STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTHFIELD PUBLIC SCHOOLS,
Public Employer-Respondent,

Case No. C08 F-115

-and-

SOUTHFIELD MICHIGAN EDUCATIONAL
SUPPORT PERSONNEL ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Floyd E. Allen & Associates, P.C., by George D. Mesritz, for Respondent

Law Office of Lee & Correll, by Michael K. Lee, for Charging Party

DECISION AND ORDER

On February 3, 2011, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter finding that Charging Party, Southfield Michigan Educational Support Personnel Association (Union or MESPA), failed to show that Respondent, Southfield Public Schools (Employer), violated §§10(1)(a), (c), or (e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a), (c), or (e), and recommending that we dismiss the charges. The ALJ found the evidence did not establish that, by subcontracting certain noninstructional support services, Respondent discriminated against MESPA's bargaining unit members for engaging in union activity. The ALJ further found insufficient evidence to conclude that Respondent otherwise interfered with, restrained, or coerced those employees in the exercise of their rights under §9 of PERA. The ALJ also determined that since the subcontracting of noninstructional support services is a prohibited subject of bargaining under §15(3)(f) of PERA, there is no statutory duty to bargain that could be breached by Respondent with respect to that subject. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with §16 of PERA. On February 25, 2011, Charging Party filed its exceptions. On April 6, 2011, after requesting and receiving an extension of time, Respondent filed its cross-exceptions.

In its exceptions, Charging Party argues that the ALJ erred by failing to find that Respondent's decision to subcontract services performed by bargaining unit members was motivated by anti-union animus. MESPA further contends that the ALJ erred by failing to draw an adverse inference against Respondent regarding the Employer's knowledge of the Union's intention to make concessions. Charging Party asserts that an adverse inference is appropriate because Respondent failed to call its chief negotiator to rebut the allegation of anti-union animus made by the Union's witnesses.

In its cross-exceptions, Respondent argues that the ALJ erred by denying its motion for summary disposition. It further contends that the ALJ erred by refusing to strike testimony pertaining solely to Charging Party's claim that the Employer violated its duty to bargain, which was given before the ALJ concluded that the failure to bargain was not at issue. Finally, Respondent excepts to the ALJ's finding that one of its witnesses expressed some anti-union animus.

Upon examining the record carefully and thoroughly, we find that Charging Party's exceptions lack merit. We further find that Respondent's cross-exceptions lack merit.

Factual Summary:

We adopt the findings of fact contained in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. When Respondent invited bids for the possible subcontracting of non-instructional support services, Charging Party sought to negotiate with Respondent in an effort to avoid the anticipated subcontracting.[1] Despite the prohibition in §15(3)(f) of PERA, the parties met and Charging Party offered financial concessions that would have resulted in savings to Respondent of approximately $18 million. Respondent made no counter proposals. It claims that its primary motivation for subcontracting was to avoid the payments statutorily required to be made on behalf of public school employees to the Michigan Public School Employees Retirement System (MPSERS).

Charging Party contends that statements made by a school board member and a school principal are evidence that the subcontracting decision was motivated by unlawful anti-union animus. The board member and a custodial employee discussed the proposed sub-contracting while they were both attending school basketball games. The employee testified that the board member told her the School District wanted to subcontract, but keep the same workforce, and that the current workforce was expensive because they made too much money and used too much paid leave time. She testified that this board member suggested that she should create a company and bid on the work and he would ensure that she was awarded the contract even if she was not the lowest bidder. She did not bid on the work and was laid-off with other employees when the outside contractor took over. The ALJ credited the employee's testimony. In the absence of any basis for finding the ALJ's credibility determination to be clearly contrary to the record, we accept

[1] Subcontracting of non-instructional support services is expressly authorized by §15(3)(f) of PERA; bargaining over the issue is prohibited.

the ALJ's judgment on this issue. See *City of Lansing (Bd of Water & Light)* 20 MPER 33 (2007); *Saginaw Valley State Univ*, 19 MPER 36 (2006); *Bellaire Pub Sch*, 19 MPER 17 (2006).

Charging Party also offered evidence that the principal of an elementary school said "privatization is looking better and better," while criticizing employee performance.

Discussion and Conclusions of Law:

The ALJ credited the testimony of Charging Party's witnesses, but found that testimony failed to establish that the decision to subcontract was motivated by anti-union animus. We agree and affirm the ALJ's dismissal of the allegations that Respondent violated §10(1)(a) and (c) of PERA for the reasons that follow.

Charging Party contends that the ALJ erred by not finding that Respondent was motivated by unlawful hostility toward Charging Party and its role in the workplace. While there were certain discussions between a school board member and a school employee, there is no evidence that the board member exerted any particular influence over other board members. Nor can we agree that the board member's concern over expenses constitutes what Charging Party describes as evidence of an intense desire to be rid of the Union. In addition, there is no evidence that such a desire motivated other school board members.

Similarly, we find no merit to Charging Party's assertion that an elementary school principal's comment that "privatization is looking better and better" supports a finding that Respondent's decision to subcontract was motivated by anti-union animus. There was no evidence linking the comment to the deliberations of the school board or any of its members.

Charging Party contends that the ALJ also erred by failing to draw an adverse inference from the fact that Respondent did not offer testimony from its chief negotiator. Charging Party argues that this witness was likely to have knowledge of facts to either refute or support Charging Party's allegation of discrimination. As we stated in *Ionia Co*, 1999 MERC Lab Op 523; 13 MPER 31014: "An adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she 'may reasonably be assumed to be favorably disposed to the party.'" citing *Ready Mixed Concrete Co*, 81 F3d 1546, 1552 (CA 10, 1996). See also, *Wayne Co*, 21 MPER 58 (2008). In each of these three cases, an adverse inference was drawn with respect to a specific question of fact. In the matter before us, Charging Party has not specified any *facts* that might properly be inferred from Respondent's failure to call its chief negotiator. In the absence of sufficient facts to support a legal conclusion of discrimination, we cannot infer that Charging Party has established its allegation that Respondent's decision to subcontract was based on anti-union animus.

Moreover, Respondent is not required here to offer evidence to refute Charging Party's claims. Where it is alleged that an employer is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the employer's decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983). It is only after a prima facie case has been established that the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). See also *City of Livonia*, 23 MPER 96 (2010). Inasmuch as the evidence offered by Charging Party was insufficient to establish a prima facie case of discrimination, Respondent was not obligated to offer additional testimony to refute Charging Party's case. Further, had Charging Party viewed the testimony of Respondent's chief negotiator as necessary to its own case, Charging Party could have subpoenaed the negotiator as a witness.

We agree with the ALJ that because Section 15(3)(f) of PERA prohibited the parties from bargaining concerning the subcontracting of non-instructional support services, there was no duty on the part of either party 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. See *Grand Haven Public Schools*, 19 MPER 82 (2006). Therefore, we dismiss the allegation that Respondent violated Section 10(1)(e) of PERA.

In its exceptions, Respondent claims that its motion for summary disposition should have been granted, reasoning that under Section 15(3)(f) a decision regarding sub-contracting was not subject to review for any reason. This Commission rejected that reasoning in *Coldwater Cmty Sch*, 2000 MERC Lab Op 244, where we noted with approval that in *Parchment Sch Dist*, 2000 MERC Lab Op 110 (no exceptions), the ALJ held that subcontracting in retaliation for exercising collective bargaining rights under PERA constitutes an unfair labor practice. Subcontracting, like other actions that may be within the legitimate authority of a public employer, may be unlawful when those actions are motivated by anti-union animus. As in other cases where unlawful discrimination is charged, the employer's motivation is a question of fact. Here, that question had to be resolved by determining whether the decision to subcontract was based on Respondent's legitimate business concerns or on an unlawful desire to terminate the Union's representation of the employees in this bargaining unit. Only after an evidentiary hearing might we determine whether there is sufficient evidence to support the allegation that Respondent's actions were unlawful.

Respondent also argues that the ALJ should have stricken certain testimony regarding concessions offered by Charging Party and that he erroneously attributed "some animus" to the school board member who spoke with a school employee at basketball games. Because the testimony sought to be stricken did not influence the ALJ's Decision and Recommended Order and has not been considered by this Commission, we find that the issue is moot. Similarly, the finding of some animus on the part of a single school board member is not controlling, thus, we need not address it.

We have considered the other arguments asserted by the parties and have determined that they would not change the result.

ORDER

We hereby dismiss the charges in this case in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

SOUTHFIELD PUBLIC SCHOOLS,
Respondent-Public Employer,

-and- Case No. C08 F-115

SOUTHFIELD MICHIGAN EDUCATIONAL
SUPPORT PERSONNEL ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

George D. Mesritz, for the Respondent

Michael K. Lee, for the 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 assigned to Doyle O'Connor, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including timely post-hearing briefs by the parties.

The Unfair Labor Practice Charge and Positions of the Parties:

On June 8, 2009, a Charge against the Southfield Public Schools (Employer) was filed by the Southfield Michigan Education Support Personnel Association (MESPA or Union), with an amended charge filed in this matter on July 18, 2009. The Charge, as amended, alleged that the Employer made a decision based on anti-union animus to sub-contract certain work involving several hundred employees in student transportation, custodial and foodservice. The Union asserted that the decision itself was discriminatory based on Union membership and therefore unlawful under PERA Section 10(1)(a) &(c). It was further asserted that the Employer's decision to sub-contract the work was preceded by the Union making increasing, and extraordinary, financial concessions to attempt to retain the work, culminating in an offer of over eighteen million dollars in financial concessions. The Union asserts that the Employer's failure to favorable receive, or to respond to, these concession offers evidenced the Employer's bad faith in making the ultimate decision to contract out the work, such that it constituted a refusal to bargain contrary to PERA Section 10(1)(e).

The Employer denied the factual allegations and asserted that the charge failed to state a claim and that, regardless, PERA Section 15 (3)(f) insulates from any review a school employer's decision to subcontract certain non-instructional support services work even if the decision was made for otherwise unlawful reasons.

Denial of Motion for Summary Disposition:

The Employer brought a pre-trial motion to dismiss the Charge, asserting that the addition in 1994 of Section 15 (3)(f) to PERA granted school employers the supposedly unreviewable "sole authority" to make and implement decisions to subcontract certain work, even if motivated by unlawful discriminatory intent. That motion was denied in an order of August 8, 2008, with the finding that:

> Presumably, the purpose of the amendment [Section 15 (3)(f)] was to attempt to foster greater flexibility and, therefore, efficiency in the provision of certain ancillary services by schools; however, it cannot be assumed that the statutory change was intended merely as a vehicle for the unfettered implementation of otherwise unlawful discriminatory or retaliatory bias. While Respondent's brief asserts that the Legislature intended to grant school districts the unreviewable right to engage in discrimination or retaliation that would otherwise be unlawful under PERA, no legislative history is offered in support of that extraordinary proposition.
>
> PERA was enacted in 1965 by the Legislature, pursuant to express Constitutional authorization, with the stated intent of prohibiting strikes while, at the same time, protecting and declaring the right and privilege of public employees to unionize. That intent of the people and of the Legislature cannot be lightly set aside by implication as a result of the 1994 amendments. The grant to an employer by statute, or even by a collective bargaining agreement, of broad discretionary decision-making as to a particular topic cannot be so simply presumed as authorization to engage in what would otherwise be unlawful discrimination.
>
> As in *Parchment School District*, 2000 MERC Lab Op 110 (no exceptions) and in *Coldwater Community Schools*, 2000 MERC Lab Op 244, whether a decision to subcontract was based on an employer's legitimate business concerns, or instead on its unlawful "desire to rid itself of the burden of dealing with the union" is a question of fact.

The Employer sought to pursue an improperly filed interlocutory appeal of the denial of the motion for summary disposition, which was summarily denied by the Commission on September 30, 2008. Failing at that, the Employer sought from the Court of Appeals an extraordinary writ of superintending control to prevent the holding of the evidentiary hearing in this matter, which was denied on January 22, 2009. The matter proceeded to four days of evidentiary hearing, followed by post hearing briefing by both parties.

Findings of Fact:

In January 2008, the Board of the Southfield Schools sought bids for the possible subcontracting of non-instructional support services. Such contracting out of non-instructional support services is expressly authorized by Section 15 (3)(f) of PERA and bargaining over the issue is prohibited. The Union sought to negotiate with the Employer in an effort to avoid the anticipated mass layoffs which might result from such subcontracting.

The parties in fact met extensively, notwithstanding that both parties recognized that the question of whether or not the Employer would sub-contract non-instructional support services was a prohibited subject of bargaining under Section 15 (3)(f) of PERA[2]. The Union recognized that a stated motivating factor driving the Employer's consideration of sub-contracting was the financial cost and the District's declining revenues. In an effort to deter the proposed sub-contracting, the Union sought to match the projected savings by offering an increasing array of financial concessions. It did appear from the testimony that each time the parties met, the Employer's representative[3] suggested a minimum savings that needed to be met, and that each time the Union made a proposal for concessions, the target savings figure was moved further away by the Employer's representative. In the space of intensive discussions between April 2 and April 22, the Union made a series of concessionary offers which began at a projected cost savings to the Employer of $1.39 million and which rapidly increased to a final union offer of wage cuts of 23%, which, with other offered concessions, would have netted the Employer projected savings of approximately $18 million. The Employer's representative made no counter proposals, but did indicate he would take the Union's proposal to the Employer's Board, although he did not commit to recommending adoption of the Union's proposal.

The Employer asserted, in both its opening statement and its post-hearing brief, that the primary motivation in sub-contracting the work was to avoid the statutory requirement that the Employer make retirement related payments to the Michigan Public School Employees Retirement System (MPSERS). The Employer sought to have the same work performed under the auspices of a sub-contractor with essentially the same work force. It was asserted that the Employer would thereby avoid a $16 retirement charge for every $100 in payroll costs.

The Union asserts that certain statements attributed, respectively, to a school board member and to a school principal, support a conclusion that the sub-contracting decision was motivated by unlawful animus. School board member Darryl Buchanan engaged in a number of discussions regarding the proposed sub-contracting with custodial employee Deidra Liddell, while both were in attendance at basketball games in which their sons were involved. Liddell testified that Buchanan raised the sub-contracting issue with her; that Buchanan asserted that the District wanted to sub-contract, but keep the same workforce; that the current workforce was expensive because they made too much money and, in part, because they used too much leave time; that Liddell should herself

[2] As a prohibited subject of bargaining, the parties were free to discuss the issue, but could not enter into a binding agreement. See *Mich State AFL-CIO v MERC*, 453 Mich 362 (1996).

[3] Throughout the discussions, the Employer refused to meet directly with the Union and instead had the Union meet with the Employer's outside counsel, who repeatedly advised the Union that he would have to check with others not present before he could respond to the latest Union proposal.

create a company and bid on the work, even though she had never run any type of company; and that if Liddell did bid on the work, Buchanan would see to it that she was awarded the contract even if she was not the lowest bidder. Liddell did not bid on the work and was laid-off along with a number of her co-workers when the outside contractor took over.[4]

While Buchanan acknowledged that certain discussions had taken place between he and Liddell at the basketball games, he denied suggesting that she should bid on the work or that he could guarantee that she would get it if she submitted such a bid. I found Liddell's version the more credible, in part as Buchanan's direct exam testimony seemed unduly rehearsed, while his cross-exam testimony was evasive. Further, Buchanan's suggestion was consistent with the Employer's goal of having the same work done by the existing workforce, but employed by an outside contractor so that pension payments could be avoided. Notwithstanding that finding, there was no evidence that Buchanan, as a single school board member, played any special role in the sub-contracting decision making.[5] There was no evidence that Buchanan proposed or promoted the idea of sub-contracting, nor that he exhibited any particular sway over other Board members.

Additional evidence of bias was offered in the form of statements attributed to the principal of Adler Elementary School, who was alleged to have commented that "Privatization is looking better & better", while critiquing the performance of certain school employees. There was no evidence that this otherwise stray comment, or opinion, by a single school administrator was brought to the attention of the school board or had any effect whatsoever on their deliberations over the sub-contracting issue, nor that she was in any way privy to the views of school board members.

Discussion and Conclusions of Law:

The Discrimination Claim

Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist v Waterford Federation of Support Personnel*, 19 MPER 60 (2006). Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful. *City of Royal Oak v Haudek*, 22 MPER 67 (2009). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra,* 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707.

[4] The Employer sought to cross-examine Liddell as to her possible credit card debt, her husband's employment and earnings, and other family financial matters. I excluded such testimony as not relevant and not probative of bias as to Liddell's testimony, especially where Liddell was regardless seeking re-employment through the Union's Charge.

[5] Even the Employer's post-hearing brief acknowledges that perhaps Buchanan was merely being boastful with Liddell about authority that he did not really possess.

Here, the Union asserts that the decision to sub-contract was motivated by a desire to rid itself of the cost and inconvenience of dealing with the Union, while continuing to have the same work performed by essentially the same workforce. There is no dispute that the employees were subject to a materially adverse employment action and generally had engaged in protected activity in forming a Union to seek better conditions of employment. Similarly, there is no dispute over the Employer knowledge of that general Union activity by its workforce. Rather, the dispute here is over whether the Employer held, and acted upon, unlawful antipathy to the Union's existence and role in the workplace, or for some other lawful reason.

The Employer's pre-trial motion for summary disposition, and its post hearing brief, each asserted that under Section 15 (3)(f) the Employer's decision making regarding sub-contracting was absolute and was not subject to review for any reason. The assertion was that in carving that workplace topic out as one not subject to bargaining in the public schools setting, the Legislature implicitly intended to create an envelope of absolute unreviewable discretion on the part of local school officials. That same assertion has previously been rejected by the Commission in interpreting that very section of the Act. In *Parchment School District,* 2000 MERC Lab Op 110 (no exceptions) and in *Coldwater Community Schools*, 2000 MERC Lab Op 244, the Commission held that under Section 15 (3)(f), whether a decision to subcontract was based on an employer's legitimate business concerns, or instead on its unlawful "desire to rid itself of the burden of dealing with the union" is a question of fact. To be sure, the statutory amendment created a strong presumption in favor of unilateral Employer action which must be met by an unusually high burden of proof of unlawful intent; however, the amendment cannot reasonably be inferred to have prohibited a review of employer discretionary action to determine if the supposed exercise of discretion was, in fact, a cover for unlawful discriminatory conduct.

A similar employer claim of unreviewable discretion was most recently rejected by the Commission in *City of Detroit (Police Command Officers Assoc)* 23 MPER 85 (2010), with the holding that even where an employer has clear and broad statutory discretion regarding particular employment related decision-making, that otherwise unfettered discretion cannot be used for unlawful discriminatory purposes, as occurred there. In *Detroit Police Command Officers,* the Commission properly relied on a significant body of precedent holding that even were a particular employer decision is ordinarily discretionary, it cannot properly be upheld if in fact it was based on unlawful discriminatory intent. *MERC v Reeths-Puffer School Dist*, 391 Mich 253; *Wayne County*, 21 MPER 58 (2008); *Grand Rapids,* 1984 MERC Lab Op 118.

The Employer here, of, course had the unfettered discretion to sub-contract the work for any reason other than an unlawful reason. The Employer faced significant budget shortfalls and anticipated securing large cost savings through sub-contracting. The Union's burden here is substantial in factually overcoming the presumption that the Employer has acted within its broad grant of statutory discretion and that it instead acted out of unlawful bias. There was at best evidence suggesting that a single school board member exhibited some animus based on the costs and complications of dealing with the Union. I find no evidence that Buchanan's apparent views are attributable to the school board as a whole. Moreover, as in *Parchment Schools*, a legitimate desire to achieve cost savings does not, in itself, support a conclusion that unlawful animus was the basis of

decision making.[6] The Union having not met its substantial burden of establishing that the sub-contracting decision was premised on unlawful bias, the portion of the Charge alleging violations of Section 10(1)(a) &(c) must be dismissed.

The Refusal to Bargain Claim

The Employer's approach to the concessionary discussions with the Union were unusual and may not have met the ordinary statutory obligation of the Employer to bargain in good faith with the Union regarding wages, hours, and other terms and conditions of employment. Here, however, the parties were not in ordinary bargaining. The parties were instead engaged in informal discussions wherein the Union sought to persuade the Employer that employee economic concessions were a viable alternative to the proposed sub-contracting of work.[7] There was no duty on the part of either party to bargain in good faith, as that term is understood under PERA. To the contrary, the parties were prohibited from engaging in formal bargaining by Section 15 (3)(f) of PERA. The Legislative judgment was clearly that the decision of whether or not to subcontract work was not a topic over which the parties had a duty to bargain. Where there was no statutory duty to bargain, any alleged failure of good faith in the parties' discussions cannot form the basis of a claimed violation of the statute and, therefore, the portion of the Charge alleging a violation of Section 10(1)(e) must be dismissed.

I have carefully considered all other arguments asserted by the parties in this matter and have determined 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 Charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: February 3, 2011

[6] A similar claim of elimination of Union positions, by this same Employer, due to alleged anti-union animus was recently rejected, premised on the finding that the Employer's motivation was in fact the expected cost savings and not unlawful bias. *Southfield Public School –and- Southfield Michigan Education Support Personnel Association (MESPA)*, 22 MPER 26 (2009), aff'd, *MESPA v Southfield Public Schools*, (Court of Appeals No. 290898, unpublished) (July 8, 2010).

[7] The Union sought an adverse inference as to the Employer's good faith in its discussions with the Union, based on the failure of the Employer to produce the testimony of its representative who took part in the ultimately fruitless discussions with the Union. No such inference is appropriate, where, as here, there was no duty to bargain in good faith.