STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF FLINT,
Public Employer - Respondent,

Case No. C10 I-236

- and -

MICHIGAN AFSCME COUNCIL
25 AND ITS AFFILIATED LOCAL 1799,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Keller Thoma, PC, by Richard W. Fanning, Jr., for the Respondent

Kenneth J. Bailey, Staff Attorney, Michigan AFSCME Council 25, for the Charging Party

DECISION AND ORDER

On May 18, 2011, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF FLINT,
Public Employer-Respondent,

Case No. C10 I-236

-and-

MICHIGAN AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1799,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, by Richard W. Fanning, Jr. for Respondent

Kenneth J. Bailey, Staff Attorney, Michigan AFSCME Council 25, for Charging Party

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

On September 20, 2010, Charging Party Michigan AFSCME Council 25 and its affiliated Local 1799 filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Flint. The charge alleges that on or about June 14, 2010, Respondent repudiated the parties' collective bargaining agreement by entering into a subcontract for work that could arguably be performed by members of Charging Party's bargaining unit without providing Charging Party with notice of its intent to subcontract and other information about the subcontract as the collective bargaining agreement required. Charging Party alleges that this conduct violated Respondent's duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of PERA, the charge was assigned Julia C. Stern, administrative law judge for the Michigan Administrative Hearing System (MAHS).

On January 11, 2011, Respondent filed a motion to dismiss the charge. Respondent attached to its motion a copy of an arbitrator's award issued on November 22, 2010. On January 19, 2011, Charging Party filed a motion for summary judgment and in opposition to Respondent's motion to dismiss. Affidavits and other documents were attached to Charging Party's motion. On February 3, 2011, Respondent filed a response in opposition to Charging Party's motion.

Having reviewed the charge and pleadings of both parties, I conclude that there are no material facts in dispute. Based on facts not in dispute as set forth below, I make the following conclusions of law and recommend that the Commission take the following action.

Facts:

The Subcontracting Clause

Charging Party represents a unit of supervisory employees of Respondent. The parties' collective bargaining agreement includes a lengthy provision, Article 15, entitled "Job Security." Article 15 states that work which is "capable of being done by bargaining unit employees, which is normally done by bargaining unit employees, and which may be performed at a competitive cost by bargaining unit employees," shall be done by bargaining unit employees. The article then states that work shall not be contracted out unless one of five listed exceptions applies. One of these exceptions allows Respondent to subcontract "when it is more reasonable for the City to contract out such work than to use its own employees." The article sets out six factors to be considered in determining whether a particular subcontract is reasonable. It also states that it is Respondent's burden to prove reasonableness.

Article 15, Section 4, entitled "Notice and Information," reads as follows:

> Before the City finally decides to contract out an item of work which it claims the right to contract out, the City, through its Labor Relations Department, shall give the Union notice of intent to contract together with the request for quote or bid which involves *labor which arguably could be performed by bargaining unit members* no later than the date that said bid package or request for quotes is made available to potential contractors. Once the bids are received, the City will review the bids with the Union and share relevant cost information. In no case shall the City enter into a contract calling in whole or in part for the performance of *labor which arguably could be performed by bargaining unit members* without giving the Union a minimum 30 day notice prior to either the proposed date of submission of the contract to City Council, or, where City Council action is not required, the proposed date upon which the contract will be executed by the City. Such notice shall contain the following information . . . [Emphasis added]

Article 15, Section 6, gives Charging Party the right to demand expedited arbitration of a subcontracting dispute. The expedited arbitration ends with a binding decision. Section 6 states that the expedited arbitration process shall be completed prior to the City's entering into a binding contract, except in cases "involving day-to-day maintenance and repair work and service which do not involved the layoff of existing employees."

The Subcontracting

Charging Party's bargaining unit includes employees with the classification title program manager. Respondent is the recipient of a federal Neighborhood Stabilization Program (NSP1) grant which pays for the purchase and redevelopment of foreclosed and abandoned homes and residential

properties. This grant was awarded through the United States Department of Housing and Urban Development (HUD) under the Housing and Economic Recovery Act of 2008. Respondent assigned a team of employees, including program managers represented by Charging Party, to administer the grant. In early 2010, HUD expressed concern that Respondent was failing to obligate and spend the grant funds in a timely manner. The HUD monitor opined that Respondent's staff, while highly motivated, lacked sufficient experience in the area of rehabilitation management. It recommended that Respondent hire a qualified contractor as soon as possible.

On May 27, 2010, Respondent issued a document entitled "Request for Proposals for Professional Program Management Services for the Neighborhood Stabilization Program NSP1." The bids were due five days later. Respondent did not provide Charging Party with a notice of intent to contract the work per Article 15, Section 4. On June 14, 2010, Respondent's City Council approved a contract with a private firm, CIG, for services related to the administration of the grant. The contract between Respondent and CIG was executed later that day. Employees of CIG then assumed duties that had been performed by members of Charging Party's unit.

On June 16, 2010, Charging Party filed a grievance. On June 30, 2010, it filed a demand for expedited arbitration under Article 15, Section 6. The parties selected Mark Glazer to arbitrate the dispute. A hearing was held in October 2010. Glazer issued his award on November 22, 2010.

Respondent argued to Glazer that the subcontracting of the grant management work was reasonable under Article 15. It also argued that it was not required to provide notice under Article 15, Section 4 because notice was required only where the work "arguably" could be performed by bargaining unit members. It argued that its existing employees could not "arguably" perform the grant work. After considering the evidence and the factors set out in Article 15, Glazer concluded that Respondent's decision to subcontract the work of administering the grant was reasonable because Respondent did not have sufficient employees available and qualified to do the work. Glazer's decision also stated:

> The Union, however, correctly points out that the Notice and Information procedures required by Section 4 of Article 15 were not observed by the City. The Employer argues that notice is not required because the work cannot arguably be performed by bargaining unit members. However, it is clear that the work prior to the subcontracting was authorized by the City to be performed by bargaining unit members, and that bargaining unit members still continue to perform some of the work, even after subcontracting. Certainly, it is arguable that City of Flint project managers could perform project manager work on the grant. Therefore, it was necessary for the Employer to follow the Notice and Information procedures.

Glazer concluded that Respondent's violations of the notice and information provisions did not require the cessation of the subcontracting, but that Charging Party was entitled to have the procedures of Section 4 followed even if an after-the-fact analysis supported the subcontracting. Glazer, therefore, incorporated an order requiring Respondent to cease and desist from further violations of Article 15, Section 4 into his award. He also noted in the award that Respondent should follow the requirements of this section in the future to avoid the possible future imposition of sanctions.

Discussion and Conclusions of Law:

The Commission has the authority to interpret the terms of a collective bargaining agreement where necessary to determine whether a party has breached its statutory obligations. *Univ of Michigan*, 1971 MERC Lab Op 994, 996, citing *NLRB v C & C Plywood Corp*, 385 US 421 (1967); *Detroit Fire Fighters Ass'n v Detroit*, 408 Mich 663 (1980). An alleged unilateral change in a term or condition of employment often also involves an alleged breach of a collective bargaining agreement. It is well established, however, that a party satisfies its statutory duty to bargain over a mandatory subject during the term of a collective bargaining agreement by entering into a contract provision that covers that subject. *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317-321 (1996). Accordingly, where the parties have agreed to binding arbitration to resolve contract disputes, the Commission generally leaves the parties to this remedy. As the Commission stated in *St Clair Co Road Comm*, 1992 MERC Lab Op 533 at 538:

> Where there is a contract covering the subject matter of the dispute which has provisions reasonably relied on for the action in question, and the contract also has a grievance procedure with final and binding arbitration, the Commission finds that the contract controls and no PERA issue is present.

The exception is when a party unilaterally modifies a contract during its term or when the party's conduct amounts to a repudiation of the collective bargaining agreement manifesting a disregard for that party's collective bargaining obligations. See, e.g., *City of Detroit (Transportation Dept)*, 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1983); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-902. Once the parties enter into an agreement covering a particular term or condition of employment, they have the right to rely on the language of the agreement. It is inconsistent with the parties' obligations to deal with each other in good faith for one party to force the other the other to invoke arbitration to enforce a contractual obligation over which no dispute exists. The Commission has described repudiation as a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960.

When the parties have agreed to binding arbitration of their contract disputes, however, the Commission has an obligation to honor that agreement and avoid supplanting the arbitrator as the interpreter of the contract. The Commission has held that in order for it to find a repudiation of contract: (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Gibraltar Sch Dist*, 16 MPER 36 (2003); *Crawford Co*, 1998 MERC Lab Op 17, 21; *Plymouth-Canton Cmty Schs*, 1984 MERC Lab Op 894, 897.

In its motion to dismiss, Respondent argues that the charge should be dismissed because it involves a contract dispute and the parties have a grievance resolution procedure ending in binding arbitration to resolve the dispute. Respondent also argues that the charge should be dismissed as moot because the arbitrator's decision has resolved the controversy between the parties.

In its motion for summary disposition, Charging Party argues that Respondent's failure/refusal to comply with the notice and information provisions in Article 15, Section 4 was a substantial breach of the contract because the purpose of the Article 15, Section 4 is to give Charging Party the opportunity to challenge Respondent's subcontracting decisions before, not after, Respondent enters into a binding contract with a third party. It argues that Respondent's failure/refusal to provide Charging Party with any prior notice before entering into the subcontract had a significant impact on the unit because it deprived the unit of the specific benefit for which it bargained. It also argues that there is and was no bona fide dispute over contract interpretation since the contract *clearly* prohibited Respondent from entering into any contract for services or labor which even arguably could be performed by the unit without giving thirty days notice and providing Charging Party with information about the proposed subcontract. According to Charging Party, whether Respondent acted properly in contracting out the work in this case was a question of contract interpretation to be decided by the arbitrator, but whether Respondent had a duty to comply with the notice and information provisions presented no question for him to decide.

Charging Party draws an analogy between Respondent's refusal to comply with the notice and information provisions and the employer's refusal, in *Gibraltar Sch Dist,* 1995 MERC Lab Op 522, to follow the procedures set out in the collective bargaining agreement for dealing with subcontracting disputes. In *Gibraltar*, the Commission held that the employer violated its duty to bargain by repudiating the subcontracting dispute procedures contained in a memorandum of understanding attached to the contract after it terminated the agreement, but before the parties had reached impasse. The employer in *Gibraltar*, however, did not rely on the language of the memorandum of agreement in asserting that it had no duty to adhere to these procedures after the contract was terminated. Rather, it asserted, contrary to established law, that wages and benefits were the only terms of employment that it was required to maintain in effect after the contract expired.

In its response to Charging Party's motion, Respondent asserts that there was no significant impact on the unit from its failure to provide notice to the union. Respondent also asserts that there was a bona fide dispute over the meaning of the term "arguable" as used in Article 15, Section 4. Respondent argued to the arbitrator that Article 15, Section 4 did not apply because the employees in this case could not arguably perform the contracted grant work. According to Respondent, its position that its employees could not even "arguably" perform the grant work was reasonable in light of HUD's position that the employees were unable to perform it. Respondent also argues that since the contract explicitly covered the circumstances under which notice must be provided, Respondent's obligations to provide notice were controlled by the contract. It cites *Central Michigan Univ,* in which the Commission held that while PERA requires an employer to provide notice to the union prior to finalizing and implementing a decision to transfer work in order to permit meaningful bargaining over the effects of the transfer, the notice obligations of the employer in that case were governed by the explicit notice provision in the contract.

The Commission has not defined the term "bona fide dispute," but it is clear that the parties may have a bona fide dispute over contract interpretation even if a party's arguments to support its interpretation are not persuasive. In *Sanilac Co Cmty Mental Health,* 19 MPER 87 (2006) (no exceptions), I reviewed Commission cases finding repudiation and concluded that in the cases I

reviewed the employers' contractual defenses had been either spurious or nonexistent. For example, in *Jonesville Bd of Ed,* the seminal "repudiation" case, the employer justified its decision to alter the contractual wage rate based on economic necessity and a management rights clause that made no reference to wages. In *City of Detroit,* 1976 MERC Lab Op 652, the employer asserted that its need to implement an affirmative action plan to remedy past racial discrimination justified its refusal to follow clear language in the contract dealing with promotions. In *City of Detroit, Dep't of Transportation,* and *Taylor Bd of Ed,* 1983 MERC Lab Op 77, the employers claimed that they could no longer afford to fulfill their contractual obligations. More recently, in *Kalamazoo Co,* 22 MPER 94 (2009), the employer argued that it had no obligation to comply with a letter of understanding because it concerned a nonmandatory subject of bargaining. In *36th District Court,* 21 MPER 19 (2008), the employer argued that a management's right clause of the contract permitted it to ignore an express contract term covering the length of the workweek, despite the fact that the management right's clause itself explicitly stated that the employer did not have the right to modify a specific and express term of the contract.

In this case, Respondent argued that under the circumstances of this case, its employees could not even arguably perform the contracted work. The arbitrator agreed with Charging Party that work which bargaining unit employees had done and continued to do was work that arguably could be performed by them. However, this does not mean that Respondent ignored the language of the contract or its obligations thereunder. I find that dispute between the parties over whether Article 14, Section 4 applied to the subcontracting in this case was bona fide. I conclude, therefore, that Respondent did not repudiate the contract and that its failure to provide Charging Party with the notice required by Article 14, Section 4 in this instance did not constitute an unfair labor practice.

I also find that the charge should be dismissed as moot. When a court's ruling would have no practical legal effect on a then existing controversy between the parties, the matter is moot. See *People v Richmond,* 486 Mich 29, 34-35 (2010). In this case, the arbitrator's award has resolved the controversy over the subcontracting of the program manager work, the dispute between the parties over the meaning of the term "arguable" in Article 15, Section 4 has been resolved in Charging Party's favor, and Charging Party has received from the arbitrator essentially all the relief it sought from the Commission. An issue which is moot may nevertheless be justiciable if it is an issue of sufficient public or legal significance that is likely to reoccur. *Richmond; Wayne State Univ,* 1991 MERC Lab Op 496, 499-500. That is not the case here. I conclude that this matter is moot and that the charge should be dismissed on this ground as well.

I find that Charging Party's motion for summary disposition should be denied and that Respondent's motion to dismiss the charge should be granted. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____