STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION),
Respondent-Public Employer,

Case No. C04B-032

-and-

AMALGAMATED TRANSIT UNION, LOCAL 26,
Charging Party-Labor Organization.
_____/

APPEARANCES:

City of Detroit Law Department, by Stacey M. Washington, Esq., for Respondent

Law Offices of Mark H. Cousens, by John E. Eaton, Esq., for Charging Party

DECISION AND ORDER

On August 25, 2005, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

Dated: _____

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City of Detroit Law Department, by Stacey M. Washington, Esq., for Respondent

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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 at Detroit, Michigan on August 3, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before October 11, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

This unfair labor practice charge was filed on February 2, 2004, by the Amalgamated Transit Union (ATU), Local 26, against the City of Detroit, Department of Transportation (DDOT). The charge alleges that Respondent violated its duty to bargain under Section 10(1)(e) of PERA by unilaterally entering into a contract with a private company to provide transportation services to DDOT employees and their families each Thanksgiving Day without first giving Charging Party notice and an opportunity to collectively bargain.

Findings of Fact:

Charging Party represents a bargaining unit of bus drivers employed by DDOT, which provides public transportation services within the City of Detroit. Members of Charging Party's unit drive both

regular transportation routes and special "flyer" runs. A flyer is an express shuttle used during holidays and other occasions to transport passengers directly to a specific destination. Drivers who are not scheduled to drive a regular route can volunteer for flyer service by writing their names on sign-up sheets posted at the bus terminals. Each flyer is assigned an "extra service number" which is used by Respondent to track the work performed by DDOT drivers for payroll purposes.

Since about 1997 or 1998, Respondent has operated a special flyer on Thanksgiving Day to transport DDOT employees and their families and friends to and from downtown Detroit for the annual parade. This flyer, referred to by the parties as the "holiday shuttle," was conceived as an initiative between Charging Party and Respondent to foster better labor-management relations. Riders are not screened before boarding the holiday shuttle, and the service has been used by individuals who have no connection to DDOT, including members of other bargaining units within the City of Detroit. Until November of 2002, the holiday shuttle buses were driven by members of Charging Party's bargaining unit. There was conflicting testimony regarding whether bargaining unit members were paid for driving the holiday shuttle buses, as described below.

Donna Mihal was DDOT's assistant superintendent of operations from 2001 to January of 2004. Mihal testified that DDOT drivers drove the holiday shuttle each year on a voluntary basis, and that they were never compensated for performing this work. According to Mihal, DDOT employees could not have been paid for driving the holiday shuttle because Respondent never assigned extra service numbers to those runs. However, as assistant superintendent, Mihal was not a first-line supervisor and most of her knowledge about what was occurring at each of the terminals was based upon information from her subordinates. Mihal did have some direct involvement with payroll matters when she worked for two years as district superintendent at Respondent's Coolidge terminal, a position which she held until sometime in 2001.

Mihal's testimony regarding compensation was disputed by Charging Party's current president, Henry Gaffney. Gaffney drove the holiday shuttle from the second year of its existence through November of 2002. Gaffney testified that he received an extra service number from his immediate supervisor for the holiday shuttle runs and that he was always paid for performing such work. Gaffney testified that he was paid at the "premium rate" or "double time" for driving the holiday shuttle, and that such payment was typically included in his regular paycheck which he received the week following the Thanksgiving holiday. Two other members of Charging Party's unit, William Williams and Fred Westbrook, also testified that they were paid overtime for driving the holiday shuttle. Williams testified that he also received holiday pay on at least one occasion.

Beginning in November of 2003, Respondent stopped using its own employees to drive the holiday shuttle buses after private charter companies complained to the City that its operation of the shuttle violated federal transit law, which prohibits the use of federally funded equipment or facilities for the purpose of providing charter service. Upon learning that Respondent had contracted with a private company to run the holiday shuttle service, Paul Bowen, Charging Party's president at the time, began questioning management officials as to why the issue had not been brought to the Union's attention for negotiation.

Charging Party and Respondent are parties to a collective bargaining agreement covering the period 2001 to 2006. During negotiations for that contract, the parties agreed to the removal of all references to charter services from the language of the prior agreement. According to Bowen, the provisions which were eliminated referred to work which Charging Party's members had not performed in the six or seven years immediately preceding the 2001-2006 agreement. The holiday shuttle was not specifically discussed during those negotiations.

Discussion and Conclusions of Law:

Charging Party contends that Respondent violated PERA by failing to bargain over its decision to privatize the holiday shuttle. 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 Board of Education*, 1973 MERC Lab Op 824. Subcontracting may be deemed a mandatory subject even when no unit jobs are lost. *Detroit Police Officers Assn v City of Detroit*, 428 Mich 79 (1987); *Highland Park*, 17 MPER 86 (2004). In determining whether a public employer has a duty to bargain over subcontracting, the Commission, as well as the courts of this state, have relied heavily upon federal precedent, beginning with the U.S. Supreme Court's decision in *Fibreboard Paper Products Corp v NLRB*, 379 US 203; 85 S Ct 398; 13 L Ed 2d 233 (1964). Under *Fibreboard* and the cases which followed it, employers have a duty to bargain over a decision to subcontract where the subcontracting involves only the substitution of unit employees by employees of a private contractor without any corresponding change in the scope and direction of the employer's basic operation. *Hospital Espanol Auxillo Mutuo de Puerto Rico, Inc,* 342 NLRB No. 40 (2004); *Torrington Industries*, 307 NLRB 809; 140 LRRM 1137 (1992). See also my discussion of *Fibreboard* and its progeny in *Interurban Transit Partnership,* 17 MPER 40 (2004).

In the instant case, there is no evidence suggesting that Respondent altered the scope and nature of its basic operation in any significant respect. The record indicates that the holiday shuttle service is still being used to transport DDOT employees and their families and friends to and from the Thanksgiving Day parade route, albeit now with non-unit drivers. More importantly, DDOT remains generally in the business of providing public transportation to individuals within the Detroit metropolitan area. Thus, this is not a case where the public employer has completely abandoned a program which was later taken up by another entity. See *Benton Harbor Area Schools*, 1989 MERC Lab Op 614 (finding no fundamental change in employer's business where school district contracted with local college regarding secondary level vocational education instruction, but retained significant control over the program). There is also nothing in the record to establish that the subcontracting decision involved capital investment, nor is there any suggestion that drivers employed by the private subcontractor have unique skills or require specialized training to perform the holiday shuttle work. Based on the principles described above, I conclude that the decision to subcontract operation of the holiday shuttle was a mandatory subject of bargaining.

Respondent argues that it had no duty to bargain the subcontracting decision in this case because ATU members drove the shuttle voluntarily and were not paid for performing this work. According to the

Employer, the decision to contract with a private company, therefore, had no impact upon the wages, hours or other conditions of employment of Charging Party's members. Although Mihal testified that unit members did not receive compensation for driving the holiday shuttle, three of the drivers who actually performed the work disputed that claim. Gaffney, Williams and Westbrook testified that they were paid "double time" for operating the shuttle busses. Williams added that he also received holiday pay on at least one occasion. I find it highly unlikely that drivers would voluntarily work on a holiday without receiving any compensation and credit the testimony of the ATU members in this regard. In so holding, I note that Respondent did not produce any payroll or other documentary evidence to refute the testimony of the drivers. Because Respondent would be in possession of such records, I draw an adverse inference from its failure to produce any documents showing that the drivers were not actually paid for the work in question. Under the adverse inference rule, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party or has relevant evidence within its control which is not produced, that failure gives rise to an inference that the evidence would be unfavorable to that party. *North Central Community Mental Health*, 1998 MERC Lab Op 427, 441; *Auto Workers v NLRB*, 459 F2d 1329 (DC Cir 1972).

Although Respondent did not specifically address the issue in its post-hearing brief, the City's primary argument at hearing was that it had no duty to bargain over the subcontracting decision in this case because continued use of bargaining unit members as drivers would have resulted in a loss of federal assistance for DDOT. 49 USC § 5323(d) prohibits the use of federally funded equipment or facilities for the purpose of providing charter service. A governmental authority or an operator of mass transportation for the governmental authority which is a recipient of federal assistance may provide charter service only if one or more of the following exceptions applies: (1) there are no private charter operators willing and able to provide the charter service; (2) a private charter operator does not have the capacity needed, or accessible equipment necessary for the trip; (3) the recipient reaches an agreement with private operators to provide the service; (4) the request is for a unique vehicle unavailable from private operators; or (5) the private operator is unable to provide equipment accessible to elderly and handicapped persons. 49 CFR § 604.9. Remedies for violations of the charter regulations may include barring the recipient from further financial assistance for mass transportation facilities and equipment. 49 CFR § 604.17.

The parties have differing views on whether operation of the holiday shuttle constitutes charter service for purposes of 49 USC § 5323(d).[1] I find that interpretation of FTA regulations is unnecessary in this case. Even assuming arguendo that the holiday shuttle is a charter under federal transit law, and that continued use of bargaining unit members to perform that work might jeopardize the City's receipt of federal assistance, I conclude that Respondent nevertheless had a duty to bargain over its decision to transfer those duties to a private contractor. The Commission considered a similar issue in a case also involving DDOT.

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1 A three-factor balancing test is utilized for distinguishing "mass transportation" from "charter service" for purposes of federal transit law:

> First, mass transportation is *under the control of the recipient.* Generally, the recipient is responsible for setting the route, rate, and schedule and deciding what equipment is used. Second, the service is *designed to benefit the public at large* and not some special organization such as a private club. Third, mass transportation is *open to the public* and is not closed door. Thus anyone who wishes to ride on the service must be permitted to do so. *Bluebird Coach Lines v Federal Transit Administration*, 48 F Supp 2d 47 (DC Cir, 1999) (emphasis in original).

In *City of Detroit, Dept of Transp*, 1998 MERC Lab Op 205, the employer adopted a drug-testing program for bargaining unit members as required by FTA regulations. After the program was implemented, the union filed a charge alleging that the employer had violated its bargaining obligation under PERA by refusing to comply with its request to provide the names of employees tested under the program. The employer responded by asserting that federal transit law prohibited the release of those names. In rejecting that argument, the Commission held that the FTA cannot preclude the union from complying with the requirements of PERA because MERC has exclusive jurisdiction over the labor relations of a municipal transit authority. Accordingly, the Commission ordered the employer to cease and desist from refusing to furnish the requested information to the union.

As described above, the decision to subcontract operation of the holiday shuttle was a mandatory subject of bargaining under *Fibreboard*. PERA is the dominant law regulating public employee labor relations, and the Commission is vested with exclusive jurisdiction to remedy unfair labor practices. *St Clair Intermediate School Dist, v Intermediate Ed Ass'n/Michigan Ed Ass'n*, 458 Mich 540 550 (1998); *Rockwell v Crestwood School Dist*, 393 Mich 616 (1975). Thus, federal transit regulations do not excuse Respondent from its duty to bargain.2 Even if it would have been unlikely that concessions by the Union would have made up for the potential loss in federal funding which DDOT might have incurred had it decided to continue using ATU members to drive the holiday shuttle, bargaining may still have served the purpose of promoting industrial peace and preventing subsequent litigation. See *Van Buren Sch Dist*, *supra* at 26. It should also be noted that there were other options available to Respondent besides simply eschewing federal funding or privatizing the service. For example, the City could have sought a waiver from the FTA, as it has done before in similar situations. Respondent could also have attempted to reach an agreement with private operators which would have allowed Charging Party's members to continue to drive the shuttle busses. 49 USC § 5323(d). In any event, Respondent cannot simply hide behind FTA regulations to escape its bargaining obligations. As the ALJ in *City of Detroit* noted, "the Public Employer is free to feed at the federal trough, but the Union is not obligated to abide by the federal regulations that are the price of the meal." 1998 MERC Lab Op at 214, n 1.

Lastly, I find no merit to Respondent's contention that Charging Party waived its right to bargain over the decision to subcontract the holiday shuttle work during negotiations for the most recent collective bargaining agreement. Although Mihal testified that the City and the Union discussed eliminating reference to charter work during negotiations, she never asserted that the holiday shuttle work was a specific topic of discussion between the parties. I find nothing in the record suggesting that the parties entered into an agreement which "clearly, explicitly and unmistakably" waived the Union's right to bargain over the holiday shuttle work. *Port Huron Educ Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 318 (1996); *City of Royal Oak, Police Dep't*, 18 MPER 35 at 120 (2005). In fact, Bowen testified credibly that the contractual provisions relating to charter work which the parties agreed to eliminate during negotiations for the 2001 to 2006 contract referred to work which ATU members had not performed in the six or seven years immediately preceding that agreement, and that the holiday shuttle was not specifically discussed.

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2 Notably, Respondent did not introduce any evidence establishing the amount of federal assistance DDOT receives or the percentage of DDOT's budget which comes from the federal government.

In summary, I find that Respondent's unilateral decision to contract out the holiday shuttle work violated Section 10(1)(e) of PERA. For the forgoing reasons, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

Respondent City of Detroit (Department of Transportation), its officers and agents, are hereby ordered to:

1. Cease and desist from subcontracting work previously performed exclusively by members of the Amalgamated Transit Union, Local 26, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

2. Restore the status quo that existed prior to Respondent's unlawful actions, and make bargaining unit members whole for all losses attributable to such unlawful actions.

3. On demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.

4. Cease and desist from further subcontracting of the bargaining unit work, pending satisfaction of the obligation to bargain.

5. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION), a public employer under the MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT subcontract work previously performed exclusively by members of the Amalgamated Transit Union, Local 26, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

WE WILL restore the status quo that existed prior to our unlawful actions, and make bargaining unit members whole for all losses attributable to such unlawful actions.

WE WILL, on demand, bargain with the above labor organization over any decision to transfer or subcontract work previously performed exclusively by members of that organization.

WE WILL cease and desist from further subcontracting of the unit work, pending satisfaction of the obligation to bargain in this case.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

CITY OF DETROIT (DEPARTMENT OF TRANSPORTATION)

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.