of disqualifying requirements. They argue that these requirements place them at a disadvantage because they are designed for response by third party contractors. It is to be expected that RFPs will be designed for a potential multiplicity of third-party contractors wishing to submit bids. That the bargaining unit will be called upon to meet some of the same conditions required of third party bidders is implicit in the statute, which provides for an equal bidding opportunity, not one that is designed for response by a bargaining unit or a labor organization. The language of the statute sends an unequivocal message that bargaining units and their representatives are to engage in the type of bidding and act in the manner of any other third-party contractor. While Charging Parties protest that it is unfair and unrealistic to expect them to act as third party contractors, that is what the statute says they must do in order to bid on a contract for noninstructional support services on an equal basis with other third party bidders. While this may not fit the realities of traditional public sector bargaining and labor-management relations, we do not judge the wisdom of legislative enactments. We interpret and apply them to the particular facts that are before us in accordance with established principles of statutory construction. The prohibitions in subsection 15(f) are lifted, and traditional public sector bargaining and labor-management relations are restored, only if a public school employer enforces a requirement that disqualifies or otherwise prevents a bargaining unit from bidding on a contract for noninstructional support services on an equal basis as other bidders.

It is argued that Respondents have the burden of proving that Charging Parties were given an equal opportunity to bid for noninstructional support services. We disagree. "As a general rule, the burden of proof rests upon one who has the affirmative of an issue necessary to his cause of action or defense." *Rasch v City of East Jordan*, 141 Mich App 336, 340 (1985) citing 11 Michigan Law & Practice, Evidence, § 21, p 159. In *Pontiac Sch Dist*, 23 MPER 81 (2010), we held that under §15, it was the school district's burden to show that the services to be contracted were noninstructional support services. There we placed the burden of proving facts in avoidance of a general rule requiring bargaining over subcontracting upon the party seeking the exception. Here, it is the Charging Parties who seek to avoid the general bargaining prohibitions in the amendments to §15. Consequently, we hold that Charging Parties have the

burden of proving facts that exempt them from those prohibitions.

In *Mt. Pleasant Public Schools*, Case No. C10 E-104, the bargaining unit did not bid on the work being subcontracted. There, the Respondent's RFP included a specific provision for the granting of exceptions to its requirements, including the qualifications of bidders. Charging Party could have submitted a bid requesting an exemption, for example, from the requirement of corporate support. If such a request were denied, and Charging Party was disqualified from bidding because of its status as an unincorporated entity, that would raise the issue of whether the subsection 15(3) bargaining prohibitions still applied. However, we will not presume that a reasonable request for an exception would have been denied. Because Charging Party did not submit a bid, and did not request an exception to any of the RFP's requirements, it cannot now complain that it was not given an equal opportunity to bid.

In *Lakeview Community Schools*, Case No. C10 C-059, Charging Party submitted a "proposal" for a collective bargaining agreement. In effect, Charging Party asked to bargain over Respondent's decision to subcontract noninstructional support services. That is precisely the bargaining that is prohibited by the amendments to Section 15 of PERA. By failing to submit a proper bid, this Charging Party, too, failed to establish a foundation upon which to claim that the bargaining unit was not given an equal opportunity to bid.

Charging Parties take exception to the ALJ's suggestion that labor organizations form corporations or create other entities for the purpose of bidding for contracts to provide noninstructional support services. We find it unnecessary to reopen the record in order to respond. The suggestion is premature and raises an issue that is not before us: whether the equal bidding opportunity preserved for the bargaining unit by statute is transferable to another entity. Additionally, we see no issue framed by the Michigan Contracts of Public Servants with Public Entities Act. The concern expressed by Charging Parties is based upon the mistaken belief that there can be a third party contract in which bargaining unit members remain employees of the school district. To the contrary, the employment relationship is severed when a school district contracts with a third party for noninstructional support services.

We also decline to reopen the record to admit Respondents' vendor relations policies. These are not newly discovered evidence and have not been asserted by Respondents to bar bidding by Charging Parties. In this matter, the statute we are called upon to interpret and apply is paramount to policies promulgated by the Respondents. Their vendor relations policies would not change the result of our deliberations.

By Act 112 of 1994, the Legislature mandated that the decision to contract with third parties for noninstructional support services be made without any involvement by school employees or their bargaining representative. Act 201 of 2009 simply provides the bargaining unit or its representative an opportunity to bid on the work to be subcontracted on an equal basis with other third party contractors. Thus, we issue the following order:

ORDER

The unfair labor practice charges in Case Nos. C10 C-059 and C10 E-104 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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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:

Case No. C10 C-059

LAKEVIEW COMMUNITY SCHOOLS,
Respondent-Public Employer,

-and-

LAKEVIEW EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION, MEA/NEA
Charging Party-Labor Organization.

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In the Matter of:

Case No. C10 E-104

MT. PLEASANT PUBLIC SCHOOLS,
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MICHIGAN AFSCME COUNCIL 25, AFL-CIO,
AND ITS AFFILIATED LOCAL 2310,
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APPEARANCES:

Varnum LLP., by John Patrick White, for Lakeview Community Schools

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Miller Cohen, P.L.C., by Robert D. Fetter, for Michigan AFSCME Council 25 and Local 2310

Clark Hill P.L.C., by Marshall W. Grate, for Amicus Curiae Flushing Community Schools

DECISION AND RECOMMENDED ORDER
ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, these cases were assigned to David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). Based on the pleadings filed by the parties on or before August 2, 2010, and the transcript of the oral argument held on October 1, 2010, I make the following findings of fact and conclusions of law.

Lakeview Educational Support Personnel Association (LESPA) is the exclusive bargaining representative for a unit of support employees of Lakeview Community Schools, including custodians, maintenance employees, and bus drivers. In Case No. C10 C-059, LESPA asserts that the school district violated PERA by issuing a request for proposal (RFP) for the subcontracting of school transportation services which failed to provide the Union with an opportunity to bid on the work on an equal basis as other bidders. In the charge, filed on March 8, 2010 and amended on May 4, 2010, LESPA contends that the district acted unlawfully in refusing its demands to bargain over the terms of the bidding process. Such conduct, according to the Union, was contrary to 2009 PA 2010, which amended Section 15(3)(f) of PERA, MCL 423.215(3)(f), effective January 4, 2010.

AFSCME Council 25 and its Local 2394, which represent a bargaining unit of facilities management personnel employed by Mt. Pleasant Public Schools, filed its charge in Case No. C10 E-014 on May 3, 2010. The Union filed an amended charge on September 29, 2010. AFSCME asserts that the Employer violated Sections 10(1)(e), 15(1)(e) and 15(3)(f) of PERA by entering into a contract with a third party to perform maintenance and custodial work at various locations throughout the district following the issuance of an RFP which effectively denied the bargaining unit an equal opportunity to bid on the contract, and by ignoring AFSCME's repeated demands to bargain over the "procedure to be followed in letting bids."

On March 22, 2010, I issued an order requiring LESPA to show cause why its charge should not be dismissed for failure to state a claim upon which relief can be granted under PERA. A similar order was issued to AFSCME on May 20, 2010. LESPA filed its response to the order to show cause on May 4, 2010, while AFSCME filed its response to the order on June 24, 2010.[4] Lakeview Community School and Mt. Pleasant Public Schools filed reply briefs on May 13, 2010 and August 2, 2010 respectively. On July 22, 2010, I issued an order consolidating Case Nos. C10 C-059 and C10 E-104 for purposes of oral argument regarding the scope of a public school employer's bargaining obligation under Section 15(3)(f) of PERA.

Oral argument on the motion for summary disposition was held on October 1, 2010. After considering the arguments made by the parties in their briefs and on the record, I concluded that there were no legitimate issues of material fact in either case and that a decision on summary disposition in favor of the Respondents was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County*

[4] In its response to the order to show cause, AFSCME asserted, for the first time, that the school district had retained sufficient control over custodial and maintenance employees so as to remain the Employer of those employees for purposes of PERA. This allegation will be addressed separately as Case No. C10 E-104(A).

and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Parties had failed to state valid claims under PERA. The substantive portion of my findings of fact and conclusions of law are set forth below:

> JUDGE PELTZ: I am issuing a decision from the bench this afternoon for the purpose of expediting a final resolution of these disputes and I am doing so because these cases involve a novel issue of first impression arising from the recent amendment to Section 15 of PERA. The amendment has resulted in a great deal of litigation in the last several months since the passage of that Act.
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> In addition to the two cases presently being heard, there are some 18 -- 16 to 18 cases pending before MERC in which the same or similar issues [have] been raised. I believe resolution of this issue is likely to have substantial implications [for] . . . public school employers, public school employees [and] labor organizations in the non-instructional support area, and that it's essential that these -- this issue be resolved in an expeditious manner.
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> * * *
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> Just briefly, the facts in the two cases as asserted by the Charging Parties, the Union in *Lakeview* alleges in its charge and amended charge that on January 22nd, 2010, the Employer notified prospective bidders that it was seeking bids for student transportation services and provided bidders with a request for proposals.
>
> The Union asserts that the RFP by its plain terms did not provide [it] with the opportunity to bid on an equal basis based on the terms therein, including requirements, for example, that the bidding process was limited to independent contractors with five or more years experience, the requirement of a bond in the amount of 5 percent of the regular route cost for a year, requiring bidders to include an audited financial report for the most recent fiscal years, requirements that the bid be accompanied by information regarding the operations, that it be signed by an affidavit of the [owner or] authorized officer, that the bidding company must remain responsible for its employees, the drug tests, et cetera, and that the bidder be an independent contractor providing personnel.[5]
>
> Prospective bidders were required to attend a pre-bid meeting on February 8th, 2010. Prior to that date, on January 25th, 2010, the Union demanded to bargain over the terms of the bidding process. The Employer denied the Union's request on January 28th of 2010. The Union renewed its request on the 8th of February and the Employer once again declined the Union's purported

[5] Charging Parties submitted the complete RFPs as attachments to their respective briefs. Respondents did not dispute the authenticity of these documents. Accordingly, the RFPs will be treated as part of the record for purposes of this decision.

demand to bargain on both February 22nd and March 1st, 2010, according to the Union.

On March 19th, 2010, the Union submitted what it refers to as a "proposal" which specifically indicated that the Union was "not able to meet various specifications" in the RFP, including the requirement that the third party be bidding as a "contractor for services." On March 22nd, the Employer rejected the Union's proposal and voted to privatize transportation services.

In *Mt. Pleasant* we have a similar set of facts as alleged by the Union. We have a contract that expired in September of 2009, but remains in effect. The charge asserts that the Employer issued a request for proposals or an RFP on March 15th of 2010, for cleaning services throughout the District. That same day, the Union allegedly sent a letter to the Employer demanding to "negotiate the procedure to be followed in letting in bids," and on March 17th, 2010, the Employer denied that request.

[As in *Lakeview*] the Union claims that the Employer failed to bargain over the decision to issue the RFP or the process for receiving proposals or bids [and] that the bargaining unit was put at . . . an extreme disadvantage to other bidders who did not represent public school employees and, therefore, would not have to account for pension and retirement benefits as required under state statute. And the Union argues, as the Union did in *Lakeview*, that the Employer deprived [it of] the opportunity to submit a proposal or bid on an equal basis as other bidders.

[T]hat concludes the findings of fact. As noted, all assertions of fact in the charges are accepted as true for purposes of the show cause.

Turning to the discussion of law, under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours, and other conditions of employment. In varying contexts, the subcontracting of bargaining unit work has been found to constitute a mandatory subject of bargaining under the Act. See, for example, as cited by one of the Charging Parties, *Detroit Police Officers Association v Detroit*, 428 Mich 79 (1987). Thus, an employer considering subcontracting bargaining unit work must, where the issue is found to be mandatory, give the Union representing members of the unit notice and an opportunity to bargain the matter or the Employer will have been found to have violated its duty to bargain under Section 10(1)(e) of PERA.

[W]hether a decision to subcontract is in fact subject to mandatory collective bargaining will depend on the particular facts of the case. And in considering that issue, we consider factors such as whether there's been a change in the scope and direction of the enterprise, whether the decision to subcontract merely involved a substitution of unit employees by employees of a private

contractor, [and] whether the decision was amenable to collective bargaining. For those principles, I would cite both the *City of Detroit Police* decision that I referenced a moment ago, as well as *Van Buren School District v Wayne County Circuit Judge*, 61 Mich App 6 (1975).

In 1994, the Legislature passed what is commonly referred to in public sector labor relations [circles] as Public Act 112 or Act 112. Act 112 gave public school employers, as defined by Section 1(h) of the Act, extraordinary discretion in managing and directing its operations, including the right to subcontract non-instructional support work without bargaining whatsoever. In other words, Act 112 created an exception to the general rule that subcontracting may be a mandatory subject of bargaining. It should be noted that the history of Act 112 was discussed extensively by the Commission in two very recent decisions, both of which were issued on September 20th of 2010. That would be *Pontiac School District*, Case Number C04 H-215, and *Harrison Community Schools*, C07 G-164. I won't go into the discussion, but it is informative as to the history of that amendment.

[W]hat Act 112 did was it modified Section 15 of PERA, MCL 423.215, by adding Subsections (2) and (3). Subsection (2) provides [that] "a public school employer has the responsibility, authority, and right to manage and direct on behalf of the public the operations and activities of the public schools under its control." That provision remains in effect today [despite] the recent amendment.

Subsection (3) identified certain subjects, including the subcontracting of non-instructional public school support work as prohibited subjects of bargaining. Specifically, Section 15(3) provides in pertinent part -- or provided:

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

Act 201 of 2009, which was part of the *Race to the Top* package of legislation, amended Section 15 once again. Effective January 4th of 2010, the list of prohibited subjects of bargaining [in Section 15(3)] now includes:

> (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 for noninstructional support services other than the bidding described in this subsection; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders

At issue today is the meaning and scope of that amendment. The Union contends that bidding or bargaining is restored as a mandatory subject of bargaining regardless of whether the Union is given an opportunity to bid on an equal basis and that bidding necessarily includes bargaining over the bidding process.

I think it's important to note some fundamental canons of statutory construction at the outset of the discussion section of this decision. Those well-established rules require that the Commission discern and give effect to the Legislature's intent as expressed by the language of the statutes. *DeBendetto v West Shore Hospital*, 461 Mich 394 (2000). If such language is unambiguous, as most such language is, we must presume that the Legislature intended the meaning clearly expressed. In such instances, no further judicial construction is required or permitted, and the statute must be enforced as written. Stated differently, a court may read nothing into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. Only where the statutory language is susceptible of more than one reasonable interpretation may a court properly go beyond the words of the statute to ascertain legislative intent. *Dan De Farms v Sterling Farm Supply, Inc*, 465 Mich 872 (2001).

Now, the Charging Parties argue that the statute must be read as requiring bargaining over the procedures for bidding – [I would] essentially characterize their argument in that manner. It is true that when construing a statute, the court should presume that every word has meaning and should avoid any construction that would render the statute, or any part of it, superfluous or nugatory. *Klapp v United Insurance Group Agency*, 468 Mich 459 (2003). However, I don't agree that the interpretation advanced by the Employers in this matter would have such effect. I read the phrase "other than the bidding described in this subsection" as explicitly exempting [the] bidding as described [in the last sentence of Section 15(3)(f)] from the list of prohibited subjects of bargaining.

The language relied upon by the Unions merely acknowledges that a bargaining unit may become involved in "the procedure" for subcontracting, something it otherwise would be prohibited from doing under [Act] 112, through the bidding process which is described . . . at the end of Section 3(f), and if

chosen, enter into a binding contract with the Employer to provide the non-instructional support services. In other words, bidding itself is a "procedure" under the amendment, one which the Union must be given an opportunity to participate in. The last sentence of Section (f) requires that the bidding process itself be conducted in a fair manner or an equal manner . . . and indicates what would result if the Union is not given an opportunity to bid on an equal basis. In such instances, subcontracting will revert back to being a non-prohibited subject of bargaining. Thus, the statute does not mean, as the Unions argued today, that the procedures for bidding themselves are exempt.

Any interpretation of the statute which would require a public school employer to bargain over the terms of the bidding process, in my opinion, would lead to tortured and absurd results. The last sentence [of Section 15(3)(f)] clearly requires that bargaining units be given an "equal" opportunity to bid on the work. If the unit had a significant voice with respect to creating the contents of the RFP and can essentially craft the RFP so that it meets the unit's objectives, the unit will, in effect, have a greater than equal opportunity to participate in the bidding process. Again, one of the fundamental canons of statutory construction is that statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513 (1998).

Reading the subsection as a whole, I find that the intent of the Legislature is clear and explicit. [T]he prohibition on bargaining over subcontracting contained within Subsection (f) continues to apply as long as the bargaining unit is given an opportunity to bid on the contract on an equal basis as other bidders.

Now, even if it can be argued that the provision is ambiguous or capable of more than one reasonable interpretation, the legislative intent is [nonetheless] clear. In amending Section 15 of PERA, the Legislature did not remove the issue of subcontracting non-instructional support services from the list of prohibited subjects. Clearly, the Legislature still intended for public school employers to have the authority to exercise, as it did before, extraordinary discretion with respect to subcontracting non-instructional support work. To read into the statute a requirement that public school employers must bargain over the terms of subcontracting based upon a generalized demand as we have here, would . . . clearly result in substantial delay [in implementing the agreement with a third party], including the possibility of extended mediation, fact finding [and] in bargaining to impasse. A delay which in many cases, as noted by counsel, could be a year or more. This would be an impediment to the process so great that it would effectively render the prohibition on bargaining over subcontracting meaningless or a nullity and return us essentially to the pre-Act 112 days [in] which subcontracting could not occur until the issue had been bargained to impasse. The Legislature had the ability to completely gut the 1994 amendment if it so desired by removing reference to subcontracting entirely from the list of prohibited subjects of bargaining and it did not take such action.

[T]he Unions' interpretation [would] be contrary to the intent of the Legislature in another way. As noted, Section 2 of Section 15 explicitly recognizes the public school employer's right to manage its operations on behalf of the public. The contents of an RFP go to the core of the Employer's managerial responsibilities. Requirements pertaining to bonding, experience, insurance, et cetera, the types of requirements that are seen every day in typical requests for proposals, are designed to insure the quality and reliability of the third party performing the services and are necessary to insure [that] the public interests are served and protected. Accepting the Union's interpretation could clearly result in public school employers issuing RFPs seeking bidders who are, for example, unincorporated, unexperienced, unbonded, and uninsured, and clearly this result would be, in addition to absurd, contrary to public policy.

For the same reason, I would find that even if the Legislature intended to remove bidding on the procedures from the list of prohibited subjects of bargaining, such a topic would be . . . a permissive subject of bargaining at best. The procedures, such as those discussed here today on the record (bonding, insurance, et cetera) have no direct impact on employee's wages, hours, and working conditions.

[I]nterpreting the statute in the manner that the Unions [suggest] would open the door to essentially endless litigation, as bargaining units could effectively challenge the procedure twice. Both at the outset, arguing that . . . they didn't have an opportunity to bargain the contents of the RFP and then again once the bidding process was completed if the Union did not prevail . . . in winning the contract, again arguing that there was something within the actual bidding process which was unequal.

Essentially what the Unions are arguing here is that the purpose of the amendment was to give labor organizations the opportunity to prevent subcontracting by offering concessions which meet or exceed the cost savings available to the district via the third-party bids, but that is not how the statute is worded. [R]egardless of the propriety of the statute . . . MERC is charged with [applying] the words that are in the statute itself. Twice in the first two sentences, the statute refers to the [school] district entering into a "contract" with a "third party" for such services and the final sentence of the Section (f) indicates that the bargaining unit must be given an opportunity to bid on the "contract" for the non-instructional support services on an equal basis as other bidders. In fact, the very use of the term bidding suggests something other than the concessionary bargaining envisioned by the Unions. [The Unions' interpretation of the amendment would lead to a result which is] in essence no different than what . . . a non-public school employer would likely have the obligation to do when faced with a subcontracting decision, and that is to give the Union an opportunity to make concessionary proposals and to hear those proposals out and to bargain over those. If that's what the Legislature intended, it could have easily brought about

that result by removing subcontracting from the list of prohibited subjects. Instead, the Legislature [retained the prohibition on bargaining the decision whether to subcontract non-instructional public school support work] and explicitly called for "bidding" [on such work] by bargaining units acting as "third-party" contractors.

* * *

I will note that there is some analysis of the *Race to the Top* legislation . . . that was prepared by the House Fiscal Agency for House Bill 4788. And [the] description of what this particular amendment at issue today would do is in line with the Employers' interpretation, not the Unions'. That legislative analysis says that the bill, "Modifies the prohibition on collective bargaining between schools and employees over contracting for non-instructional support services so that the prohibition would only apply if the bargaining unit providing the non-instructional support service is given an opportunity to bid on the contract for the non-instructional support services on an equal basis as other bidders." There is no reference therein to bargaining over the procedures or bargaining over the contents of an RFP . . . in that legislative analysis.

[T]he Unions claim that the right to bargain over the procedure for bidding is necessary to ensure that public school employers don't essentially stack the deck by drafting a particularly . . . onerous RFP which the Unions would be incapable of meeting. [The Union in *Lakeview*] wrote in its brief, "Bargaining over the bidding process provides the bargaining unit a voice to ensure that the bidding process will provide the unit with the opportunity to bid an equal basis." However, that protection is already explicitly included in the amendment. The last sentence says that if the unit is not given an opportunity to [bid] on an equal basis, [then the issue of subcontracting] reverts back to a non-prohibited subject of bargaining. The remedy in such cases . . . if a charge were filed after the bidding process was completed, would be an order to restore the status quo and the parties would go from there.

Now, I'll note, although not binding, that my interpretation of the statute is consistent with the ultimate conclusion of the Attorney General in OAG 2009-2010, Number 7249, issued June 15th of 2010, as well as the reasoning expressed by Isabella County Circuit Court Judge Paul Chamberlain in a case involving Mt. Pleasant Schools and AFSCME, a decision issued on June 9th of 2010.

[T]here is nothing in the statute which would prohibit the bargaining unit or the Union from bringing [its] concerns over the terms of the RFP to the attention of the Employer prior to submitting a bid. The Commission and the Courts have held that the term "prohibited subject of bargaining" under Section 15 of PERA is synonymous with "illegal subject of bargaining" as that term has previously been defined. That means that Employers and Unions are free to

discuss any illegal or prohibited subject of bargaining. They simply cannot enter into an enforceable contract provision on that issue. [T]he Union and the Employer are free to discuss the terms of the RFP prior to bidding and I think the Employer operates at its own peril if an issue regarding an RFP is raised which goes to the opportunity to bid on an equal basis and the Employer fails to take those concerns seriously and goes forward with the bidding process and effectively close the door to a bid by the bargaining unit. [The Employer] then runs the risk of having an order [issued by the Commission] requiring [a] return to the status quo after the bidding process has been completed.

[E]ven if some form of bargaining [over the terms of the RFP] were required, I do think, under prior Commission case law, it would have to be preceded by a proper demand. And in neither case here is there any factually supported assertion at this time in the briefs that have been filed that any such demand was made. Although a bargaining demand need take no particular form in order to be effective, the employer must know that a request is being made. A statement that an issue is negotiable, or even a protest of an employer's action, does not constitute a demand to bargain under the Act. *Michigan State University*, 1993 MERC Lab Op 52. A statement which does not identify the subjects about which the Union wishes to negotiate is insufficient to constitute a bargaining demand for purposes of PERA. As an example of that, I would cite *City of Grand Rapids*, 22 MPER 70 (2009) and *Detroit Public Schools*, 17 MPER 14 (2004) (no exceptions).

Turning to the actual facts as asserted by the Charging Parties in these matters and the RFPs which the Unions attached to their pleadings, the requirements set forth in those RFPs are not atypical requirements for a public employer seeking to contract with an outside entity to perform work for it. Charging Parties have offered no reasonable explanation as to why the unit members cannot either form their own corporation for the purpose of bidding on or performing the work alone or with a bidding partner, i.e., a private third-party contractor. It should be noted that public sector labor organizations in this state have experience with such a structure, as that very type of joint bidding has occurred, for example, in the Detroit Public Schools. As already noted, the language of the statute clearly indicates that the Legislature intended for the bargaining units to engage in exactly this type of bidding, to act in the manner of, and be judged equally to, any other third-party contractor.

The Unions . . . seem to assert that "equal" means a level playing field in terms of what each bidder can or cannot afford, but there is no indication in the statute that the Employer must consider all bids at a rate the bargaining unit can afford. The Legislature did not require that [bargaining] units be treated fairly or reasonably with respect to the bidding process or the subcontracting generally. All that is required is that units be given an opportunity to bid on the work on an equal basis. In other words, bargaining over subcontracting remains a prohibited subject of bargaining as long as the Employer fairly considers all the bids and

doesn't approve or reject any bid . . . based solely on the identity of the bidder. So it is clearly an attempt by the Legislature to ensure that a bargaining unit isn't excluded [outright] from the bidding process.

Now, with respect to AFSCME and perhaps with respect to the MEA in this case as well . . . it is undisputed that the unit did not bid on the work being subcontracted. With respect to the MEA, there was no formal bid submitted. There was a proposal which . . . Mr. Iorio . . . specified that that was not a bid, but was in fact a "proposal." And essentially, the units made their own determinations [that] the terms of the bidding were unfair and that the Employer would reject bids that did not meet all or some of the RFP terms. I find that by refusing to submit a good faith bid on the work, the Unions have failed to preserve their right to make an argument before the Commission that the bidding process was somehow not equal. How can the Commission determine whether the bidding process was equal if the bargaining unit did not actually place a bid which is then rejected by the Employer?

Now, in concluding my comments, I understand that the interpretation of the recent amendments to Section 15 of PERA that I set forth today, and in particular my finding that bargaining units must act as third-party contractors and be subject to the same normal requirements typically placed on such entities, may yield results which seem perhaps unwise. But this interpretation is based on . . . the explicit unambiguous wording of the statute, and it is not the function of the Commission to question the Legislature's motives or intent.

I'll note, as Mr. White did quite honestly and candidly earlier [on behalf of Lakeview Community Schools], I think that the recent amendment fits in well with some of the other statutory provisions enacted as part of 112. Many of the provisions enacted in 1994 have proven difficult to interpret and even more difficult to enforce and the statute, as a whole, appears to have been enacted -- I'm talking the 1994 statute now -- with little consideration given to the realities of public sector bargaining and labor-management [relations]. And perhaps this is due . . . to the fact that the 1994 amendments were essentially rushed through the deliberative process without review or input from the Commission, the agency charged with enforcing the Act, or the public. [T]his is contrary to the manner in which PERA has been amended in the past. As an example . . . I cite [the fact that in the] 1960s, Governor Romney commissioned an advisory panel to review proposed amendments to the Act, a panel which met for a full year and which ultimately issued a report to the Governor which served as the genesis for several PERA amendments. But again, these are not issues appropriate for the Commission to delve into. We are charged with [applying] the statute as written.

So in conclusion, I find [that] the passage of Act 112 of 1994 making the subcontracting of non-instructional support services by schools a prohibited subject of bargaining was an unequivocal policy determination by the Legislature that the decision . . . whether to subcontract . . . and how to go about that

> subcontracting was a decision to be made by the school's administration [without] any involvement of the employees or their bargaining agent. [That is a] determination properly left to the Legislature and it is transparent that the Legislature determined that the best way for schools to get the most and best services for non-core functions was for the school administrators to be in a position to use outside contractors without constraints or [the] delay [resulting from] bargaining.
>
> The recent amendment or refinement to the statutory scheme cannot be read as a significant deviation from that earlier legislative determination. Rather, it is a narrow refinement. The sole purpose of the [2009] amendment was to see to it that schools did not prevent the existing workforce from bidding on the work to be subcontracted on an equal basis [as] other potential outside contractors. I conclude that Section 15(3)(f) does not require a public school employer to negotiate with a bargaining unit over the terms or procedures for bidding on the subcontracting of non-instructional support services, nor does the amendment require there to be a level playing field in terms of the requirements which must be met as part of the bidding process.[6]

Based on the findings of facts and conclusions of law set forth above, I recommend that the Commission issue the following order:

ORDER

The unfair labor practice charges in Case Nos. C10 C-059 and C10 E-104 are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____

[6] The transcript excerpt reproduced herein contains typographical corrections and other minor edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.