STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

GALESBURG-AUGUSTA COMMUNITY SCHOOLS,
Public Employer - Respondent,

-and-

Case No. C12 G-135
Docket No. 12-001240-MERC

MICHIGAN AFSCME COUNCIL 25, AFL-CIO AND ITS AFFILIATED LOCAL 1677,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Lisa L. Swem, for Respondent

Kenneth J. Bailey, Staff Attorney, for Charging Party

DECISION AND ORDER

On March 19, 2013, Administrative Law Judge Julia C. Stern issued a 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

_____
Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Robert S. LaBrant, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

GALESBURG-AUGUSTA COMMUNITY SCHOOOLS,
Public Employer-Respondent,

Case No. C12 G-135
Docket No. 12-001240-MERC

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO AND ITS AFFILIATED LOCAL 1677,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Lisa L. Swem, for Respondent

Kenneth J. Bailey, Staff Attorney, Michigan AFSCME Council 25, for Charging Party Organization

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION FOR SUMMARY DISPOSITION

On July 12, 2012, Michigan AFSCME Council 25 and its affiliated Local 1677 filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the Galesburg-Augusta Community Schools, pursuant to §§10 and 16 of the Public Employment Relations Act (PERA or the Act), 1965 PA 379, as amended, MCL 423.210, 423.216. Pursuant to §16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System.

On October 2, 2012, Respondent filed a motion for summary dismissal of the charge. Charging Party did not file a response. Based on the fact as alleged in the charge, a more definite statement of the allegations filed on September 17, 2012, and additional facts not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit consisting of all full-time and part-time nonsupervisory maintenance/custodians, head custodians, custodians, and grounds keepers employed by the Employer. On September 28, 2011, after being informed that Respondent was

considering subcontracting unit work, Charging Party made a written demand to bargain over "whether the bargaining unit was to be given an opportunity to bid on an equal basis as other bidders." If Respondent did not agree to bargain over this issue, Charging Party requested that Respondent provide it with the procedures to be used by the unit to submit a bid and/or that the unit be excused from all provisions of the RFP for third party contractors.

On or about April 11, 2012, Respondent issued a request for proposals (RFP) seeking bids from contractors to provide the custodial services Charging Party's members had been providing. On April 11, 2012, Respondent sent Charging Party a copy of the RFP. In an attached letter, Respondent informed Charging Party that it was giving it the opportunity to bid on the proposal on an equal basis with other bidders and, therefore, had no duty to bargain with Charging Party over the procedures for bidding or any other aspect of the contract.

Citing the Commission's decision in *Lakeview Cmty Schs,* 25 MPER 37 (2011), Charging Party asserts that Respondent had a duty to bargain over whether Charging Party's bargaining unit was to be given an opportunity to bid on an equal basis as other bidders. It alleges that Respondent's refusal to do so violated §§10(1)(a) and (e) of PERA. Charging Party also asserts that since Respondent refused to bargain over whether the unit was to be given an opportunity to bid, and the RFP by its terms effectively precluded the unit from bidding, Respondent also had an obligation to bargain over all issues relating to the contract. These included the decision to contract, the procedures for obtaining the contract, and the impact on employees. It alleges that Respondent's refusal to bargain over these issues also violated §§10(1)(a) and (e) of PERA.

Facts:

Section 15(3)(f) of PERA

Section 15 of PERA, MCL 423.215, requires a public employer to bargain collectively with the representatives of its employees with respect to the employees' wages, hours and other terms and conditions of employment. In 1994 PA 112 (Act 112), the Legislature added §§15(3)(f) and 15(4) to §15. The new sections made the decision of whether or not to contract with a third party for one or more noninstructional support services, the procedures for obtaining the contract, the identity of the third party, and the impact of the contract on individual employees or the bargaining unit prohibited subjects of bargaining for public school employers and the bargaining representatives of their employees. In 2009 PA 2010, the Legislature amended §15(3)(f). This section now reads as follows (language added in 2009 in italics):

> The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract *for noninstructional support services other than the bidding described in this subsection;* or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. *However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given the opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.*

Background, Charging Party's Demands to Bargain, and the Response

The most recent collective bargaining agreement between the parties expired on June 30, 2012. According to a letter sent to Respondent by Charging Party AFSCME Council 25 Staff Representative Angela Tabor and attached to Respondent's motion, Charging Party agreed to reopen its contract and grant contract concessions amounting to approximately $15,000 for the 2010-2011 school year. At or before a meeting between the parties on September 20, 2011, Respondent asked Charging Party to agree to approximately $15,000 in additional concessions for the 2011-2012 school year. During the September 20 meeting, Respondent also told Charging Party that it was considering contracting with a third party for custodial services.

In this meeting, and in a letter sent to Respondent on September 28 2011, Tabor complained that Respondent was seeking too much in concessions from a unit of six people. She also warned Respondent that, under the 2009 amendments to PERA, the subcontracting of noninstructional support services was no longer automatically a prohibited subject of bargaining. Tabor cited the Commission's decision in *Lakeview* for the proposition that, under the 2009 amendments, a public school employer has a duty to bargain over "whether the bargaining unit is to be given an opportunity to bid on an equal basis as other bidders." Tabor stated that if Respondent was considering subcontracting unit work, Charging Party demanded to bargain over whether the unit was to be given an opportunity to bid on an equal basis. Tabor's letter also stated that while the Commission had ruled in *Lakeview* that the bargaining unit "must transform itself into some entity like a third party contractor or otherwise act as a third party contractor," Charging Party disagreed with that ruling. The letter stated that AFSCME had no desire to "be an employer or transform itself into a corporation." She stated that if Charging Party had to become an employer to bid on the contract, Charging Party's position was that "it should not be provided an opportunity to bid on an equal basis." Tabor noted that *Lakeview* was pending before the Court of Appeals and stated that Charging Party was confident that *Lakeview* would be overturned. Tabor's letter included this paragraph:

> If the District refuses to bargain over whether to provide the bargaining unit an opportunity to bid on the procedures for AFSCME to submit a bid, then AFSCME requests that the District provide the procedure for the bargaining unit to bid in writing. If your answer is the RFP that is issued for subcontractors, the bargaining unit requests to be excused from all provisions of the RFP. Let us know if this is acceptable and what provisions of the RFP will be applicable to the bargaining unit.

Respondent did not immediately reply to Tabor's letter. As noted above, on April 11, 2012, Respondent sent Charging Party a copy of an RFP for custodial services which it was about to issue. In a lengthy letter accompanying the RFP, Respondent noted that its decision to seek proposals for custodial services was based on several factors, including that the State School Aid Act provided significant financial incentives to school district who engaged in statutory "best practices," which included obtaining competitive bids on the provision of noninstructional services. In response to Tabor's September 2011 demand to bargain, Respondent asserted that there was no need to bargain over "whether the bargaining unit is to be given an opportunity to bid on an equal basis as other bidders," because Respondent was

providing Charging Party with this opportunity. The letter pointed out that both *Lakeview* and an Attorney General's opinion interpreting §15(3)(f) concluded that the 2009 amendments did not require a public employer to bargain over procedures for obtaining the contract, including the contents of the RFP.

The RFP included two provisions which Charging Party asserts precluded it from submitting a bid. One was a provision in the RFP defining "contractor" as a "custodial company." The other was a provision restricting communications by any prospective bidder with "RFP Selection committee Members, Board of Education Members, Administration, School employees or students." The RFP included other terms which Charging Party asserts made it impractical for it to submit a bid. These included provisions requiring the bidder to provide a supervisor, provide supplies and equipment, indemnify the employer, provide liability insurance, pay all taxes relating to members, pay unemployment taxes, and provide ten references from other businesses.

Charging Party did not submit a bid. On June 14, 2012, after the deadline for submitting bids had expired, Tabor sent Respondent another letter again demanding to bargain over whether the unit was to be given the opportunity to bid on the contract on an equal basis. Tabor reiterated that Charging Party had no desire to be an employer or to transform the unit into a corporate entity and, therefore, it was Charging Party's position that it should not be provided the opportunity to bid on an equal basis. In her June 14 letter, Tabor opined that if there was no agreement to provide the bargaining unit with an opportunity to bid on an equal basis, the prohibitions in §15(3)(f) against bargaining over the subcontracting were lifted. Since there had been no agreement between the parties, Tabor said, Charging Party also demanded to bargain over all issues relating to the contract, including the impact of the contract on unit employees. Tabor asked Respondent to reply before June 18.

On June 14, Respondent sent Tabor a letter stating that Respondent had provided the AFSCME bargaining unit with an equal opportunity to bid on the contract and, therefore, there was no need to bargain this issue. The letter also stated that since the statutory requirement had been satisfied, all other aspects of the bid process, and the impact of the decision on employees, were prohibited subjects of bargaining under the statute.

Neither the charge nor Respondent's motion indicates whether Respondent entered into a contract with a third party bidder for custodial services.

Discussion and Conclusions of Law:

The Commission has issued two decisions discussing the impact of the 2009 amendments to §15(3)(f) on a public school employer's duty to bargain. In addition to *Lakeview*, which remains pending before the Court of Appeals, in July 2012 the Commission issued *Rochester Cmty Schs*, 26 MPER 17 (2012). In *Rochester*, the Commission reiterated its holding in *Lakeview* that a public school employer, when seeking bids for noninstructional support services, does not have an obligation to bargain with the union representing its employees over the procedure for submitting bids. The Commission observed in both cases that, "the conundrum is that bidding is a procedure for obtaining a contract and the procedures for bidding are also the

procedures for obtaining a contract over which bargaining is prohibited… If the procedures for bidding are a mandatory subject of bargaining, the prohibition against bargaining the procedures for obtaining a contract is nullified." In *Rochester*, the Commission quoted from its *Lakeview* decision as follows:

> The 2009 amendment to Section 15 expressly prohibits bargaining over the procedures for obtaining a contract for noninstructional support services. The exemption asserted by Charging Parties does not apply to bidding in general. It applies to "the bidding described in this subsection." The bidding described in subsection 15(3)(f) is the "opportunity to bid on the contract for noninstructional support services on an equal basis as other bidders." *Giving due consideration to the general purpose of the 1994 and 2009 amendments to Section 15 of PERA, we find that the only issue to be bargained with regard to bidding is whether the bargaining unit is to be given an opportunity to bid on an equal basis as other bidders.* If the public school employer fails to give the bargaining unit an opportunity to bid on an equal basis as other bidders, the prohibitions of subsection 15(3)(f) are removed. If the bargaining unit is given an equal opportunity to bid, bargaining over other procedures for obtaining the contract, including the procedures for bidding, is prohibited. [Emphasis added]

The Commission's statement that whether the bargaining unit is to be given an opportunity to bid on an equal basis is "an issue to be bargained" is somewhat puzzling. Under *Rochester* and *Lakeview*, a public school employer obviously has a strong incentive to give the unit the opportunity to bid on the contract on an equal basis, since if the employer does not do so its obligation to bargain over a range of topics relating to the contract are revived. The union, on the other hand, may prefer that the public school employer *refuse* the unit the opportunity to bid, particularly since the Commission has interpreted the "opportunity to bid on an equal basis" as requiring the unit or union to bid as a third party contractor. Like the Charging Party in this case, many unions would prefer a right to bargain over the subcontracting decision to the opportunity to bid as a third party contractor on the work. Seizing upon the statement quoted above, Charging Party argues that under *Lakeview* it can regain its pre-Act 112 right to bargain over the employer's decision to subcontract the work and its impact on employees simply by taking the position that the unit should *not* be allowed to bid on the contract on an equal basis with other bidders.

This outcome is clearly not what the Commission, or the Legislature, intended. I find that whether the employer has permitted the unit to bid on an equal basis as other bidders is a question of fact, not an issue over which it must bargain. I note, as Administrative Law Judge David Peltz did in his decision and recommended order in *Lakeview*, that an employer acts as its peril if it ignores the union's objections to the terms of the RFP and the RFP effectively closes the door to a bid by the bargaining unit. However, I conclude that if a public school employer voluntarily agrees to allow the unit to bid on the contract on an equal basis, and then does so, it has no obligation to bargain with the union over the bid or any aspect of its subcontracting decision.

As Respondent points out in its motion, the Commission held in *Lakeview* and *Rochester* that a union cannot assert that it was denied the opportunity to bid on an equal basis unless it actually submits a bid and its bid is rejected. These cases suggest that a union that believes that terms of the RFP preclude it from bidding on an equal basis should either submit a bid requesting an exemption from these terms or, after its bid is rejected, challenge the terms of the RFP.[1] Since Charging Party did not submit a bid in this case, under the law as it stands it is precluded from claiming that it was not given an equal opportunity to bid.

I conclude that Respondent did not have a duty to bargain with Charging Party over "whether the unit was to be given the opportunity to bid on the contract on the same basis as other bidders," over the content of the RFP, or over the procedures for submitting a bid, and that Respondent did not violate PERA by failing or refusing to bargain with Charging Party over these topics. I also conclude that as Charging Party did not bid on the contract, it cannot assert that it was denied the opportunity to bid on an equal basis. Under §15(3)(f), therefore, Respondent had no duty to bargain with Charging Party over its decision to contract with a third party or the impact of this decision on employees. I recommend, therefore, that the Commission grant Respondent's motion for summary dismissal, and that it issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____

[1] However, as Respondent notes in its motion, in *Michigan AFSCME Council 25 v. Woodhaven-Brownstown School Dist*, 293 Mich App 143, 156, (2011), the Court of Appeals concluded that a bargaining unit is not entitled to the opportunity to submit a bid on terms that differ from those of other potential bidders.