STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAKLAND COUNTY, WATER RESOURCES COMMISSION,
Respondent-Public Employer,

MERC Case No. C17 J-082

-and-

OAKLAND COUNTY EMPLOYEES UNION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Butzel Long, P.C., by Craig S. Schwartz, for Respondent

Soma & Soma, by Edward J. Soma, for Charging Party

DECISION AND ORDER

On February 23, 2018, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order[1] in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by either of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: April 13, 2018

[1] MAHS Hearing Docket No. 17-022417

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

OAKLAND COUNTY, WATER RESOURCES COMMISSION,
Respondent-Public Employer,

Case No. C17 J-082
-and- Docket No. 17-022417-MERC

OAKLAND COUNTY EMPLOYEES UNION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Butzel Long, P.C., by Craig S. Schwartz, for Respondent

Soma & Soma, by Edward J. Soma, for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

This case arises from an unfair labor practice charge filed by the Oakland County Employees Union (OCEU) against Oakland County, Water Resources Commission. Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, the charge was assigned to David M. Peltz, Administrative Law Judge for the Michigan Administrative Hearing System (MAHS), acting on behalf of the Michigan Employment Relations Commission (the Commission).

The Unfair Labor Practice Charge and Procedural History:

The charge, which was filed on October 16, 2017, alleges that the County violated PERA by entering into a contract with a private company to perform the functions and responsibilities of bargaining unit members. The OCEU asserts that the County contracted with Vanguard Utility Services, Inc. (Vanguard) to replace water meters within the City of Pontiac. Upon receipt of the charge, I scheduled an evidentiary hearing for December 4, 2017.

At the request of the parties, a prehearing conference was held on November 17, 2017, during which the parties agreed to adjourn the hearing until February 15, 2018. The parties further agreed that Respondent would have until the close of business on December 22, 2017, to

file a motion for summary disposition and that the OCEU would file its response to that motion by no later than January 12, 2018.

Following the prehearing conference, I issued a notice rescheduling the hearing for February 15, 2018. The hearing was later rescheduled for March 5, 2018, at the request of the parties.

Respondent filed its motion for summary disposition and a brief in support thereof, along with three supporting affidavits and other documentation, on December 21, 2017. On January 16, 2018, the OCEU filed an answer and brief in response to the County's motion, attached to which were two affidavits. With the permission of the undersigned, the County and the Union each filed reply briefs on January 29, 2018, and February 7, 2018, respectively. After carefully reviewing the motion, briefs and affidavits, I determined that the County was entitled to summary disposition for the reasons set forth below. Accordingly, I issued an order cancelling the hearing on March 5, 2018.[2]

Facts:

The following facts are derived from the unfair labor practice charge, the motion for summary disposition and the various briefs submitted by the parties, with all factual allegations set forth by Charging Party accepted as true.

Charging Party represents a bargaining unit comprised of certain employees of the Oakland County Water Resources Commission (WRC). Their duties include the maintenance and replacement of water meters in various communities within Oakland County. Historically, the City of Pontiac operated its own water system and did not utilize County employees to perform work on water meters for the City's residences and businesses.

In 2014, Oakland County assumed operation of the City of Pontiac water system. At that time, the County decided that a wholesale replacement of water meters within the City of Pontiac was necessary because a large number of the meters in use were defective or inaccurate. Due to the scope of the project, the County decided to take bids from outside contractors to perform the work. On October 12, 2015, the County awarded a "phase I" contract to Vanguard to replace 6,780 meters. Vanguard began performing the work in August of 2016. The work continued to be performed by Vanguard employees as of the date the instant charge was filed.

[2] In a letter accompanying the order, I indicated that I would be recommending dismissal of the charge, in part, on timeliness grounds. Subsequent to the issuance of that letter, I determined that there are disputed issues of fact which preclude my reaching any conclusion on the question of timeliness without a hearing. As set forth in detail below, I am recommending dismissal of the charge based solely upon my determination that the Union failed to establish the existence of any material issue of fact relating to its obligation to make a timely bargaining demand.

At no point prior to the filing of this charge did any representative of the OCEU demand to bargain with the County over the subcontracting of water meter replacement work within the City of Pontiac. As set forth in detail below, the County contends that the Union had unequivocal notice of its intent to outsource the work as early as June of 2014 and that OCEU representatives knew or should have known that Vanguard employees were actually replacing water meters for the County shortly after the contract was implemented.

Discussion and Conclusions of Law:

Pursuant to Rule 165(1), R 423.165(1), of the General Rules and Regulations of the Employment Relations Commission, which govern practice and procedure in administrative hearings conducted on behalf of the Commission by MAHS, the ALJ may "on [his] own motion or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party." See Rule 1501, R 792.11501, of the MAHS Administrative Hearing Rules. Commission Rule 423.165(2)(f) is modeled after MCR 2.116(C)(10), which tests whether there is factual support for a claim. When judgment is sought based on this subsection, the court must consider the pleadings, affidavits, depositions and other documentary evidence available to it in the light most favorable to the party opposing the motion. The moving party has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross and Peters Co*, 451 Mich 358, 362-363 (1996); *Flat Rock ESP Ass'n*, 19 MERC Lab Op 79 (2006) (no exceptions). See also *Teamsters Local 214*, 16 MPER 74 (2003) (no exceptions). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119-121 (1999).

In the instant case, the County contends that the unfair labor practice charge must be dismissed on summary disposition, in part, because the OCEU failed to make a timely demand to bargain over its decision to use an outside contractor for the City of Pontiac water replacement project. The County asserts that it put the Union on notice of its intention to outsource the work as early as 2014.

Under Section 15 of PERA, a public employer has a duty to bargain in good faith with respect to mandatory subjects of bargaining, i.e., wages, hours and other terms and conditions of employment. In varying contexts, the subcontracting of bargaining unit work has been found to constitute a mandatory subject of bargaining. See e.g., *Van Buren School Dist* v *Wayne Circuit Judge*, 61 Mich App 6 (1975), *Davison Bd of Ed*, 1973 MERC Lab Op 824. However, an employer has no obligation to bargain over a change in terms and conditions of employment, including the subcontracting of unit work, unless and until the union makes a demand to do so. *SEIU Local 586 v Village of Union City*, 135 Mich App 553, 557 (1984). If the union fails to make a timely demand, the employer has satisfied its obligations and may implement the change in working conditions. *Michigan State Univ*, 1993 MERC Lab Op 52; *Local 586 SEIU, supra*. Under such circumstances, the Union has waived any rights it may have unless it can establish that the demand would have been futile. *Ida PS*, 1996 MERC Lab Op 21.

In support of its contention that the Union waived its right to bargain over the water meter replacement project, the County relies upon the sworn affidavits of Jordie Kramer and Carol Griesser. Kramer is the Director of Human Resources for Oakland County. In his affidavit, Kramer asserts that he and other management representatives attended a special conference with bargaining representatives of the OCEU, including then Union president Steven Schell, on June 2, 2014, to discuss the County's assumption of water and sewer services for the City of Pontiac.

According to Kramer, the County explained to the Union representatives at that meeting that "it was initiating a program to replace defective and out-moded water meters within the City of Pontiac and that due to the large number of meters that needed to be switched out, this work could not be performed by unit members" and would instead be performed "by an outside company pursuant to contract." Kramer further avows that at no time during or after this special conference did the OCEU request bargaining over the use of an outside company to perform the work.

Carol Griesser is a supervisor in the metering division of the water unit at the WRC. In her affidavit, Griesser asserts that a crew meeting was conducted on September 24, 2014, during which employees of the water unit were "informed that a comprehensive water meter replacement program would be implemented in the City of Pontiac, and because there were so many meters to be replaced, Oakland County would be soliciting bids from outside contractors for the work." According to Griesser, Robert Malek, an OCEU representative/steward, was in attendance at this meeting. Griesser contends that Malek was also present at various staff meetings held in 2015 at which employees were informed that Vanguard employees would be performing the Pontiac meter replacement work. Finally, the Griesser affdaivit states that beginning in August of 2016, Vanguard employees began bringing back the old meters to the metering division where they were stored on shelves which were newly built for that purpose by OCEU employees, including Malek. Griesser claims that she "clearly explained to all employees assigned to this task the fact that the shelves were being built to store the old meters that Vanguard employees had replaced with new meters."

With respect to the facts underlying the waiver issue, the Union's brief in response to the County's motion for summary disposition could best be described as equivocal. The OCEU does not expressly deny that any of its representatives were informed of the County's plan to outsource the project long before the contract with Vanguard was entered into. In fact, the Union admits, without further explanation or clarification, that it had "some discussions" with the County regarding subcontracting the water meter work. However, the Union denies that a special conference was ever held and it asserts that OCEU representatives did not become aware of the contract with Vanguard until October of 2017. Given that Respondent supported its brief with sworn affidavits which explicitly state that

the Union had notice of the County's plan to outsource the meter replacement work within the City of Pontiac as early as 2014, the OCEU, as the non-moving party, had the burden of challenging those assertions, not only by way of argument, but in the form of its own affidavits, depositions, admissions or other documentary evidence. Neither of the affidavits submitted by the Union in this matter even obliquely refute the claims made by Kramer and Griesser.

In support of its response to the County's motion for summary disposition, the OCEU submitted the affidavit of Steven J. Schell, a Union officer from 1989 through his retirement in 2017. In his affidavit, Schell never explicitly denies, or even specifically addresses, the County's contention that it notified the Union of its plans to subcontract the water meter replacement work in June of 2014. In fact, the affidavit seems to suggest that Charging Party did in fact have prior knowledge of the County's intent to outsource the work. Although Schell does not specify a date, he describes a conversation between the parties during which representatives of the County stated its rationale for outsourcing the work and indicated to the Union that "this was going to be a one time 'short term' thing."
Similarly, the affidavit of longtime Union officer and current OCEU president David Schlak does nothing to rebut the claims made by Kramer and Griesser. Like Schell, Schlak does not even address the County's assertion that a special conference was held with OCEU representatives in June of 2014 at which the outsourcing of work was discussed, nor does the Schlak affidavit specifically deny that the County informed Union representatives, including Malek, of its plan to subcontract the work in 2014 and 2015. Schlak merely asserts that no OCEU representative was informed of the actual contract with Vanguard and that he personally did not learn of the Vanguard contract until July of 2017, three months before he filed the instant charge. Notably, the Union did not submit an affidavit from Malek or otherwise explain its failure to do so.

Based upon the affidavits submitted by the parties in this matter, I must accept, as true, the County's assertion that it gave unequivocal notice to the OCEU of its intent to outsource the Pontiac water replacement program on multiple occasions prior to the actual implementation of that plan in August of 2016, including as early as June of 2014, even though it had not yet made a final decision regarding which company to use to perform the work. Therefore, even assuming arguendo that a bargaining duty existed, I find there is no factual dispute that Charging Party, by its inaction, waived its right to bargain over the subcontracting of unit work. In so holding, I reject the Union's contention that its obligation to request bargaining did not arise until the County entered into a contract with Vanguard or until after OCEU representatives learned that Vanguard was actually performing the work. It is well established under PERA that a Union must request bargaining as soon as it learns that the employer is considering a change in terms and conditions of employment. In *Leelanau County*, 1988 MERC Lab Op 590, the Commission held that the union waived its right to bargain by failing to make a timely demand after receiving notice of the County's intent to

subcontract in October of 1986, despite the fact that the employer did not actually enter into a contract with a private contractor until May of 1987. In so holding, the Commission recognized that "[m]eaningful bargaining is most likely to take place after the employer begins to give serious consideration to a proposed change but before it makes its final decision." See also *Herrick Memorial Hosp*, 1992 MERC Lab Op 529; *Traverse City Area Pub Sch*, 1993 MERC Lab Op 860; *Michigan State University*, 1993 MERC Lab Op 52; *Twp of Meridian*, 1990 MERC Lab Op 153; *Holland Public Schools*, 1989 MERC Lab Op 346; *City of St. Clair Shores*, 1986 MERC Lab Op 259. A union cannot, without penalty, delay its response in hopes that the issues will go away. *South Lake Sch*, 2000 MERC Lab Op 210, 214 (no exceptions).

I have carefully considered the remaining arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The unfair labor practice charge filed by the Oakland County Employees Union against Oakland County, Water Resources Commission in Case No. C17 J-082; Docket No. 17-022417-MERC, is hereby dismissed in its entirety on summary disposition.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: February 23, 2018