STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

DETROIT PUBLIC SCHOOLS,
Public Employer-Respondent,

- and - Case No. C10 G-175

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Daryl Adams, Assistant Director, Office of Labor Relations, Detroit Public Schools, for the Respondent

Law Office of Wayne A. Rudell, P.L.C., by Wayne A. Rudell, for Charging Party

DECISION AND ORDER

On April 19, 2012, 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

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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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Public Employer-Respondent,

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-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Daryl Adams, Assistant Director, Office of Labor Relations, Detroit Public Schools, for Respondent

Wayne A. Rudell, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to §§10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, a hearing was held in this case at Detroit, Michigan on October 13, 2010 before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including: (1) the charge filed on July 8, 2010 and amended charge filed on September 13, 2010; (2) motions for summary disposition filed by Respondent on August 4, September 21, 2010, and October 8, 2010; (3) Charging Party's September 13, 2010 and March 18, 2011 responses to these motions; (4) my interim order dated June 27, 201l recommending that the charge be summarily dismissed, in part; (5) exhibits entered and testimony taken at a hearing on October 13, 2010; (6) exhibits entered and testimony taken in the consolidated cases UC09 C-009, R09 C-047, and C09 G-103, which the parties stipulated should be made part of the record in this case; and (7) a post-hearing brief filed by Respondent on July 18, 2011, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and History:

Charging Party Teamsters Local 214 represented a bargaining unit of public safety officers/security officers employed by Respondent Detroit Public Schools to provide security at its schools and other buildings. In 2009, Respondent contracted with a private company to

provide security services at some of its schools. The contractor's employees provided services of the type that had been provided by Charging Party's members. On or about April 12, 2010, Respondent issued a request for proposals (RFP) soliciting bids from contractors to provide security services at all its schools and buildings. Sometime after January 1, 2010, Respondent entered into a contract for these services. Effective July 30, 2010, Respondent terminated all its remaining security officers.

On July 8, 2010, Charging Party filed a charge alleging that Respondent violated its duty to bargain in good faith under PERA by "refusing to acknowledge a bid for services based on cost savings that had been earlier demanded," "refusing to bargain for a collective bargaining agreement that would have provided the cost savings that had been demanded," "refusing to allow the union to submit a bid prior to negotiating with a third party," and "intentionally delaying the collective bargaining process."

The allegations in the July 8, 2010 charge were based, in part, on new language added by the Legislature to §§15(3)(f) and 15(4) of PERA in late 2009. Sections 15(3)(f) and 15(4), which apply only to public school employers, their employees, and the bargaining representatives of these employees, make the decision to contract with a third party for noninstructional support services a prohibited subjects of bargaining. These sections also make the procedures for obtaining the contract, the identity of the third party, and the impact of the contract on individual employees or the unit prohibited subjects. There is no dispute that the services provided by the security officers constituted "noninstructional support services." However, in 2009, the Legislature added language to §§15(3)(f) and 15(4) making these prohibitions applicable only if a unit is given "the opportunity to bid on the contract on an equal basis as other bidders." The "opportunity to bid" provisions went into effect on January 1, 2010. When Respondent solicited bids for security services in April 2010, there had as yet been no interpretation of this new language by the Commission, the courts, or the Attorney General.

On August 4, 2010, Respondent filed a motion for summary dismissal of the July 8 charge. Respondent argued that since Charging Party had notice that Respondent proposed to enter into a contract for security services, but did not submit a bid, Respondent had no obligation to bargain with it over any aspect of the contract or its impact on employees. On September 13, 2010, Charging Party filed a response to the motion and an amended charge. Although admitting that it had not submitted a bid in accord with the procedures set out in Respondent's request for proposals (RFP), Charging Party argued that it had effectively bid on the contract by presenting Respondent, on February 19, 2010, with a package proposal for a new collective bargaining agreement with the wage and benefit concessions that Respondent had previously demanded. Charging Party asserted that Respondent's refusal to consider this proposal denied it the opportunity to bid on the contract on an equal basis as other bidders.

Shortly after Charging Party filed its response, Administrative Law Judge (ALJ) David Peltz held oral argument and issued a bench decision dismissing unfair labor charges in *Lakeview Cmty Schs*, Case No. C10 C-059, and *Mt Pleasant Pub Schs*, Case No. C10 E-104. Both these cases involved the 2009 amendments to §§15(3)(f) and 15(4). ALJ Peltz rejected the argument of the charging party union in *Lakeview* that its concessionary proposal constituted a "bid" within the meaning of the statute. Because Respondent's motion involved this same issue of statutory

interpretation, I held Respondent's motion to dismiss in abeyance pending the Commission's decision *Lakeview*. On May 11, 2011, the Commission issued a decision adopting ALJ Peltz's interpretation of Section 15(3)(f). *Lakeview Cmty Schs*, 25 MPER 37 (2011). [1] On June 27, 2011, I issued an interim order notifying the parties that I intended to recommend to the Commission that it grant Respondent's motion for summary dismissal of the allegations in the charge filed on July 8, 2010.

As noted above, on September 13, 2010, Charging Party filed an amended charge. On September 15, I issued an order disallowing most of the amendments on the basis that they merely duplicated allegations made by Charging Party in previous charges and/or involved events unrelated to the matters covered by the charge. However, I permitted Charging Party to amend its charge to allege that the layoff or termination of its members violated §10(1)(e) of the Act because it constituted a repudiation of the parties' collective bargaining agreement. Respondent then filed an amended motion for summary disposition incorporating this allegation. In my June 27, 2011 interim order, I indicated that I intended to recommend to the Commission that it grant Respondent's motion to dismiss this allegation.

I also permitted Charging Party to amend its charge to allege that that Respondent had violated §§10(1)(a), (c) and (d) of PERA when it contracted with a third party to perform the work of its bargaining unit. The charge, as amended, asserts that Respondent singled out Charging Party's members for layoff/termination because of their union activities and activities undertaken by Charging Party on their behalf over a period of several years. These included filing grievances, making requests for information under PERA, taking certain positions at the bargaining table, and filing numerous unfair labor practice charges.

I held an evidentiary hearing on the discrimination allegations on October 13, 2010. After issuing my interim order on Respondent's motion for summary disposition, I invited the parties to file post-hearing briefs on the discrimination allegations. Respondent filed a brief on July 18, 2011. Charging Party did not file a brief.

II. Refusal to Bargain Allegations - Facts

As noted above, on June 27, 2011, I issued an interim order indicating that I intended to recommend to the Commission that the allegations of the charge alleging a refusal to bargain be dismissed. The conclusions made in the interim order have been incorporated into this decision. The facts below are those alleged by Charging Party in its charge and in its responses to Respondent's motions for summary disposition, and are the facts upon which I relied in my interim order.

In December 2008, Charging Party and Respondent commenced negotiations for a successor collective bargaining agreement. The parties continued to bargain throughout 2009 without reaching agreement. During a negotiation session held on February 16, 2010, Charging Party presented Respondent with a package contract proposal containing a number of wage and benefit concessions, including a proposal for a 5.5% reduction in wages. Respondent's representatives handed the written proposal back to Charging Party's negotiators without

[1] An appeal of the Commission's decision in *Lakeview* is currently pending in the Court of Appeals.

considering it. Charging Party then transmitted the proposal by letter to Respondent's chief negotiator, Gwendolyn de Jongh, but did not receive a response.

On or about April 12, 2010, Respondent issued an RFP for a contract to provide "in-school security staffing" and posted this RFP on its website. The RFP included instructions for submitting a bid. The original deadline for bids was April 26, but the deadline was extended to May 10. On April 23, Respondent sent Charging Party a letter drawing its attention to the RFP. Charging Party did not submit a bid in accord with the terms of the RFP. On June 18, 2010, Charging Party sent a letter to Robert Bobb, then Respondent's appointed emergency financial manager, asking for the results of the bid solicitation "in order that this Local Union has an opportunity to provide you with a competitive contractual bid that will allow us to maintain the Board employment of your current security cadre."

On July 23, 2010, Charging Party wrote to Bobb asking again for an "opportunity to bargain about the opportunity to bid on a contract involving the employment of security personnel." This letter noted that Respondent had told Charging Party that Respondent was in the process of negotiating with bidders, and asked Respondent to "provide us with all of the information that Detroit Public Schools provided to anyone who submitted a bid and a detailed summary of those negotiations so that Teamsters Local 214 can have an equal opportunity to submit a bid that will be considered on a the same basis." The July 23 letter also included a package contract proposal which the letter characterized as a bid. This proposal contained more extensive wage and benefits concessions than the February 16, 2010 proposal, including a proposed 10% reduction in wages.

At some point in 2010, Respondent entered into a contract with a private entity to provide the security services that had been performed by Charging Party's members. On July 29, 2010, Respondent sent a letter to members of Charging Party's bargaining unit advising them that they were terminated effective at the end of the business day on July 30, 2010 because in-school security services had been outsourced.

The collective bargaining agreement in effect when Respondent terminated its security officers included a provision requiring Respondent to conduct disciplinary hearings prior to terminating security officers and a provision prohibiting the discipline or discharge of a security officer except for just cause. The contract also contained a number of provisions relating to layoff, including a requirement that Respondent provide fourteen days advance notice of layoff and continue the employee's health care benefits during layoff under certain circumstances. In addition, the contract also provided that employees could lose their seniority only for reasons specifically enumerated in the contract. Respondent did not conduct disciplinary hearings prior to terminating Charging Party's members in July 2010. When Charging Party filed a grievance asserting that the terminations violated the just cause and disciplinary hearing provisions, Respondent asserted that these provisions did not apply because the terminations did not constitute discipline. Respondent also did not provide employees with fourteen days notice of their termination, and did not continue their health care benefits after it terminated them. Respondent asserted, in response to Charging Party's grievance, that the terminations were not layoffs under the contract because there was no reasonable expectation that the employees would be recalled.

III. Refusal to Bargain Allegations - Discussion and Conclusions of Law:

Effective January 1, 2010, §§15(3) (f) and 15(4) PERA read as follows:

> (3)(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 the opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders*
>
> (4) *Except as otherwise provided in subsection (3)(f),* the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide. [Language in italics added by 2009 amendments]

In *Lakeview Cmty Schs,* the Commission interpreted the italicized language to mean that the subjects enumerated in §15(3)(f) cease to be prohibited subjects of bargaining if a public school employer fails to give the bargaining unit an opportunity to bid on an equal basis as other bidders. It found, therefore, that an employer risks being found to have violated its duty to bargain over the decision to contract and the impact of this decision if it fails to provide the unit with an opportunity to bid on a contract for its work. It concluded, however, that the prohibitions on bargaining these issues remained in place as long as the employer provided the unit with an equal opportunity to bid.

One of the issues in *Lakeview* was whether the employer denied the union the opportunity to bid on a contract on an equal basis by refusing to consider a union proposal for a collective bargaining agreement that allegedly provided cost savings that met or exceeded the savings to be expected from subcontracting the work. ALJ Peltz found in that case that the union's concessionary proposal was not a bid, and also found that the union had waived its right to argue that it did not have the opportunity to bid on an equal basis by failing to submit a formal bid. The Commission agreed with the ALJ, stating as follows:

> 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 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(3)(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. [Emphasis added]

The Commission also agreed with the ALJ that by demanding that the employer consider its concessionary proposal in lieu of a bid, the charging party in *Lakeview* was effectively demanding what §15(3)(f) explicitly prohibits - bargaining over the employer's decision to subcontract noninstructional support services. It held that by failing to submit a proper bid, the charging party failed to establish a foundation upon which to claim that the bargaining unit was not given an equal opportunity to bid.

In accord with the Commission's holding in *Lakeview*, I find that Charging Party's February 19, 2010 contract proposal did not constitute a "bid" within the meaning of §15(3)(f). Since Charging Party failed to submit a bid in response to Respondent's April 2010 RFP, it has no basis on which to argue that it was not given the opportunity to bid on an equal basis with other bidders. I conclude, therefore, that the subcontracting of the security work which took place in 2010, including the procedures for obtaining the contract and the identity of the contractor, and the impact of the contract on employees and the bargaining unit, were all prohibited subjects of bargaining under §15(3)(f) and that Respondent had no duty to bargain over any of these issues.

Charging Party asserts that this case is distinguishable from *Lakeview* because there was a collective bargaining agreement in effect which prohibited Respondent from terminating its members after subcontracting their work. The collective bargaining agreement did not contain a no-subcontracting provision, which Charging Party appears to admit would have been unenforceable under §§15(3) and 15(4) of PERA if Respondent had given it an equal opportunity to bid. However, the collective bargaining agreement required Respondent to recognize the Charging Party as the bargaining representative for security officers and to "maintain in full force and effect the terms of employment" contained in that agreement. According to Charging Party, the collective bargaining agreement provided that employees could lose their seniority only for reasons enumerated in the agreement, which did not include being replaced by employees of a contractor. It also asserts that the agreement required Respondent to take certain steps before discharging or laying off employees, procedures that were not followed before Respondent notified the employees that they were terminated in July 2010. Charging Party asserts that Respondent's actions constituted a repudiation of its collective bargaining agreement and, therefore, violated its duty to bargain under PERA.

The Commission has held that repudiation of a collective bargaining agreement constitutes a violation of an employer's duty to bargain under Section 10(1)(e) of PERA. Repudiation exists when no bona fide dispute over interpretation of the contract is involved, and

the contract breach is substantial and has a significant impact on the bargaining unit. *Plymouth-Canton Cmty Sch*, 1984 MERC Lab Op 894, 897. The Commission will find repudiation only when the action of a party amounts to a rewriting of the contract or a complete disregard for the contract as written. *Goodrich Area Sch*, 22 MPER 103 (2009*); City of Detroit (Dept of Trans),* 19 MPER 34 (2006). I find that in this case the parties had a bona fide dispute over whether the contract provisions cited by Charging Party applied to the termination of the entire unit because their work had been contracted to a third party. I conclude, therefore, that Respondent's failure to follow these provisions when it terminated Charging Party's members did not constitute an unlawful repudiation of its collective bargaining agreement.

I also conclude that finding Respondent guilty of a repudiation violation in these circumstances would violate the Legislature's clearly expressed intent to give public school employers broad authority to act unilaterally to contract for noninstructional support services. When it enacted 1994 PA 112 to add §15(3)(f) and 15(4) to PERA, the Legislature was obviously aware that the contracting contemplated by §15(3)(f) might result in noninstructional support employees losing their jobs and their bargaining units disappearing. However, in addition to prohibiting bargaining over the decision to subcontract, it explicitly made "the impact of the contract on individual employees or the bargaining unit" a prohibited subject of bargaining. As Charging Party appears to acknowledge, a no-subcontracting provision which explicitly restricted Respondent's ability to contract with a third party for security services during the term of the collective bargaining agreement would have been unenforceable. I conclude that any contractual restriction on Respondent's ability to subcontract, including restrictions on its ability to terminate employees after their work has been subcontracted, is also unenforceable. For this reason as well as the one stated in the paragraph above, I conclude that Respondent's termination of the security officers after subcontracting their work did not constitute an unlawful repudiation of the collective bargaining agreement.

As I did in my interim order issued on June 27, 2011, I find that Respondent's motion for summary disposition should be granted and that the allegations that Respondent violated §10(1)(e) of PERA should be dismissed.

IV. Discrimination and Retaliation Allegations – Findings of Fact

Unfair Labor Practice Charges filed between 2007 and 2010

Between September 2007 and the filing of this charge in July 2010, according to Commission records, Charging Party filed ten unfair labor practice charges against Respondent on behalf of the security officers' unit. Five of these charges, C08 H-160, C08 I-179, C09 B-09, C09 B-10, and C09 B-11, were withdrawn by Charging Party. One of these, Case No. C08 H-160, was withdrawn on July 21, 2010 after Respondent complied with the terms of a settlement agreement reached on May 26, 2010. The other five remained pending when the security officers were terminated in 2010. Charging Party repeatedly sought to have all these charges consolidated and decided on one record, but its requests were denied by the ALJs to which they were assigned.

The charge in Case No. C07 H-252 was filed on November 16, 2007 and amended

several times thereafter. In 2006, Charging Party and Respondent entered into a written agreement which provided that the security officers would be paid a lower wage rate through June 30, 2007. The charge in Case No. C07 H-252 alleged that the Respondent violated its duty to bargain in good faith by repudiating the agreement to restore the former higher wage rate on and after July 1, 2007. It also alleged that in March 2008, Respondent improperly declared that the parties had reached an impasse in bargaining a wage reopener agreement and unlawfully implemented a new lower wage rate. An evidentiary hearing on this charge was held before ALJ Doyle O'Connor in early 2010. On May 18, 2011, ALJ O'Connor issued a Decision and Recommended Order. He found that in early 2007, before the 2006 agreement expired, the parties bargained over wages for the security officers' unit pursuant to a wage reopener provision in their collective bargaining agreement. Negotiators for the parties reached a tentative agreement on a wage rate which was higher than the rate in the 2006 agreement, although lower than the pre-concession rate. Respondent reached similar agreements with other bargaining units, including some represented by Charging Party. These agreements were ratified by the members of these units and subsequently went into effect. However, on or about July 18, 2007, the security officers' unit rejected the tentative wage agreement. The ALJ found that despite the lack of an agreement authorizing it to do so, Respondent continued to pay the security officers the reduced salary in the 2006 agreement after July 1, 2007. Negotiations continued over a salary agreement for the security officers' unit in the summer and fall of 2007. In November 2007, Respondent hired a new labor relations director. After meeting with Charging Party in December 2007, the new director sought and obtained authorization to restore the pre-concession agreement wage rate effective January 15, 2008. Bargaining then continued over a new wage rate, with Respondent determined to achieve the savings from the security officers' unit that it had obtained from its other units. The parties agreed that the security officers would not receive a lump sum payment for the period between July 1, 2007 and January 15, 2008 during which Respondent paid the improper wage rate. The parties continued to exchange proposals until March 2008, when Respondent declared impasse and implemented its wage proposal for the remainder of the fiscal year ending on June 30, 2008.

ALJ O'Connor concluded that Respondent had violated its duty to bargain in good faith by repudiating the agreement to restore the higher wage rate after June 30, 2007. However, after an extensive review of the bargaining history, he concluded that the parties had reached a legitimate impasse when Respondent implemented its last wage offer in March 2008. He also concluded that Respondent's lawful implementation of a new wage scheme in March 2008 obviated any back pay liability for the repudiation of the 2006 agreement. Neither Respondent nor Charging Party filed exceptions to this decision. However, a group of security officers filed a motion to intervene in the case and a request for permission to file exceptions. On April 17, 2012, the Commission issued a Decision and Order denying the motion to intervene and adopting the ALJ's recommended order. *Detroit Pub Schs*, 25 MPER _____ (Case No. C07 K-252)

The charge in Case No. C07 I-205, filed on September 4, 2007 and assigned to me, alleged that Respondent had routinely and repeatedly failed or refused to hold hearings and respond to grievances within the time periods required by the grievance procedure in the parties' collective bargaining agreement, including, in some cases, forcing Charging Party to make demands to arbitrate before providing answers to grievances. The charge alleged that these

actions constituted a violation of Respondent's duty to bargain in good faith. It also alleged that Respondent was deliberately refusing to comply with the grievance procedure in order in pressure members of the bargaining unit into accepting Respondent's demands for concessions. As indicated above, at the time the charge was filed, and for some time before that, Respondent and Charging Party had been negotiating pursuant to a wage reopener provision in their contract and Respondent had sought, and to some extent had obtained, wage concessions from the unit.

The charge in Case No. C07 J-228, filed on October 5, 2007 and assigned to me, alleged that Respondent had violated its duty to bargain by failing and/or refusing to provide Charging Party with information relevant to its duties to engage in collective bargaining and administer the contract. This included failing to provide Charging Party with an updated seniority list of its members, despite repeated requests made by Charging Party over an extended period of time.

After multiple days of hearing and many adjournments, on June 6, 2010, Charging Party and Respondent entered into a written settlement agreement of the charges in Case No. C07 I-207 and C07 I-228. The settlement required Respondent, within sixty days of the date of the agreement, to send a notice to unit employees admitting that it had failed to timely provide Charging Party with some information as required by PERA. The notice was also to include an admission that Respondent had failed in certain cases to hold Step 1 hearings and failed in certain cases to answer Step 2 grievances in a timely manner as required by PERA. The settlement agreement stated that Respondent was to provide a seniority list once every six months beginning on September 1, 2010 with certain specific information. The terms of the settlement were not carried out, however, because Respondent terminated the employment of its security officers at the end of July 2010. The charges in Case Nos. C07 I-207 and C07 I-228 remain adjourned without date pending the Commission's decision in the instant charge and a determination of whether Respondent should be required to reinstate the terminated employees.

The charge in Case No. C09 G-103 was filed on July 10, 2009. This charge was assigned to me and consolidated with a representation petition, (Case No. R09 C09 C-047) and unit clarification petition (Case No. UC09 C-009) filed by Charging Party in which it sought to clarify its unit to include employees with the title campus security police officer (CSPO). In March 2009, Respondent hired or promoted employees into the CSPO title and placed them in a bargaining unit of its police officers represented by another labor organization, the Police Officers Labor Council (POLC). The charge alleged, first, that Respondent violated §Sections 10(1) (a) and (e) of PERA by refusing to recognize the Charging Party as the bargaining representative for employees with the title CSPO; refusing to apply the terms of the Charging Party's collective bargaining agreement to these employees; and failing to provide the Teamsters with accurate information about the alleged new position, as requested on January 22, 2009. Second, it alleged that Respondent provided unlawful assistance to the POLC, in violation of § 10(1)(b) of PERA, by recognizing the POLC as the bargaining representative for the CSPO title before any employees were hired and by deducting dues for the POLC from the CSPOs' paychecks without a valid union security or dues deduction provision in place. Third, the charge alleged that Respondent's actions violated §§10(1)(c) and (d) of PERA because their actions constituted retaliation against Charging Party for positions it had taken at the bargaining table, as discussed above, and because, as discussed above, it had filed previous unfair labor practice

charges against Respondent. Charging Party also filed an unfair labor practice charge against the POLC (Case No. CU09 G-021).

The evidence presented in the consolidated cases included an email exchange between Respondent Inspector General John Bell and Wayne County Prosecutor Kym Worthy on the subject of Worthy's approval of a proposal by Respondent to make the CSPOs "private security police officers" under the Private Security Guard Act of 1968, 1968 PA 330 (Act 330), MCL 338. 1031 *et seq.* On August 14, 2009, Bell sent Worthy the following email:

> Next Tuesday Public Safety Chief Grimes has to appear before a MERC hearing with regard to the union status of the 10 School security officers which were selected to undergo PA 330 training. Because their new duties would involve supervision of regular security officers in the high schools, during the tenure of former Chief Mitchell they were moved to the Organization of School Administrators, Local 28. This move was in anticipation of their impending management responsibilities. *Since the PA 330 request has not been approved, Teamsters Local 214 is attempting to get them back.* It is still our hope that you will approve the PA 330 request in view of the new leadership at DPS and Public Safety. We are ready to initiate the training required for these positions upon your approval. We consider it important to our safe schools strategy that each group of security officers at a high school has a supervisor who can assign responsibilities and hold his/her subordinates responsible for their performance, in addition to collaborating with the principal to address the school administrator's concerns. I know that I have taken a lot of your time here but it would help Chief Grimes immensely at the hearing if he could report the PA 330 program has your approval and we are moving forward. [Emphasis added][2]

On April 30, 2010, I issued a Decision and Recommended Order in the consolidated cases UC09 C-009, R09 C-047, and C09 G-103. I concluded that Respondent had violated §§10(1)(a) and (e) by refusing to recognize Charging Party as the bargaining agent for the ten employees who had been given the CSPO title, but had been performing the duties of a security officer and by refusing to apply the terms of Charging Party's collective bargaining agreement, including the union security and dues checkoff provisions, to them. I also found that Respondent had unlawfully failed to provide Charging Party with certain information about CSPO position which it requested on January 22, 2009. The remedy which I recommended for that violation included requiring Respondent to recall one laid off security officer and to reimburse Charging Party for dues it had been unable to collect from the CSPOs.

I concluded, however, that Respondent had not violated §10(1)(b), and also that the evidence did not support a finding that Respondent's refusal to recognize Charging Party as the bargaining representative for the CSPOs violated §§10(1)(a) and (c). I held:

[2] The ten security officers referred to in the email were the CSPOs, and Charging Party was indeed trying to get the positions back into its unit. However, Bell was mistaken when he stated that the ten security officers had been placed in a bargaining unit represented by the Organization of School Administrators. He was also mistaken when he said that Respondent intended to make the ten officers supervisors.

> The Employer and the Teamsters have a series of unresolved disputes, evidenced by the pending unfair labor practice charges, dating back to 2007. The timing of the Employer's decision to remove security officers from the Teamsters unit in the midst of these many unresolved disputes might be considered suspicious. However, suspicious timing, by itself, is not sufficient to establish unlawful intent. *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 73; *North Central Community Mental Health*, 1998 MERC Lab Op 417, 437; *Univ of Michigan*, 1990 MERC Lab Op 242, 249. I find the evidence here insufficient to establish that activity protected by the Act was even a motivating factor in the Employer's decision.

After I issued my Decision and Recommended Order, Respondent filed a motion to reopen the record to admit new evidence, and the case was remanded to me on July 15, 2010. On February 17, 2011, after conducting further hearings, I issued a Supplemental Decision and Recommended Order on Remand in the unfair labor practice case in which I concluded that the CSPOs had been properly placed in POLC unit in December 2009 based on the new job duties and authority they were given at that time. I concluded, nevertheless, that Respondent had violated its duty to bargain by refusing to recognize Charging Party as the bargaining agent for these employees prior to December 2009. Respondent filed exceptions with the Commission to my findings. Charging Party did not file exceptions to my recommendation that its allegations of unlawful discrimination be dismissed. In a decision issued January 12, 2012, the Commission held that Respondent acted lawfully when it placed the CSPOs in the POLC unit at the time it hired them in early 2009. The Commission concluded that Respondent had violated its duty to provide Charging Party with information about the CSPO position, but dismissed the rest of the allegations. *Detroit Pub Schs*, 25 MPER 58 (2012). On this same date, the Commission also issued a decision dismissing the charge filed against the POLC. *Police Officers Labor Council*, 25 MPER 57 (2012).

The tenth unfair labor practice charge, Case No. C10 F-129, was filed on June 1, 2010 and was assigned to me. The substance of this charge was that Respondent was continuing the course of conduct that I had found to be unlawful in my April 30, 2010 decision and recommended order in Case No. C09 G-103. On August 13, 2010, I issued an order holding Case No. C10 F-129 in abeyance until the Commission issued a final order in Case No. C09 G-103.

In addition, on February 19, 2010, the Michigan Association of Police filed a petition for representation election (Case No. R10 B-020) seeking an election in the unit of security officers. This petition has also been held in abeyance pending a determination by the Commission in the instant case.

Other Events Leading Up to the Terminations

In the years before 2010, Respondent suffered a substantial loss of students and revenue. At one time, Respondent employed 310 security officers. By the beginning of 2008, the number had been reduced to between 280 and 290. In March 2009, the State Superintendent of Schools determined that Respondent, which had an overall deficit in excess of two hundred million dollars, was in a financial emergency which required the appointment of an emergency financial

manager under the Local Government Fiscal Responsibility Act of 1990, MCL 141.1201 et seq, (Repealed by 2011 PA 4).

The parties stipulated to the admission of an affidavit from Respondent's chief financial officer, Angela Joyner, and a chart prepared by Respondent's Office of Management and Budget (OMB). According to Joyner's affidavit, around April 2009, Respondent's Office of the Inspector General asked the OMB to prepare an analysis of possible cost savings from outsourcing the security officers' work. The OMB prepared a chart detailing projected cost savings for fiscal years beginning in 2011 and continuing through 2014. The chart shows projected savings from outsourcing of around $5.5 million dollars per year.

In 2009, before the 2009 amendments to PERA went into effect, Respondent entered into an agreement with a private company to provide security services at some of Respondent's schools. Some bargaining unit members were laid off as a result of this contract. In addition, as discussed in C09 G-103, between March 2009 and April 2010, Respondent promoted forty-nine security officers to CSPO and left their vacated positions unfilled. There were 229 security officers remaining in the unit on July 29, 2010, when Respondent sent them termination letters.

Respondent was actively involved throughout 2009 in seeking wage concessions from its bargaining units, including but not limited to Charging Party's unit of security officers. On December 3, 2009, Respondent and the union representing its teachers signed a tentative agreement providing that wages were to be frozen at 2008-2009 levels through the 2010-2011 school year, with a base salary increase of one percent to go into effect at the beginning of the 2011-2012 school year. On January 29, 2010, Respondent and one of the unions representing non-instructional supervisors entered into a tentative agreement providing for a six percent wage reduction beginning February 1, 2010, along with five unpaid furlough days between February 1, 2010 and June 30, 2010 and an additional ten furlough days after July 1, 2010. However, in December 2009, Respondent and Charging Party were far apart on wages for their successor contract, with Respondent proposing a ten percent wage decrease and Charging Party proposing a wage freeze through June 30, 2011 and a reopener for the remainder of the term of the contract. On February 16, 2010, Charging Party gave Respondent a contract proposal that included a 5.5% wage reduction, but with a proviso that after January 2, 2012 negotiations would be reopened on the restoration of the concessions and another that wages would be restored to their current levels effective December 30, 2013. Respondent rejected the proposal without discussion.

As discussed above, on or about April 12, 2010, Respondent issued an RFP for security services and, sometime in 2010, entered into a contract under which the private company that had begun providing security at some schools would take responsibility for security at all Respondent's schools. Effective July 30, 2010, Respondent terminated all remaining members of the security officers' bargaining unit, Respondent also subcontracted the work of its bus drivers, another group represented by Charging Party, in June or July 2010. Respondent also subcontracted other work around this time, although what work this was, and when the subcontracting occurred, is not stated in the record.

IV. Discrimination and Retaliation Allegations – Discussion and Conclusions of Law:

A subcontracting decision that is a prohibited subject of bargaining under §§15(3))(f) and 15(4) may nevertheless be unlawful if the employer's actions are motivated by anti-union animus. *Southfield Pub Schs,* 25 MP 36 (2011); *Coldwater Cmty Schs,* 2000 MERC Lab Op 244; *Parchment Sch Dist,* 2000 MERC Lab Op 110 (no exceptions). As the Commission noted in *Southfield,* where unlawful discrimination is alleged, the employer's motivation is a question of fact. When the alleged discrimination is the subcontracting of bargaining unit work, that question is resolved by determining whether the decision to subcontract was based on the employer's legitimate business concerns or on an unlawful desire to terminate the union's representation of the employees.

The elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are, in addition to an adverse employment action: (1) employee union or other activity protected by the act; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist,* 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems,* 1997 MERC Lab Op 530, 551-552. Where it is alleged that an employer is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was at least a motivating or substantial factor in the employer's decision. *Southfield; MESPA v Evart Pub Schs,* 125 Mich App 71, 74 (1983). Once a prima facie case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *Evart; Wright Line, a Division of Wright Line, Inc.*, 662 F2d 899 (CA 1, 1981).

Charging Party has established the first two elements of a prima face case of unlawful discrimination – protected activity by the members of the security officers' unit and employer knowledge of that activity. In July 2007, the security officers rejected a tentative wage concession agreement at the same time that other bargaining units accepted similar agreements. During the next three years, the relationship between Respondent and the unit of security officer was contentious. During this period, Charging Party filed numerous unfair labor practice charges, as well as grievances and information requests, on behalf of the employees in this unit.

However, Charging Party must do more than show that it had been vigorously defending the interests of the employees when Respondent decided to subcontract their work. As noted above, Charging Party must demonstrate that its protected conduct was at least a motivating factor in Respondent's decision to subcontract. To meet this burden, it must demonstrate, by direct or circumstantial evidence or a combination thereof, that Respondent had anti-union animus. As I noted in my April 30, 2010 Decision and Recommended Order in Case Nos. UC09 C-009, R09 C-047, and C09 G-103, suspicious timing, by itself, is not sufficient to show unlawful intent.

In support of its argument that Respondent wished to get rid of a troublesome union, Charging Party cites John Bell's August 14, 2009 email to Wayne County Prosecutor Worthy in

which he urges her to approve Respondent's request to make CSPOs private security police officers because Respondent had moved the CSPOs into another unit and Charging Party was "attempting to get them back." When Bell sent this email, Respondent was preparing for a hearing at which Respondent would be expected to justify its decision to place the CSPOs in the POLC unit and Charging Party was attempting to get the CSPOs put back in its unit of security officers. I find no significance in the fact that Bell sought Worthy's help to avoid this outcome. I also disagree with Charging Party that Respondent's decision to tell the security officers that they were terminated, rather than laid off, was evidence that it wanted to be permanently rid of them. It was not unreasonable for Respondent to consider the officers terminated, since Respondent did not expect to go back to providing security services with its own employees. Moreover, as indicated in the grievances Charging Party filed after the terminations, the parties' collective bargaining agreement imposed certain obligations on Respondent when it laid off employees. Respondent avoided these obligations by terminating the security officers rather than laying them off.

Charging Party's principal argument is that Respondent's anti-union animus is established by its history of unfair labor practices committed against this unit. As noted above, Charging Party repeatedly sought to have the unfair labor practice charges it filed in 2007 and after heard together, to more clearly demonstrate Respondent's hostility toward this bargaining unit. All of these charges, except for the instant charge and Case No. C10 F-129, have now been decided or otherwise resolved. Respondent has been found to have committed, or has admitted committing, several unfair labor practices. In Case No. C07 H-252, Respondent was found to have violated its duty to bargain in good faith by repudiating an agreement to restore the security officers' former wage rate after expiration of a wage concession agreement on June 30, 2007. In Case No. C09 G-103, Respondent was found to have violated its duty to provide Charging Party with information about the new classification, CSPO, performing the work of its unit. In addition, in a settlement agreement entered into on June 6, 2010 in Case Nos. C07 I-207 and C07 I-228, Respondent admitted that it had failed to timely provide Charging Party with some information that Respondent was required by PERA to provide, and also admitted that it had failed to comply with the grievance procedure as required by PERA. All Charging Party's other unfair labor practice allegations have either been dismissed or have been abandoned.

In a discrimination case, the commission of other unfair labor practices by an employer may be evidence of the employer's anti-union motive. However, violations of the duty to bargain do not always support a finding of anti-union animus. For example, the refusal of an employer to provide a union with information is a per se violation of the employer's duty to bargain without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co*, 220 NLRB 189, 191 (1975). Unilateral changes in terms and conditions of employment are also "per se" violations. *NLRB v. Katz*, 369 US 736 (1962). Commission of these types of unfair labor practices, therefore, may not indicate anti-union animus. *The Denver Post Corp*, 328 NLRB 118, 121 (1999); *Mt Clemens General Hospital and RN Staff Council*, 344 NLRB 450, 466 (2005).

As the record here clearly indicates, the years between 2007 and 2010 were a period of severe economic stress for Respondent. The Commission has found, or Respondent has admitted, that during this period Respondent failed to provide Charging Party with information to which it was entitled under PERA. The Commission has also found, or Respondent has admitted, that

during this period Respondent violated PERA by failing to comply with clear and unambiguous agreements it had entered into with Charging Party covering the security officers' unit. I find, however, these unfair labor practices do not establish that Respondent had anti-union animus; i.e. that it desired to rid itself of either the security officers or its obligation to deal with Charging Party because they had exercised rights protected by the Act. I conclude that Charging Party has not met its burden of showing that the security officers' exercise of their Section 9 rights or Charging Party's filing of multiple unfair labor practice charges were even motivating factors in Respondent's decision to subcontract their work. I recommend, therefore, that the Commission dismiss the allegation that Respondent violated §§10(1) (a), (c) and (d) of PERA, as well as those alleging violations of §10(1)(e), and that it 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: _____