

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

In the Matter of:

GRAND RAPIDS PUBLIC MUSEUM,
Public Employer – Respondent in Case No. C01 G-132,
Charging Party in Case No. CU01 F-32,

-and-

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION,
Labor Organization – Charging Party in Case No. C01 G-132
Respondent in Case No. CU01 F-32.

APPEARANCES:

Varnum, Riddering, Schmidt, Howlett, LLP, by John Patrick White, Esq., for the Employer

Kalniz, Iorio, & Feldstein, LPA, by Fillipe S. Iorio, Esq., for the Labor Organization

DECISION AND ORDER

On May 31, 2002, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were 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

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Bary Ott, 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 and 423.216, this case was heard at Lansing, Michigan on September 6, 2001, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before November 8, 2001, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

The Grand Rapids Public Museum (the Employer) filed the charge in Case No. CU01 F-32 against the Grand Rapids Employees Independent Union (the Union) on June 18, 2001. The Employer alleges that sometime in early May 2001, the Union violated the ground rules for the parties' contract negotiations by speaking to a newspaper reporter about the parties' ongoing contract negotiations without providing the

Employer with prior notice. The Employer alleges that by this act the Union violated its duty to bargain in good faith under Section 10(3)(c) of the Act. The Union filed the charge in Case No.C01 G- 132 against the Employer on July 2, 2001. The Union alleges that the Employer unlawfully interfered with employee rights in violation of Section 10(1)(a) of PERA when it sent letters to members of the bargaining unit threatening to file an unfair labor practice charge, and when it subsequently filed an allegedly baseless charge. The Union also alleges that on June 19, 2001 the Employer engaged in unlawful direct bargaining with employees over the issue of health insurance.

Facts:

The Union's Alleged Bad Faith Bargaining and The Employer's Alleged Interference:

The Union was certified as the bargaining representative for a unit of all full-time nonsupervisory employees of the Employer in August 1999. The parties began negotiating their first contract on August 30, 1999. The parties agreed on several ground rules for the negotiations. They included the following: (1) only a party's chief spokesperson could make proposals; (2) all tentative agreements would be dated and initialed by both parties; (3) each party would give the other 24-hours notice before "publication" of information about the negotiations, including talking to staff or the press.

Between August 1999 and May 2000 the parties had approximately nine negotiating sessions. Sometime during this period, the Union changed its chief spokesperson. The parties reached tentative agreements on a several issues. Each time the parties agreed on an issue, they immediately generated a document setting out the agreement and the date it was reached. Copies of the document were distributed to both parties, but the parties did not initial the document. The parties were not able to agree to a contract, and on May 26, 2000, the Union filed a petition for fact finding. Fact-finding hearings were held on December 19, 2000 and March 14, 2001. As of the date of the hearing the fact-finder had not yet issued his report.

In late March 2001, Tim Chester, the Employer' director, was interviewed by a reporter for the *Grand Rapids Press* for an article that appeared in that paper on April 1, 2001. The Union did not find out about the interview until the article appeared.. The focus of the article was the museum's budget shortfall and Chester's request to the Grand Rapids City Commission for additional funding. Chester admitted that he made the remarks attributed to him in the article. The article quoted Chester as saying that he expected the museum to struggle financially the next year because of continued construction around the museum, and because of increases in utility and employee health insurance costs. The article also stated that Chester was "lobbying for 3 per cent pay hikes" for museum employees as they had gone several years without a raise. According to the article, these pay hikes would add another \$70,000 to the museum's budget. The article did not mention the parties' contract negotiations.

Another article about the museum appeared in the *Grand Rapids Press* on May 16, 2001. The article reported that the Grand Rapids City Manager had proposed additional money for the museum in his budget, but that the City Commission was studying the issue. The article quoted several statements made by

Chester at a public meeting of the City Commission concerning possible sources of funding for the museum.

In early May 2001 a *Press* reporter interviewed the Union's president and vice-president about the status of contract negotiations. The Union did not notify the Employer that its representatives had spoken to the reporter. Their comments appeared in a *Press* article on May 18, 2001. The Union representatives told the reporter that museum employees were tired of not getting the same raises other city employees enjoyed. They said that while most city employees had gotten raises equaling 27.5 percent since 1994, and Chester's salary had gone up 11.5 percent during this period, other museum employees had received increases of only 7.7 percent. The Union vice-president told the reporter, "Certainly Tim Chester is entitled to wage increases the same as anyone else, but they could share the wealth a little more evenly." The Union representatives claimed that the Union was "not even close to getting the museum's management to agree to a contract." The Union president also said that museum employees were reluctant to speak to reporters because they felt they had no job security, and the Union hadn't "been able to bargain out the basic outline of a contract."

The *Press* reporter contacted Chester for comment, and his remarks also appear in the May 18 article. Chester noted that though museum employees were on the city payroll, they were employed by the museum and its citizen board. Chester said that museum employees had not gotten raises equal to other workers because they were well paid in comparison to employees in similar institutions. Chester also said that the museum's benefit package was higher than anyone's they had been able to survey. Chester was quoted as saying that "he would not comment on the negotiations," because it would violate a deal in which both sides promised not to talk publicly.

On May 22, 2001, Chester sent a letter to museum employees about the Union representatives' remarks to the *Press* reporter. Chester complained that the Union representatives had violated mutually agreed upon bargaining rules and also that they had disseminated false and misleading information. The letter also stated that the Employer was planning to file unfair labor practice charge based on "the Union's failure to honor its own ground rules and its commitment to bargaining in good faith." As noted above, the Employer filed the unfair labor practice charge in this case on June 14, 2001

Alleged Direct Bargaining

All City of Grand Rapids employees have health care benefits through a plan known as the Unified Health Plan (the Plan). Employees of the museum have also traditionally been covered by the Plan, as do employees of the 61st District Court and the public library. The City and all unions representing City employees have an agreement which prohibits any one of them from opting out of the Plan without the agreement of all the other parties.

There was no discussion of the Employer leaving the Plan during the negotiations that preceded fact-finding. On March 14, 2001, after the fact-finding hearings had concluded, the Employer presented the Union with an economic proposal for fiscal year 2000 (July 1, 2001-June 30, 2002). The Employer agreed, if its request for additional funding was approved, to continue to provide employees with coverage under the Plan and to continue to pay the entire cost of the premium. If the City rejected the Employer's funding

request, the Employer offered alternate proposals. Under one option, the Employer would continue to pay the entire premium under the Plan. The other option required employees to pay 17.5% of the premium, but provided a larger salary increase. The Employer also told the Union that if it could not get a funding increase from the City, employees would probably have to be laid off. Chester also mentioned the possibility of switching from the Plan to a more cost effective plan, and/or a cafeteria plan, in the future. Chester said that this was not an option for the current fiscal year because of the Employer had not yet talked to the City, and it anticipated difficulties in getting permission to leave the Plan. However, Chester told the Union that there was a possible loophole which might allow the museum to leave the Plan, and he mentioned leaving the Plan as a possible “long-term strategy.”

On June 19, 2001 the Employer held its regular quarterly staff meetings, one in the morning and one in the afternoon. At both meetings, Chester talked to employees about the Employer’s financial problems, and about the fact that the Employer’s efforts to get additional funding from the City seemed to be meeting with success. Chester also said that even if the museum received the additional funding, the museum would likely begin the next year with a deficit. Chester mentioned that the Employer was experiencing increasing health care costs and said that trying to opt out of the Plan might be one way to save money. Chester indicated that he believed that the City’s Human Resources Director may have acted illegally by agreeing to have museum employees covered by the Plan without obtaining the approval of the Employer’s board, and that this fact might allow the museum to leave the Plan. Chester told employees that the Employer might be able to obtain equivalent coverage at a lower rate outside of the Plan because many of the museum’s employees were single and did not have families. He said that the Employer was looking at options involving “opting out” of the Plan.

Discussion and Conclusions of Law:

The Employer maintains that the Union violated the parties’ negotiating ground rules when it spoke to the reporter from the *Grand Rapids Press* in early May 2001 and did not notify the Employer. The Employer asserts that the Union’s breach of this ground rule constituted a “per se” violation of its duty to bargain in good faith.

According to the Employer, this is an issue of first impression for this Commission. I agree. In *Crestwood S.D.*, 1975 MERC Lab Op 608, the Commission rejected a Union claim that the Employer had engaged in surface bargaining. Among the actions alleged to support this claim was the fact that the Employer’s new chief bargaining representative, entering the negotiations at the second session, repudiated the procedure for exchanging proposals to which the parties had agreed at their first bargaining session. The Commission held that a change in “strategy or tactics” during negotiations was not evidence of bad faith, but it did not explicitly hold that a breach of ground rules was not per se an unfair labor practice.

The Employer relies primarily on the decision of a hearing examiner for the Indiana Education Employment Relations Board (IEERB), *Lafayette School Corporation*, 22 IPER (LRP) P28, 016; 1997 IPER LEXIS 12. Under the applicable Indiana statute, the IEERB was required to send copies of a fact finder’s report to the parties ten days before the IEERB released the report to the public. In *Lafayette*

School Corporation, the school district and the representative of its teachers reached a tentative contract agreement shortly after receiving a copy of a fact finder's report, and before the IEERB had released the report. The parties agreed to make a joint statement to the press that they had reached a tentative agreement, but that no details would be released until after the agreement had been ratified. However, the school district's chief spokesperson was not aware of this agreement. Later that day he spoke to both television and newspaper reporters, revealing both the specifics of the salary settlement and the fact finder's report which had recommended a higher pay increase for union members. The hearing officer said, "While revealing the salary settlement to the media might not sustain a holding of bad faith bargaining, certainly revealing the fact-finder's salary recommendation at the same time would sustain a conclusion that the Corporation bargained in bad faith." She held that the Corporation had committed a per se violation of the Indiana statute because "the fact-finder's salary recommendation was released to the media contemporaneously with the salary settlement in the tentative agreement when the parties had agreed not to reveal the details of the settlement until after ratification." She found that "the actions of the Corporation were inconsistent with good faith bargaining and the harmonious and cooperative relationship that the (Indiana) Act intends."

The only other authority cited by the Employer is a decision of the Director of the New Jersey Public Employment Relations Commission declining to issue a complaint upon a union's charge that a community college engaged in unlawful interference and violated its bargaining obligation by publishing a newspaper advertisement concerning the status of negotiations. *Brookdale Community College*, 17 NJPER (LRP) P22, 043; 1989 NJPER LEXIS 281. In his decision the Director noted that the advertisement did not contain threats or promises and did not violate the parties' ground rules.

Agencies administering public employee collective bargaining statutes in other states, however, have held that the breach of a negotiating ground rule is not, by itself, a violation of the duty to bargain in good faith. In *City of Wilkes-Barre*, 22 PPER (LRP) P29, 233; 1998 PPER LEXIS 226, the Pennsylvania Labor Relations Board held that the City did not violate its duty to bargain in good faith when its mayor issued press releases arguing for the City's bargaining position in negotiations after the Union had requested interest arbitration, despite the parties agreement to a ground rule prohibiting discussing negotiations with the media. The Pennsylvania PERB stated that its research had disclosed no previous decisions by it on this issue. However, it noted with approval decisions of the New York Public Employment Relations Board dating back to 1973 holding that, in the absence of evidence of an intention to frustrate the negotiation process, the mere breach of a negotiation ground rule is not a violation of the statutory duty to bargain in good faith, but is at most a violation of a contractual agreement. The Pennsylvania PERB held that there was no evidence that the mayor's statements were intended to frustrate the negotiation process, and that therefore the City had not violated its statutory duty to bargain.

In *Jacksonville Port Authority*, 12 FPER (LRP) P17, 162; 1986 FPER LEXIS 113, the General Counsel of the Florida Public Employment Relations Commission summarily dismissed a charge that a union bargained in bad faith by appealing to the public for support during negotiations. The General Counsel stated that even assuming that this conduct violated the parties' grounds rules for negotiations, it had no bearing on his determination, and that any "isolated ground rule violations" must be viewed as part of the

totality of the conduct of both parties during the bargaining process. See also *City of Highland Park*, 14 PERI (LRP) P2023; 198 PERI LEXIS 63, in which the Illinois State Labor Relations Board adopted the holding of its administrative law judge that a union did not violate its duty to bargain in good faith by violating a ground rule stating that after a tentative agreement was reached, all members of the union's bargaining committee would use their best efforts to secure ratification by the union's membership.

I have not been able to find a decision precisely on point arising under the National Labor Relations Act (NLRA), 29 USC § 150 *et seq.* In *Detroit Newspaper Agency*, 326 NLRB No. 64 (1998), the issue was whether the National Labor Relations Board (the Board) should apply its standards for withdrawal from multiunion bargaining agreements to the Employer's alleged repudiation of an agreement to bargain jointly with its unions on economic issues. Four of the five Board members noted in their discussion, however, that a party's breach of negotiating ground rules, without more, does not violate its statutory duty to bargain in good faith.

I am not persuaded that the Commission should adopt the rule that a party commits a per se violation of its duty to bargain in good faith when it violates a negotiating ground rule. Rather, the totality of the circumstances should be considered to determine whether the party intended to circumvent its obligation to bargain and to reach an agreement in good faith. *Warren Education Association*, 1977 MERC Lab Op 815.

The Union argues that it was released from its agreement to notify the Employer before talking to the press because: (1) the parties ignored other ground rules; (2) the parties were participating in fact finding, and thus their dispute had become public; (3) Chester had violated the ground rule against talking to the press before the Union representatives spoke to the *Press* reporter. I find that none of these factors excused the Union's conduct. First, the parties mutually agreed to dispense with the requirement that tentative agreements be individually initialed, and the ground rules did not prohibit the Union from replacing its chief spokesperson. Second, when the Union representatives gave their interview the fact finder had not issued his report. Therefore, the facts involved in the disagreement had not yet been determined or made publicly known as provided in MCL 423.25(1). Moreover, the record indicates that the parties continued to bargain while awaiting the fact-finder's report. Third, prior to May 18 Chester had spoken to a reporter about the Employer's budget problems, and remarks he made in a public meeting had also been quoted, but had not discussed the negotiations. I agree with the Employer that the Union violated their ground rules by talking to the press without notifying the Employer.

However, I do not believe that the Union's conduct in this case was sufficient to indicate bad faith. I note that negotiations were not at a crucial juncture in May 2001.¹ I also note that the Employer has not pointed to any other act by the Union as demonstrating its intent to abandon the bargaining process. Based on the "totality of circumstances" test, I conclude that record does not demonstrate that the Union engaged

¹ This was a critical time for the Employer, as its request for additional funding was being considered by City Council. However, the Union's statements to the *Press* generally supported the Employer's position that it needed more money.

in bad faith bargaining. *Compare, Lamphere Federation of Teachers (on remand)*, 1978 MERC Lab Op 194, holding that a union's decision to strike after one mediation session evidenced a lack of good faith in the bargaining process.

The Union's charge contains two allegations. It alleges, first, that the Employer violated Section 10(1)(a) of PERA by threatening to file, and then filing, a baseless unfair labor practice charge. The Union relies on *Bill Johnson's Restaurants, Inc. v NLRB*, 461 US 713 (1983), affirming that an employer commits an unfair labor practice under the NLRA by filing and/or prosecuting a baseless lawsuit against employees or their union with the intent of retaliating against employees for the exercise of their rights under the NLRA, and establishing that in certain cases such lawsuits may be enjoined. However, I can find no indication that the Board or this Commission has ever held that filing, or threatening to file, an unfair labor practice charge constitutes an unfair labor practice. Moreover, under *Bill Johnson*, a "baseless" lawsuit must have no reasonable basis in either fact or law. I find that the Employer's charge here would not in any case meet this standard, since the Union did not demonstrate that the Employer's argument was contrary to established Commission precedent.

The Union's second allegation is that the Employer engaged in direct bargaining with employees when Chester discussed "opting out" of the Plan at employee meetings held on June 19, 2001. Under Section 11 of PERA, an employer is required to bargain exclusively with the recognized bargaining agent of its employees. An employer may not submit for employees' consideration offers which have not been made to the union. *St. Clair Community College*, 1979 MERC Lab Op 541. However, an employer is not foreclosed from discussing mandatory topics of bargaining with its employees. *Huron S.D.*, 1990 MERC Lab Op 628; *Bangor Twp. Bd. of Ed.*, 1984 MERC Lab Op 274. Here the record establishes that what Chester told employees on June 19 about leaving the Plan was substantially what he had previously said to the Union on March 14. I find that Chester did not engage in direct bargaining with employees on June 19, 2001.

In sum, I find that the Union violated the parties' ground rules by speaking to a reporter about the parties' negotiations without giving the Employer prior notice. However, for reasons set forth above, I conclude that the Union did not violate its duty to bargain in good faith. I also find that the Employer did not unlawfully interfere with its employees' exercise of their Section 9 rights when it sent them a letter on May 22, 2001 threatening to file an unfair labor practice charge, or when it subsequently filed this charge. Finally, I conclude that Chester did not engage in unlawful direct bargaining when he discussed leaving the Plan at employee meetings held on June 19, 2001.

In accord with the findings of fact, discussion and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charges are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____