STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SCHOOL DISTRICT OF THE CITY OF FLINT,
Respondent-Public Employer,

Case No. C98 J-205

-and-

FLINT SECURITY ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Bellairs, Dean, Cooley, Siler, Moulton & Smith, by C. Rees Dean, Esq., for Respondent

Fink Zausmer, P.C., by Harvey I. Wax, Esq., for Charging Party

DECISION AND ORDER

On September 28, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 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

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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Fink Zausmer, P.C., by Harvey I. Wax, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Section 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210, MSA 17.455(10), this case was heard at Detroit, Michigan on March 24, 1999, 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 June 4, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Positions of the Parties:

The charge was filed on October 5, 1998, by the Flint Security Association, MEA/NEA, against the School District of the City of Flint. Charging Party represents security aides employed by Respondent. Charging Party alleges that Respondent violated its duty to bargain in good faith under Section 10(1)(c) of PERA by unilaterally changing an established term and condition of employment, i.e., its practice of assigning security aides to middle schools. Respondent asserts that the school in dispute, Williams, was not a middle school during the 1998-99 school year. Respondent also argues that it had no duty to bargain over its decision not to assign security aides to this school.

Facts:

Respondent is a large K-12 school district. It operates elementary schools, middle schools, a combined middle and high school, traditional high schools, vocational high schools, alternative middle schools, alternative high schools, and adult education centers. Prior to about 1994, its middle schools consisted of grades 7 and 8, but since that time it has been gradually expanding its middle schools to include grade 6 as well.

Charging Party represents a bargaining unit of approximately 52 security aides employed by Respondent. The security aides monitor and control student behavior and prevent unauthorized persons from entering the school buildings. Since sometime in the mid-1970s, Respondent has assigned security aides to all its middle and high schools, alternative education schools, and adult education centers. During the spring of 1999, Respondent for the first time began assigning security aides to some elementary schools.

At the beginning of the 1997-98 school year, Respondent entered into a contract with the Edison Project, L.P., a private for-profit corporation, to operate Garfield and Williams schools as chartered public academies. At this time both Garfield and Williams were elementary schools which included sixth graders. Employees in schools operated by Edison are covered by collective bargaining agreements between Respondent and its unions.

Normally Edison operates elementary schools consisting of grades K-5, and junior academies consisting of grades 6-8. During the spring of 1998, Edison and Respondent began discussions concerning establishment of a junior academy to be operated by Edison. In June 1998 Respondent and Edison entered into an agreement to create a transitional junior academy, consisting of grades 6 and 7, at Williams Elementary School. At that time Williams had the space to add another grade, but not two grades. It was understood that at some time subsequent to the 1998-99 school year the junior academy would move to a separate building, and grade 8 would be added.

On June 29, 1998, at Charging Party's request, Charging Party met with Respondent's Director of Employee Relations and a representative of the Edison organization. At that meeting, Charging Party presented Respondent with a proposed memorandum of understanding. This document stated that two security aides were to be employed at the "Edison Project Williams Junior Academy Partnership School." The document also set forth proposed terms and conditions of employment for security aides at that school, including modifications to Charging Party's contract necessary to accommodate differences between the Edison academy's school day and year and those of Respondent's schools. Respondent told Charging Party that it and Edison did not want security aides at the junior academy while the academy was in a building where there were also elementary students. Respondent agreed that once a stand-alone junior academy was established, there would be need for an agreement between Respondent and Charging Party covering security aides at that academy. Charging Party objected, and Respondent's Employee Relations Director agreed to meet again to discuss the matter. Subsequent requests from Charging Party to meet, however, were ignored. No security aides were assigned to Williams at the beginning of the 1998-99 school year, and none had been assigned there as of the date of the hearing.

Discussion and Conclusions of Law:

Charging Party argues that the assignment of security aides to middle schools, because it pertains to the basic work of Charging Party's bargaining unit, is a mandatory subject of bargaining. In support of this proposition, Charging Party cites three cases from the National Labor Relations Board (NLRB), *Alameida Bus Lines,* 142 NLRB 445, 53 LRRM 1055 (1963); *Batavia Newspapers Corp.* 311 NLRB 477, 480, 143 LRRM 1278, 1282 (1993); *Antelope Valley Press,* 311 NLRB 459, 143 LRRM 1209 (1993). In *Alameida,* the Employer was held to have violated its duty to bargain when it refused to discuss the wages it paid to bargaining unit employees when they were assigned to charter runs. The NLRB rejected the Employer's argument that the employees were working for a different employer when they drove charter runs. In both *Batavia* and *Antelope Valley,* the Employers had insisted to impasse on contract clauses permitting them to assign certain specified tasks to employees outside the unit. The Unions argued that the employers' proposals were proposals to change the scope of the unit, and as such were permissive subjects of bargaining only. The NLRB concluded that the Employers' proposals were mandatory subjects of bargaining, since they had not specifically insisted on a change in the unit description, and since they had not attempted to deprive the unions of the right to assert that the individuals performing the work after the transfer were to be included in the unit. For reasons discussed below, I conclude that none of these cases are apposite.

Under PERA, a public employer has the managerial prerogative to make decisions regarding the size and scope of the services it provides. *Metropolitan Council No. 23 v City of Center Line*, 414 Mich 642, 660 (1982). Where work is not transferred from unit employees to emploiees outside the bargaining unit, an employer may unilaterally eliminate unit positions. *Macomb County Road Commission*, 1988 MERC Lab Op 461; *Richmond Community Schools,* 1986 MERC Lab Op 850. Where there is no impact on the safety of bargaining unit employees, an employer may unilaterally decide not to fill vacant positions, although it must bargain regarding the impact, if any, on bargaining unit employees. *Wayne County Dept of Public Works,* 1985 MERC Lab Op 305; *Center Line School District*, 1982 MERC 756, 763, 1983 MERC Lab Op 30.

I conclude that the decision whether to provide a particular school, or any of its schools, with security aides is within the scope of Respondent's managerial prerogative. Accordingly, Respondent had no duty to bargain with Charging Party over its decision not to assign a security aide to the junior academy at Williams School. Charging Party argues that by assigning security aides to all its middle schools for the past 25 years, Respondent has acknowledged that assignment of security aides to buildings housing sixth, seventh or eighth grade students is a term or condition of security aide employment. The conditions under which a past practice may develop into a term or condition of employment were discussed by the Supreme Court in *Port Huron Education Association v Port Huron Area School District,* 452 Mich 309 (1996), and *Detroit Police Officers Association v Detroit*, 452 Mich 339 (1996). As noted above, however, Respondent has a managerial right to determine where security aides should be assigned. The fact that an Employer has followed a consistent practice does not turn a permissive subject of bargaining into a mandatory one. *University of Michigan,* 1989 MERC Lab Op 720,725. Therefore, the fact that for the past 25 years

Respondent has consistently provided its middle schools with security aides is irrelevant. Equally irrelevant is the dispute over whether Williams School was truly a "middle school" during the 1998-99 school year.

In accord with the findings of fact and the discussion and conclusions of law above, I find that Respondent School District of the City of Flint had no obligation to bargain over its decision not to assign security aides represented by Charging Party Flint Security Association to Williams School for the school year 1998-99. I find, therefore, no merit to the charge that Respondent violated Section 10(1)(c) of PERA in this case, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____