STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer -Respondent,

Case No. C06 E-107

-and-

ASSOCIATION OF DETROIT ENGINEERS,
Labor Organization-Respondent.
____/

APPEARANCES:

Andrew R. Jarvis, Esq., Assistant Corporation Counsel, City of Detroit Law Department, for Respondent

Sachs Waldman PC, by John R. Runyan, Esq., for Charging Party

DECISION AND ORDER

On March 29, 2007, Administrative Law Judge Julia S. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: ____________

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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, this case was heard at Detroit, Michigan on September 22, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 5, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Association of Detroit Engineers filed this charge against the City of Detroit on May 10, 2006. Charging Party represents a bargaining unit of approximately 160 nonsupervisory engineers employed by Respondent in several City departments, including the water and sewerage department (DWSD). The charge alleges that Respondent violated its duty to bargain in good faith under Section 10(1)(e) of PERA by repudiating provisions of the parties' collective bargaining agreement dealing with the subcontracting of bargaining unit work.

Findings of Fact:

The Collective Bargaining Agreement

Articles 41(B) and (C) of the parties' collective bargaining agreement read as follows:

> B. The right of contracting or sub-contracting is vested in the City. The right to contract or sub-contact shall not be used for the purpose or intention of undermining the Association nor to discriminate against any of its members nor shall any employee be laid off as a direct and immediate result of work performed by an outside contractor.
>
> C. In cases of contracting or sub-contracting affecting employees covered by this agreement, the City shall hold advance discussions with the Association prior to entering into a new contract or extending an existing contract. The Association Representatives shall be advised of the nature, scope, and contractual period of work to be performed and the reasons (equipment, manpower, etc.) why the City is contemplating contracting out the work.

Articles 41(B) and (C) have been part of the parties' collective bargaining agreements for at least a decade. Their contract also contains a grievance procedure ending in binding arbitration.

Subcontracting and Layoffs in the DWSD

The DWSD maintains and operates water and wastewater treatment systems that serve the City of Detroit and communities throughout the Detroit metropolitan area. At any given time, the DWSD has many capital improvement projects at every stage of completion, from planning to final stage. Most of these projects involve contracts between the City and private contractors. Some of these contracts are for engineering services. It is undisputed that the DWDS has a long history of contracting for engineering services, either because a project requires specialized skills that DWSD engineers do not possess or for other reasons. During a project's planning stage, DWSD managers decide which engineering services DWSD engineers will perform and which will be contracted out. Engineers represented by Charging Party sometimes participate in these decisions, but Charging Party, as an entity, does not.

Although Article 41(C) has been part of the contract for a long time, no witness could recall a time when the DWSD routinely provided Charging Party with advance notice of its intent to enter into or renew contracts for engineering services. Insofar as the record discloses, prior to March 2006 Charging Party never demanded that it do so. Prior to 2006, Charging Party did occasionally request that the DWSD meet with it to discuss the reasons for contracting out engineering services on specific projects, and the DWSD did so. However, the DWSD never routinely discussed with Charging Party its reasons for entering into contracts for engineering services.

In January 2006, the parties began negotiations for a successor collective bargaining agreement. In February 2006, Victor Mercado, director of the water and sewerage department (DWSD), met with representatives of all the unions representing water and sewerage department employees, including Charging Party, to discuss rumors that City employees might soon be laid off.

Mercado told the union representatives that there would be no layoffs within the DWSD. However, after the Detroit City Council delayed approving a water rate increase sought by the DWSD, Respondent's human resources department informed the DWSD that it was required to lay off employees.

On March 13, 2006, Charging Party president Hany Choulagh received the following letter from Charlotte Bush, human resources manager for the DWSD.

> In an effort to keep you apprised of reductions to your labor union, please be advised that the Detroit Water and Sewerage Department anticipates layoff notices beginning the week of April 10, 2006.
>
> The following list of titles is not intended to be exhaustive, as additional titles contained in your bargaining unit may be affected based on reduction in force rules and on-going budget adjustments.
>
> Associate Civil Engineer
> Associate Mechanical Engineer
> Sr. Assistant Architectural Engineer
> Sr. Assistant Chemical Engineer
> Sr. Assistant Civil Engineer
> Sr. Assistant Electrical Engineer
> Sr. Assistant Mechanical Engineer
>
> The City reserves the right to modify this list as necessary to effectuate the reduction in force.

Other unions representing DWSD employees received similar letters. At about the same time, Charging Party treasurer Sanjay K. Patel found on the DWSD's internal website documents outlining the DWSD's capital improvement programs for its water supply and sewage disposal systems for the fiscal years 2006 through 2010. These documents included lists of DWSD contracts associated with active projects, projects on hold, projects substantially completed, and projects awaiting approval from the Board of Water Commissioners as of July 2005. The documents included a brief description of the work covered by each contract. Patel discovered about 279 separate contracts for engineering services. Of these, Patel identified 102 that he believed could have been performed, in whole or in part, by engineers in Charging Party's bargaining unit. Some of these were projects where Patel had personally worked with the contractor. Some involved work that Patel, based on his training as a mechanical engineer, believed that could be done by mechanical engineers in the bargaining unit. Some involved work that other engineers in the bargaining unit with different areas of expertise identified as work that they could do. On some of these contracts, Patel, or other unit engineers to whom he spoke, recognized the work as the same as or similar to work done in the past by bargaining unit engineers. For other contracts, Patel knew that engineers who had previously worked for the City in Charging Party's bargaining unit were doing the work for the

contractors. Finally, Patel included on his list several contracts where the work was described as "small-scale projects that had not been initiated due to lack of in-house engineering staff."[1]

On March 22, 2006, Charging Party's attorney sent the following letter to the director of Respondent's human resources department:

> The Association has become aware that the City has entered into or is extending a series of contracts or subcontracts affecting employees covered by its agreement with the City (see attachments hereto), without first meeting its obligations under Article 41, paragraph C. This oversight is particularly significant in light of the layoffs of which the Association was advised by letter from HR Manager Charlotte A. Bush dated March 13, 2006.
>
> This is to request an immediate meeting with the appropriate City representatives for the purpose of holding the advance discussion contemplated by Article 41, paragraph C. We request that such discussions be held in advance of any contemplated layoffs. Should the City fail to respond to this request or fail to hold the advance discussions required by Article 41, paragraph C, the Association will take whatever legal action it deems necessary and appropriate to protect the interest of its members.

Respondent scheduled a special conference with Charging Party for April 11. The conference was attended by Choulagh, Charging Party treasurer Sanjay K. Patel, Charging Party vice-president Sanjay M. Patel, Bush and several other DWSD representatives. Charging Party representatives complained that Respondent was repudiating Article 41(B) of the contract by laying off bargaining unit engineers while giving their work to outside contractors. Charging Party gave Respondent a partial list of contracts that Sanjay K. Patel had identified as containing work that could be done by bargaining unit employees. It requested that Respondent hold the layoffs in abeyance until the Charging Party was given an opportunity to meet with Mercado to review the contracts.

On April 20, 2006, Choulagh received a letter from Bush advising him that the date of the layoffs had been changed to May 6, 2006, that approximately sixteen bargaining unit employees in ten different classifications would be laid off, and that an additional four unit employees would be demoted. Eighteen unit employees were eventually laid off between May 6 and June 12, and six were demoted. DWSD employees in other bargaining units were also laid off around this time. In total, more than 130 DWSD employees were laid off in May and June of 2006.

Under the parties' contract, Respondent is required to provide Charging Party with a written position statement on the issues raised at each special conference. On April 27, Respondent sent Choulagh the following letter regarding the April 11 special conference:

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1 A witness for Respondent, head engineer for one of the DWSD's divisions, testified at the hearing that DWSD engineers lacked the necessary expertise to do the work on several of the 102 contracts tagged by Patel as work that could have been done in-house. He noted that for one of these contracts, the contractor was using experts in tunnel design from Europe. The head engineer admitted that he did not have sufficient information to give an opinion on all 102 contracts. He testified, however, that the DWSD had much more engineering work than could be done by its current employees.

> The current contracts/subcontracts were being utilized prior to the anticipating [sic] layoffs. The Department does not anticipate any new contracts as a result of the layoffs. With the current budget constraints and impending time limits, the department's position remains unchanged regarding the upcoming layoffs. The bargaining unit members identified for layoff will be implemented as planned. [Sic].

The parties held a second special conference on April 28, 2006. Representatives from Respondent's labor relations division conducted this meeting, which was not attended by anyone from the DWSD. Charging Party, through its attorney, complained again that Respondent was violating Article 41(B) by laying off bargaining unit members while giving their work to outside contractors. It also gave Respondent a more complete list of the contracts it had identified as involving work that could be done by the unit.

On May 22, Charging Party received Respondent's position statement:

> Mr. Choulagh explained the nature of the Union's concerns, specifically, layoffs of engineering staff while Detroit Water & Sewerage Department has contract staff, violation of Article 41, paragraph C, Section B. The Union contends DWSD failed to meet contractual agreement regarding meeting with the Union prior to entering to [sic] contract. The Union is requesting all engineers affected by layoff be reinstated.
>
> Human Resources has requested Engineering management to increase their dialogue with the Union regarding use of Contractors, specific projects that contracts are bidding for and the use of in-house staff for projects.

After receiving Respondent's May 22 letter, Charging Party filed a grievance alleging violations of Article 41. As of the date of the hearing, the grievance was still pending. At the time of the hearing, the DWSD had not provided Charging Party with an explanation of its reasons for entering into the contracts identified by Charging Party as involving work that could be done by its unit.

Discussion and Conclusions of Law:

The subcontracting of bargaining unit work is, in most circumstances, a mandatory subject of bargaining under PERA. *Van Buren Public Sch Dist v Wayne Circuit Judge*, 61 Mich App 6, 28 (1975); *Davison Bd of Ed,* 1973 MERC Lab Op 824. However, an employer satisfies its obligation to bargain over a mandatory topic by negotiating for a provision in the collective bargaining agreement that "fixes the parties' rights" on this topic. *Port Huron Ed Ass'n v Port Huron Area Sch Dist,* 452 Mich 309, 318 (1996). If the term or condition in dispute is thus covered by the agreement, and the parties have agreed to a grievance procedure ending in binding arbitration, the details and enforceability of the provision are left to arbitration. *Port Huron,* at 321. The Commission has repeatedly held that an employer satisfies its obligation to bargain under PERA by agreeing to a contract provision specifying the circumstances under which subcontracting may or may not occur. *Village of Romeo,* 2000 MERC Lab Op 296, 301; *Central Mich Univ,* 1995 MERC

Lab Op 113; *Village of Constantine,* 1991 MERC Lab Op 468; *City of Muskegon*, 1984 MERC Lab Op 857.

The narrow exception to the rule that the Commission will not remedy a contract breach as an unfair labor practice are those cases in which a party's actions amount to a "repudiation" of the collective bargaining agreement. The Commission has defined repudiation as a rewriting of the contract or a complete disregard for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch,* 1980 MERC Lab Op 956, 960. It has held that in order for it to find repudiation: (1) the contract breach must be substantial, and have a significant impact on the bargaining unit, and (2) there must be no bona fide dispute over interpretation of the contract. *Gibraltar Sch Dist,* 16 MPER 36 (2003*); Plymouth-Canton Cmty Schs,* 1984 MERC Lab Op 894, 897.

Article 41 (B) of the parties' collective bargaining agreement gives Respondent the right to subcontract bargaining unit work except in the circumstances set out in that clause, including where any employee is "laid off as a direct and immediate result of work performed by an outside contractor." Charging Party asserts that Respondent violated Article 41 (B) by laying off members of its bargaining unit while contracting out work that unit members could perform. Respondent denies that the layoffs violated this article. According to Respondent, the layoffs were not the "direct and immediate result" of work performed by outside contractors, and it points to the fact that it did not increase its use of contractors after the layoffs. I find that the parties have a bona fide dispute over the proper interpretation of Article 41(B). I conclude that Respondent's alleged breach of this provision did not constitute a repudiation of the parties' contract.

The parties also disagree over the meaning of Article 41(C). According to Charging Party, this provision requires the DWSD to discuss its reasons for contracting out <u>any</u> engineering work with Charging Party. It also requires that these discussions take place before Respondent enters into any new contract or extends any contract for such work. Respondent, however, argues that the phrase "subcontracting affecting employees" in the first sentence of Article 41(C) does not encompass all engineering work. It maintains that it has no obligation to discuss its reasons for contracting out engineering work unless the subcontracting violates Article 41(B). According to Respondent, it did not have an obligation to explain to Charging Party why it continued to contract out engineering work since the layoff of Charging Party's members in May and June 2006 was not the "direct and immediate" result of subcontracting in the DWSD.

As I stated in my proposed decision in *Sanilac Co Cmty Mental Health,* 19 MPER 87 (2006) (no exceptions), my review of the case law indicates that the Commission has found employer "repudiation" only in cases where the employer's contractual arguments have been either spurious or nonexistent. For example, in *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901, the employer justified its decision to alter the contractual wage rate based on economic necessity and a management's rights clause that made no reference to wages. In *City of Detroit*, 1976 MERC Lab Op 652, the employer asserted that its need to implement an affirmative action plan to remedy past racial discrimination justified its refusal to follow clear language in the contract dealing with promotions. In *City of Detroit, Dep't of Transportation,* 1984 MERC Lab Op 937, *aff'd* 150 Mich App 605 (1985); and *Taylor Bd of Ed,* 1983 MERC Lab Op 77, the employers claimed only that they could no longer afford to fulfill their contractual obligations. See also *Eaton Co and Sheriff,* 17

MPER 82 (2004) (no exceptions); *Cass City Pub Schs,* 1982 MERC Lab Op 241 (no exceptions); *Howard Brisssette d/b/a/ The Golden Key*, 1967 MERC Lab Op 664 (no exceptions). Charging Party argues persuasively that the intent of Article 41(C) was to require Respondent to provide Charging Party with the information necessary to determine whether a proposed contract violated the restrictions on subcontracting set out in Article 41(B) before the City entered into this contract. As Respondent itself points out, once Respondent enters into a contract with a third party, it may not be able to rescind that contract without penalty. Respondent's argument, that Charging Party had to show that employees were laid off as a result of its subcontracting of engineering work before the DWSD had an obligation to explain the reasons for this subcontracting, seems to me to put the cart before the horse. However, I am not the arbitrator selected by the parties pursuant to their grievance procedure to resolve their contract dispute. I cannot conclude in this case that Respondent's contractual argument was spurious, or that it acted in bad faith when it asserted that it had no obligation to discuss with Charging Party its reasons for contracting out engineering work in the DWSD. I find that the parties have a bona fide dispute over the interpretation of Article 41(C) of their contract and that Respondent did not violate its duty to bargain by repudiating the parties' collective bargaining agreement. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: ______________