

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

KALAMAZOO PUBLIC SCHOOLS,
Respondent-Public Employer

-and-

Case No. C02 B-046

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW) AND
ITS LOCAL 2150,
Charging Party-Labor Organization

APPEARANCES:

John G. Manske, Esq., for the Public Employer

Georgi-Ann Bargamian, Associate General Counsel, International Union, UAW, for the Charging Party

DECISION AND ORDER

On September 17, 2002, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order 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 any 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:

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Georgi-Ann Bargamian, Associate General Counsel, International Union, UAW, for the
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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Lansing, Michigan on May 23, 2002, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on February 14, 2002, by the International Union, UAW, and its Local 2150, alleging that the Kalamazoo Public Schools had violated Section 10 of PERA. Based upon the record, including briefs filed on or before August 16, 2002, the undersigned makes the following findings of fact and conclusions of law and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges the following:

Since on or about October 11, 2001, the Public School Employer has failed and refused to bargain with the Union over the unilateral removal of Coordinator of Fine Arts classification bargaining unit work and the creation of an “independent contractor” Facilitator for Fine Arts position to do that bargaining unit work.¹

Facts:

UAW Local 2150 represents a bargaining unit consisting of public school administrators, including principals, assistant principals, and coordinators employed by the Kalamazoo Public Schools. The District consists of two high schools, three middle schools, and 18 elementary schools.

The position at issue, the Coordinator of Fine Arts and Music, was held by Georganne DeVries for approximately four years. DeVries worked for the district for 30 years, primarily as an elementary art education teacher. She is certified to teach in the classroom and also certified to teach art in kindergarten through high school. The job description for the position of Coordinator of Fine Arts and Music reflects the following scope of responsibilities:

The Coordinator of Fine Arts & Music is responsible for the development and evaluation of the elementary and secondary curriculum and participates in the selection, assignment, and evaluation of staff. The coordinator provides leadership through the coordination of instruction, assessment, services, programs, information and activities within the district and community.

Qualifications for the position include a master’s degree with a major emphasis in either fine arts/arts education or music/music education; K-12 certification in music or art with demonstrated experience in both areas; possession of, or eligibility for, a Michigan Central Office administrator certification; and five years of teaching experience. The Coordinator is a full-time, 12-month position in the Teaching and Learning Services Department and reports to the Assistant Superintendent heading that department.

DeVries testified regarding her duties and responsibilities. As Coordinator of Fine Arts and Music she oversees the fine arts and music programs, recommends goals and objectives, and designs and writes curriculum guides. DeVries evaluates the teaching process by observing teachers in the classroom and meeting with them to discuss her observations. She looks for ways to assist them in becoming a better teacher and delivering instruction more efficiently. DeVries is also responsible for placing staff within their areas of expertise according to contractual guidelines. In addition to the recruiting, screening, and recommending of qualified candidates for positions, she is responsible for the orientation of new personnel. DeVries evaluates program and teacher needs and makes recommendations to the building principal. She plans in-service training programs for teachers and also participates in the training. For example, DeVries

¹ The charge also alleged that since January 2002, the Employer failed to supply information to the Union regarding the removal of the Coordinator of Fine Arts position. As no proofs were submitted regarding this allegation, it will be considered withdrawn.

conducted a workshop for the entire art staff and other interested teachers, presenting nontraditional ways to integrate art history into the curriculum. DeVries plans and coordinates District art and music events, such as student art exhibits, vocal fests, and symphony visits. On occasion, she has taught art classes, when a substitute teacher with sufficient art experience was not available.

As Coordinator of Fine Arts and Music, DeVries is given an allocation by the department head, and is responsible for developing and maintaining the budget for the program, ensuring that all needs are met. DeVries maintains a resource area for teachers, consisting of a circulating library of textbooks and materials. She is also responsible for maintaining a service center of musical instruments and a storage center for art materials and equipment. DeVries promotes school programs by publicizing performances and exhibits, through posters, invitations, and newsletters. She also participates in the implementation of the District's strategic plan, assisting principals and administrators in identifying and prioritizing instructional goals in each school building.

Prior to the beginning of the 2001-2002 school year, DeVries requested a leave of absence which was granted by Human Resources. She began her leave of absence on August 7, 2001. On September 25, 2001, the District entered into an independent contractor agreement with Richard C. Hintz as a Fine Arts Consultant for the first semester of the 2001/2002 school year. Pursuant to this contract, Hintz agreed to perform the following services:

Facilitate communication between and among teachers and administrators.

Listen to the needs that teachers and administrators might have and help to solve these problems.

Plan meaningful and appropriate in-service activities in art and music.

Assist new art and music teachers.

Provide evaluation input as needed.

The agreement provided that the engagement of the independent contractor was "at will" and also stated that the agreement could be terminated by either party for any reason by providing a 30-day written notice of termination. Pursuant to the written agreement, Hintz was to provide services generally on Monday, Wednesday, and Thursday of each week for approximately 20 hours per week.

At the end of October of 2001, DeVries made inquiries as to what she needed to do in order to return to work and was informed that she needed a medical release. In March of 2002, the District received a letter from DeVries' doctor, specifying a number of accommodations which would be necessary in order to permit DeVries to return to work. Because it was felt that

these accommodations would change the nature of the Coordinator position, the District was unable to accommodate DeVries. She remained on leave at the time of hearing.

Discussion and Conclusions:

Charging Party alleges that the Employer violated PERA when it refused the Union's demand to bargain over the subcontracting of the Coordinator position to an independent contractor and unilaterally removed the work from the bargaining unit. The Union maintains that the Coordinator position is "instructional" and as such does not fall within the language of Section 15(f) of PERA which prohibits bargaining on the decision of whether or not to contract with a third party for one or more noninstructional support services.

Although in its answer to the charge the Employer takes the position that the Coordinator of Fine Arts is a noninstructional position, the Employer does not assert Section 15(f) of PERA as a defense. The Employer maintains that the Union failed to meet its burden of proof in this matter; no evidence of a request to bargain was presented, and, in any event, no violation of PERA occurred when the Employer obtained a short-term substitute during DeVries' leave of absence for an unknown duration.

There is no question that an employer's bargaining duty is conditioned upon a request to bargain from the bargaining agent. *Local 586 SEIU v Village of Union City*, 135 Mich App 553, 558 (1984), *lv den* 421 Mich 857 (1985), *affg* 1983 MERC Lab Op 510. DeVries left in early August and the independent contractor arrangement was not entered into until September 25, 2001, almost two months later. Although there was clearly time for negotiations to take place, the record is devoid of evidence that the Union approached the Employer to discuss alternatives with respect to temporarily filling DeVries' position. However, even if the Union is suggesting that the Employer presented the independent contractor arrangement as a *fait accompli*, which is not established by this record, no violation of PERA has been demonstrated.

In *Detroit Water & Sewerage Dept*, 1990 MERC Lab Op 34, 40-42, the Commission reiterated that a transfer of bargaining unit work must have a significant adverse impact on unit employees, such as effecting layoffs or demotions. The Commission found that a *de minimus* or speculative impact would not justify restricting an employer's freedom to make decisions regarding the assignment of work. In cases where an employer utilized outside assistance on an emergency or temporary basis, it has been found that no permanent transfer of work occurred, and no bargaining obligation attached. *City of Detroit*, 1997 MERC Lab Op 346, 352 (*affd* Mich App No. 204946, 2/19/99, *unpubl*); *City of Hamtramck*, 1991 MERC Lab Op 7. The independent contractor agreement was of limited duration and was subject to cancellation by either side with a 30-day written notice. In addition, the position was part-time and the job duties assigned were only a fraction of those performed by DeVries in the Coordinator position. I conclude that under these circumstances, the Union has not demonstrated that the impact on the

bargaining unit was other than *de minimus*. It is therefore recommended that the Commission issue the order set forth below:²

RECOMMENDED ORDER

It is hereby ordered that the charge be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: _____

² Because of this conclusion, it is not necessary to reach the issue of whether the Coordinator of Fine Arts and Music is an “instructional” position. However, based on record evidence, I would find that since the Coordinator plays an integral role in the educational process, under Commission precedent this position would be considered instructional. See, for example, *Benton Harbor Area Schools*, 1984 MERC Lab Op 904, 908-909; *Brown City Com Sch*, 1978 MERC Lab Op 730, 733; *Coleman Com Sch*, 1978 MERC Lab Op 1069, 1071.