STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

REESE PUBLIC SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C11 I-155

-and-

REESE PROFESSIONAL SUPPORT
PERSONNEL ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Joe D. Mosier, for Respondent

White, Schneider, Young & Chiodini, P.C., by Timothy J. Dlugos and Michael M. Shoudy, for Charging Party

DECISION AND ORDER

On April 3, 2012, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order on Summary Disposition in the above matter finding that Respondent, Reese Public School District, did not violate § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), when it subcontracted the secretarial services previously performed by members of the bargaining unit represented by Charging Party, Reese Professional Support Personnel Association MEA/NEA. Following review of the parties' pleadings and oral argument by the parties, the ALJ found that the secretaries employed by Respondent provided noninstructional support services within the meaning of § 15(3)(f) of PERA. Based on that finding, the ALJ held that Respondent's decision to subcontract secretarial services is a prohibited subject of bargaining, over which Respondent has no duty to bargain, and recommended that the charge be dismissed. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with § 16 of PERA.

On April 26, 2012, Charging Party filed its exceptions to the ALJ's Decision and Recommended Order and a brief in support of its exceptions. On May 4, 2012, Respondent filed its brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, Charging Party contends that the ALJ refused to recognize the distinction between instructional services and instructional support services under PERA § 15(3)(f). Charging Party argues that the ALJ erred by concluding that the duties of the

secretaries cannot be determined to be of an instructional nature. Further, Charging Party disagrees with the ALJ's conclusion that Respondent had no duty to bargain over its decision to subcontract the secretaries' work because he found them to be noninstructional support employees. Charging Party contends that Respondent breached its duty to bargain by subcontracting bargaining unit services without first giving the Union an opportunity to bargain. Charging Party argues that Respondent also repudiated the collective bargaining agreement that specifically provided for the employment of bargaining unit secretaries.

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

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. Charging Party represents a bargaining unit of Reese Public School District employees described in the 2011-2012 collective bargaining agreement between the parties as including: "Building Engineer – Bus Maintenance, day custodian (Leader), day Custodians, secretaries, clerks, paraprofessionals, and employees, but excluding: all administrators, supervisors, teachers of the RPEA, and bus drivers and all other employees." The parties' most recent collective bargaining agreement prior to the filing of the charge in this matter has an effective date of July 1, 2011. Without bargaining with Charging Party over the issue, Respondent decided to obtain secretarial services from a private company and to lay off six bargaining unit secretaries, effective July 8, 2011. The secretaries performed numerous clerical and other tasks including: maintaining and reporting student attendance and enrollment records; ordering and maintaining an inventory of office and classroom supplies; administering first aid to students; proctoring exams; and supervising student detentions and in-school suspensions.

Discussion and Conclusions of Law:

The parties agree that there are no material facts at issue and the legal issue to be resolved is whether the secretaries provide noninstructional support services within the meaning of §15 (3)(f) of PERA. Section 15 (3)(f) provides:

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
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> . . .
>
> (f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; 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.

While both Charging Party and Respondent agree that the secretaries perform support services, they disagree over whether those services are instructional support or noninstructional support. Charging Party makes two arguments with respect to its contention that the secretaries provide instructional support services: 1) that instructional support services consist of services assisting instructional staff; and 2) that instructional support services include services by support staff providing instruction or direction to students.

We first considered the issue of whether certain services were noninstructional support services in two decisions, *Pontiac Sch Dist*, 23 MPER 81 (2010), aff'd sub nom *Pontiac Sch Dist v Pontiac Ed Ass'n*, 295 Mich App 147 (2012) lv den 493 Mich 861(2012) and *Harrison Cmty Sch*, 23 MPER 82 (2010). In both cases, the public school employer subcontracted for the services that had been performed by bargaining unit employees and laid off those employees without first bargaining with the employees' bargaining representative. In both cases, the employers contended that the laid off employees were performing noninstructional support services. In *Pontiac*, the employer asserted that occupational and physical therapists provided noninstructional support services because those employees did not possess teaching certificates. In that case, we concluded that the physical and occupational therapists provided training and instruction that was necessary for the students to be taught by the certificated teachers. We determined that, whether or not these services were support services, they were instructional services and, therefore, did not fall within the group of noninstructional support services subject to § 15(3)(f) of PERA. Our conclusion was affirmed by the Court of Appeals majority. See *Pontiac Sch Dist v Pontiac Ed Ass'n*, 295 Mich App 147 (2012). In *Harrison*, the employer contended that the paraprofessionals provided noninstructional support services as it was undisputed that those employees provided support services. There, we explained that services that are not provided by a teaching professional may nevertheless be instructional services where instructing students is a substantial part of the employee's duties.

In the matter before us, Charging Party relies on our statement in *Harrison* that "these are not services provided by a professional, but are services provided by support employees to assist professionals in performing the duties for which they have been licensed." We found the paraprofessionals in *Harrison* were providing instructional support based on an examination of their duties, which included: "assisting and instructing students in classroom activities (for the teacher aides/special education position); tutoring students, providing individual instruction, and leading group instructional lessons (for the chapter 1 instructional aide/kindergarten position); and assisting and instructing students in the use of the library (for the library aide's position)." While the *Harrison* paraprofessionals performed some incidental clerical duties, we found a substantial and regular part of their duties included providing instruction. Accordingly, we found that the paraprofessionals provided instructional support services. Although the secretaries in this case may occasionally provide oversight for students and respond to infrequent questions from them, that is not a substantial part of their duties. The secretaries' duties are largely administrative and clerical; their duties, for the most part, are noninstructional.

Charging Party states that it is "not claiming that the secretaries provide the professional instructional services; rather, their duties and responsibilities act to support and assist the types of licensed professionals who arguably provide the instructional services." It appears that Charging Party would have us determine whether support services were instructional or noninstructional based on whether the professional staff members who receive secretarial assistance provide instructional or noninstructional services. In this case, the secretaries were laid off because the Employer issued a request for proposal to obtain secretarial services and accepted a proposal from a private contractor to provide those services. Although some of the professional staff who received assistance from the secretaries are instructors, that did not transform the secretarial services into instructional support services. As we explained in *Harrison* and *Pontiac*, the term "noninstructional" modifies "support services." The terms "noninstructional" and "instructional" in this context, describe the kind of support services provided, not the kind of professional who is assisted by the support services. Instructional support services are only those services in which the support services provided are substantially instructional.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, we adopt the Administrative Law Judge's findings of fact and conclusion of law. Accordingly, we find that Respondent did not violate § 10(1)(e) of PERA.

ORDER

The charges in this case are dismissed in their 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:

Case No. C11 I-155

REESE PUBLIC SCHOOL DISTRICT,
Respondent-Public Employer,

-and-

REESE PROFESSIONAL SUPPORT
PERSONNEL ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
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APPEARANCES:

Thrun Law Firm, P.C., by Joe D. Mosier, for Respondent

White, Schneider, Young & Chiodini, P.C., by Michael M. Shoudy and Timothy J. Dlugos, for Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was assigned to David M. Peltz, Administrative Law Judge (ALJ) of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the pleadings and the transcript of the oral argument which was held on March 2, 2012, I make the following findings of fact and conclusions of law.

This case arises from an unfair labor practice charge filed on September 15, 2011 by the Reese Professional Support Personnel Association, MEA/NEA. The charge alleges that the Reese Public School District violated Sections 10(1)(a) and (e) of PERA by privatizing the secretarial services previously performed by members of Charging Party's bargaining unit. On November 7, 2011, the school district filed motions for order to compel, for order to show cause and for summary disposition. The Employer asserts that the work in question constitutes "noninstructional support services" under Section 15(3)(f) of the Act and, therefore, the decision to subcontract or privatize the work was a prohibited subject of bargaining under PERA. Charging Party filed a response to the school district's motions on December 15, 2011.

On March 2, 2012, the parties appeared for oral argument before the undersigned. After considering the extensive arguments made by counsel for each party on the record, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a decision from the bench, finding that Charging Party had failed to state a valid claim under PERA. The substantive portion of my findings of fact and conclusions of law are set forth below:

> In the charge, the Union alleged that the School District had violated PERA by subcontracting out the work of six secretarial employees of the School District. The Union asserted within the charge that the secretarial services at issue were not "non-instructional support services," as that term is used in Section 15(3)(f) of the Act. Rather, the Union asserted that the . . . secretary members performed instructional support services for the District. The Union further asserted that the subcontracting of the secretarial services repudiated . . . contractual language.
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> Specifically referenced [by the Union in the charge] was a Letter of Understanding entered into by the parties on or about May 24th, 2011, which indicates [that] all secretaries would work the 10 working days before the school year begins prior to the first student day, and work the 10 working days after the last student day. The letter further provides that, "The Board of Education may use the 20 pre and post school year days during the months of June, July, and August when the desired work days do not interfere with the employer's schedule of vacation or other prescheduled activities."
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> The School District filed a series of motions essentially characterized for purposes of this decision as a Motion for Summary Disposition on November 7th of 2011, and the Union responded to that Motion on December 15th of 2011. In its response, the Union went through and highlighted the job descriptions for the secretarial employees that are at issue in this case. And I'll accept [those characterizations] for purposes of this case as true and accurate and complete representations of what the secretaries do . . . with a few qualifications which were made on the record today.
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> I'll note in -- for purposes of this bench decision some of the duties that were highlighted within the brief and/or emphasized today by the Charging Party during oral argument. In the document is a job description for the high school secretary which indicates that the secretary supervises office workers, including student assistants, and I'll note that that was one area that was clarified today [by the parties during oral argument]. There was a discussion that there had been [at one time] a course offered in respect to secretarial work that was essentially run by the secretaries. The parties have [agreed that [the] course is no longer in existence, and it hasn't been for at least a period of 5 years.

There [was] also [an] allegation that the secretaries direct the work of the student[s] when they come down to the school office, either for disciplinary issues or otherwise, and there was an allegation made that there was some tutoring done [by the secretaries] when the students come down [to the office]. I think it's clear that the secretaries, like other support employees, redirect the students to perform their work . . . [w]hen they are not focusing on those tasks, but to the extent that there's any tutoring going on, the Charging Party has acknowledged that that's on a sporadic, an occasional basis, and is essentially [limited to] situations where a student perhaps may ask a question and receive an answer from the secretary, but it's not a systemic, every-day part of the secretary's job duties. Those are the two areas which require the clarification.

The other duties that were highlighted and which I will accept as accurate, the building secretaries are described in the Union's brief as often the first contact the public has with the school. The building secretary receives questions and requests, and sees that matters are disposed of promptly, correctly, and tactfully. The building secretary keeps attendance records, and keeps up-to-date and in compliance with attendance reporting [requirements] with the State. The building secretary completes reports as required [or] assigned by the business manager of [the] central office, assists with student enrollment and with [the] withdrawal application process, orders and maintains inventory of office and teacher supplies, [and] is responsible for building communication [including] websites, newsletters and schedules as assigned by the principal. [The building secretaries also administer first aid and assist with the scheduling of plans for special education students.]

* * *

[T]he secretaries all are involved with disciplining students and . . . there's also [an] assertion that the secretaries proctor exams and that they assist with scholarship applications . . . [T]he remaining job duties as they're described in the Union's brief, I accept as -- for purposes of the Union's motion as true. And that concludes the factual background for purposes of this decision.

[T]he focus of this case is the 1994 amendment to PERA, which alters the general duty to bargain on the part of a public school employer. Under PERA, all topics are classified as mandatory, permissive, or illegal subjects of bargaining. The description of this division amongst the various categories of bargaining subjects is set forth in *Detroit Police Officers Association v. City of Detroit*, 391 Mich 44, (1974). The parties have a duty to bargain over wages, hours, and other terms of conditions of employment. Those are subjects that fall into the category of mandatory subjects of bargaining. The remaining matters not classified as mandatory subjects are referred to as either permissive or illegal subjects of bargaining. Parties are not required to bargain over a permissive subject. They may bargain by mutual agreement on a permissive subject, but neither side may insist on bargaining to the point of impasse. With respect to an illegal subject of

bargaining, that is categorized as a provision that is unlawful under the collective bargaining statute or other applicable statutes. Parties are free to discuss such matters, but a contract provision embodying an illegal subject is unenforceable.

The specific statutory language we're discussing today, again, is a 1994 amendment to PERA that altered the bargaining obligations of public school employers and labor organizations by adding the following language [to] Section 15(3) of PERA:

> Collective bargaining between a public school employer and a bargaining representative of its employee shall not include any of the following:
>
> (f) The decision of whether or not to contract with a third party for one or more non-instructional support services or the procedures for obtaining a contract or the identity of the third party or the impact of the contract on individual employees of the bargaining unit.

So the issue in this case is whether the . . . secretarial work is considered non-instructional support services [for purposes of Section 15(3)(f) of PERA]. If the secretaries fall into that category, the subcontracting -- the issue of subcontracting their work falls into the category of [an] illegal subject of bargaining, and the employer cannot be required to bargain about that issue. The employer can act unilaterally with respect to subcontracting such work.

[B]efore we get to whether the duties of the secretaries fall within that category, there's been an argument from the Union that regardless of whether the secretarial [work] can be described as non-instructional or not, that the School District's act of subcontracting the services in this particular case constitutes a repudiation of the language in the letter of agreement between the parties, although . . . I'll note that [the] letter of agreement cannot be characterized itself as a no subcontracting clause necessarily. I think it's clear from the statutory language that to the extent that any labor organization would intend to rely on language of the type referenced in this case to prevent subcontracting, that that would violate or run afoul of the amendment and the purpose of the amendment, which was to allow a public school employer to make those decisions unilaterally. This is no different than the arguments that came before the Commission immediately after the passage of the 1994 amendment to PERA, where unions relied on, for example, language in [a contract's] recognition clause as prohibiting subcontracting, and claiming it was a repudiation of such language to outsource the work. I see really no difference between that and this case. If the work in question is non-instructional support services, then there [could] be no repudiation on the part of the District of any contractual language which might otherwise apply.

[I]n terms of the specific job duties relied upon [by the Union] in this case and whether they qualify as non-instructional or not non-instructional, as indicated, the statute did not provide a definition of "non-instructional support services"; however, the meaning of that phrase has been analyzed and considered prior to this by MERC. In *Pontiac School District*, 23 MPER 81 (2010), the Commission affirmed ALJ Doyle O'Connor, and that decision was recently upheld by the Court of Appeals on January 5th of 2012 at 25 MPER 44. Judge O'Connor went through a detailed analysis of what the term "non instructional support services" means, the legislative history behind the 1994 amendment, and, I think, a full and complete analysis of the proper interpretation of that term.

I'll note that the Commission [in affirming ALJ O'Connor] specifically did not adopt any particular definition . . . of [the term] non-instructional support services . . . but [the] facts that were emphasized by the Commission were the same as those facts emphasized by Judge O'Connor. And I think looking at those -- the facts and the duties relied upon by the Commission in that case is instructional -- I should say "informative" here, so as not to confuse things.

There's also *Harrison Community Schools*, 23 MPER 82 (2010) [in which the Commission] again [affirmed an] ALJ. The ALJ's decision also provided a detailed analysis of the term "non instructional support services" and [an] exploration of the legislative history. Again, I agree with the analysis in both of those decisions . . . I see "non-instructional" as modifying the words "support services" in the statutory provision, which indicates a legislative intent to exclude certain support services from the requirements of the amendment, but not all. I do not interpret the language as drawing a distinction between instructional services and instructional support services. I don't believe there's any indication in the wording of the statute, the legislative history, or the MERC decisions that positions which merely provide support to instructional personnel would fall within the exception in Section 15(3)(f) of the statute; rather, it's a certain subset of support employees, those which provide instructional work, that would qualify for the exception.

And I think, if you look at the analysis from Judge O'Connor in the *Pontiac School District* case in terms of what qualifies as instructional work, you will -- it becomes apparent that there must be some imparting of knowledge, some imparting of wisdom in order for . . . a classification to qualify as instructional or not non-instructional, if you will. And I'll go over what occurred in those cases briefly.

In the *Pontiac School District* case, MERC agreed with the ALJ's conclusion that the work in question constituted instructional [services] where the occupational therapist and physical therapist, which were the classifications at issue in that case, worked closely with the certified teachers and other professional staff as well as paraprofessionals in evaluating the needs of students and providing the students with activities and tools that would assist them in the

educational process. The record in that case indicated that the therapist prepared activities to assist students in acquiring and developing skills necessary for them to achieve their educational goals, and directly provided students with training and instruction which assisted the children in learning the subjects taught as part of the core curriculum. Applying the plain meaning of the definition of non-instructional, the Commission determined that the duties performed by the therapist did not fall within that definition and, therefore, that the district in that case violated Section 10(1)(e) of PERA by unilaterally subcontracting their work.

Similarly, in the *Harrison School District* case, the Commission upheld the ALJ's determination that the services provided by Chapter 1 instructional aides, kindergarten aides, RTC coordinators, and library aides were properly categorized as instructional. [T]he factors that the Commission found important were that the aides assisted the students with their lessons and worksheets, instructed students on aspects of the curriculum, and practiced skills or lessons with students at the direction of the certified teachers. In addition, the Commission found [it] notable that the job descriptions of the aide positions indicated that those employees were responsible for performing duties such as tutoring the students, providing individual instruction, and leading group instructional lessons. While recognizing in that case that some of the aides may have had "incidental non-instructional responsibilities, such as copying or other clerical duties," the Commission concluded that the classifications were instructional where, "a substantial and regular part of their duties" -- I'm sorry -- reading -- this is reading from the ALJ decision, which the Commission affirmed -- "a substantial and regular part of their duties includes working directly with students, assisting them in mastering their lessons, and helping them learn to adjust their behavior to accommodate the learning process."

In the instant case, accepting all of Charging Party's well-pleaded allegations as true, it appears that the duties of the secretaries employed by Reese School District cannot be determined to be of an instructional nature. The secretaries employed by the School District are not certified teachers. There has been no indication that they work closely with the students with respect to instructional matters, or that they in any way assist the certified teachers in directly furthering the educational mission of the District; rather, it appears that the secretaries are assigned general clerical duties of the sort performed by secretaries in school districts throughout the State, and the type of clerical duties referenced by the Commission in *Harrison School District*.

As I indicated in my [written order] setting this case for oral argument, their work can no more be characterized as [being] intimately linked to the educational process than the duties routinely performed by other support staff such as janitors, building maintenance workers, food service providers, and school bus drivers. Charging Party relied on the secretaries' role in disciplining students. Again, I don't see that being anything indistinguishable from what other support employees may do as part of their normal daily routines, and I think the

> characterization that Judge O'Connor made in his decision as well, in looking at whether the type of work is specific and unique to a school setting is appropriate here. And with respect to the work we're talking about in this case, these employees perform the type of support work that is typically found in any public or private office or facility, including those outside of the educational sphere.
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> On that basis, I would conclude that there are no material facts at issue, and that given -- accepting all of the characterizations of the duties of the secretaries set forth by the Charging Party, both in its brief and as clarified on the record today, that for purposes of Section 15(3)(f) of PERA, the employees in question are non-instructional support employees, and therefore there was no violation of the duty to bargain by the School District when it subcontracted out or privatized their work. That matter was a prohibited subject of bargaining under PERA, and the District was free to act unilaterally . . . on that basis.[1]

Based on the findings of fact and conclusions of law set forth above, I recommend that the Commission issue an order dismissing the unfair labor practice charge filed by the Reese Professional Support Personnel Association against the Reese Public School District in Case No. C11 I-155 in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 3, 2012

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