STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TRI COUNTY AREA SCHOOLS,
Public Employer-Respondent,

Case No. C13 E-081
-and- Docket No. 13-002779-MERC

TRI COUNTY CUSTODIAL/MAINTENANCE ASSOCIATION, MEA/NEA
Labor Organization-Charging Party.
_____/

APPEARANCES:

Clark Hill P.L.C., by Marshall W. Grate, for Respondent

Kalniz, Iorio & Feldstein, L.P.A., by Fillipe S. Iorio, for Charging Party

DECISION AND ORDER

On June 12, 2014, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent Tri County Area Schools (Respondent) did not violate § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The ALJ found that Charging Party Tri County Custodial/Maintenance Association, MEA/NEA (Union) failed to establish a prima facie case of unlawful discrimination and failed to prove that anti-union animus was a motivating or substantial factor in Respondent's decision to subcontract bargaining unit work. She also found that Respondent did not violate its duty to bargain in good faith and did not engage in direct dealing. The ALJ concluded that the Union failed to demonstrate that it was denied an opportunity to bid on an equal basis for a contract to perform bargaining unit work. The ALJ recommended dismissal of the unfair labor practice charge in its entirety. The Decision and Recommended Order of the ALJ was served on the parties in accordance with § 16 of PERA.

After requesting and receiving an extension of time, the Union filed exceptions to the ALJ's Decision and Recommended Order on August 6, 2014. After being granted an extension of time to file its response, Respondent filed a Brief in Support of the ALJ's Decision and Recommended Order on September 2, 2014.

In its exceptions, the Union argues that the ALJ erred when she found that Respondent's decision to subcontract was not motivated by anti-union animus, that Respondent did not bargain in bad faith and that Respondent did not engage in direct dealing. The Union also contends that

the ALJ erred by holding that it was afforded an equal opportunity to bid on the subcontracting of bargaining unit work.

In its Brief in Support of the ALJ's Decision and Recommended Order, Respondent contends that the ALJ did not err in any of her findings of fact and conclusions of law and urges the Commission to adopt the ALJ's Decision and Recommended Order in its entirety.

We have carefully reviewed the Union's exceptions and find them to be without merit.

Factual Summary:

We adopt the facts found by the ALJ and repeat them here only as necessary.

The bargaining unit consists of custodial and maintenance employees who performed cleaning and maintenance of the buildings and care of the grounds and athletic fields. The Union and Respondent were parties to a collective bargaining agreement that expired on June 30, 2013. Pursuant to the contract, each year bargaining unit members bid on job assignments based on seniority; one year an employee might do cleaning work, the next year grounds or building maintenance work. Respondent claims that this had a negative effect on the quality of the work and was inefficient.[1] Respondent wanted to train maintenance workers to operate and maintain new heating and electrical systems and to keep those workers in maintenance positions permanently in order to avoid having to train new people every year. To achieve that result, Respondent desired to eliminate annual job selection based on seniority and separate the bargaining unit into two job classifications – custodial and maintenance.

Bruce Mactavish, a bargaining unit member, testified that all heavy maintenance, such as replacing or repairing boilers, electrical re-wiring or installing new wiring, was already being done by outside contractors and the bargaining unit never did that kind of work. Maintenance work, he testified, consisted of duties such as fixing doors, changing light bulbs, and replacing pencil sharpeners. Custodial work consisted of cleaning classrooms, restrooms, the gym, locker rooms and other areas inside the buildings. Grounds work consisted of, among other things, mowing grass, trimming and setting up for athletic field games. Mactavish said he had performed all of the functions of custodial, maintenance and grounds crews, as had all bargaining unit members. Kathi Wood, Respondent's Director of Finance and Operations, testified that any work which required a license, such as a plumber's license or an electrician's license, was performed by outside contractors. No bargaining unit member was required to possess a license of any kind.

Due to the loss of state funds and reduced enrollment, Respondent, in an attempt to cut costs, issued a Request for Proposals (RFP) for a contract to perform custodial and maintenance services.[2] Wood testified concerning the school district's ongoing operating deficits.[3] The Union

[1] None of the bargaining unit members had been disciplined for poor job performance.

[2] Respondent claims that it sought the RFPs because it wished to receive "best practices" money from the State Department of Education. The district would receive $52.00 per pupil if it met 7 of 8 criteria identified as best practices. One of the criteria was the obtaining of competitive bids for noninstructional support services. School districts were not required to actually subcontract bargaining unit work in order to receive best practices funds.

[3] Wood also testified that in the past, deficits resulted in Respondent privatizing its transportation department.

responded to the RFP, but its bid was rejected because it did not meet the requirement that bidders include estimated costs for the services on a Proposal Pricing Form. In its proposal, the Union explained that it was neither an employer nor an independent contractor, but was bidding for bargaining unit members to perform the work, and "we have no custodial services pricing proposals to offer."

The school board held a bid opening meeting in February 2013, where it opened the bids and read aloud the figures regarding costs. Ervin Pratt, the Union UniServ Director, testified that the Union's bid was not opened, but was "tossed aside." Wood testified that she opened the Union's bid and it did not include the Proposal Pricing Form. She added that despite the Union's failure to submit proposed costs, she assigned them a number to make a comparison with the other bids. Janet Powell, a member of the School Board, conceded that the winning bid did not include estimated maintenance work costs, but only included estimated custodial work costs. She also testified that when doing a cost comparison, the Board compared the total cost of both maintenance and custodial employees in the bargaining unit with the cost of only custodial work submitted by the winning bidder. At its May 13, 2013 meeting, the School Board approved subcontracting the bargaining unit work.

When bargaining began for a successor agreement on April 29, 2013, Respondent had already made the decision to advise the Board to subcontract bargaining unit work. However, during negotiations, Respondent made a proposal: It would not subcontract four of the seven bargaining unit positions if the Union would agree to eliminate seniority-based bidding for job assignments and give Respondent the authority to make job assignments based on qualifications. Respondent also proposed separating custodial positions from maintenance positions and, if the Union would agree to the proposal, granting a slight pay increase to both classifications. The Union rejected the offer.

Union members Mindy Wernette, Paula Elliot and MacTavish testified that on April 19, 2013, each met separately with supervisor Brian Akey to review their performance evaluations. According to the witnesses, Akey told each of them that if they did not give up the seniority/bidding provisions in the contract, their jobs would be subcontracted. Wernette testified that Akey told her that "if you guys do not give up your bidding rights, the board is going to privatize you." Akey testified that he told them that it was his opinion that "… if they didn't allow the District the ability to place them where we thought they could benefit us, they would be outsourced."

Respondent subcontracted the bargaining unit work and, on June 30, 2013, all but one of the seven bargaining unit members were laid off.

Discussion and Conclusions of Law:

Duty to Bargain and Alleged Bad Faith Bargaining

The Union argues that the ALJ erred in finding that it had an equal opportunity to bid on the contract for custodial and maintenance services, and, because it was not afforded an equal opportunity, Respondent had a duty to bargain over whether it would subcontract. We agree with

the ALJ that Respondent had no obligation to bargain over whether to subcontract bargaining unit work. PERA §15(3)(f) states in pertinent part:

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

The Michigan Court of Appeals, interpreting §15(3)(f), has stated that "collective bargaining cannot include matters pertaining to third-party contracts relative to noninstructional support services, because the legislature gave sole authority over that issue to the public school employer." *Reese Pub Sch Dist*, 28 MPER 51 (2014), citing *Pontiac Sch Dist*, 295 Mich App 147 (2012). The employer and the union may discuss prohibited subjects of bargaining, but the employer does not commit an unfair labor practice if it refuses to bargain over them. We agree with the ALJ that because §15(3)(f) of PERA prohibits the parties from bargaining concerning the subcontracting of non-instructional support services, there was no duty on the part of Respondent to bargain in good faith. Where there is no statutory duty to bargain, the parties' discussions cannot constitute a breach of the duty to bargain in good faith. *Grand Haven Public Schools*, 19 MPER 82 (2006).

The ALJ also correctly noted that the §15(3)(f) prohibition on bargaining applies only where the Union has an equal opportunity to bid on the contract for bargaining unit work. We have held that if a public school employer prevents a bargaining unit from bidding on a contract for noninstructional services on an equal basis as other bidders, the employer has the same duty to bargain over subcontracting services as public employers have over the subcontracting of other types of bargaining unit work. However, we have also found that in order to bid on a contract on an equal basis as other bidders, the union must submit a bid that complies with the RFP. Submitting a proposal for a concessionary collective bargaining agreement does not qualify as a bid under PERA. *Lakeview Cmty Schs*, 25 MPER 37 (2011), aff'd in *Mt Pleasant Pub Schs v AFSCME Council 25*, 302 Mich App 600 (2013), cert. denied, 495 Mich 998 (2014).

The ALJ was correct in concluding that the Union had an equal opportunity to bid on the RFP. In *Lakeview, supra*, the union argued that the requirements of the RFP placed them at a disadvantage because they were unable to meet certain requirements including that the third-party bidder be a "contractor for services." We disagreed, stating that:

> The language of the statute [§15(3)(f)] sends an unequivocal message that bargaining units are to engage in the type of bidding and act in the manner of any other third-party contractor. While Charging Parties protest that it is unfair and

> unrealistic to expect them to act as third-party contractors, that is what the statute says they must do in order to bid on a contract for noninstructional support services on an equal basis with other third-party bidders. While this does not fit the realities of traditional public sector bargaining and labor-management relations, we do not judge the wisdom of legislative enactments.

The Court of Appeals, in affirming *Lakeview*, stated that §15(3)(f) "does not support plaintiff's position that they were entitled to input into the terms of any request for proposal before the bidding process, or to have terms drafted in a manner that would permit the bargaining unit an opportunity to submit a bid on terms that differed from those other potential bidders. This approach would put plaintiffs in a superior position to other bidders." In this case, the Union's bid explicitly stated that it was not bidding as a third party contractor, and that if its bid were accepted Respondent would remain the employer. The ALJ correctly held that the Union was given an opportunity to bid on an equal basis and that its bid did not comply with the RFP. Accordingly Respondent had no legal duty to bargain over its decision to subcontract bargaining unit work and its failure to do so did not violate §10(1)(e).

The Union also takes exception to the ALJ's finding that Respondent did not engage in bad faith bargaining during negotiations for a successor contract. It claims that Respondent set preconditions to bargaining by informing the Union at the first bargaining session that the Board had made the decision to eliminate seniority provisions with respect to job placement. That precondition, the Union claims, demonstrates that Respondent was not open to compromise and had no desire to reach an agreement. Citing *St Clair Intermediate Sch Dist*, 17 MPER 77 (2004), the Union asserts that "[a]n employer who notifies the union of its decision only after the decision becomes a *fait accompli* violates its obligation to bargain in good faith." However, *St Clair* involved instructional employees where there was a duty to bargain; thus, §15(3)(f) did not apply there. In addition, Respondent's offer to maintain four of the seven bargaining unit positions, and to give pay increases if the Union would agree to give up seniority-based job placement, demonstrates willingness to compromise and a desire to reach an agreement.

In *Kentwood Pub Schs*, 17 MPER 61 (2004) (no exceptions), the union alleged that the employer set preconditions to bargaining when the superintendent discussed the financial condition of the district with union officials and at a union general membership meeting. She informed them that there would not be enough money for fully paid insurance and step and salary increases due to the district's financial status. The union filed a charge alleging that the employer violated PERA by setting preconditions to bargaining. The ALJ held that the employer "merely provided information on Respondent's ability to provide salary and step increases and fully-paid insurance premiums in view of declining revenue. A precondition to bargaining implies that one party must do something before the other party will bargain. Charging Party has failed to identify any condition in the Superintendent's remarks that had to be fulfilled before Respondent would bargain." In the instant case, the Union has likewise failed to identify a condition it had to fulfill before Respondent would bargain. The parties were engaged in bargaining when Respondent made the offer to retain four bargaining unit positions if the Union would agree to certain concessions. Respondent also offered pay raises in exchange for the Union's concession on seniority bidding. Because Respondent had no duty to bargain over subcontracting, its offer, during negotiations, to minimize the impact of subcontracting was not a

pre-condition, but rather a negotiating position. The ALJ, therefore, was correct that Respondent did not engage in bad faith bargaining in violation of §10(1)(e).

Anti-Union Animus

The Union claims that the ALJ erred by finding that Respondent's decision to subcontract bargaining unit work was not motivated by anti-union animus. A public school employer's decision to subcontract noninstructional support services, even where it is not subject to a duty to bargain, may be unlawful if motivated by anti-union animus. *Coldwater Cmty Schs*, 2000 MERC Lab Op 244. As the Commission stated in *Southfield Pub Schs*, 25 MPER 36 (2011), when an employer's decision to subcontract is the issue in a case alleging unlawful discrimination, the question to be resolved is whether the decision was based on legitimate business concerns or on an unlawful motive, such as the desire to terminate the union's representation of employees.

In addition to an adverse employment action, the elements of a prima facie case of unlawful discrimination are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Grandvue Medical Care Facility,* 27 MPER 37 (2013). There must be sufficient evidence from which to make a reasonable inference that discrimination was the employer's motive. *MERC v Detroit Symphony Orchestra,* 393 Mich 116 (1974). Union or other protected concerted activity must be shown to have been a motivating or substantial factor in the employer's decision. If the charging party demonstrates a prima facie case, the burden shifts to the employer to prove that the same action would have been taken even without the protected conduct. The ultimate burden remains with the charging party. *Grandvue, supra; MESPA v Evart Pub Schs*, 125 Mich App 71 (1983).

We agree with the ALJ that the Union failed to demonstrate that anti-union animus motivated Respondent's decision to subcontract bargaining unit work. The Union claims that Respondent's refusal to sign a March 2013 Letter of Agreement extending union security provisions is evidence of anti-union animus.[4] However, the ALJ noted that the parties were not engaged in contract negotiations when the Union presented the Letter of Agreement. Respondent was in the process of analyzing bids from third parties to do bargaining unit work. In addition, the district superintendent did not want to extend union security until the parties had settled on a new contract. The parties did not begin negotiating a successor contract until April 29, 2013. Respondent offered to begin negotiations on March 26, 2013, when union security agreements were still lawful, but Union officials rejected that date. In addition, Respondent agreed to a union security contract with its teachers as part of a complete successor agreement, which demonstrates that Respondent was not against such agreements. For all of these reasons, the ALJ was correct in finding that Respondent's refusal to sign the union security agreement was not motivated by anti-union animus.

The second action cited by the Union as proof of anti-union animus was the alleged threats made by Akey to unit members that if they did not agree to give up seniority bidding

[4] Union security agreements were still lawful in early March 2013 when the Union presented Respondent with the Letter of Understanding; the State's Right to Work law, PA 349, did not take effect until March 28, 2013.

rights, Respondent would subcontract their positions. In *Southfield Pub Schs, supra*, the union alleged anti-union animus based in part upon a conversation between an employee and a school board member in which the board member said that the current work force was "expensive because they made too much money and used too much paid leave time." We dismissed the charge, finding that the statement did not demonstrate anti-union animus.

We agree with the ALJ that Akey's statements are not evidence of anti-union animus. When Akey made the statements, Respondent had already received bids from third party contractors and prepared a cost analysis to determine whether subcontracting bargaining unit work would be fiscally responsible. Respondent also had concerns about the skills of unit employees performing maintenance and grounds duties and was attempting to address those concerns. We agree with the ALJ that Respondent's desire to match employee skill sets with specific job requirements is a legitimate business concern. We also agree that Respondent's concerns about loss of revenue and the necessity of cutting costs are legitimate business concerns. The ALJ was correct in finding that Akey's comments "merely disclosed the legitimate business considerations that Respondent was weighing in deciding whether to subcontract some or all of the unit's work, and were not evidence of anti-union animus." Accordingly, the ALJ correctly concluded that Respondent did not violate §10(1)(c) of PERA.

Direct Dealing

To determine whether an employer has engaged in direct dealing in violation of its duty to bargain in good faith, the following must be shown: (1) the employer was communicating directly with union-represented employees; (2) the communication was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and (3) the communication was made to the exclusion of the union. *Permanente Medical Group, Inc*. 332 NLRB 1143, 1144 (2000); *City of Detroit*, 2000 MERC Lab Op 368 (no exceptions). In *West Bloomfield Township*, 25 MPER 78 (2012), we held that "[m]ere discussions between an employer and employee to ascertain an employee's interest in a position that is not subject to the promotional process of the parties' collective bargaining agreement does not constitute a direct dealing violation." See also *City of Detroit (Water and Sewerage)*, 1983 MERC Lab Op 603 (direct discussions with an employee about that employee's preferences regarding a discretionary assignment do not constitute improper direct dealing.)

We agree with the ALJ that Akey's statements to Wernette, MacTavish and Elliot during their performance evaluations did not constitute unlawful direct dealing. The ALJ was correct that the statements were not made for the purpose of establishing or changing wages, hours and terms and conditions of employment and were not made to undercut the union's role in bargaining. The statements were made after the School Board had published the RFP, after the bids were opened and processed, and after Respondent had recommended a contractor. Wernette and Elliot testified that they asked Akey about the status of subcontracting. The ALJ found that Akey "merely responded to their questions based on what he knew about the proposal Respondent intended to present to Charging Party when the parties finally met to begin negotiations." We agree. The record does not indicate that Akey was trying to circumvent

negotiations or undercut the Union's role. Moreover, Akey was not the decision maker; decisions concerning subcontracting were made by the School Board.

The Union also alleged that when Akey asked MacTavish if he had any interest in a permanent grounds position, he engaged in direct dealing. However, the ALJ noted that Akey did not tell MacTavish that Respondent was considering retaining maintenance and grounds work if employees gave up their bidding rights. Therefore, his question to MacTavish about accepting a grounds job cannot be interpreted as an offer to keep MacTavish employed if he could persuade the Union to agree to the elimination of bidding rights. We agree with the ALJ that Akey's question to MacTavish, and his comments to Wernette, Elliot and MacTavish, did not constitute either threats or direct dealing. Respondent, therefore, did not violate §10(1)(a).

We have carefully reviewed all other arguments made by the Union in its exceptions and find that they would not change the result. We affirm the ALJ's recommended dismissal of Charging Party's unfair labor practice charge and issue the following Order:

ORDER

The unfair labor practice charge is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: February 12, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

TRI COUNTY AREA SCHOOLS,
Public Employer-Respondent,

Case No. C13 E-081
Docket No. 13-002779-MERC

-and-

TRI COUNTY CUSTODIAL/MAINTENANCE ASSOCIATION, MEA/NEA
Labor Organization-Charging Party.
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APPEARANCES:

Clark Hill P.L.C., by Marshall W. Grate, for Respondent

Kalniz, Iorio & Feldstein, L.P.A., by Fillipe S. Iorio, 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 Lansing, Michigan on July 11 and August 15, 2013 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 October 31, 2013, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Tri County Custodial/Maintenance Association filed this charge against the Tri County Area Schools on May 10, 2013. Charging Party represents a bargaining unit of custodial and maintenance employees of Respondent. On December 20, 2012, Respondent issued a request for proposals (RFP) to perform the work done by Charging Party's members. Charging Party submitted a proposal in response to the RFP. The proposal was not accepted.

On April 29, 2013, before Respondent's Board had made a decision on the subcontracting, Respondent and Charging Party held a meeting to bargain a successor contract to their collective bargaining agreement which was to expire on June 30, 2013. At this meeting, Respondent presented Charging Party with a proposal for a new contract. In this proposal, Respondent proposed to eliminate bidding by seniority for job assignments and give Respondent

the authority to make job assignments based on qualifications. Respondent told Charging Party that if it accepted Respondent's proposal, Respondent's administrators would recommend to the Board that Respondent retain four positions within the unit to perform maintenance and grounds duties. Charging Party rejected the proposal. On May 13, 2013, Respondent's School Board authorized its superintendent to enter into an agreement with a third party contractor for custodial, maintenance and grounds services. Pursuant to its agreement with this contractor, Respondent laid off all but one of the thirteen members of Charging Party's unit effective June 30, 2013.

Charging Party asserts that Respondent did not give serious consideration to Charging Party's bid, and, therefore, it had an obligation to bargain with Charging Party over its decision to subcontract the work. Charging Party alleges that Respondent violated §10(1)(e) of PERA by failing to bargain in good faith over this decision. Charging Party also alleges that Respondent violated its obligation to bargain by preconditioning its agreement on a successor contract on Charging Party's agreement to eliminate unit members' right to choose their job assignments by seniority. In addition, Charging Party alleges that Respondent engaged in unlawful direct dealing with unit members when, on or about April 19, 2013, Respondent's director of operations told unit members that if they did not give up their seniority rights with respect to job placement, Respondent would subcontract their positions. Finally, Charging Party alleges that Respondent's decision to subcontract bargaining unit work violated §10(1)(c) of PERA because it was based on anti-union animus.

Findings of Fact:

At time the charge was filed, Respondent's employees were represented in three bargaining units. One consisted of teachers and other professional employees, a second represented paraprofessional, clerical and food service employees, and the third was Charging Party's unit of custodial and maintenance employees. Employees in Charging Party's unit cleaned buildings, performed maintenance work, and cared for the grounds. Respondent has water retention lagoons on its property, and one unit employee possessed a license to monitor and maintain the lagoons.

On June 29, 2013, there were thirteen employees in Charging Party's unit. Historically and under the terms of the parties' collective bargaining agreement, there was only one job classification within this unit. The collective bargaining agreement also provided that job assignments would be offered for bid once per year and awarded strictly by seniority. For the 2012-2013 school year, there were thirteen different job assignments. Each job assignment included both custodial and maintenance duties, with some assignments covering one building and some covering multiple buildings. One job assignment also included grounds duties, including maintaining the school athletic fields.

The parties' last collective bargaining agreement covered the period 2010 through June 30, 2013. In 2010 or early 2011, while negotiations for this agreement were taking place, Respondent issued an RFP for a contract to perform the work done by the bargaining unit. After the parties agreed to a fifteen percent wage decrease, Respondent decided not to subcontract the work.

During the 2011-2012 school year, Respondent discovered some additional funds not covered by the budget. In April 2012, Charging Party asked Respondent to restore some of the wage cuts the unit had taken in the 2010-2013 agreement. Respondent told Charging Party that it would consider raising wages if Charging Party agreed to allow Respondent to create separate classifications for custodial, maintenance and grounds employees and pay employees in these classifications at different rates. According to finance director Kathi Wood, a member of Respondent's bargaining committee, Respondent had noticed that its grounds looked markedly better in some years than others, depending on which employee had been awarded the grounds assignment, and the Respondent wanted an employee skilled in grounds duties permanently assigned to that job. It also wanted maintenance duties assigned to only a few employees so that Respondent could provide them with adequate training in operating and servicing its new electronic heating and cooling systems.

In August 2012, Mindy Wernette, Charging Party's president and the least senior employee in the unit, asked to be given a job assignment that had been awarded to a more senior member of the bargaining unit who then took a leave of absence. Wood and Brian Akey, director of operations and Wernette's direct supervisor, refused to allow her to switch assignments, telling her that her job was too dangerous for a substitute to do. According to Wernette, they also said, "they would never, ever help us out in any way, shape or form until we gave up our bidding rights." Neither Akey nor Wood explicitly denied making this statement.

Like many other school districts in Michigan, Respondent has experienced drops in revenue over a period of years due to a combination of falling student enrollment and decreases in state per pupil funding. In its 2011-2012 fiscal year, Respondent's operating deficit was approximately $500,000. In 2012-2013, it was approximately $860,000. In its June 2013 estimated budget for the 2013-2014 fiscal year, Respondent projected an operating deficit of over $1 million. Because Respondent balanced its budgets for those years by reducing its fund balance, Respondent's ratio of fund balance to budgeted expenditures fell from a healthy 24.27 percent to 16.72 percent, close to the 10 percent Respondent's Board had previously concluded was fiscally prudent. In response to these operating deficits, Respondent undertook a number of budget cutting measures between 2010 and the spring of 2013. These included closing a school building, laying off teachers, and subcontracting its transportation services.

For the 2012-2013 school year, the State Department of Education offered local school districts a "best practices" incentive of an additional $52 per pupil in funding if it met seven of the eight criteria the Department identified as best practices. One of the eight was the obtaining of competitive bids for noninstructional support services. At a meeting of Respondent's School Board on December 10, 2012, the Board's finance committee recommended that a RFP be issued for custodial services. On December 20, 2012, Respondent issued an RFP for a three year contract to begin July 1, 2013 for custodial, maintenance and grounds services.

A copy of the RFP was mailed on December 19 to Ervin Pratt, the Michigan Education Association's UniServ Director assigned to Charging Party's unit. The cover letter to Pratt pointed out that the RFP required any request for exceptions to the terms of the RFP, or the form contract attached to the RFP, be specifically enumerated and submitted by the contractor as part

of the proposal, along with an explanation of why the contractor believed that the term or terms could not be met by or were not applicable to the contractor. The cover letter also pointed out that the RFP required that all "pricing factors" be clearly indicated in the manner required on a proposal form attached to the RFP.

The proposal form included as an attachment to the RFP required the bidder to state the total price for its bid, including wages, benefits, overhead, and profit, for each year of the three year contract. The bidder was also to give separate prices for custodial, grounds and facilities maintenance services, and the prices for grounds services were to include separate prices for lawn maintenance and snow removal services. The form also required the bidder to list the number of total budgeted man hours, both labor and supervisory, and the number of FTEs included in the quoted price for each group of services.

The RFP provided for a mandatory pre-proposal conference to be held on January 3, 2013 and a due date for submission of the written proposal of February 5, 2013. Wernette and Charging Party Vice-President Sandy Penner, along with representatives of seven private vendors interested in the work, attended the conference. During this conference, the timelines and requirements of the RFP were reviewed and prospective bidders were given the opportunity to ask questions. Respondent explained that it would accept separate bids for custodial, maintenance and grounds services, as well as package bids incorporating all three services. Respondent also explained the type of maintenance and other work it expected to be performed under the contract.

On or before February 5, 2013, Pratt, on Charging Party's behalf, submitted a written bid. It read, in pertinent part, as follows:

> With respect to the specifications listed in the RFP, the Association, not serving as a Contractor, is not able to comply with many portions of your RFP. However, the Association will use its best efforts to achieve the results requested by the district. The Association proposes that the Tri County School District will continue to remain as the Employer. The Association additionally proposes that all Tri County Custodial/Maintenance employees continue to be members of the Association, with all membership rights, responsibilities, wages, hours and working conditions, unless otherwise specified.
>
> The Association maintains that the District has not provided the Association an opportunity to bid on this contract for non-instructional support services on an equal basis as other bidders, and in not providing this opportunity has violated Section 10(1)(e) and Section 15 (3)(f) of the Public Employment Relations Act, MCL 423. In responding to this request for proposals, the Association reserves all rights to pursue legal remedies to address these violations.
>
> The Association is currently providing Custodial Services for the Tri County Area School District. The Association has represented employees providing custodial services to Tri County Area Schools for more than thirty (30) years. The Association members have one hundred sixty-seven (167) years of experience

> providing Custodial Services to the Tri County Area School District. The Association is not bidding as a contractor, therefore has no "corporate history" to provide.
>
> The Association is not submitting this proposal as a Contractor, therefore costs and "pricing" are unknown. It is the Association's expectation that the working conditions of every employee are a mandatory subject of bargaining and the specificity of portions of our proposal will be subject to negotiations. The following are the Association's responses to each issue in "Proposal Requirement and Format."

The bid then enumerated specific sections of the RFP with which Charging Party could not comply because it was not bidding as a contractor. It stated that it was in compliance with all applicable local, state and federal laws, and that it proposed to continue the in-service training offered by Respondent for custodial employees. The bid stated:

> Although the Association is not bidding as a Contractor for services, the Association does offer resources that a Contractor is not able to offer and which demonstrates and enhances the Association's ability to carry out the services required under this RFP. These resources are:
>
> a. Trained, experienced staff.
> b. Over thirty (30) years of successful custodial services to the District.
> c. Knowledge of the Tri County Area School District facilities.
> d. Knowledge of the Tri County Area School District grounds.
> e. Knowledge of the Tri County Area School District staff.
> f. Knowledge of the Tri County Area School District students and parents.
> g. Knowledge of special circumstances and needs of District students.
> h. Knowledge of the Tri County community. Staff members participate in community events/ school events.
> i. Knowledge of existing equipment, supply use, and utilization of equipment.
> j. A high percentage of staff who are residents of the Tri County Area School District.
> k. Knowledge of the Tri County Area School District buildings.
>
> . . .
>
> The Association proposes to negotiate with the District over wages and benefits. . . . The Association is not bidding as a Contractor for services; therefore, we have no "Custodial Services Pricing" proposals to offer.

Attached to the bid was a document dated February 5, 2013 and signed by Wernette. The document stated that Charging Party was proposing: (1) that the Tri County Area School District continue to remain as the employer and honor its responsibilities under the 2010-2013 collective bargaining agreement with the understanding that negotiations for a successor agreement would

commence no later than April 15, 2013; (2) that negotiators for Charging Party and Respondent meet and discuss insurance plans and pay scales; and (3) that negotiators for Charging Party and Respondent meet and discuss Article 22 of the contract (containing several miscellaneous provisions, not including job assignment or bid.)

Pratt testified that Charging Party's expectation was that Respondent would receive bids from other bidders that included dollar amounts. After these bids were opened, according to Pratt, Respondent and Charging Party would negotiate over wages and benefits.

Five or six entities submitted bids in addition to Charging Party. Respondent conducted a bid opening meeting on or around February 18, 2013. Wernette, Penner and Pratt attended the meeting along with representatives of the other bidders. Wood and Akey opened the bids. Wood and Akey read the figures in the bids aloud as they opened them. When they came to Charging Party's bid, they did not say anything but simply placed it in the pile of bids.

On March 12, 2013, Pratt sent an email to Respondent Superintendent Al Cumings with a proposed letter of understanding to be signed by the parties extending the union security clause contained in the 2011-2013 collective bargaining agreement beyond the agreement's stated expiration date of June 30, 2013.[5] Cumings did not respond to the email. When Pratt contacted Cumings a short time later, Cumings told Pratt that he was not interested in talking about the proposal at that time.

Wood testified that she considered Charging Party's bid to be noncompliant with the requirements of the RFP. Wood selected three bidders, not including Charging Party, to interview. The interviews were conducted by a team that included Board members and Akey. After the interviews, the field was narrowed to two, and Wood and Akey visited other sites where these bidders were performing services. At a Board meeting held on April 8, 2013, Wood presented the Board with information about the bid proposals. Her presentation did not include Charging Party's bid, as Wood considered its bid to be noncompliant with the terms of the RFP. She recommended to the Board that it select Grand Rapids Building Services, Inc. (GRBS) as the contractor if it made the decision to outsource custodial and/or grounds and maintenance services. Wood calculated, and told the Board, that a contract with GRBS would save Respondent $224,248 per year over the life of the contract if Respondent retained some employees to do maintenance and grounds work and $328,688 per year if the contract with GRBS covered grounds, maintenance and custodial services. Wood testified that in making these calculations, she used the current year's costs, as reflected in the amended budget of February 11, 2013, because Charging Party's bid did not include cost information for future years. A large group of Charging Party's unit members attended the Board meeting. It was not clear from the record whether any of them spoke.

Akey was hired as Respondent's director of operations at the beginning of the 2012-2013 school year. During his period as supervisor of the unit, Akey came to the conclusion that bidding for job assignments by seniority should be eliminated and that assignments should

[5] 2012 PA 349 (Act 349), prohibits employers and unions from entering into union security agreements such as the one contained in the parties' 2011-2013 collective bargaining agreement. However, Act 349, which took effect on March 28, 2013, exempted agreements entered into before the effective date of the Act.

instead be made on the basis of qualifications. Akey communicated his views on this issue to Woods and Cumings.

In April 2013, Akey prepared annual evaluations for each unit member. On or about April 19, 2013, Akey held individual meetings with each member of the unit to discuss their evaluations. Wernette and two other unit members, Bruce MacTavish and Paula Elliot, testified regarding their conversations with Akey during their evaluation meetings. MacTavish, a former Charging Party president, testified that during the evaluation discussion, Akey asked MacTavish if he would be interested in a grounds position if Respondent "got our bidding rights where they could place us." MacTavish told Akey that he would not be interested, and that he was kind of shocked that Akey had brought up eliminating bidding rights as Respondent had never proposed this before. Akey agreed that he asked MacTavish whether he would be interested in a grounds position, but he did not recall any conversation about the bidding process. Wernette testified that during small talk after her evaluation, she asked Akey if he knew what was going on with respect to the subcontracting. According to Wernette, Akey said, "I can tell you this, that if you guys do not give up your bidding rights the Board is going to privatize you." According to Akey, during her evaluation Wernette asked him why they were doing evaluations since they were going to be outsourced anyway. Akey did not recall saying anything to Wernette about bidding rights during her evaluation. Elliot also testified that after Akey finished her evaluation, she asked him about the subcontracting. She testified that Akey said, "If you are not agreeing to give up bidding rights and possibly split custodial/maintenance, then more than likely you will be privatized." Akey did not recall saying anything to Elliot about the subcontracting during her evaluation. Although Akey did not recall discussing subcontracting with MacTavish, Wernette or Elliot during their evaluations, he testified that around this time many bargaining unit employees asked him if he thought that their jobs would be outsourced. According to Akey, he responded that, in his opinion, "if the employees didn't allow the District the ability to place them where we thought they could benefit us, they would be outsourced."

On April 29, 2013, the parties held the first meeting for purposes of negotiating a successor to the contract expiring on June 30, 2013. Respondent's bargaining team consisted of its counsel, Marshall Grate, Wood, Cumings, and Board member Janet Powell. Charging Party's team consisted of Pratt, Wernette and Penner. Charging Party prepared an agenda for this meeting that included the introduction of bargaining team members, review of ground rules for negotiations, an informal presentation by Charging Party of its "thoughts and ideas," a response by Respondent, and the scheduling of future bargaining sessions. After the first two items had been covered, Pratt asked Wernette to speak. Wernette stated that Charging Party was looking for a fifteen percent wage increase, and Pratt told Respondent that Charging Party wanted to recoup the fifteen percent pay reduction it took in the prior contract.

Respondent then presented Charging Party with a comprehensive written proposal for a new agreement. The first page of the proposal read as follows:

> The Administration will recommend at the next Board meeting that the District subcontract its custodial work. The Administration is willing to recommend that the District retain up to 4 bargaining unit positions that will be reconfigured as

maintenance and grounds job classifications, provided the following terms are agreed to:

1. The language changes as indicted in the attached document. The underlying theme is that seniority will not be determinative of job assignments. Instead, job vacancies will be determined based on the candidate's qualifications.

2. 0% on the wage scale.

3. Insurance as described in the Agreement.

4. One year agreement.

Respondent emphasized to Charging Party during the meeting that its representatives intended to recommend the subcontracting of custodial work even if Charging Party accepted the proposal. Respondent told Charging Party that the Board would vote on May 13, 2013 on its representatives' recommendation to subcontract the work to GRBS.

The April 29 meeting lasted about two hours, during which the parties went over the specific language changes proposed by Respondent. Respondent stated that it wanted to determine where it could place employees based on qualifications, but there was no discussion of why Respondent wanted this right. Charging Party made no formal bargaining proposal at this meeting. The parties concluded the meeting with an agreement that Charging Party would respond to Respondent's proposal before the May 13 Board meeting. They also scheduled a bargaining session for June 14.

On May 10, Charging Party gave Respondent a written proposal. Charging Party proposed that Respondent remain as the employer, unit members remain employees, and no changes be made in any non-economic contract language except as required to comply with Act 349. Charging Party proposed a two-year agreement with step movement but no increase in the salary schedule for the first year, and step movement with a two percent increase in the salary schedule for the second year. Charging Party proposed that insurance coverage and contributions remain the same as in 2011-2013 agreement, but with the understanding that Charging Party would have the right to explore less expensive plans during the term of the agreement.

As noted above, on May 10, Charging Party filed the instant charge. At its May 13, 2013 meeting, the Board unanimously adopted the recommendation of Woods and Cumings to contract with GRBS. Its resolution authorized Cumings to negotiate the terms of a contract with GRBS, subject to review and approval by legal counsel and in accord with the terms of the RFP and GRBS' proposal. The Board also authorized Cumings to execute a contract with GRBS on behalf of Respondent and to issue notices of layoff/termination to Charging Party's members.

The parties met again on June 14. At that meeting, Respondent told Charging Party that its bid had not met the requirements of the RFP. It also told Charging Party that Respondent would keep its April 29 proposal open until June 21 at 4:00 pm, after which the proposal would

be withdrawn. After the June 14 meeting, Charging Party held a meeting of its members at which the members voted to reject Respondent's proposal.

At some point after May 13, but not reflected in the record, Respondent entered into an agreement with GRBS which covered custodial, grounds, and maintenance services. Effective June 30, 2013, twelve of the thirteen members of Charging Party's unit were laid off. The unit member with the sewage lagoon license was retained. He was also the employee with the most unit seniority.

Discussion and Conclusions of Law:

Respondent's Duty to Bargain over the Subcontracting of Unit Work

Pursuant to §15(3)(f) of PERA, the "decision of whether or not to contract with a third party for 1 or more noninstructional support services," "the procedures for obtaining the contract other than the bidding describing in this subsection," "the identity of the third party, "and the impact of the contract on individual employees or the bargaining unit," are prohibited subjects of bargaining for public school employers and the unions representing their employees. A public school employer and union may discuss prohibited topics, but the employer cannot be found to have committed an unfair labor practice by refusing to bargain over them, and these topics may not become part of an enforceable agreement between the parties. *Michigan State AFL-CIO v MERC,* 212 Mich App 472, 484-488 (1995).

Section 15(3)(f) also states:

> . . . [T]his 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.

In *Lakeview Cmty Schs,* 25 MPER 37 (2011), aff'd in *Mt Pleasant Pub Schs et al v AFSCME Council 25,* 302 Mich App 600 (2013), cert. denied, 495 Mich 998 (2014), the Commission concluded that if a public school employer enforces a requirement that disqualifies or otherwise prevents a bargaining unit from bidding on a contract for noninstructional services on an equal basis as other bidders, the prohibitions in §15(3)(f) are lifted and a public school employer has the same duty to bargain over the subcontracting of noninstructional support services as public employers have over the subcontracting of other types of bargaining unit work under PERA. The Commission also held that in order to bid on a contract on an equal basis as other bidders, the unit or its representatives must submit a bid that complies with the RFP. It concluded that presenting the employer with a proposal for a concessionary collective bargaining agreement does not qualify as a bid under the statute. Finally, the Commission held that while requiring a unit or its representatives to submit a bid as a third party contractor, i.e., a bid in which some entity other than the public school employer is the employer, might not fit the realities of traditional public sector bargaining, this is what §15(3)(f) states the unit must do in order to bid on an equal basis as other third party bidders. The Commission concluded that exempting unions and employees from the requirement that they bid as third party contractors would place them in a superior, not equal, position relative to other bidders.

In the instant case, Respondent provided Charging Party with a copy of the RFP on the day before it was issued along with a cover letter specifically addressed to Charging Party drawing its attention to provisions in the RFP. These included the requirement that all prices be listed on a form and made part of the bid. Respondent allowed Charging Party representatives to attend the pre-bid conference during which Respondent explained the services it wanted and the fact that it would accept bids for some or all of these services. Charging Party submitted a bid that was timely. However, Charging Party's bid explicitly stated that it was not bidding as a third party contractor, and that if its bid were accepted Respondent would remain the employer. In addition, although the RFP required bidders to explicitly list their prices for specific services for each year of the contract, Charging Party's bid included no prices. Instead, the bid merely proposed that the parties meet and bargain over wages and insurance for the term of the contract.

I conclude that Respondent did give Charging Party an opportunity to bid on an equal basis as the other bidders. I also find that Respondent did not reject Charging Party's bid because it was submitted by a union. Rather, the "bid" Charging Party submitted failed in substantial ways to comply with the requirements of the RFP. This was not only because Charging Party was not proposing to assume the responsibilities of an employer, but because, unlike the successful bidder, it did not provide Respondent with pricing information so that Respondent could compare the cost of Charging Party's bid with the costs of the bids submitted by the other bidders. In effect, what Charging Party sought in its "bid" was not equal consideration in the bidding process, but to persuade Respondent not to subcontract the work. Thus, the "bid" brought to Respondent's attention the long experience of unit employees working in the school district, their familiarity with the work, and their ties to the community. While these may have been factors deserving of consideration in Respondent's decision, Respondent's rejection of Charging Party's "bid" on the basis that it failed to comply with the RFP was not a refusal to allow Charging Party to bid on the work on an equal basis as other bidders. Because I find that Respondent gave Charging Party the opportunity to bid on the subcontracting of its work on an equal basis with other bidders, I conclude that Respondent had no duty to bargain with Charging Party over its decision to subcontract the noninstructional support work performed by Charging Party's members.

Alleged Violation of Section 10(1)(c)

A public school employer's decision to subcontract its noninstructional support services, even if not subject to a duty to bargain, may be unlawful if its action is motivated by anti-union animus. *Southfield Pub Schs*, 25 MPER 36 (2011). See also *Coldwater Cmty Schs*, 2000 MERC Lab Op 244, 247. As in other situations where unlawful discrimination is alleged, the employer's motivation is a question of fact. As the Commission stated in *Southfield*, when an employer's decision to subcontract is the issue in a case alleging unlawful discrimination, the question to be resolved is whether the decision was based on legitimate business concerns or on an unlawful motive or motives, such as the desire to terminate the union's representation of employees.

Where an adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause

of the alleged discriminatory action. *Grandvue Medical Care Facility,* 27 MPER 37 (2013). See also *Univ of Michigan,* 2001 MERC Lab Op 40. A charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974); *City of Grand Rapids Fire Dep' t,* 1998 MERC Lab Op 703, 707. The charging party must first present evidence sufficient to support the inference that union or other protected concerted activity was a "motivating or substantial factor" in the employer's decision to take action adverse to an employee, despite the existence of other factors supporting the employer's actions. Once the prima facie case is met, the burden shifts to the employer to produce credible evidence that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *Grandvue; MESPA v Evart Pub Schs,* 125 Mich App 71 (1983).

Charging Party argues that anti-union animus was a motivating factor in Respondent's decision to subcontract. It argues that Respondent's anti-union animus was established by: (1) its refusal to sign the March 2013 letter of agreement extending union security provisions for the unit; and (2) the alleged threats made by Akey to unit members in April 2013 that if they did not agree to give up their bidding rights, Respondent would subcontract their positions.

Union security agreements were not unlawful in March 2013 when Pratt presented Cumings with the letter of agreement on this subject because Act 349, making them unlawful, did not take effect until the end of that month. However, the parties were not in contract negotiations at that time, and Respondent was in the process of analyzing bids submitted by third parties to do unit work. Respondent clearly had no obligation to sign or even discuss an agreement on union security in March 2013. I find that Cumings' refusal to sign such an agreement cannot be considered evidence of anti-union animus.

I credit Wernette's, Elliot's, and MacTavish's versions of what Akey said to them about bidding and subcontracting during their evaluations. However, I conclude that Akey's statements, when viewed in context, were not evidence of anti-union animus. When Akey made these statements, Respondent had already received bids from third party contractors which, per the requirements of the RFP, included separate prices for custodial, maintenance and grounds services. It had also prepared a cost analysis which allowed it to determine that subcontracting either custodial work or custodial, grounds, and maintenance work would save money over continuing to provide the services with its own employees. Respondent's finance director, Wood, had recommended a contractor, GRBS, to its Board. The record also established that Respondent had concerns about the skills of employees performing maintenance and grounds duties which it had tried to address in April 2012 by proposing the creation of separate job classifications. Charging Party argues that these concerns were not valid, and points out that Respondent had not disciplined any unit employees for poor work performance. It also points out that Respondent did not identify any specific cost savings that would accrue from eliminating the current job bidding system. However, Respondent's desire to have its work done by employees with the skills necessary to do their job well was a legitimate business concern. I find that Akey merely disclosed the legitimate business considerations that Respondent was weighing in deciding whether to subcontract some or all of the unit's work, and were not evidence of anti-union animus.

I conclude that Charging Party did not establish a prima facie case of unlawful discrimination under §10(1)(c) of PERA because it did not present evidence that anti-union animus was a motivating or substantial factor in Respondent's decision to subcontract the work of Charging Party's unit. Because Charging Party did not establish a prima facie case, Respondent was not required to demonstrate that the same action, i.e., the subcontracting, would have taken place even in the absence of protected conduct. However, Respondent did present evidence that it had a financial motive for subcontracting the unit's work. In the last several fiscal years, Respondent had substantial operating deficits. These operating deficits caused its fund balance, while still healthy, to drop precipitously. As noted above, after analyzing the bids, Respondent concluded that the cost of providing custodial services, or custodial, maintenance and grounds, services, through a third party contractor was less than the cost of providing these services with Respondent's own employees, despite the very large wage reductions taken by Charging Party's unit during the last contract negotiations. Respondent clearly had a motive, based on cost alone, to subcontract the work.

Alleged Bad Faith Bargaining In Contract Negotiations

Charging Party asserts that Respondent bargained in bad faith for a successor to the 2011-2013 collective bargaining agreement because it did not enter into negotiations with a sincere desire to reach an agreement. Charging Party argues that Respondent announced as a *fait accompli* at the April 29 bargaining session that it had made the decision to eliminate seniority with respect to job placement. Charging Party also argues that Respondent unlawfully preconditioned agreement on a successor contract on Charging Party's agreeing to eliminate seniority provisions.

Seniority, including the use of seniority to determine job assignments, is a mandatory subject of bargaining under PERA. In this case, Respondent had an obligation to maintain the status quo for its existing unionized employees with respect to job bidding, wages, health insurance benefits, and other mandatory subjects of bargaining absent good faith impasse. However, Respondent had no obligation to bargain with Charging Party over whether to subcontract any or all of the work of the unit to a third party and eliminate jobs. The record reflects that Respondent's adminstrators decided, before bargaining over the successor contract began, to recommend to the Board that Respondent subcontract at least its custodial work. On April 29, they told Charging Party that they would exclude maintenance and grounds duties from their recommendation, and retain four jobs, if Charging Party agreed to certain conditions. These conditions included the elimination of bidding for job assignments and vacancies by seniority. Had Respondent's Board decided at its May 13, 2013 meeting not to enter into a third party contract, the subsequent negotiations for a successor agreement might have taken a different form. As it happened, however, the Board voted to enter into a contract with GRBS and also authorized Cumings to negotiate specific terms consist with the bid. That is, the Board, in effect, left the decision as to the scope of the contract, and which positions would be eliminated, to Cumings. These were all decisions which Respondent had the right to make without bargaining with Charging Party. I conclude that the offer of Respondent's bargaining team to retain four employees to perform maintenance and grounds duties only if the Charging Party agreed to the elimination of bidding for job assignments by seniority did not violate Respondent's duty to bargain in good faith with the representatives of its employees.

Alleged Direct Dealing

Unlawful direct dealing or bargaining occurs when an employer communicates with represented employees for the purpose of establishing conditions or making changes regarding a mandatory subject of bargaining and does so to the exclusion of the Union. In *Southern California Gas Co*, 316 NLRB 979 (1995), the National Labor Relations Board (NLRB) set out the criteria to be applied in determining whether an employer has engaged in direct dealing in violation of its duty to bargain in good faith. These are: (1) that the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. See also *Permanente Medical Group, Inc.* 332 NLRB 1143, 1144 (2000); *City of Detroit,* 2000 MERC Lab Op 368, 376 (no exceptions).

Charging Party alleges that Akey's statements to employees Wernette, MacTavish and Elliot during their evaluations constituted unlawful direct dealing over a term or condition of employment, seniority. I find that the statements made to these employees by Akey were not made for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the union's role in bargaining. Both Wernette and Elliot testified that they initiated conversations with Akey by asking about the status of the subcontracting. Akey merely responded to their questions based on what he knew about the proposal Respondent intended to present to Charging Party when the parties finally met to begin negotiations. I find that the facts do not indicate that Akey was endeavoring to circumvent those negotiations or undercut Charging Party's role, and I conclude that his statements to Wernette and Elliot did not constitute unlawful direct dealing.

I also conclude that Akey's statement to MacTavish did not constitute unlawful direct dealing. Had Akey also told MacTavish that Respondent was considering retaining maintenance and grounds work if employees gave up their bidding rights, his question to MacTavish about accepting a grounds job might be have been interpreted as an offer to keep MacTavish employed if he could persuade Charging Party to agree to the elimination of bidding rights. However, MacTavish did not testify that Akey told him that Respondent was considering retaining some of the work. Moreover, MacTavish does not seem to have interpreted Akey's question about his interest in a grounds job as an inducement. I conclude that Akey's statements to MacTavish also did not constitute unlawful direct dealing.

Based on the findings of fact and conclusions of law above, I conclude that Respondent did not commit an unfair labor practice or practices. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 12, 2014