STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

ROCHESTER COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C10 H-190

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25
AND ITS AFFILIATED LOCAL 202,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lusk and Albertson, P.L.C., by William G. Albertson, for Respondent

Miller Cohen, P.L.C., by Robert A. Fetter and Bruce A. Miller, for Charging Party

DECISION AND ORDER

On July 21, 2011, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Rochester Community Schools (Employer), did not violate § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), and recommended dismissal of the charge. The ALJ found that Respondent did not commit an unfair labor practice by refusing the demand of Charging Party, American Federation of State, County and Municipal Employees Council 25, and its affiliated Local 202, that the Employer bargain over the procedure for submitting bids when Respondent made a decision to subcontract its hall monitor services. Furthermore, Respondent did not violate PERA by refusing to meet with Charging Party in response to its demand to bargain over the terms and conditions of the subcontracting or by executing the contract with the third party after receiving that demand. Lastly, the ALJ found that Respondent had no obligation under PERA to recognize Charging Party as the bargaining representative for the individuals employed by the subcontractor to provide services as hall monitors, because there was no joint employer relationship and Respondent is not the employer of those individuals. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

On September 9, 2011, after requesting and receiving an extension of time, Charging Party filed exceptions to the ALJ's Decision and Recommended Order. After also being granted

an extension of time, Respondent filed its Brief in Support of the ALJ's Decision and Recommender Order on October 17, 2011.

In its exceptions, Charging Party objects to the ALJ's finding that Respondent had no obligation to bargain over the terms of its request for proposals for a contract to provide hall monitor services or the issues contained in the request. Charging Party argues that, contrary to the ALJ's findings, Respondent violated PERA when it refused Charging Party's demand to bargain over the procedure in letting bids and by refusing to meet with Charging Party to bargain over the terms and conditions of the subcontracting of bargaining unit positions. Lastly, Charging Party disagrees with the ALJ's finding that Respondent had no obligation under PERA to recognize Charging Party as the bargaining representative for the employees of the subcontractor.

We have considered each of the arguments made in Charging Party's exceptions, and find them to be without merit.

Factual Summary:

We adopt the ALJ's findings of fact and repeat them here only as necessary. Charging Party represents a bargaining unit that includes Respondent's hall monitors, who provide security at three high schools. On July 1, 2010, Respondent issued a request for proposals (RFP) for the contracting of "professional hall monitoring services." The RFP explained what was to be addressed in the proposals and included a form contract. The RFP permitted bidders to request clarification of information contained in the RFP and stated that responses to any request for clarification would be provided to all parties who received or requested a copy of the RFP. The RFP also provided that requests for exceptions to its terms and conditions or any other special consideration were to be submitted with an explanation of the reasons for the request. Charging Party did not submit a bid in response to the RFP.

Respondent declined Charging Party's request that it bargain over the decision to subcontract and the procedures for bidding. On July 22, 2010, bids were opened, on July 28, Respondent interviewed the finalists, and on August 2, 2010, the unfair labor practice charge in this case was filed by Charging Party alleging that Respondent had violated PERA by refusing to bargain in good faith regarding the bidding process and by implementing bidding procedures without bargaining to impasse. On August 9, 2010, Respondent's Board voted to accept a contract bid for hall monitoring services submitted by Burr Security.

The contract between Respondent and Burr Security took effect on September 1, 2010. Employees providing hall monitor services are paid by Burr Security and Burr maintains their personnel and time records. These employees receive health insurance under Burr's group plan and are subject both to rules and policies promulgated by Burr Security as well as to policies promulgated by Respondent for employees on its premises. Burr Security assigns employees to shifts and locations after consulting with Respondent regarding its needs. The work of Burr's hall monitors is directed by Burr supervisors, as well as Respondent's school principals and other administrators. Only Burr has the right to discipline these employees. Burr conducts regular evaluations of the hall monitors and applies Burr Security policies regarding any pay raises.

Discussion and Conclusions of Law:

Charging Party claims that Respondent had an obligation to bargain over the terms of its RFP for hall monitor services. Charging Party argues that Respondent violated PERA when it refused to bargain over the procedure for letting bids and by refusing to meet with Charging Party to bargain over the terms and conditions of the subcontracting of bargaining unit positions. We addressed Charging Party's arguments in *Lakeview Cmty Sch*, 25 MPER 37 (2011).

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, 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:
>
> . . .
>
> (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(3)(f). The prohibition on bargaining over noninstructional support services is now modified 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.

Here, as in *Lakeview*, Charging Party contends 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. It argues 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. As we observed in *Lakeview*, "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." Thus, we determined, "If the procedures for bidding are a mandatory subject of bargaining, the prohibition against bargaining the procedures for obtaining a contract is nullified." Finally, we held in *Lakeview*:

> 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[(3)](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 Party contends that Respondent's RFP was designed for response by third party contractors and that Charging Party, being a labor organization, is not capable of bidding on an equal basis with third party contractors. As we noted in *Lakeview*:

> 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.

As in *Lakeview*, Charging Party argues that Respondent has the burden of proving that Charging Party was given an equal opportunity to bid for noninstructional support services. As in *Lakeview*, we hold that because Charging Party seeks to avoid the bargaining prohibitions in the amendments to §15 it is Charging Party's burden to prove facts that exempt it from those prohibitions.

Charging Party did not bid on the work being subcontracted, even though Respondent's RFP included specific provision for the granting of exceptions. We will not presume that Respondent would have denied a reasonable request for an exception. "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." *Lakeview Cmty Sch.*

Charging Party also alleges that Respondent has unlawfully refused to recognize it as the bargaining representative for the employees of Burr Security, claiming that Respondent is a joint employer of these employees.

Section 1(e) of PERA states:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the

> political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission or board, or in any other branch of the public service, subject to the following exceptions:
>
> (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state *is not an employee of the state or that political subdivision, and is not a public employee*. [Emphasis added.]

Section 1(e)(i) of PERA excludes from PERA's coverage workers hired by private entities having contracts with the state or political subdivisions of the state. *City of Lansing*, 2001 MERC Lab Op 403, 407-408. Therefore, as explained in the ALJ's Decision and Recommended Order, Respondent had no obligation under PERA to recognize Charging Party as the bargaining representative of Burr Security employees.

We hold that Respondent did not violate PERA by refusing to bargain with Charging Party over the procedures for bidding a contract for hall monitor services, by refusing to bargain over the decision or the impact of the decision to enter into a contract with a third party for these services, or by refusing to recognize Charging Party as the bargaining representative for individuals providing the hall monitor services after September 1, 2010. The ALJ's Decision and Recommended Order is affirmed.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

ROCHESTER COMMUNITY SCHOOLS,
Public Employer-Respondent,

Case No. C10 H-190

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 25 AND ITS AFFILIATED LOCAL 202,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Lusk & Albertson, P.L.C., by William G. Albertson, for Respondent

Miller Cohen, P.L.C., by Robert A. Fetter and Bruce A. Miller

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard in Detroit, Michigan on November 10, 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 post-hearing briefs filed by the parties on December 13, 2010, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Background:

The American Federation of State, County and Municipal Employees (AFSCME) Council 25, and its affiliated Local 202, filed this charge against the Rochester Community Schools on August 2, 2010. Charging Party represents a bargaining unit of Respondent's paraeducators and hall monitors. On or about July 1, 2010, Respondent issued a request for proposals (RFP) for a contract to provide hall monitor services. Effective September 1, 2010, it entered into a contract with a private company, D.M. Burr Security Services, Inc. (hereinafter Burr Security or Burr) for these services.

Section 15 of PERA, MCL 423.215, requires a public employer to bargain collectively with the representatives of its employees with respect to the employees' wages, hours and other terms and conditions of employment. In 1994 PA 112 (Act 112), the Legislature amended

Section 15 to make the decision of whether or not to contract with a third party for one or more noninstructional support services, the procedures for obtaining the contract, the identity of the third party, and the impact of the contract on individual employees or the bargaining unit prohibited subjects of bargaining for public school employers and the bargaining representatives of their employees. However, in 2009 the Legislature added new language to Sections 15(3)(f) and 15(4) of PERA. The amendments, 2009 PA 210, opened up questions about the obligations and rights of public school employers and unions under PERA when an employer subcontracts noninstructional support services it has been providing with its own employees to a third party. The allegations in this charge are largely based on this new language.

The matters which are prohibited subjects of bargaining are listed in Section 15(3). Section 15(3)(f) now reads (new language in italics):

> 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.*

Charging Party first alleges that Respondent violated its duty to bargain under Section 15 of PERA, as amended, by refusing Charging Party's demand to bargain over the procedures for bidding the hall monitor contract. Charging Party asserts that under Section 15(3) (f), as amended, "the procedures for the bargaining unit bidding on work on an equal basis" are no longer a prohibited subjects of bargaining. It also asserts that in order for a bargaining unit to be able to bid on work on an equal basis with bidders who are contractors, the unit must have the right to bargain over how it is to go about bidding and what terms or conditions of the RFP will apply to it.

Charging Party also asserts that because Respondent did not give it the opportunity to bid on an equal basis, it had a duty to bargain with it over the decision to subcontract the work and the impact of this decision on employees. Therefore, it argues, Respondent violated its duty to bargain by failing to give Charging Party the opportunity to bargain over these topics before it decided to outsource the work.

Finally, Charging Party asserts that Respondent is a joint employer, with Burr Security, of the employees currently providing it with hall monitoring services.[1] It alleges that Respondent has a duty under Section 15 of PERA to recognize Charging Party as the bargaining representative of these hall monitors in accord with the recognition clause of the parties' collective bargaining agreement and that it violated this duty by refusing Charging Party's demand for recognition.

[1] The charge originally alleged that Respondent was either a joint or the sole employer of the employees providing the services. However, in its post-hearing brief Charging Party argues only that Respondent and Burr are joint employers.

Findings of Fact:

Prior to subcontracting their services, Respondent employed a total of nine hall monitors. The hall monitors were assigned to provide security at Respondent's three high schools. Respondent first debated outsourcing the hall monitor services as part of a deficit reduction plan during the 2008-2009 school year. The issue came up again during budget discussions in the winter of the 2009-2010 school year. The focus of these discussions was the money that Respondent might save on fringe benefit costs by outsourcing the work. At some point during these discussions, it was suggested that outsourcing the hall monitor services might save $148,000 per year.

In mid-May 2010, Charging Party Staff Representative Gary Shimer, Charging Party's chief negotiator, heard rumors that Respondent was going to issue an RFP for hall monitor services. In late May, William Mull, Respondent's assistant superintendent for business services and Respondent's representative in negotiations with the Charging Party, telephoned Shimer to tell him that Mull wanted to set up dates to begin negotiations on wages and benefits pursuant to reopener provisions in the parties' collective bargaining agreement. During their conversation, Shimer asked Mull whether an RFP was going to go out for the hall monitor positions and if, so, whether he could have a copy. Mull told him that the RFP was not prepared and that Respondent's School Board had not yet authorized the RFP to go out. He said, however, that a RFP would likely be issued if the Board adopted the administration's budget recommendations. According to Mull, Shimer told him that he believed that Charging Party had the right to bargain over the "language of the RFP," and that he would be making a demand to bargain if "things were to progress." Mull said that he disagreed that Respondent had a duty to bargain over this topic, but told Shimer that he would keep him advised of developments concerning the RFP.

On June 10, Shimer sent Mull a letter stating that Charging Party understood that Respondent either had or was about to issue an RFP without first allowing the union to bargain over "the procedures for obtaining the contract which will give Local 202 Paraeducators an opportunity to bid on an equal basis with any other vendor." The letter stated:

> The Amendment to [PERA] gives our bargaining unit important new rights to protect their jobs either through the normal process or by bidding those jobs. We cannot fully take advantage of these rights unless we are involved from the beginning. Accordingly, we request that the process be placed on hold, revoke the RFP and set up a meeting with us so that we can negotiate the procedure to be followed in letting bids.

On June 17, Mull emailed Shimer a copy of an opinion of the Michigan Attorney General (AG) issued on June 15, 2010 interpreting the language added to PERA by 2009 PA 210. The AG's opinion, OAG 2009-2010, concluded that a union has no right under these amendments to bargain over bidding procedures. Mull followed with a letter, dated June 22, advising Shimer that Respondent had not yet issued the RFP, but refusing his demand to bargain over bidding procedures on the grounds that the procedures for obtaining a contract for noninstructional support services were prohibited subjects of bargaining under Section 15(3)(f) of PERA.

On July 1, Respondent issued a RFP for "professional hall monitoring services." It sent Shimer an email notifying him of the RFP and directing him to Respondent's website to obtain the RFP and attached documents. The RFP stated that proposals were to be submitted on or before 3 p.m. on July 22, 2010.

The RFP consisted of fourteen pages with a form contract and other documents attached. Section 1.5 of the RFP set out what was to be included along with the proposal. This included, but was not limited to, references from other public school district or educational institutions with which the contractor had contracted to provide security or other staffing services; evidence that the contractor was able to provide the insurance coverage required by the contract; documentation of sufficient financial resources and capacity to carry out the requirements of the contract; an audited financial report for each of the last three years; and an affidavit disclosing any familial relationship between the contractor and its employees and Respondent's superintendent or members of its school board. The form contract contained many provisions typically found in a well-drafted contract for services. It contained hold harmless and indemnification clauses. It required the contractor to provide workers' compensation and specific levels of liability insurance. It gave Respondent the right to review the pre-employment and other records of prospective or actual employees of the contractor assigned to work under Respondent's contract, and the right to demand that any employee be removed from working under the contract, while also providing that the contractor was free to hire only those employees which it deemed best qualified. It required the contractor to supply Respondent with a list of all employees assigned to each high school and their assigned areas of responsibility and to keep this list current, while giving the contractor the responsibility for making assignments and providing substitutes for absent employees. Under the heading "service specifications," the form contract detailed Respondent's expectations for the qualifications and conduct of employees assigned to work under the contract. The contract also required the contractor to assume certain responsibilities for ensuring that individuals with criminal histories were not assigned to work on Respondent's premises in contravention of the Michigan School Code, including the responsibility for paying for fingerprinting and criminal background checks for new employees.

The RFP stated that Respondent was seeking the equivalent of nine full-time equivalent employees (FTEs), with three FTEs at each high school, and provided the dates and hours for which it required services. Prospective contractors were given a "proposal pricing form" which required the contractor to provide the following: (1) annual prices for management and non-management services, including profit and all costs except health insurance; (2) number of total man hours provided per year under quoted pricing; (3) number of total FTEs per year under quoted pricing; (3) amount pricing would be increased or decreased if Respondent changed the number of FTEs; (4) hourly rates to be charged for additional work outside the hours of work set forth in the RFP; and (5) detailed information about the heath benefits, if any, that the contractor intended to provide to the employees providing services under the contract. The RFP specifically provided that Respondent would pay, in addition to the other costs of the contract, the employer's share of those health benefits actually received by the employees providing services under the contract. It stated, however, that the contractor's plan could not require the employer to pay more than 80% of the costs of the plan, i.e. the employer/employee cost split had to be 80/20 or lower. The contract also included deductions and financial incentives for the contractor. For

example, the contractor was to be charged $50 each time it assigned an employee to work on Respondent's premises who had not been preapproved to work there, and $300 for each shift left uncovered by either a regularly assigned employee or a substitute.

The RFP permitted contractors to request clarification of information contained in the RFP by sending an email to an address set forth in the RFP. The RFP stated that all communication with contractors, including requests for clarification, would be by email, and that the responses to any request for clarification would be provided to all parties who received or requested a copy of the RFP. The RFP also contained the following provision:

> Any exceptions to the terms and condition contained in this RFP, the form of Contract contained in this RFP or any other special consideration of conditions requested or required by the Contractor must be specifically enumerated by the Contractor and be submitted as part of its Proposal, together with an explanation as to the reason such terms and conditions of the RFP or form of Contract cannot be met. The selected Contractor shall be required and expected to meet the specifications and requirements as set forth in the RFP and the form of Contract in their entirety, except to the extent exceptions are expressly set forth in the Contractor's Proposal and those exceptions are expressly accepted by the School District.

Finally, the RFP included the following language, in bold and underlined:

> Moreover, each Contractor shall understand that, in accordance with applicable law, the current bargaining unit which currently provides hall monitor services for the School District has the opportunity to bid on the Services on an equal basis.

On July 13, Respondent and Charging Party held their first bargaining session on the wage and benefit reopener. They began this meeting with a discussion of the hall monitor RFP. Shimer pointed out some items in the RFP, including the requirement that the bidder provide worker's compensation and liability insurance, and asked if Respondent "would hold the union to those things." Mull said that it would not, although, according to Mull, he specifically said that Respondent would not require these things from Charging Party if it submitted a bid. Shimer also asked Mull how Charging Party could go about bidding. Mull said he did not know, that he had never heard of a labor organization submitting a bid in response to a school district's RFP, and that he was not sure how Charging Party could actually bid. According to Shimer, he and Mull agreed that Charging Party's last proposal at the bargaining table would constitute its "bid," and that this proposal would be presented to the Board. According to Mull, he told Shimer that if Charging Party chose to submit a bid, Respondent would be glad to read and evaluate it. However, Mull also testified that he agreed with Shimer that bargaining seemed to be the only obvious method for Charging Party to submit a "bid," and that he envisioned Charging Party presenting a proposal at the bargaining table which would then be compared to the bids submitted by the contractors. Mull did not tell Shimer that the only way Charging Party could receive consideration of its proposal would be to submit a bid in response to the RFP.

On July 21, the day before proposals were due in response to the RFP, Charging Party and Respondent had another meeting scheduled to discuss the wage reopener. According to Mull, he reminded Shimer at the meeting that bids were due the next day and asked Shimer if Charging Party would be submitting a bid. According to Mull, Shimer said that he was not sure. Shimer denied that this exchange took place. During this meeting, Charging Party's bargaining team presented what Shimer described as a "supposal," or informal proposal, to save the hall monitors' jobs. It suggested that Respondent fill the full-time hall monitor vacancies created by several upcoming retirements with half-time employees. As half-time employees, these individuals would not be entitled to health insurance under the collective bargaining agreement. According to Shimer, Mull said that he would take this proposal to the Board, but that he had to receive the bids first to get some hard figures on the savings Respondent might realize from outsourcing. According to Mull, he merely said that he would see what the bids looked like and if they got one from Charging Party, and would reconvene the meeting after the bids were received. The parties then spent some time discussing the bumping rights of individual hall monitors if their jobs were eliminated.

Charging Party did not submit a bid in response to the RFP. According to Shimer, Charging Party's bargaining team decided that it would wait until all the outside bids were received and then try to come up with a proposal for the Board that would match or come close to the cost savings reflected in the bids.

On July 22, the bids were opened. On July 28, as per the RFP, Respondent interviewed the finalists. Sometime between July 28 and August 3, 2010, Mull decided to recommend to the Board that it contract with Burr Security.

Burr Security is a subsidiary of the D.M. Burr Group, whose offices are located in Flint. The Burr Security subsidiary provides security and investigation services. Other subsidiaries of the D.M. Burr Group offer facilities management and disaster restoration services. Burr Security is licensed as a security company by the State of Michigan. In the fall of 2010, about 280 employees of the D.M. Burr Group were providing services to various public school districts, and the Burr Security subsidiary provided security services to ten or eleven school districts. It also had private sector clients.

After Burr Security submitted its proposal, Mull suggested that it raise its bid price in order to pay its employees a somewhat higher hourly wage and provide for better employee retention. Mull also decided to expand the hours of service to include evenings, and therefore asked for more FTEs. The proposal, as amended at Respondent's request, provided Respondent with savings of only about $30,000 per year over its costs from the previous year. Mull testified, however, that he concluded that Burr had a better operational model than Respondent and would provide greater efficiencies in the future.

The unfair labor practice charge in this case was filed on August 2, 2010. On August 3, Respondent and Charging Party had scheduled another meeting to discuss the wage reopener. Mull began the meeting by stating that he was planning to recommend to the Board at its next meeting that it contract with Burr Security. According to Shimer, Mull said that it was not as much about the money anymore, and that Respondent wanted to go in another direction.

According to Mull, he told Charging Party that Burr stood out from the other vendors and that he perceived them to be a "value-added vendor." Mull told Shimer that he was still willing to listen to Charging Party's proposals, but Shimer interpreted Mull's statement as an indication that he had made up his mind to proceed with the contract with Burr.

After the August 3 meeting concluded, Shimer sent Mull a letter formally demanding that Respondent bargain with Charging Party over "all terms and conditions of employment as related to contracting out the [hall monitor] positions," and that it "cease and desist from any further action related to outsourcing," including voting to approve or awarding a contract, until the parties had had a chance to negotiate these terms and conditions of employment.

At a meeting of Respondent's Board held on August 9, Mull recommended to the Board that it enter into the contract with Burr Security. Shimer and several hall monitors and other citizens spoke in opposition to the contract at the meeting. However, the Board voted to accept Mull's recommendation. According to the minutes of the Board meeting, the Board based its decision, in part, on the fact that the contract with Burr Security provided more hours of coverage for less money.

On August 17, Mull sent Shimer a letter reiterating that Respondent did not believe that it was under a legal obligation to negotiate the contracting out of noninstructional support services, and refusing Charging Party's demand that refrain from entering into a contract. The letter also stated:

> As you are aware, Rochester Community Schools and Local 202 have negotiated regarding cost reductions connected to the hall monitors but have been unable to mutually reach numbers that are competitive with the bids of the outside contractors and Local 202 has not provided any indication that it will be competitive in this regard. Furthermore, as I have made known to you, the model under which the successful bidder operates is one that the school district believes will provide additional efficiencies and high quality services.

The contract between Respondent and Burr Security took effect on September 1, 2010. Burr Security advertised for, interviewed, and hired employees to work under the contract and paid for their criminal background checks. The results of the background checks were sent directly to Respondent, and Respondent approved them to work on its premises. One of the employees regularly assigned to work for Respondent was a current Burr Security employee; the others were new hires. The employees regularly assigned to work for Respondent included one supervisory employee. Respondent and Burr Security together agreed on the uniform the employees were to wear and the equipment they were to carry. Burr purchased the uniforms and the equipment.

The employees providing hall monitor services receive paychecks from Burr Security and Burr maintains their personnel and time records. The employees receive health insurance from Burr's insurance company under Burr's group plan. They do not receive retirement benefits. They are subject both to employee rules and policies promulgated by Burr Security for its employees and to policies promulgated by Respondent for employees on its premises. Burr

Security has a policy that security employees are not to enter a restroom without another security employee present; at the beginning of the contract, at Respondent's request, Burr agreed to modify its policy for employees working under the contract so that the hall monitors could perform regular restroom checks.

Burr Security assigns employees by shift and location after consulting with Respondent's administrators regarding their needs. Burr is required to keep Respondent advised of any change in these assignments, so that Respondent's administrators know every day which employee is working at which location. The employees take direction both from the Burr supervisor and from Respondent's principals and other administrators. Only Burr has the right to discipline the employees, although Respondent has the right to demand that an employee be removed from working under its contract and Respondent's administrators are actively involved in any discipline issued to employees. Burr conducts regular evaluations of the employees and the employees are subject to Burr's policies regarding pay raises.

On September 3, Shimer wrote Mull asserting that under the contract between Respondent and Burr Security, Respondent remained the employer of the employees performing the work previously completed by the hall monitors. Shimer demanded that Respondent recognize Charging Party as their bargaining representative under the recognition clause of the collective bargaining agreement. On September 8, Charging Party filed a grievance which made this same argument. Mull replied on September 9, stating that the individuals who were performing hall monitor security services were employees of Burr and not Respondent, and denying Shimer's demand for recognition. On September 17, the parties agreed to put the grievance in abeyance.

Discussion and Conclusions of Law:

Alleged Duty to Bargain over "Bidding Procedures,"

On October 1, 2010, after the instant charge was filed but before the hearing in this case was held, MAHS Administrative Law Judge David Peltz held oral argument on behalf of the Commission and issued a bench decision dismissing the charges in two cases, *Lakeview Cmty Schs,* Case No. C10 C-059, and *Mt Pleasant Pub Schs,* Case No. C10 E-104. These two cases, like the instant charge, involved the 2009 amendments to Section 15(3)(f) of PERA. The parties in the instant case were aware of ALJ Peltz's decision and both parties discussed it in their post-hearing briefs. On May 11, 2011, the Commission affirmed the ALJ's decision and dismissed both charges. *Lakeview Cmty Schs,* 24 MPER _____ (2011).[2]

One of the issues specifically addressed in *Lakeview* was whether under Section 15(3)(f) of PERA, as amended, a public school employer has an obligation to bargain over the procedures for bidding or terms of the bidding process before it issues an RFP for a contract for noninstructional support services. The Commission, like the Attorney General in his opinion interpreting the 2009 amendments to PERA, found that it has no such obligation. The Commission held that "procedures for bidding" are the same thing as "procedures for obtaining the contract" as set out in Section 15(3)(f). It also concluded that the Legislature did not intend to

[2] An appeal of the Commission's decision in *Lakeview* has been filed and is pending before the Court of Appeals.

remove the procedures for obtaining the contract from the list of topics made prohibited subjects when it added the phrase "other than the bidding described in this subsection" to Section 15(3)(f). Rather, as ALJ Peltz discussed in his decision, this phrase was merely intended to make it explicit that the bidding referenced in the last sentence of Section 15(3)(f) is not a prohibited subject, i.e. that a union is not prohibited from becoming involved in the "procedures" for subcontracting by submitting a bid.

Section 15(3)(f), as amended, states that the matters set out that subsection are not prohibited subjects of bargaining unless the union is given the opportunity to bid on the contract "on an equal basis as other bidders" Both ALJ Peltz and the Attorney General noted that if a bargaining unit was given the opportunity to craft the RFP through bargaining so that it met the unit's objectives, it would gain an advantage over other bidders. They concluded that the Legislature could not have intended to allow bargaining over bidding procedures because this would have given a bargaining unit a greater than equal opportunity to participate in the bidding process. ALJ Peltz also noted that requiring an employer to bargain with the unit over the terms of the RFP might result in the employer issuing RFPs seeking bids from unqualified and/or unreliable third party contractors. In answer to these points, Charging Party argues that it did not seek to bargain the terms of the RFP applicable to contractors, but only to bargain how these terms applied to the bargaining unit. That is, according to Charging Party, it was not seeking to affect the terms and conditions that a third party contractor would have to meet in order to secure the contract, but only the terms and conditions that the unit would have to meet.

In its June 10, 2010 letter, Charging Party demanded to bargain over the "procedure to be followed in letting bids." It did not specifically limit its demand to how the terms of the RFP would apply to the unit. However, I conclude that even if Charging Party had demanded to bargain over only this issue, Respondent had no obligation to bargain over how the terms of the RFP applied to the bargaining unit because, as "a procedure for obtaining the contract," this also was a prohibited subject of bargaining under Section 15(3)(f). As ALJ Peltz discussed in his decision in *Lakeview*, the subcontracting of bargaining unit work and its impact on employees have long been held, at least in some contexts, to be mandatory subjects of bargaining under PERA. It is settled law that once a subject is classified as a mandatory subject of bargaining under PERA, the parties are required to bargain concerning the subject if it is proposed by either party, and neither party may take unilateral action on the subject absent an impasse in negotiations. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 54-55 (1974). The Legislature was clearly aware of this law when it adopted the Act 112 amendments to PERA freeing public school employers from any duty to bargain with their unions over issues related to the subcontracting of noninstructional support services. The most recent amendments to Section 15(3)(f) may not be the quintessence of legislative clarity. However, I find nothing in the language of these amendments to suggest that the Legislature intended to permit the Commission or Courts to impose on a public school employer the duty to bargain, as that duty is defined in the law, over any of the issues listed in that section as long it gives the bargaining unit an equal opportunity to bid on the contract.

Although Respondent had no duty to bargain over what terms of the RFP applied to the bargaining unit, this did not mean that the parties were prohibited from discussing this issue, as in fact they did in an informal way. See discussion in *Michigan State AFL-CIO v Michigan*

Employment Relations Com'n, 212 Mich App 472, 486-487(1995), *aff'd* 453 Mich 362 (1996). In this case, the RFP also allowed any prospective contractor to request clarification of the information in the RFP. Therefore, Charging Party could have utilized this mechanism to formally request information regarding what terms of the RFP applied to the unit before it submitted its bid. I conclude that Respondent did not violate PERA by refusing Charging Party's June 10, 2010 demand that it bargain over the procedure to be followed in letting bids.

Effect of Charging Party's Failure to Submit a Bid

Like the union in *Lakeview* and its companion case, *Mt. Pleasant Schs*, Charging Party did not submit a bid or proposal in response to the RFP even though, as was the case in *Mt Pleasant*, the RFP permitted a bidder to request exceptions to its requirements. In its *Lakeview* decision, the Commission held that because the unions in those cases did not submit bids, they could not complain that they were not given an equal opportunity to bid. I find that because Charging Party did not submit a bid in response to the RFP, it cannot now assert that it was denied the opportunity to bid on an equal basis as other bidders. I conclude, therefore, that Respondent did not violate PERA by refusing to meet with Charging Party in response to its August 3, 2010 demand to bargain over the "terms and conditions" of the subcontracting or by executing the contract with Burr Security after receiving that demand.

Charging Party's Demand for Recognition

Charging Party also alleges that Respondent has unlawfully refused to recognize it as the bargaining representative for the employees of Burr Security now performing the hall monitor work. According to Charging Party, because Respondent is a joint employer with Burr Security of these employees, the parties' collective bargaining agreement requires Respondent to recognize Charging Party as the representative of its hall monitors.

PERA does not contain a definition of a "public employer." However, the general characteristics of employers under PERA are as follows: (1) that they select and engage the employees; (2) that they pay the wages; (3) that they have the power of dismissal; and (4) that they have power and control over the employee's conduct. *Saginaw Stage Employees Local 35, IATSE v City of Saginaw*, 150 Mich App 132, 134 (1986); *Wayne Co Civil Service Comm v Wayne Co Bd of Supervisors*, 22 Mich App 287, 295 (1970).

PERA does define a "public employee." Section 1(e) reads as follows:

> "Public employee" means a person holding a position by appointment or employment in the government of this state, in the government of 1 or more of the political subdivisions of this state, in the public school service, in a public or special district, in the service of an authority, commission or board, or in any other branch of the public service, subject to the following exceptions:
>
> (i) Beginning March 31, 1997, a person employed by a private organization or entity that provides services under a time-limited contract with the state or a political subdivision of the state *is not an*

> *employee of the state or that political subdivision,* and is not a public employee. [Emphasis added.]

Subsection (i) was added to PERA by 1996 PA 543. As discussed in *City of Lansing,* 2001 MERC Lab Op 403, 407-408, the legislative history of this amendment indicates that one of its purposes was to exclude from PERA workers hired by private entities having contracts with the State. Beginning with *Louisiana Homes and State of Michigan, Department of Mental Health,* 1989 MERC Lab Op 51, the Commission held that the Michigan Department of Mental Health (DMH) and private entities who contracted with the DMH, either directly or indirectly, to operate group homes for persons with mental disabilities were joint employers of the employees working at these homes. This joint employer finding was based on the amount of control exercised by the DMH over the employees under its contracts with the private group home operators. In *Louisiana* and subsequent cases, the Commission directed elections in units consisting of employees working in homes operated by the individual group home provider, but its order named both provider and the DMH as employers. On appeal of the Commission's order in *Louisiana,* the Court affirmed both the Commission's finding of a joint employer relationship between Louisiana and the DMH and its assertion of jurisdiction over both entities. *Michigan Council 25, AFSCME v Louisiana Homes, Inc,* 192 Mich App 187 (1991) *aff'd AFSCME v Louisiana Homes,* 192 Mich App 187 (1991), *appeal denied,* 440 Mich 879 (1992), *vacated and remanded* 441 Mich 883 (1992), *reaff'd on remand,* 203 Mich App 213 (1994). However, the Court of Appeals subsequently vacated Commission orders involving the DMH and other group home operators on the grounds that, due to a change in NLRB law, the Commission's jurisdiction over the private group home providers was now arguably preempted by the National Labor Relations Act (NLRA), 29 USC 150 et seq. *AFSCME v Department of Mental Health,* 215 Mich App 1 (1996).

The legislative analysis for 1996 PA 543 stressed the need to prevent the State from being drawn into a collective bargaining relationship with the "thousands of private sector employees who work for contractors doing business with the State." However, the new language also covered persons employed by private entities having contracts with a "political subdivision" of the State. Under Section 1(3)(e), persons employed by a private entity that provides services under a time-limited contract with a political subdivision of the State of Michigan are not, by statute, employees of that political subdivision. Although the Legislature's focus was on the situation created by the group home cases, the problems are essentially the same whether it is the State or a political arm of the State that is found to be a joint employer with a private entity. Section 2 of the NLRA excludes "any State or political subdivision thereof" from the definition of an "employer" under that statute, and excludes from the definition of "employee" any individual employed by any person or entity who is not an "employer" under the NLRA. Moreover the NLRA protects conduct, i.e., striking, which PERA explicitly prohibits. A finding that individuals are employed jointly by a private entity and any political subdivision of the State, including a school district, raises questions about the rights and obligations of these individuals under collective bargaining statutes and of the Commission's jurisdiction to order a political subdivision of the State to bargain over the terms and conditions of employment of individuals employed jointly by the political subdivision and an employer subject to the NLRA. I find that the Legislature put these questions to rest for employees of private contractors providing services to the state or its political subdivisions by stating, in Section 1(e)(i) that these

employees "are not" employees of the state or political subdivision. That is, individuals cannot, under Section 1(e) (i), be employed, in the same position and at the same time, by both a private contractor and the State or political subdivision with which it has a contract. By this language, I conclude, the Legislature prohibited the Commission from finding a joint employer relationship based on, as in *Louisiana,* on shared control over the contractor's employees. For that reason, I conclude that Respondent cannot be found to be a joint employer of the Burr Security employees now providing Respondent with hall monitor services, and it is irrelevant whether Respondent and Burr Security share control over these employees.

Section 1(e)(i), I note, applies only to persons "employed by a private organization or entity." It does not prevent the Commission from finding a public entity to be the sole employer of individuals of disputed employment status, or from concluding, if the facts so indicate, that the public employer has entered into a sham subcontract to escape its obligations to bargain. There are no such facts in this case. Burr Security was not created by Respondent and has contractual relationships with other clients. Moreover, Burr Security retains control over some essential aspects of the employment relationship, as Charging Party appears to recognize when it argues that Burr Security and Respondent are joint employers. This includes interviewing and selecting employees, deciding whether to discipline them, and determining whether, if Respondent requests their removal, they are to be discharged or reassigned to another workplace. I find that Respondent is not the employer of the individuals who have been providing it with hall monitor/security services since September 1, 2010. I conclude, therefore, that Respondent had no obligation under PERA to recognize Charging Party as their bargaining representative.

In accord with the findings of fact and conclusions of law above, I find that Respondent did not violate its duty to bargain by refusing Charging Party's demand to bargain over the procedures for bidding a contract for hall monitor services, by refusing its demand to bargain over the decision to enter into a contract with a third party for these services and the impact of this contract on employees, or by refusing to recognize Charging Party as the bargaining representative for the individuals providing the hall monitor services after September 1, 2010. 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: _____