STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PORT HURON AREA SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C10 J-255

-and-

PORT HURON EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fletcher, Fealko, Shoudy & Francis, P.C., by Todd J. Shoudy, for Respondent

Law Offices of Lee and Correll, by Michael K. Lee and Erika P. Thorn, for Charging Party

DECISION AND ORDER

On March 5, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Port Huron Area School District, did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ held that the charge filed by Charging Party, Port Huron Education Association (Charging Party or Association), failed to support the contention that Respondent violated its duty to bargain in good faith under §10(1)(e) of PERA by unilaterally subcontracting bargaining unit work performed by school psychologists to the St. Clair County Regional Services Association (RESA). The ALJ also held that the evidence failed to establish that Respondent violated PERA by refusing to provide Charging Party with accurate and timely information about the subcontracting of unit work. Finally, the ALJ held that PERA does not provide a cause of action for conspiracy and recommended dismissal of the allegation that Respondent conspired with the RESA to privatize instructional bargaining unit work. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with § 16 of PERA.

On March 25, 2013 Charging Party filed exceptions to the ALJ's Decision and Recommended Order. After requesting and receiving an extension of time, on April 25, 2013, Respondent filed a combined brief opposing the exceptions and supporting the ALJ's Conclusions.

In the exceptions, Charging Party presents various arguments including that the ALJ erred by concluding that Respondent had no PERA obligation to bargain with Charging Party over the decision to enter into an arrangement with the RESA and that Respondent did not violate PERA by the conspiracy allegations. Charging Party further alleged error in the ALJ's finding that it waived its bargaining rights and that Respondent did not fail or refuse to provide requested information. Finally, Charging Party contends that the ALJ erred by failing to draw an adverse inference regarding Respondent's awareness of Charging Party's knowledge of its discussions with RESA. Conversely, in its brief supporting the ALJ's conclusions, Respondent rejects the arguments contained in Charging Party's exceptions.

On reviewing the record carefully and thoroughly, we find Charging Party's exceptions to be without merit.

Factual Summary:

We adopt the facts regarding the underlying merits of this case as set forth fully in the ALJ's Decision and Recommended Order and repeat them only as necessary.

The bargaining unit relevant to this dispute includes school psychologists, as well as teachers, school social workers, and other professional personnel. The parties' most recent collective bargaining agreement covered the period 2007-2010 and expired on August 15, 2010. Respondent employed six school psychologists during the 2009-2010 school year.

In late 2009, Respondent's school board realized that, if it did not significantly decrease its expenditures, it would end the 2010-2011 budget year with a deficit of $7 million. As a result, Respondent began to look for ways of generating cost savings, including using the RESA to provide psychological services to its students.

In early 2010, Respondent and the RESA informally agreed that "something would be worked out" between the two districts for the following school year.

In about February 2010, Respondent distributed school building position allocations for the following school year that did not include any school psychologists. Consequently, on March 3, 2010, Port Huron Education Association Executive Director, Kathleen Trongo, wrote Respondent's Assistant Superintendent, Ronald Wollen, the following letter demanding that Respondent cease and desist from removing the school psychologist positions from the bargaining unit:

> It has come to our attention that the district is not allocating any school psychologist positions for the 2010-2011 school year. This will result in the removal of all school psychologist positions from our bargaining unit.
>
> The Port Huron Education Association and the Port Huron Area School District currently have a settled contract through August 15, 2010. The

> school psychologists are protected by this contract. Therefore, the District cannot unilaterally remove them from our bargaining unit. The PHEA is demanding that you cease and desist the removal of the school psychologist positions from our bargaining unit…

There is no evidence that Respondent replied to this letter. Subsequent to this, however, Respondent's director of special education, Rebecca Falk, met with Respondent's school psychologists to inform them that they would be transferred to work for RESA and that they would be RESA employees and receive benefits from RESA.

On April 29, 2010, Trongo wrote Wollen to request information, including correspondence and records, relating to the transfer of school psychologists:

> This is a request for information per PERA and the Freedom of Information Act and the Port Huron Education Association's Master Agreement with the Port Huron Area School District.
>
> Any and all information, including correspondence and records, relating to the transfer of PHEA School Psychologist and/or Social Workers to the St. Clair County Regional Educational Service Agency.

Respondent's finance director, Christina Kostiuk, replied to Trongo's request by letter dated May 17, 2010, stating:

> In order to respond to your request, I conducted a review of the claimed transfer of PHEA members to the St. Clair County Regional Educational Service Agency. There is no evidence to support the claim that these positions are being transferred to another entity. Like many Michigan public school districts facing severe financial challenges, the Port Huron Area School District may be forced to make cuts that will result in layoffs of employees.

On May 18, 2010, the six school psychologists employed by Respondent received notice that they would be laid off at the end of the 2009-2010 school year. On June 15, 2010, Respondent held an unemployment workshop for those employees who received layoff notices. Charging Party's Executive Director Trongo and the laid off school psychologists attended the meeting, at which Human Resources Director Paul announced that Respondent was "in the process of looking at a deal with RESA for those positions and you can know as soon as the end of this week."

On June 16, Trongo again wrote Respondent to request information, including correspondence and records, relating to the transfer of school psychologists to the RESA:

> On April 29, 2010, we requested information (per FOIA) relating to the transfer of PHEA School Psychologists and/or Social Workers to the SCC –RESA. On May 17, 2010, you responded to this request with a letter

stating, "There is no evidence to support the claim that these positions are being transferred to another entity."

We continue to hear rumors throughout the community that our psychologists' jobs are being turned over to the RESA. To add to this, at our joint Unemployment workshop held yesterday, Wendy Paul announced, "To those psychologists that I see here, we are in the process of working out a deal with RESA for those positions (school psychologists) and you could know as soon as the end of this week."

In light of the above, we are once again requesting any and all information, including correspondence and records, relating to the transfer of PHEA School Psychologists and/or Social Workers to the St. Clair County Regional Educational Service Agency.

On July 7, Assistant Superintendent Kindle replied to Trongo's June 16 letter:

…As indicated in a letter to you dated May 17, 2010, there is no evidence or documentation to support a "transfer" of school psychologists and/or social workers to St. Clair County Regional Educational Service Agency. We are seeking to provide non-instructional legally mandated services in an alternative manner. If the PHEA/MEA wishes to submit a proposal to provide these services, we will be happy to discuss the matter further.

Kindle and Trongo subsequently had several conversations about the psychologists. According to Kindle, whose testimony was credited by the ALJ, he asked whether Charging Party was "going to be interested in bidding, bargaining, negotiating over these services." Kindle further testified that Trongo informed him that Charging Party did not plan on submitting a proposal because Charging Party had a contract, and cited the recognition clause in the collective bargaining agreement to Kindle.

In July 2010, the RESA posted a request for quotes (RFQ) on its website. The RFQ sought contractors to provide school psychology and evaluative services on an as-needed basis for the RESA and any of its constituent districts, including Respondent.

On August 9, 2010, Respondent's School Board passed a resolution authorizing Respondent to contract with the RESA to provide "psychological and evaluative" services to special education students for the 2010-2011 school year.

On August 25, Trongo sent Kindle another request for information under PERA and the FOIA:

We are requesting any and all documents, including letters, notes, correspondence, requests for proposals (RFPs) and other information relating in any way to:

1. The possible transfer of school psychologists duties/jobs to St. Clair County RESA.

2. Acceptance or request for bids (RFPs) from outside contractors or agencies to perform the duties of a school psychologist.

In addition, we would like a compilation of the amount of monies (salaries and benefits) spent on school psychological services in the 2009-2010 school year.

This is the third such request made by the Association for this information regarding the status of school psychologist services in the Port Huron Area School District. The PHASD continues to state that "there is no evidence to support the claim that these positions are being transferred to another entity."

If the above is true, then who will deliver the psychological services to the students in the Port Huron Area Schools? These services are mandated by law.

Kindle replied to Trongo on September 8 as follows:

I am writing in response to your FOIA request and concerning the comments you made at the Board of Education meeting last night. Given our prior correspondence I was quite taken aback by your comments and the threatened litigation. In my letter of July 10, I specifically mentioned we would entertain a proposal by the PHEA to provide the psychological and social work services and would be happy to discuss the matter further. I meant this sincerely and never received a response.

I am enclosing the information which is responsive to your FOIA request. I do not want to get caught up in the semantics of how we describe who will be providing the services. As noted in my previous letter, the PHASD is having the RESA provide the services which is an area of expertise they have and they provide such services for every other district in the County. I am enclosing the bids the RESA obtained to provide the services and a compilation of the bids. This information will further enable the PHEA to determine whether it wishes to bid to provide the services. We have a provision in the RESA contract which permits us to terminate the contract if we reach an agreement for the PHEA to provide the services in question.

I will await further word from you regarding whether the PHEA wishes to submit a bid, whether you need more information and whether the PHEA wishes to meet regarding this issue. We are available to meet on short notice. I will await further word from you.

Attached to Kindle's letter, was a copy of the proposed contract between Respondent and the RESA as well as copies of all the bids submitted to the RESA in response to the July 2010 RFQ.

On September 9, 2010, Charging Party filed a grievance alleging that Respondent's use of the RESA to perform psychological and evaluative services violated the recognition clause of the collective bargaining agreement. This grievance was ultimately taken to arbitration. The arbitrator, however, held that the agreement's recognition clause did not prohibit the subcontracting of work under the relevant circumstances and denied the grievance.

On September 10, 2010, Respondent's Board approved a "Service Agreement" between the RESA and Respondent under which the RESA would hire outside contractors to provide psychological evaluations and testing of Respondent's special education students.

Discussion and Conclusions of Law:

The Public Employment Relations Act (PERA), MCL 423.201, et seq., governs labor relations in public employment in the state of Michigan. It imposes a duty of collective bargaining on public employers and unions only with respect to those matters which constitute "mandatory subjects of bargaining." *Detroit v Michigan Council 25, AFSCME*, 118 Mich App 211, 215; 324 NW2d 578 (1982). A mandatory subject of bargaining is one which has a material or significant impact upon "wages, hours and other terms and conditions of employment." MCL 423.215(1); *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168, 177; 445 NW2d 98 (1989). Issues falling outside mandatory subjects of bargaining are classified as either permissive or illegal. *Id*. at 178. What constitutes a mandatory subject of bargaining "must be decided case by case." *Southfield Police Officers Ass'n*, supra at 178.

In public education, courts have previously looked to whether the employer's action clearly constitutes educational policy, for which there is no bargaining obligation, or a condition of employment, to which the duty to bargain extends. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 279-280, 273 NW2d 21 (1978). As the Michigan Supreme Court recognized in *Local 1277, Metropolitan Council No. 23, AFSCME v Center Line*, 414 Mich 642 (1982), at 660-661, certain subjects are within the scope of management prerogative, and a public employer, who remains politically accountable for such decisions, must not be severely restricted in its ability to function effectively.

Under PERA, a public employer has the duty to bargain over the subcontracting of bargaining unit work where (1) the subcontracting does not alter the employer's basic operation; (2) there is no significant capital investment or recoupment; (3) the public employer's freedom to manage would not be significantly abridged by a bargaining obligation; and (4) the dispute is amenable to resolution through the collective bargaining process. *Benton Harbor Area Sch*, 2 MPER 20108, 1989 MERC Lab Op 614. Where a

public employer attempts to substitute private employees for public employees in order to conserve finances, PERA generally requires that it provide the union with adequate notice and an opportunity to demand bargaining. *Van Buren Pub Sch Dist v Wayne Circuit Judge*, 61 Mich App 6, 33 (1975). As with other mandatory bargaining subjects, once the union makes a demand to bargain, the employer is prohibited from unilaterally implementing the subcontracting until impasse or agreement is reached. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268 (1978); *Local 1467, IAFF v City of Portage*, 134 Mich App 466 (1984).

In *Bay City Educ Ass'n v Bay City Public Sch*, 430 Mich 370, 422 NW2d 504 (1988), the Plaintiff employee associations brought unfair labor charges against the Bay City Public Schools after the school board decided to terminate its operation of a special education center and to transfer the responsibility for the programs conducted there to the Bay-Arenac Intermediate School District (ISD). The Michigan Supreme Court held that local school board's decision to terminate its operation of its special education center and to transfer operation of the center's programs to the intermediate school district was an educational policy decision within its managerial discretion rather than a "term and condition of employment" subject to the duty to bargain under the Public Employment Relations Act. The Court held:

> It is within the scope of a local school board's management prerogative to determine its role in the delivery of educational services. The disputed decision at issue here was a cooperative one made in recognition of the interrelationship and funding concerns of all the constituent districts and their intermediate school district. The school district's transfer of special education center programs to the ISD was a fundamental management policy decision anticipated and authorized by the Legislature. As was the MERC, we are persuaded that the board's decision is analogous to a partial closing of a business.

Although Charging Party argues that the ALJ erroneously relied on *Bay City Educ Ass'n*, the Commission agrees with the ALJ that Respondent had no duty to bargain over its decision to use its RESA to provide psychological evaluations and testing. Under § 1751 of the School Code, MCL § 380.1751(1), a local school district may either operate special education programs directly, "contract" with its ISD for the delivery of special education programs and services or utilize a combination of these alternatives. Per that section of the School Code, once a local board transfers responsibility to its ISD, the ISD controls the manner in which the work is performed. As noted by the Court in *Bay City Educ Ass'n*, a local school district and its ISD are jointly responsible for decisions regarding the services to be offered to special education students and the delivery of these services.

Further, as in *Bay City Educ Ass'n*, the instant case does not involve an attempt by a public employer to simply substitute private employees for public employees in order to conserve finances. There are no allegations of antiunion animus here. To the contrary, the local board and its ISD entered into the arrangement at issue here in order to meet

their shared responsibility for special education programs while also maximizing state funding for these programs and thereby reduce its deficit. Consequently, Respondent's decision to contract with RESA to provide psychological evaluations and testing for special education students was an educational policy decision as provided for by MCL 380.1751 and not subject to a duty to bargain. To hold to the contrary, would unreasonably restrict Respondent from making decisions that it is specifically authorized by the Legislature to make.

Charging Party also contends that the ALJ erred in concluding that it failed to make a timely demand to bargain over either the decision or its effects. The record, however, establishes that Respondent eliminated all school psychologist positions in May 2010 at the end of the school year and laid off six bargaining unit members. Charging Party unquestionably had sufficient information at that time to allow it to make a demand to bargain over the decision and its effects, but did not do so. Instead, Charging Party chose to argue, ultimately before an arbitrator, that the collective bargaining agreement prohibited Respondent from assigning the psychologists' work outside of the bargaining unit. Additionally, although Charging Party contends that it was notified of the decision only after it had become a *fait accompli*, Charging Party's position is without basis. Assistant Superintendent Kindle, whose testimony was credited by the ALJ, testified that he and Executive Director Trongo had conversations about the psychologists between the time he became assistant superintendent and the fall of 2010. According to Kindle, he asked Trongo whether Charging Party was "going to be interested in bidding, bargaining, negotiating over these services" but was told by Trongo that Charging Party did not plan on submitting a proposal because it had a contract. In support of her position, Trongo referred the assistant superintendent to the recognition clause of the collective bargaining agreement. Respondent's decision was, thus, not presented as a *fait accompli*, contrary to the assertion of Charging Party, and a demand to bargain would not have been futile. Consequently, Charging Party waived any rights it had to bargain by its failure to make a demand to bargain over the decision involved in the present dispute or the effect of this decision on employees.

In its exceptions, Charging Party further argues that the ALJ erred when she concluded that Respondent did not fail or refuse to provide Charging Party with the specific information it requested by letters dated April 29, 2010, June 16, 2010, and August 25, 2010. We disagree. In interpreting § 10 of PERA, this Commission and the Michigan Supreme Court have often looked to precedent involving the National Labor Relations Act for guidance. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53, 214 NW2d 803 (1974); *Local 1277, Metropolitan Council No. 23, AFSCME v Center Line*, 414 Mich 642, 652-653, 327 NW2d 822 (1982). Under the National Labor Relations Act, there is no duty to furnish information concerning a non-mandatory subject of bargaining. *Pieper Electric, Inc*. 339 NLRB 1232 (2003); *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 fn. 1 (1988). The duty to furnish information is predicated on the duty to bargain. Consequently, where there is no duty to bargain, there is no duty to furnish information. Furthermore, even if a mandatory bargaining subject were involved, Charging Party's argument would be without merit. Charging Party's April 29, 2010 letter requested information "relating to the transfer of school

psychologists and/or social workers" to the RESA. In its May 17 reply, Respondent indicated that there "is no evidence to support the claim that these positions are being transferred to another entity." Respondent's timely reply was accurate. As noted by the ALJ, there were no documents or correspondence on this subject because Respondent had not had any discussions about transferring the psychologists or their positions to the RESA. Similarly, Respondent's July 7 reply to Charging Party's June 16 request for information timely and truthfully informed Charging Party that "there is no evidence or documentation to support a 'transfer' of school psychologists and/or social workers to St. Clair County Regional Educational Service Agency." Finally, Respondent's September 8 reply to Charging Party's August 25 request for information provided all of the information requested by Charging Party. Respondent has no obligation to volunteer information that was not requested. Consequently, Respondent did not fail or refuse to provide Charging Party with the information it requested relating to the transfer of the psychologists' positions to the RESA.

Charging Party further alleges the ALJ erred when she determined that Respondent did not violate PERA when it purportedly conspired with the RESA to evade the employment protections provided in §1742 of the School Code. The Commission, however, agrees with the ALJ's conclusion that PERA does not provide a cause of action for conspiracy or for conspiracy to violate another statute. Charging Party has provided nothing to the contrary.

Charging Party also contends that the ALJ erred by failing to draw an adverse inference from the fact that Respondent did not offer testimony from Human Resources Director Paul or from Director of Special Education Falk. Charging Party argues that these witnesses were likely to have knowledge of Respondent's awareness of Charging Party's knowledge of its discussions with RESA. As we stated in *Ionia Co*, 1999 MERC Lab Op 523; 13 MPER 31014: "An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she 'may reasonably be assumed to be favorably disposed to the party,' " citing *Ready Mixed Concrete Co*, 81 F3d 1546, 1552 (CA 10, 1996). See also, *Wayne Co*, 21 MPER 58 (2008). In each of these three cases, an adverse inference was drawn with respect to a specific question of fact. In the matter before us, however, Charging Party has not specified any relevant facts that might properly be inferred from Respondent's failure to call Paul or Falk. Moreover, Respondent is not required here to offer evidence to refute Charging Party's claims. Inasmuch as the evidence offered by Charging Party was insufficient to establish a violation of PERA, Respondent was not obligated to offer additional testimony to refute Charging Party's case. Further, had Charging Party viewed the testimony of Paul or Falk as necessary to its own case, the Association could have subpoenaed them as witnesses. *Southfield Pub Sch*, 25 MPER 36 (2011).

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. Accordingly, we agree with the ALJ that the facts alleged in the charge do not support a finding that Respondent breached its duty to bargain. The ALJ's Decision and Recommended Order is affirmed.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission. The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. Labrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: November 19, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS DIVISION

In the Matter of:

PORT HURON AREA SCHOOL DISTRICT,
Public Employer-Respondent,

Case No. C10 J-255

-and-

PORT HURON EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Fletcher, Fealko, Shoudy & Francis, P.C., by Todd J. Shoudy, for Respondent

Law Offices of Lee and Correll, by Michael Lee, for Charging Party

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 May 23, 2012, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on or before July 20, 2012, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Port Huron Education Association filed this unfair labor practice charge against the Port Huron Area Schools on October 15, 2010. The charge was amended on October 6, 2011. Charging Party represents a unit of Respondent's professional employees, including school psychologists. Among other duties, Respondent's school psychologists did psychological evaluations and testing of special education students, a function mandated by the Michigan Department of Education (MDE). At the end of the 2009-2010 school year, Respondent eliminated all of its school psychologist positions and six school psychologists were laid off. Effective with 2010-2011 school year, Respondent and its intermediate school district, the St. Clair County Regional Services Association (hereinafter the RESA) entered into an agreement under which the RESA

hired outside contractors to provide psychological evaluations and testing of Respondent's special education students.

The charge, as amended, alleges that Respondent violated its duty to bargain in good faith under §15 of PERA by unilaterally subcontracting bargaining unit work performed by the school psychologists to the RESA without giving Charging Party an opportunity to bargain. Charging Party also alleges that Respondent violated §10(1)(e) of PERA by conspiring with the RESA to privatize instructional bargaining unit work in violation of §1742(1) of the Michigan School Code, MCL 380.1742. Finally, the charge alleges that Respondent violated §10(1)(e) of PERA by refusing to provide Charging Party with accurate and timely information about the subcontracting of its unit work.

Findings of Fact:

Relevant Provisions of the Michigan School Code

Section 1711 of the Revised School Code, MCL 380.1711, sets out the obligations of intermediate school districts for special education services. This section provides, in pertinent part:

> (1) The intermediate school board shall do all of the following:
>
> (a) Develop, establish, and continually evaluate and modify in cooperation with its constituent districts, a plan for special education that provides for the delivery of special education programs and services designed to develop the maximum potential of each student with a disability of whom the intermediate school board is required to maintain a record under subdivision (f). The plan shall coordinate the special education programs and services operated or contracted for by the constituent districts and shall be submitted to the superintendent of public instruction for approval.
>
> (b) Contract for the delivery of a special education program or service, in accordance with the intermediate school district plan in compliance with section 1701. Under the contract the intermediate school board may operate special education programs or services and furnish transportation services and room and board.
>
> (c) Employ or engage special education personnel in accordance with the intermediate school district plan, and appoint a director of special education meeting the qualifications and requirements of the rules promulgated by the superintendent of public instruction.

The obligations of a local school district for special education services are set out in §1751 of the Revised School Code, MCL 380. 1751. This section states, in pertinent part:

> (1) The board of a local school district shall provide special education programs and services designed to develop the maximum potential of each student with a disability in its district on record under section 1711 or for whom an appropriate educational or training program can be provided in accordance with the intermediate school district special education plan, in either of the following ways or a combination thereof:
>
> (a) Operate the special education program or service.
>
> (b) Contract with its intermediate school board, another intermediate school board, another local school district board, an adjacent school district board in a bordering state, the Michigan schools for the deaf and blind, the department of community health, the department of human services, or any combination thereof, for delivery of the special education programs or services, or with an agency approved by the superintendent of public instruction for delivery of an ancillary professional special education service. The intermediate school district of which the local school district is constituent shall be a party to each contract even if the intermediate school district does not participate in the delivery of the program or services.
>
> * * *
>
> (3) Each program or service operated or contracted for by a local school district shall be in accordance with the intermediate school district's plan established pursuant to section 1711.

Section 1742 of the School Code, MCL 380.1742, provides:

> (1) When employing additional personnel to implement a special education program or service, the intermediate school board shall employ first an employee of a constituent district whose employment is discontinued because the constituent district is discontinuing a special education program or service for which the person was employed.
>
> (2) Special education personnel employed under subsection (1) shall be entitled to all rights and benefits to which they would otherwise be entitled if they had been employed by the intermediate school board originally. The persons shall be entitled to all rights under Act No. 4 of the Public Acts of the Extra Session of 1937, as amended, being sections 38.71 to 38.191 of the Michigan Compiled Laws to which they would have been

entitled if employed originally by the intermediate school board, except that at the option of the controlling board, they may be subject to another probationary period of 1 year.

Transfer of Psychologist Duties to the RESA

During the 2009-2010 school year, Respondent employed six school psychologists. The MDE mandates that special education students be tested and evaluated by licensed psychologists. The school psychologists performed these evaluations for Respondent. They also routinely participated in meetings to develop individualized education plans (IEPS) for special education students and were available to consult with Respondent's staff on a variety of issues.

Charging Party and Respondent were parties to a collective bargaining agreement that expired on August 15, 2010. In late 2009, as part of the preparation for its 2010-2011 budget, Respondent's finance director, Christina Kostiuk, presented Respondent's school board with budget projections that indicated that if Respondent did not significantly decrease its expenditures, it would end the 2010-2011 budget year with a deficit of $7 million. The Board directed the administration to look for cost savings to avoid this deficit.

As set out in the statutes quoted above, both intermediate and local school districts are authorized to provide special education services and programs. When an intermediate school district provides auxiliary services to special education students in its constituent local districts, it is eligible for reimbursement from the State for between 28% and 29% of the cost of providing those services. Under current funding formulas, local school districts are not reimbursed, beyond the amount of their per pupil grant, for providing these same auxiliary services.

Kostiuk testified that in late 2009, Respondent began looking at alternate ways to provide psychological services to its students, including through the RESA. The RESA has seven constituent local districts, including Respondent. The RESA operates a special education center for students in its area with the greatest need for this service. It also hires consultants in a variety of specialized special education areas and provides its constituent districts, and one local district outside its area, with staff training and other auxiliary special education services. In 2009-2010, only two of the RESA's local districts, Respondent and the Capac Schools, employed psychologists, and the RESA did not have any psychologists on staff. In the other five districts, the evaluation and testing of special education students was done by psychologists who were independent contractors, some of whom had contracts with the RESA and some of whom had contracts with the local districts. The RESA paid these psychologists, submitted requests for reimbursement to the State, and billed the local districts for the remainder of the cost. Respondent, whose students comprise about 41% of the student population of the RESA,

was the only local district in the RESA employing school psychologists on a full-time basis to provide services exclusively to its students.

In 2007 or 2008, Respondent and the RESA had discussed transferring responsibility for providing psychological services to the RESA, but had not reached an agreement. In early 2010, according to the testimony of Jean Sturtridge, the RESA's director of legal and human resources, Respondent's superintendent and the RESA's superintendent agreed informally that "something would be worked out" between the two districts for the following school year.

In about February 2010, Respondent distributed a preliminary list of positions to be allocated to each school building for the 2010-2011 school year. The list included no psychologists. On March 3, 2010, Kathleen Trongo, Charging Party's executive director and a former school psychologist, sent Respondent Assistant Superintendent Ronald Wollen this letter:

> It has come to our attention that the district is not allocating any school psychologist positions for the 2010-2011 school year. This will result in the removal of all school psychologist positions from our bargaining unit.
>
> The Port Huron Education Association and the Port Huron Area School District currently have a settled contract through August 15, 2010. The school psychologists are protected by this contract. Therefore, the District cannot unilaterally remove them from our bargaining unit. The PHEA is demanding that you cease and desist the removal of the school psychologist positions from our bargaining unit.
>
> As we discussed, I have enclosed a copy of a MERC decision.... involving the outsourcing of bargaining unit work. If the District continues with its course of action to remove psychologists from the PHEA bargaining unit, we will initiate any and all legal action necessary to prevent this from occurring. . . .

There was no testimony in the record regarding the previous discussion between Wollen and Trongo referenced in Trongo's letter. However, Trongo testified that before she sent this letter she had heard from Wendy Paul, Respondent's Human Resources Director, that the school psychologists' work might be privatized or the psychologists transferred as employees to the RESA, and also that the psychologists were being laid off. Trongo did not receive a response to her March 3 letter.

At the same time that Respondent was looking for ways to cut its budget, Respondent was having communications with the MDE regarding Respondent's compliance with MDE's guidelines for timely completion of testing and evaluations of special education students and the preparation of IEPs. In early to mid-April 2010, Kostiuk and Paul asked to meet with Sturtridge. In their meeting, Kostiuk and Paul told Sturtridge that there was no provision in Respondent's budget for psychologists for the

next school year, and asked her how the RESA provided psychological services to its other constituent districts. The three talked about how many evaluations Respondent needed done, how much it was costing Respondent per evaluation, and the RESA's cost per evaluation. Kostiuk and Paul told Sturtridge that Respondent needed between 900 and 1,000 evaluations done each year. They discussed Respondent's past problems in complying with the MDE's time guidelines, and the fact that Respondent might need to spend more money on evaluations the next year to meet the time guidelines. Sturtridge, who had personally conducted training for Respondent's special education staff, told Kostiuk and Paul that she was also concerned that Respondent was failing to identify all children eligible for special education services and thereby potentially jeopardizing its state and federal funding.

At either this meeting or a subsequent one, Sturtridge also asked Kostiuk and Paul to explain what kind of things Respondent's psychologists did, how they were assigned, and how their work was divided. After listening to them, Sturtridge told Kostiuk and Paul that their model was a great one if they could have afforded it. She told them, however, that the RESA would provide only the legally-mandated services, i.e., the services necessary to get IEPs done in a timely fashion and make sure that all students needing services were identified, and would not provide psychological consultations.

Sometime later, Sturtridge presented Respondent with a proposed flow chart for the conducting of evaluations based on the model used in the RESA's other local districts. Sturtridge proposed that Respondent designate a knowledgeable clerical employee to be the point person. This person would be responsible for finding out which children needed what types of testing, obtaining the necessary parental consent, compiling the records necessary for a psychologist to do the testing, and then contacting psychologists under contract with the RESA until he or she found one who agreed to do the testing and the evaluation report within a preset time frame. Sturtridge told Respondent that she had surveyed the other local districts within the RESA, found that in all of them it was a rare occurrence for a psychologist to actually attend an IEP meeting, and concluded that there was no requirement that psychologists attend these meetings. Sturtridge testified that she and Kostiuk and Paul never discussed making Respondent's psychologists employees of the RESA since Kostiuk and Paul were aware that the RESA employed no psychologists and used independent contractors for testing and evaluation in all the other districts.

Kostiuk testified that Respondent did not actually decide to accept adopt the RESA's proposal until sometime in the summer of 2010. However, in the spring of 2010, when Kostiuk prepared Respondent's 2010-2011 preliminary budget, she replaced the line items for the employee wage and benefit costs for psychologists with a line item called "pupil services" under the heading of purchased services. In calculating the cost of "pupil services" for this budget, Kostiuk took the cost of the salaries and benefits paid to Respondent's school psychologists in 2009-2010 and subtracted 29%, the savings she anticipated from a relationship with the RESA. As discussed below, this was a conservative estimate since the actual savings were significantly more.

Sometime during the spring of 2010, Rebecca Falk, Respondent's director of special education, met with Respondent's school psychologists and told them that the psychologists were going to be transferred as a group to work under the RESA and that they would be RESA employees and receive benefits.

On April 29, 2010, having heard rumors about an agreement with the RESA, Trongo sent Wollen this letter:

> This is a request for information per PERA and the Freedom of Information Act and the Port Huron Education Association's Master Agreement with the Port Huron Area School District.
>
> Any and all information, including correspondence and records, relating to the transfer of PHEA School Psychologist and/or Social Workers to the St. Clair County Regional Educational Service Agency.

Kostiuk replied to Trongo's request in a letter dated May 17. She stated:

> In order to respond to your request, I conducted a review of the claimed transfer of PHEA members to the St. Clair County Regional Educational Service Agency. There is no evidence to support the claim that these positions are being transferred to another entity. Like many Michigan public school districts facing severe financial challenges, the Port Huron Area School District may be forced to make cuts that will result in layoffs of employees.

Sturtridge testified that Kostiuk consulted her before drafting the May 17 letter, and that they agreed that if the RESA hired service providers for Respondent this would not constitute a transfer of employees.

The preliminary budget for the 2010-2011 school year was adopted by Respondent's Board at its meeting on May 17, 2010. Kostiuk explained to the Board that the cost for psychologist services was based on contracting with the RESA. She said that if the Board did not agree to contract with RESA, the numbers would have to be changed. This assumption was not outlined in the budget document itself, although, as noted above, the document showed the costs as "pupil services" rather than employee wages and benefits. The preliminary budget was published in a local newspaper, as required by law, and was included in a Board meeting packet sent to the Charging Party.

On May 18, the six school psychologists received notice that they would be laid off at the end of the 2009-2010 school year. Sara Schultz-Mullins was one of these psychologists. On June 15, 2010, Respondent conducted an unemployment workshop for all its employees who had received layoff notices for the upcoming school year. This meeting was attended by Trongo as well as the laid off school psychologists. At this meeting, Human Resources Director Paul announced to the psychologists that

Respondent was "in the process of looking at a deal with RESA for those positions and you can know as soon as the end of this week."

On June 16, Trongo wrote to Kostiuk as follows:

> On April 29, 2010, we requested information (per FOIA) relating to the transfer of PHEA School Psychologists and/or Social Workers to the SCC –RESA. On May 17, 2010, you responded to this request with a letter stating, "There is no evidence to support the claim that these positions are being transferred to another entity."
>
> We continue to hear rumors throughout the community that our psychologists' jobs are being turned over to the RESA. To add to this, at our joint Unemployment workshop held yesterday, Wendy Paul announced, "To those psychologists that I see here, we are in the process of working out a deal with RESA for those positions (school psychologists) and you could know as soon as the end of this week."
>
> In light of the above, we are once again requesting any and all information, including correspondence and records, relating to the transfer of PHEA School Psychologists and/or Social Workers to the St. Clair County Regional Educational Service Agency.

At the end of that week, Trongo called Paul to ask about the arrangement with the RESA. Paul told her that Respondent was still "working on something with RESA but did not have any details as to what would happen to the school psychologists."

Effective June 30, 2010, Respondent promoted Eddie Kindle from building principal to assistant superintendent, and Kindle took over responsibility for completing the arrangements with the RESA. On July 7, Kindle sent Trongo the following reply to her June 16 letter:

> As indicated in the correspondence to you dated June 16, 2010, the Port Huron Area School District is in receipt of your request, received on June 16, 2010 . . . You requested any and all information, including correspondence and records, relating to the transfer of PHEA School Psychologists and/or Social Workers to the St. Clair County Regional Educational Services Agency, pursuant to the Michigan Freedom of Information Act and other applicable law.
>
> As indicated in a letter to you dated May 17, 2010, there is no evidence or documentation to support a "transfer" of school psychologists and/or social workers to St. Clair County Regional Educational Service Agency. We are seeking to provide non-instructional legally mandated services in an alternative manner. If the PHEA/MEA wishes to submit a proposal to provide these services, we will be happy to discuss the matter further.

Sturtridge helped Kindle draft his reply to Trongo. The last sentence of the letter, added at Stutridge's recommendation, was prompted by a recent amendment to §15(3)(f) of PERA which made the subcontracting of "noninstructional support services" by a public school employer a prohibited subject of bargaining as long as the public school employer gave employees the opportunity to bid on the subcontract.[1] Trongo testified that she was confused by Kindle's letter. She could not recall if she and Kindle had a follow up conversation about the letter. However, she also testified that she and Kindle did not have any discussions about the psychologists or their work.

Kindle, however, testified that he and Trongo had several face-to-face or telephone conversations about the psychologists between the time he became assistant superintendent and the fall of 2010. According to Kindle, he asked Trongo whether Charging Party was "going to be interested in bidding, bargaining, negotiating over these services." Kindle testified that Trongo told him that Charging Party did not plan on submitting a proposal because it had a contract, and referred him to the recognition clause in the collective bargaining agreement. It seems unlikely that Trongo, confused by Kindle's July 7 letter, would have failed to contact him following receipt of that letter and subsequent events. For this reason, I credit Kindle's testimony on this point.

According to Kindle's testimony, Respondent did not make the decision to go forward with the plan to use the RESA until sometime in late July 2010. In mid to late July, the RESA posted a request for quotes (RFQ) on its website seeking contractors to provide school psychology and evaluative services on an as-needed basis for the RESA and any of its constituent districts, including Respondent. The RFQ stated that bids would be opened on August 6, 2010. According to Sturtridge, the reason for the posting was that the RESA did not have enough contract psychologists to service Respondent's students in addition to those of its other constituent districts and wanted to be prepared if an agreement was reached.

At an August 9, 2010 special meeting, the School Board passed a resolution to authorize Respondent to contract with the RESA to provide "psychological and evaluative" services to special education students effective with the 2010-2011 school year. Trongo could not recall whether she was informed about this meeting before it occurred or if anyone called afterward to inform her of the Board's action.

At about this same time, Schultz-Mullins, the laid off school psychologist, ran into Kindle who asked her if she was going to bid on providing psychological services. Kindle directed Mullins to the RESA's website, where she discovered the RFQ. With assistance from special education director Falk, Mullins submitted a bid. Mullins' bid initially included two other laid off psychologists, but these individuals withdrew after the bid was submitted. None of the other laid off psychologists submitted bids. On August 17, 2010, the RESA sent letters to Schultz-Mullins and five other psychologists and groups of psychologists indicating that their bids had been accepted.

[1] Respondent does not contend in this proceeding that the services of the school psychologists are "non-instructional support services" within the meaning of §15(3)(f).

After hearing about the RFQ, Trongo consulted legal counsel and sent Kindle, on August 25, another request for information under PERA and the FOIA:

> We are requesting any and all documents, including letters, notes, correspondence, requests for proposals (RFPs) and other information relating in any way to:
>
> 1. The possible transfer of school psychologists duties/jobs to St. Clair County RESA.
>
> 2. Acceptance or request for bids (RFPs) from outside contractors or agencies to perform the duties of a school psychologist.
>
> In addition, we would like a compilation of the amount of monies (salaries and benefits) spent on school psychological services in the 2009-2010 school year.
>
> This is the third such request made by the Association for this information regarding the status of school psychologist services in the Port Huron Area School District. The PHASD continues to state that "there is no evidence to support the claim that these positions are being transferred to another entity."
>
> If the above is true, then who will deliver the psychological services to the students in the Port Huron Area Schools? These services are mandated by law.

Kindle sent Trongo this response on September 8:

> I am writing in response to your FOIA request and concerning the comments you made at the Board of Education meeting last night. Given our prior correspondence I was quite taken aback by your comments and the threatened litigation. In my letter of July 10, I specifically mentioned we would entertain a proposal by the PHEA to provide the psychological and social work services and would be happy to discuss the matter further. I meant this sincerely and never received a response.
>
> I am enclosing the information which is responsive to your FOIA request. I do not want to get caught up in the semantics of how we describe who will be providing the services. As noted in my previous letter, the PHASD is having the RESA provide the services which is an area of expertise they have and they provide such services for every other district in the County. I am enclosing the bids the RESA obtained to provide the services and a compilation of the bids. This information will further enable the PHEA to determine whether it wishes to bid to provide the services. We have a

provision in the RESA contract which permits us to terminate the contract if we reach an agreement for the PHEA to provide the services in question.

I will await further word from you regarding whether the PHEA wishes to submit a bid, whether you need more information and whether the PHEA wishes to meet regarding this issue. We are available to meet on short notice. I will await further word from you.

Along with this letter, Kindle sent Trongo a copy of the proposed contract between Respondent and the RESA discussed below and copies of all the bids that had been submitted to the RESA in response to the RFQ.

A contract, titled "Service Agreement," between Respondent and the RESA was drafted and eventually approved by Respondent's Board at its meeting on September 10, 2010. By this time, the RESA had entered into agreements with the additional psychologists whose bids it had accepted on August 17.

The essential terms of the "Service Agreement" were as follows:

1. The PHASD provides educational instruction and opportunities for students in grades kindergarten through twelfth grade. In order to provide a free and appropriate public education to students enrolled within the district, school districts are required to provide necessary psychological and educational evaluations.

2. The RESA currently contracts with certified and qualified individuals through service agreements to perform these services for the RESA as well [as] other local constituent districts. The RESA has agreed to obtain on behalf of the PHASD the necessary testing and evaluative services.

* * *

4. The PSASD agrees to reimburse RESA for invoices received for providing psychological testing and evaluative services. Such costs shall include, but not be limited to: the cost of any observation, testing, evaluation, interpretation of results, and report preparation and presentation as well as any required attendance at identified meetings or hearings. In addition to the services identified above, and at the request and direction of the PHASD, [if] other services become desired or necessary, it is understood that PHASD will be responsible to reimburse RESA for its expenditures on behalf of PHASD.

5. The RESA agrees to invoice the PHASD on a quarterly basis. Said invoice will reflect the anticipated state special education cost reimbursement, therefore, holding the PHASD harmless for the reimbursable costs.

> 6. In the event that the anticipated state special education cost reimbursement is either disallowed for discontinued for this purpose, it is understood and agreed that the PHASD shall assume the responsibility to reimburse the RESA for the actual costs expended or incurred on its behalf.
>
> 7. The term of this Agreement shall be for the 2010-2011 school year. The Agreement will commence on the date of its authorization and shall run, unless lawfully terminated, with the academic year ending on June 30, 2011 . . .
>
> 8. The PHASD will identify those students who require testing and evaluative services as described above, and will secure the necessary releases and authorization in order to permit the testing of the specific students as well as identify, collect and cause to be provided to the entity providing the service any and all relevant materials necessary for its timely completion.
>
> 9. Due to the fact that individual providing the contracted services will be required to conduct specific services on the property of the PHASD, it will be required that the PHASD maintain in effect at all times under this agreement adequate policies of insurance, including comprehensive general and public liability coverage for bodily injury and property damages, as may be required. The PHASD shall provide the RESA with written verification of such insurance coverage.
>
> * * *
>
> 12. In the event that the RESA cannot secure adequate, acceptable or appropriate service providers to provide the requested services as determined by the parties, the RESA may unilaterally terminate this agreement upon providing the PHASD advance written notice.

On September 9, 2010, Charging Party filed a grievance asserting that the outsourcing of psychological and evaluative services through the RESA violated the recognition clause of the parties' collective bargaining agreement. On August 19, 2011, an arbitrator rendered a decision denying the grievance on the basis that the recognition clause did not prohibit subcontracting of the work under the circumstances of this case.

The savings to Respondent from its service agreement with the RESA have greatly exceeded the amount of the State reimbursement to the RESA. At the end of the first semester of the 2010-2011 school year, Respondent reduced its projected annual expenses for the services of contract psychologists by about twenty-five percent. In fact, Respondent spent less than half this amount; its total cost for the services of psychologists during the 2010-2011 school year was less than ten percent of the cost of employing the six school psychologists during the 2009-2010 school year.

Hiring and Supervision of Contract Psychologists

As noted above, the RESA posted a RFQ for psychological services on its website in July 2010 to increase the number of psychologists on its list of contractors. Under its arrangements with its local constituent districts, including Respondent, the RESA reviews bids submitted in response to its postings for psychologists, examines and checks the bidders' credentials, and decides whether to accept a bid. RESA does not consult with local school districts regarding whether to accept a bid.

Schultz-Mullins testified about the conditions under which she provided services as a contract psychologist to Respondent during the 2010-2011 and 2011-2012 school years At the beginning of the 2010-2011 school year, Falk and Jennifer Tindall, Respondent's supervisor of exceptional children, held an orientation meeting for the contract psychologists who were to do evaluations of Respondent's students. Four psychologists attended this meeting, including Schultz-Mullins. No one from the RESA was present at this meeting. Falk and Tindall explained to the contract psychologists the evaluation process, how Respondent wanted the evaluations done and how they wanted the contract psychologists to function within the school district.

Schultz-Mullins testified that as a contract psychologist, she receives emails from the secretary to Respondent's director of special education. These emails ask her to evaluate the student named in the email and explain the type of evaluation that needs to be done, the manner in which it is to be done, and the deadline by which the evaluation report must be completed. She indicates by return email whether she will accept the assignment. Schultz-Mullins then calls the student's school and arranges with the school secretary for a time to meet with the student that is convenient for both their schedules. She conducts the evaluation at the school during the time arranged. She sometimes meets with the student's teacher or observes the student in his or her classroom as part of the evaluation. Schultz-Mullins has never received an email asking her to do an evaluation at a school district other than Respondent. After she completes the evaluation report, she submits the report to Respondent's special education department with a copy to Respondent's intervention district coordinator. She also sends Respondent her invoice. A few weeks later, she receives a check from the RESA. According to Schultz-Mullins, she does not send a copy of her report or invoice to the RESA. She testified that typically she has no further communication with anyone after she prepares the evaluation. However, on occasion there have been issues with the report, a concern about the evaluation itself, or a request for her to perform additional testing. In those cases, Schultz-Mullins has been contacted by Respondent's special education secretary, its special education director, or its supervisor of exceptional children. Schultz-Mullins testified that the RESA has never contacted her about her evaluations or reports. She also testified that after she was hired by RESA as contractor, she had no contact with anyone from the RESA during the entirety of 2010-2011 school year.

The contract Schultz-Mullins signed with the RESA requires her to provide all her own testing equipment and supplies unless the parties mutually agree to the use of RESA-provided equipment. However, Mullins testified that she never received any testing

materials from the RESA. When she needed materials that she did not personally own, she obtained them from Respondent. According to Mullins, she also received a couple of different achievement tests from Respondent throughout the year which she administered as part of her assessment. Schultz-Mullins was also provided with scoring software to use in preparing her evaluation reports. Schultz-Mullins testified that she understood that this software was something that the RESA required, although she received the software from a Respondent representative and not from the RESA.

At the beginning of the 2011-2012 school year, RESA held a meeting for contract psychologists to explain changes in the evaluation process for learning disabled students; approximately 45% of the evaluations the psychologists do are for learning disabilities. Schultz-Mullins asked at this meeting if the procedures for other types of evaluations were changing, and was told by RESA representative Cynthia Ramo to perform other types of evaluations in the manner in which the requesting school district wanted it.

Sturtridge testified that the RESA is ultimately responsible for ensuring that the contract psychologists are doing the evaluations and preparing the reports. According to Sturtridge, shortly after the RESA and Respondent entered into their first service agreement, the RESA adopted a new set of special education standards, practices and procedures that applied to all its local districts. She testified that both RESA and the local districts get copies of the evaluation reports completed by the contract psychologists, and that RESA periodically does a random sampling of reports from each psychologist and reviews them for compliance with RESA's guidelines. The RESA also has a monthly meeting with representatives of all its districts in which the local districts are asked whether the RESA's contractors, including but not limited to the psychologists, are complying with RESA's guidelines. Sturtridge also testified that while some of the contract psychologists own their own testing materials, the RESA purchased some testing materials for use by contract psychologists who did not have them, including Schultz-Mullin. According to Sturtridge, these testing kits are owned by the RESA but are stored in various places, including Respondent's special education offices. The RESA also purchased the scoring software which was distributed to all its contract psychologists. Sturtridge testified that both the RESA and Respondent approve the contract psychologists' invoices before the RESA pays them. The RESA submits requests for reimbursement to the State, which it receives annually in its State aid payment, and bills Respondent quarterly for the remaining costs.

Sturtridge also testified that the RESA conducts training for contract psychologists, as well as for local district special education staff, although the local district special education directors sometimes do the actual training.

Discussion and Conclusions of Law:

The Duty to Bargain over the Subcontracting of Unit Work

The classic definition of subcontracting is an employer's decision to replace its employees with employees of a subcontractor to perform the same work under similar

conditions and under the ultimate control of the same employer. See *St Clair Co ISD*, 17 MPER 77 (2004). Under PERA, this type of decision is generally subject to the duty to bargain, except where it has been specifically made a prohibited subject of bargaining in PERA. As the Court of Appeals noted in *Van Buren Pub Sch Dist v Wayne County Circuit Judge,* 61 Mich App 6, 26-27 (1975), a subcontracting dispute may be amenable to resolution by bargaining even when the employer's decision to subcontract is not based upon labor costs:

> Union input might reveal aspects of the problem previously ignored or inadequately studied . . . The union may well be able to offer an alternative to the one chosen . . . which would fairly protect the interests and meet the objectives of both. Surely discussion of the subject would have done much to "promote industrial peace" and may even have prevented the present lawsuits. Negotiation, even if ultimately unsuccessful, does much to appease; explanation at the bargaining table will sooner quell anger than receipt of a tersely worded termination slip.

It is well established that the subcontracting of unit work is a mandatory subject of bargaining only if: (1) the decision to subcontract does not alter the employer's basic operation; (2) there is no capital investment or recoupment; (3) the employer's freedom to manage his business would not be significantly abridged by requiring bargaining; and (4) the dispute is amenable to resolution through the collective bargaining process. *Fibreboard Paper Products Corp v National Labor Relations Board*, 379 US 203, 213 (1964); *Van Buren,* at 28; *Detroit Police Officers Ass'n v City of Detroit*, 428 Mich. 79, 95 (1987); *St. Clair ISD.*

In *Bay City Ed Ass'n v Bay City Public Schs,* 430 Mich 370 (1988), however, the Supreme Court held that a local school district's decision to transfer its special education programs to its intermediate school district was not, under the circumstances of that case, subcontracting. It concluded instead, that it was an educational policy decision and a matter of managerial prerogative over which the local district was not required to bargain. Respondent contends that under that case and the statutory provisions discussed therein, it had no obligation to bargain over its decision to enter into the agreement with the RESA.

The Bay City Case

On April 1, 1982, three unions representing employees of the Bay City Public Schools filed an unfair labor practice charge with the Commission alleging that the Employer had committed unfair labor practices by refusing to bargain with them over the Employer's decision to subcontract with the Bay-Arenac Intermediate School District (the ISD) to operate its special education programs. Prior to this decision, Bay City operated a special education center that serviced both its own students and students from other constituent local districts within the ISD. However, the ISD could receive more

state aid per student for operating the programs Bay City provided at the center. For this reason, the boards of all the other constituent districts passed resolutions requesting the ISD to operate these programs. When it became clear that the other local districts would no longer send their students to the programs operated by Bay City, the Employer's school board adopted a motion to transfer its special education programs to the ISD and to ask the ISD to assume this responsibility as to Bay City students. When its unions demanded to bargain, the Employer refused on the grounds that it was not subcontracting these services but merely terminating its responsibility for them by transferring them to the ISD. However, it offered to bargain over the impact of the decision on employees. After the ISD began operating the center, the ISD controlled the programming and the students of the constituent districts attending the center became students of the ISD for all purposes, including the calculation of state aid. According to the record before the Commission, Bay City did not offer any form of special education services in the school year following its decision to transfer the center's programs to the ISD.

The unions argued that the Employer's decision was a mandatory subject of bargaining because it involved the subcontracting to the ISD of bargaining unit work. In *Bay City Pub Schs*, 1985 MERC Lab Op 367, and 1985 MERC Lab Op 563 (on motion for reconsideration), the Commission concluded that the employer's decision did not involve subcontracting and that employer had no duty to bargain over the decision. The Commission found that Bay City was required by §1751 of the School Code to provide special education services or contract for them, and that the ISD was also obligated by law to provide these services. The Commission concluded that despite the fact that the Employer's school board had used the word "transfer" in its resolution, Bay City had simply decided to terminate a program that it had formerly operated. It noted that this type of decision had long been held to be within an employer's inherent managerial prerogative.

In *Bay City Ed Ass'n v Bay City Pub Schs,* 154 Mich App 68 (1986), the Court of Appeals reversed the Commission's decision. It concluded, first, that the Commission had erred in finding that Bay City could, under §1751 of the School Code, "get out of the business" of providing special education services. It found that the Employer continued to provide the services, albeit through a contract with the ISD. The Court of Appeals concluded that the employer had subcontracted bargaining unit work to the ISD and, applying the standards set forth in *Fibreboard Paper Products Corp* and *Van Buren Public Sch Dist*, concluded that it had a duty to bargain over the decision to do so. The Court noted that the decision did not involve any capital investment or recoupment, and that, because the sole purpose of the decision was to save the employer money, the dispute was amenable to resolution through collective bargaining.

In *Bay City Ed Ass'n v Bay City Public Schs,* 430 Mich 370 (1988), the Michigan Supreme Court reversed the Court of Appeals and reinstated the Commission's dismissal of the charge. The Court characterized the employer's decision as a decision "regarding

the extent of its curriculum" and held, based on PERA and §1701 of the School Code, that this decision was not subject to the duty to bargain. The Court stated:

> Once the transfer was effectuated in the present case, the local board relinquished its management control over the special education programs and assumed a position on equal footing with the other constituent districts of the ISD. In spite of whether the ISD or the local district provides the program of service, however, neither party may completely terminate its statutory obligation to these special education students. The Legislature crafted a statutory scheme that contemplated cooperative decision making and shared responsibility for providing programs and services designed to develop the maximum potential and address the special needs of each handicapped child in this state. In recognition of this comprehensive statutory scheme, we decline to consider this arrangement a subcontract or to subject it to a *Fibreboard* [*Fibreboard Paper Products Corp v NLRB,* 379 US 203 (1964)] analysis. *Bay City,* at 378-379

The Court went on to further distinguish the case from the types of contracts found to require bargaining, noting that this case did not simply involve an attempt by a public employer to substitute private employees in order to conserve finances, but that the local board and ISD entered into the arrangement at issue in order to discharge the responsibility vested by law in both of them while maximizing state funding for special education programs and services. The Court also noted that the Legislature had anticipated and authorized this exercise of managerial control and had, in fact, provided a measure of employment security for affected employees by enacting §1742. The Court concluded, at 381-382:

> It is within the scope of a local school board's management prerogative to determine its role in the delivery of educational services. The disputed decision at issue here was a cooperative one made in recognition of the interrelationship and funding concerns of all the constituent districts and their intermediate school district. The school district's transfer of special education center programs to the ISD was a fundamental management policy decision anticipated and authorized by the Legislature.

The Court also noted that the decision was not amenable to the collective bargaining process, in part because §1742 of the School Code provided protections for affected employees. Thus, the Court concluded, the only benefit the union could have gained in bargaining was a "delay or reversal" of the employer's decision, a decision the employer clearly had the right to make.

As noted above, Respondent argues that under *Bay City*, its decision to contract with the RESA to provide a mandated special education service was an educational policy decision within its managerial control and not subject to the duty to bargain. It argues that the fact that *Bay City* involved the transfer to the ISD of all the local district's special education programs, and not a single service as in the instant case, is not

significant because §1751 of the School Code specifically authorizes a local school district to contract with its ISD for delivery of one or a combination of special education programs or services. Charging Party asserts that *Bay City* is distinguishable on its facts. It cites the Court's statement, quoted above, that in *Bay City* the local board relinquished its managerial control over the special education programs, and notes that in this case Respondent continues to exercise control over the evaluations performed for its students. In addition, unlike the local district in *Bay City*, Respondent also continues to be ultimately responsible for paying for these evaluations. Second, Charging Party argues that in concluding that the transfer in *Bay City* was not a decision subject to the duty to bargain, the Court relied on the fact that the employees of the local school district would, in accord with §1742 of the School Code, become employees of the ISD and be provided with all the rights and benefits to which they would have been entitled had they been employed by the ISD originally. In this case, of course, the RESA did not offer to hire Respondent's school psychologists or provide them with the benefits to which they would have been entitled as employees of the RESA.

I agree that there are significant differences between the transfer of special education programs to the ISD in *Bay City* and the agreement between Respondent and the RESA in this case. Both actions were authorized by §1751 of the School Code. However, the fact that a public entity has the legal authority to contract with another entity to provide services to its population says nothing about whether it has a duty to bargain with the unions representing its employees over that contract. The Court did not hold that the local district in *Bay City* had no duty to bargain simply because §1751 gave it the authority to contract with the ISD, among several other types of entities, for the delivery of special education services. In addition, Respondent's decision to contract with the RESA to provide psychological evaluations for special education students being educated in Respondent's classrooms, evaluations that Respondent continued to oversee and to pay for, is harder to conceptualize as a "decision about its curriculum" than the transfer of managerial responsibility for special education programs to the ISD in *Bay City*.

In my reading, however, the determinative factor in the Court's conclusion that the transfer in *Bay City* was fundamentally an educational policy decision, and therefore a matter of managerial prerogative, was its finding that an ISD and its local districts share responsibility for special education programs and services and that the "statutory scheme" contemplates that the ISD and its local districts will cooperatively decide how and by whom these programs and services will be provided. I note that §1711 of the School Code not only gives an ISD the right to operate or deliver a special education program or service, it requires it to develop and maintain a plan for the delivery of special education services throughout its district, and to coordinate the programs and services provided by its local districts. Under §1751, the ISD must also be a party to any contract entered into by the local district for the provision of special education services, and any program or service provided by a local district must comply with the ISD's plan. In this case, Respondent had for a number of years employed school psychologists to provide certain special education services. As long as Respondent was willing to pay their salaries, the RESA apparently did not object. However, under the School Code, the decision as to what kind of psychological or any other type of services would be offered to Respondent's special education students, and how they would be delivered, was

ultimately not Respondent's alone, but rather a decision to be made cooperatively with the RESA. Requiring Respondent to bargain with Charging Party over its decision to enter into an arrangement with the RESA would, I conclude, not only conflict with Respondent's inherent right to make decisions about educational policy, but also interfere with the RESA's ability to satisfy its own statutory responsibilities. I conclude that under the Court's decision in *Bay City,* Respondent did not have an obligation under PERA to bargain with Charging Party over the decision to enter into an arrangement with the RESA to provide psychological evaluations and testing for Respondent's special education students.

Respondent's Response to Charging Information Requests and

Charging Party's Failure to Demand Bargaining

An employer's duty to bargain is dependent on its receipt of an appropriate demand. *Local 586, Service Employees International Union v Union City*, 135 Mich App 553, lv den 421 Mich 857 (1995). When a union fails to make a timely demand, it waives any rights it may have unless it can establish that the demand would have been futile. *Ida PS*, 1996 MERC Lab Op 211; *Leelanau Co Bd of Comm*, 1988 MERC Lab Op 590. However, a union has no duty to demand bargaining over a unilateral change when that change is presented as a fait accompli. *Allendale Public Schools,* 1997 MERC Lab Op 183, 189; *County of Wayne*, 1985 MERC Lab Op 833, 839.

Respondent contends that Charging Party waived any right it may have had to bargain by failure to make a timely demand. I conclude that even if Respondent had an obligation to bargain over its decision to contract with the RESA or its effects on unit employees, Charging Party waived its rights by failure to make a timely demand to bargain. As discussed below, I reach this conclusion even though I also find that Respondent failed to respond honestly and forthrightly to Charging Party's requests for information.

On March 3, 2010, after Trongo discovered that Respondent had not allocated any school psychologist positions for the following year, she sent Respondent a letter demanding that Respondent not remove the positions from the unit and threatening litigation. This letter did not include a demand to bargain or a request for information. The letter required no response, and Trongo did not receive one. On April 29, 2010, however, Trongo sent Respondent a request for information under both PERA and the Freedom of Information Act asking for information "relating to the transfer of [school psychologists and/or social workers" to the RESA. The facts show that by the time Respondent responded to this letter, it had effectively decided to eliminate the school psychologist positions and transfer responsibility for their functions to the RESA where they would be performed by contractors. Respondent's superintendent and the superintendent of the RESA had agreed that "something would be worked out" between the two entities," and Respondent had eliminated the salaries and benefits of psychologists from its preliminary budget and removed the positions from its building allocations. In addition, Kostiuk and Paul had met with Sturtridge and learned that the RESA would provide only legally -mandated psychological services, i.e. testing and evaluations, and that the RESA only used contractors, and not employees to provide this

service. Respondent's May 17, 2010 response to Trongo's letter was not literally false, since Respondent had not had any discussions about transferring the psychologists or their positions to the RESA and presumably there were no documents or correspondence on this subject. The response was, however, carefully calculated to avoid disclosing Respondent's actual plans. Respondent had not yet entered into a contract with the RESA on July 7, 2010, when Respondent replied to Trongo's June 16 request for information, However, Respondent's Board had adopted the budget that did not include funds for psychologists' salaries, and Respondent had apparently made no effort to have the evaluations done by anyone other than the RESA. Like its May 17 letter, Respondent's July 7, 2010 letter contained no statements that were literally false. Again, however, it carefully avoided disclosing to Charging Party the truth about its plans. In addition to Respondent's evasive letters, Paul made statements to Trongo and the psychologists which led them to believe that the psychologists might be transferred as employees to the RESA when, according to Sturtridge, Paul knew that this was never an option. It was not until after the start of the 2010-2011 school year that Respondent finally admitted to Charging Party that it planned to have the RESA provide the evaluations through the use of independent contractors.

Despite Respondent's evasiveness, however, I find that Charging Party was not presented with a fait accompli, and that in the spring or early summer of 2010 it had sufficient information to place upon it the obligation to make a demand to bargain over the decision and/or its impact on employees. According to Trongo, Paul told her before March 6 that the psychologists were being laid off and that their work might either be privatized or the psychologists themselves transferred to work as employees for the RESA. This was surely sufficient grounds for Trongo to have made a demand to bargain over the subcontracting or transfer of the psychologists' work and its effects on employees, but she did not do so. Trongo did not demand to bargain even after Respondent informed her, in its May 17 letter, that "there was no evidence" that the psychologists positions would be transferred to the RESA and the psychologists received notice on May 18 that they would be laid off at the end of that school year.

Respondent asserts that Trongo, herself a former school psychologist, knew that the testing and evaluation of special education students by psychologists is mandated by the State. It maintains that she knew, as soon as she learned in February 2010 that Respondent had not allocated any school psychologist positions for the next school year, that Respondent would be looking at other methods of delivering this service. Respondent argues that Trongo never made a demand to bargain because she did not want to bargain. Rather, Trongo wanted to argue, as Charging Party eventually did before an arbitrator, that the collective bargaining agreement required Respondent to assign that work to bargaining unit employees. As indicated above, I agree that Charging Party had sufficient information by the end of the 2009-2010 school year to place upon it the obligation to make a demand to bargain over the transfer or subcontracting of work performed by the school psychologists. I find, therefore, that Charging Party waived any rights it had to bargain by its failure to make a demand to bargain over either Respondent's decision to contract with another party for the services of psychologists or the effect of this decision on employees. Charging Party's motives for failing to make a demand to bargain are irrelevant. I conclude, therefore, that even if Respondent had a duty to bargain over its decision to transfer arrangements with the RESA or the impact of

these arrangements on employees, the allegation that Respondent violated this obligation should be dismissed because Charging Party failed to make a demand to bargain over either the decision or its effects.

As discussed above, I find that during the spring and summer of 2010, Respondent deliberately evaded telling Charging Party of its plans to transfer the work of performing psychological evaluations for special education students to the RESA, where they would be done by outside contractors. Despite this, however, I conclude that Respondent did not fail or refuse to provide Charging Party with the specific information it requested on April 29 and June 16, 2010, which was "information… relating to the transfer of the psychologists' positions to the RESA." I recommend, therefore, that the allegation that Respondent violated its duty to bargain by refusing to provide Charging Party with accurate and timely information be dismissed.

Conspiracy to Privatize Bargaining Unit Work

Charging Party alleges that Respondent violated PERA by conspiring with the RESA to deprive the laid off psychologists of the employment protections provided in §1742 of the School Code. According to Charging Party, §1742 required the RESA to give hiring preference to the six school psychologists laid off as a result of the transfer of psychological services from Respondent to the RESA and to provide them with the same level of compensation they would have received had they been employed originally by the RESA.

I agree with Respondent that PERA does not provide a cause of action for conspiracy, much less conspiracy to violate another statute. I recommend, therefore, that this allegation also be dismissed and that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____