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# School Districts Precluded from Unilaterally Subcontracting Occupational and Physical Therapists

By Ann L. VanderLaan / May 29, 2014

In *Pontiac School District v Pontiac Education Association*, Mich App (January 5, 2012), the Michigan Court of Appeals, in a published decision, held that occupational and physical therapists did not fall within the definition of "noninstructional support services" under MCL 423.215(3)(f). The Court affirmed the Michigan Employment Relations Commission's (MERC) decision that the school district could not unilaterally subcontract these services without first bargaining with the union.

In May 2004, the Pontiac School District sought to subcontract occupational and physical therapists (OTs and PTs), for cost-savings and efficiency reasons. The school district refused to bargain over its subcontracting decision with the Association on the grounds that the OTs and PTs provided "noninstructional support services" under MCL 423.215(3)(f), and that the decision whether to subcontract those services was a prohibited subject of bargaining under MCL 423.215(4). Accordingly, the school district laid off its OTs and PTs and entered into a contract with a private entity to provide OT and PT services to its eligible students.

The Association filed an unfair labor practice charge with MERC alleging that the OTs and PTs provided "instructional services" and, therefore, the school district should have bargained with the Association before it subcontracted OT and PT services. MERC ruled that the school district should have first bargained with the Association before it subcontracted the work.

In affirming MERC's decision, the Michigan Court of Appeals reviewed the plain language of the statute, which included the phrase "noninstructional support services" and concluded that it was not ambiguous. The Court determined that a broad, dictionary definition of the term "instruction" should be applied in interpreting the statute even though the OTs and PTs were not certified teachers.

The Court observed that if the Legislature had intended the word "instructional" to mean teaching core curriculum, the Legislature could have defined the phrase "noninstructional support services" in that manner, but the Legislature chose not to do so.

Although OTs and PTS were not certified teachers of core curriculum, OTs and PTs instructed students with respect to addressing and overcoming problems associated with their "fine and general motor skills" and had "worked in conjunction with teachers to impart knowledge and information." Thus, the Court affirmed MERC's decision that the school district must first bargain with the Association before it subcontracted OTs and PTs' work.

Given the Michigan Court of Appeals broad interpretation of "instruction," school districts should be cautious about unilaterally subcontracting employee groups other than traditional noninstructional positions such as bus drivers, custodians, clerical, and food service employees. If you have any questions about the bargaining obligations relative to subcontracting specific employee groups, please contact your Clark Hill Education Law Attorney.