STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BLOOMFIELD HILLS SCHOOL DISTRICT,
Respondent-Public Employer,

Case No. C98 I-192

-and-

BLOOMFIELD HILLS SUPPORT PERSONNEL ASSOCIATION/
MICHIGAN EDUCATION SUPPORT PERSONNEL ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Dickinson Wright PLLC, by Elizabeth M. Pezzetti, Esq., for Respondent

Amberg, NcNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., and Teresa A. Killeen, Esq., for Charging Party

DECISION AND ORDER

On January 20, 2000, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent Bloomfield Hills School District unilaterally removed a bargaining unit position from a unit represented by Charging Party Bloomfield Hills Support Personnel Association/Michigan Education Support Personnel Association in violation of Section 10(1)(e) of the Public Employment Relations Act (hereafter APERA@), 1947 PA 336, as amended, MCL 423.210(1)(e); MSA 17.455(10)(1)(e). The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accordance with Section 16 of the PERA. On March 6, 2000, Respondent filed timely exceptions to the Decision and Recommended Order of the ALJ. Charging Party filed a timely response to the exceptions and a brief in support of the ALJ=s decision on March 16, 2000.

Charging Party represents a bargaining unit consisting of all nonsupervisory clerical and secretarial employees of the Bloomfield Hills School District. The 1994-1997 collective bargaining agreement between the parties identified the position of Aaccounts payable specialist@ (hereafter AAPS@) as a unit position. During negotiations for a successor contract, the parties discussed reclassification of the APS position which, at the time, was held by Diana Bennett. The parties

reached a tentative agreement on a successor contract on March 4, 1998. The following month, Respondent notified the Union that the APS position would be renamed Aaccounts payable coordinator@ (hereafter AAPC@) to reflect Bennett=s increased supervisory responsibilities and removed from the bargaining unit. On September 16, 1998, the Union filed an unfair labor practice charge alleging that removal of the position constituted a unilateral change in violation of PERA. The ALJ agreed, concluding that the APC was not a new position because the duties and responsibilities assigned to Bennett were insufficient to confer upon her supervisory status. The ALJ ordered the Employer to recognize Charging Party as the bargaining representative for the APC position and, upon demand, bargain with the Union concerning Bennett=s wages, hours and other terms and conditions of employment.

On exception, Respondent contends that the ALJ erred in finding that the APC is not a supervisor. Although PERA contains no definition of the term Asupervisor,@ we have often utilized the definition contained in the National Labor Relations Act (hereafter ANLRA@), 29 USC ' 152(11):

> The term Asupervisor@ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their duties, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any of the powers above will make one a supervisor, and it is the possession of the power and not the exercise of the power that is determinative. *Huron County Medical Care Facility*, 1998 MERC Lab Op 137, 146; *City of Detroit, Dep=t of Health*, 1991 MERC Lab Op 41, 45; *East Detroit School District*, 1966 MERC Lab Op 60, 64. That is, as long as his or her authority is real and not theoretical, the fact that the employee has had little or no occasion to exercise that authority is not relevant. *City of Detroit, Human Resources Department*, 1999 MERC Lab Op 81, 89. See also *MEA v Clare-Gladwin ISD*, 153 Mich App 792, 797 (1986). An employee who possesses only routine responsibility to direct or assign work, but has no other indicia of supervisory authority, is not a supervisor under our definition. *Huron County Medical Care Facility*, *supra*; *Detroit Parks and Recreation*, 1969 MERC Lab Op 661, 666-668.

We have recognized that the authority to discipline or to effectively recommend discipline is a particularly important indicia of supervisory authority, regardless of whether that authority is frequently exercised. *City of Detroit, Department of Public Works*, 1999 MERC Lab Op 283, 287-288. An individual who is Ain charge@ of a group of employees is generally found not to be a supervisor unless he or she has an effective role in discipline or in recommending discipline. *Id.* at 288. See also *City of Detroit*, 1996 MERC Lab Op 282, 286*; Michigan Community Services, Inc*, 1994 MERC Lab Op 1055, 1060. In concluding that the position at issue in the instant case was not a supervisor under PERA, the ALJ found that the role of the APC in the disciplinary process was limited to telling the two half-time accounts payable clerks who report to her to correct and not repeat errors. We disagree with the ALJ=s characterization of the record. Bennett testified that she

has the authority to issue both verbal and written reprimands without the approval of her immediate supervisor, Diane Barnes, and Bennett=s testimony on this point was corroborated by both Barnes and assistant superintendent for personnel Christine Barnett. In fact, Bennett stated that she had the authority to take A*any* disciplinary actions that would be necessary to perform.@ (Emphasis supplied.) Furthermore, assistant superintendent Barnett testified that all of the supervisors employed by the school district, including Bennett, have the authority to suspend employees whose work they are assigned to oversee. Based on this evidence, we find that the ALJ erred in concluding that the APC position has no significant role in the disciplinary process.

We also find that the record does not support the ALJ=s determination that Bennett has no authority to effectively recommend that employees be hired. To Aeffectively recommend@ means that the individual=s recommendations are generally accepted by higher authority without independent investigation or consideration. *City of Detroit, Department of Health*, *supra*; *Bronson Methodist Hospital*, 1973 MERC Lab Op 946. Although no accounts payable clerks have been hired during the short period of time since the APC position came into existence, it is undisputed that Bennett has the authority to select applicants for interview and to make a recommendation to her supervisor, Diane Barnes. Barnes then consults with assistant superintendent for business services Daniel White who, in turn, discusses the matter with assistant superintendent for personnel Barnett. Although Barnett makes the final hiring decision, both Barnes and White testified unequivocally that they would not overrule Bennett=s recommendation when consulting with Barnett. Moreover, White was adamant in his contention that Bennett=s input will be determinative with respect to the hiring of accounts payable clerks. At the hearing, White testified that the district Awould hire the person that [Bennett] wanted to bring in.@ We find this evidence sufficient to establish that Bennett has the authority to effectively make hiring decisions on the Employer=s behalf.

Based on Bennett=s role in the disciplinary and hiring process, as well as the fact that she has the authority to assign work and to adjust grievances at the first step, we conclude that the APC position is a supervisor as that term has been defined under PERA. Because the APC is a new supervisory classification, the Employer had no duty to negotiate with the Union concerning its creation or its placement outside the unit. The Employer=s only obligation was to bargain with Charging Party over the impact of that decision on the unit, and there is no indication in the record before us that Respondent has in any way breached that duty. See e.g. *Bedford Public Schools*, 1988 MERC Lab Op 630, 634-635; *City of Hamtramck*, 1985 MERC Lab Op 1123, 1125. Accordingly, we order that the unfair labor practice charge be dismissed in its entirety.

ORDER

Pursuant to Section 16 of PERA, we hereby dismiss the unfair labor practice charge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Chair

Harry W. Bishop, Member

C. Barry Ott, Member

DATED:

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EMPLOYMENT RELATIONS COMMISSION
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Charging Party - Labor Organization
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APPEARANCES:

For Respondent: Dickinson Wright PLLC
by Elizabeth M. Pezzetti, Esq.

For Charging Party: Amberg, McNenly, Firestone & Lee, P.C.
by Joseph H. Firestone and Teresa A. Killeen, Esqs.

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, MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on May 19, 1999, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. The proceeding was based upon an unfair labor practice charge filed by the Bloomfield Hills Support Personnel Association/MESPA (the Union), against the Bloomfield Hills School District (Respondent) on September 16, 1998. Based upon the record, and briefs filed by July 15, 1999, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 16(b) of PERA:

The Charge:

The Union alleges that Respondent improperly removed a bargaining unit position - accounts payable specialist - from its bargaining unit without bargaining to impasse. In its October 1, 1998, answer, Respondent admits that it removed the position from the unit. However, it asserts that the title Aaccounts payable specialist@ (APS), was changed to Aaccounts payable coordinator@ (APC), to reflect the position=s actual duties which include employee supervision.

Findings of Fact:

Charging Party represents a bargaining unit of non-supervisory clerical and secretarial employees grouped into three classes - I, II, and III. The APS was identified as a class III position in the parties 1994-1997 collective bargaining agreement. A recent two-year reclassification study had demonstrated that the duties and responsibilities of the APS position did not fall within either of the three established classes. Throughout negotiations for a successor agreement which commenced on November 7, 1997, the parties bargained about the APS reclassification. The Union favored creating a fourth class, while Respondent argued for removing the APS position from the unit.

On March 4, 1998, when the parties reached a tentative agreement, placement of the APS position was still unresolved. The agreement was ratified by the Union and the Employer on March 25 and April 7, 1998, respectively. In an April 16, 1998, letter, Respondent informed the Union that the APS position would be removed from the unit on May 4, 1998. Pertinent parts read:

> Diane Bennett is currently employed in the job of APS. This job is covered by the Bloomfield Hills Office Personnel bargaining unit.
>
> * * *
>
> During negotiations, in January 1998, I advised you that the business office manager had resigned (effective February 13, 1998). As a result, job responsibilities in the business office were going to be realigned, and those changes would affect and further increase the job responsibilities of Diana Bennett. However, the union=s position was that the job of account payable specialist must remain in the union regardless of the supervisory responsibilities and the changes in the type of duties the accounts payable specialist is performing. After several meeting on this issue, I stated on February 24 and March 24, 1998 that I intended to remove the position from the bargaining unit.
>
> I have enclosed a job description . . . The description reflects the supervisory and other job responsibilities that are now applicable to this position. Ms. Diane Barnes has been hired as the business office manager and will begin working in that position on May 4. On that date, Diane Bennett=s position will be changed from accounts payable specialist to accounts payable coordinator, a non-union position.

The job description outlined nineteen duties and responsibilities for the APC position. Two addressed the management of personnel. Item one noted that she supervised and directed the work of the accounts payable clerical staff, and item 18 stated that she participated in their evaluation. The record, however, establishes that Respondent does not have a formal evaluation process and the APC does not, therefore, evaluate employees.

The APC performs her duties with minimum supervision. In addition to overseeing and directing the work of two half-time accounts payable clerks, the APC approves and analyzes all vendor payments;

enforces board policy regarding subcontractors who seek information about payments; deals directly with District administrators and advise them on accounts payable policies; and has created an accounts payable manual. However, the APC has no authority to hire or fire employees. The assistant superintendent for personnel is the only District employee authorized to hire and fire employees. He described the APC=s role in the hiring process as follows: A . . . she gets to sit on the initial selection and go over the applications, and that she can do the interviewing, but then she talks to Diane Barnes, her supervisor.@ Barnes, in turn, makes a recommendation to the assistant superintendent. According to Barnes, if the APC preferred one applicant and she preferred another, she [Barnes] would recommend to the superintendent that the applicant preferred by the APC be hired because the APC must supervise and work with the person.

The APC=s role in terminating employees is even more limited. She recommends termination to her supervisor, who then makes a recommendation to Dan White, her supervisor. White then make a recommendation to the assistant superintendent. The APC=s authority to discipline employees is also restricted. She may only issue verbal warnings, i.e., bring errors to the clerks= attention and tell them not to repeat them. Although no grievances have been filed during the short period of the APC=s tenure, the assistant superintendent explained that if a grievance were filed, the APC would not participate in the process beyond step 1 - informal discussion and initial written answer if grievance is not resolved informally.

Conclusions of Law:

At the onset of the hearing, Respondent claimed that the charge should be dismissed because it was not filed within six months of March 4, 1998, the date the parties reached a tentative agreement and the Union made its last demand to represent the APS. To support this view, Respondent cites *Wayne County Community College*, 1987 MERC Lab Op 981. There the Commission held that in cases involving the removal of bargaining unit work and the gist of the union=s charge is that the employer has a duty to recognize it as the bargaining representative for a position in dispute, the statute of limitations runs from the union=s last demand for recognition. Alternatively, Respondent asserts that the charge was not filed within six months of November 1997, when bargaining commenced and the Union knew, or should have known, that the APS position would be removed from the bargaining unit.

I find no merit to Respondent=s arguments. Contrary to Respondent=s assertion, however, there is nothing on the record to show that the Union ever demanded to represent the APS position. Rather, the Union contended that the APS position, which it already represented, should be placed in a new class instead of being removed from the unit. Under these circumstances, the test set forth in *Wayne County Community College*, *supra*, for determining when the six-month limitation period begins to run does not apply. I find that the statute began to run on May 4, 1999, when Respondent removed the APS work from the bargaining unit. *City of Huntington Woods, Wines*,122 Mich App 650-651 (1983). The September 16, 1999, charge was filed within six months of that date.

The Commission has found that the decision to create a new classification is an inherent management right, although there is a bargaining duty over the wages, hours, and working conditions of a bargaining unit position, as well as a bargaining obligation over the impact on the unit. *City of Hamtramck*, 1985 MERC Lab Op 1123; *City of Warren*, 1988 MERC Lab Op 761. Although an employer characterizes its action as the creation of a new position, the Commission has held that in fact,

the employer has unilaterally changed terms and conditions of employment of an existing unit position. *City of Hamtramck, supra*; *Meridian Township*, 1986 MERC Lab Op 915. In the latter cases, the Commission has found that the employer did not have a managerial right to create a new position without violating its bargaining obligation.

In this case, I find that Respondent has unilaterally removed bargaining unit work in violation of PERA. The Commission has defined supervisors as employees with authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, award, discipline or responsibly direct employees, adjust grievances, or effectively recommend such actions, as long as the authority requires the use of independent judgment. It must involve more that the routine scheduling or assigning work to a small shift of employees. *MEA* v *Clare-Gladwin ISD*, 153 Mich App 792, aff=g 1985 MERC Lab Op 915; *City of Detroit*, 1999 MERC Lab Op 81; *Berrien County Sheriff*, 1999 MERC Lab Op 177. There is nothing in the record to support Respondent=s contention that the APC is a supervisor. Unlike, the sub-foreman in *City of Detroit, Dept. of Public Works*, 1999 MERC Lab Op ___ (issued 8/5/99), the APC has no authority to issue Awritten oral@ warning or written warning, or evaluate employees. The APC=s role in disciplining the two half-time clerks who report to her is limited to telling them to correct, and not repeat errors. Respondent does not have an evaluation process; therefore, the APC does not evaluate employees.

I also find no support on the record for Respondent=s view that the APC has the authority to effectively recommend that employees be hired or terminated. An Aeffective recommendation@ is one which is generally accepted on its face, without independent investigation, from upper-level supervision. *City of Lansing*, 1985 MERC Lab Op 93. Since in public employment final personnel decisions are generally made by a personnel office or executive, a supervisory determination under PERA often depends on the weight given to the alleged supervisor=s recommendations. *Bedford Schools*, 1988 MERC Lab Op 630. Here, decisions to hire and fire employees are made by an assistant superintendent who is three levels removed from the APC. Any recommendation made by the APC to terminate an employees is independently reviewed by two supervisors before the final decision is made by the assistant superintendent. Likewise, a recommendation to hire is reviewed by the APC=s supervisor before the assistant superintendent decides. Although the APC=s supervisor testified that she would recommend hiring an applicant preferred the APC instead of one she (the supervisor) preferred, the final hiring decision still remains with the superintendent. The record is silent on whether hiring and firing recommendations made by the APC=s supervisors are accepted on their face without independent investigation.

In summary, I find that the APC has no significant role in hiring, firing, or disciplining employees. Her involvement in the first step of the grievance process, without more, is insufficient to confer supervisory status. Based on the above discussion, I conclude that Respondent violated Section 10(1)(e) of PERA by removing bargaining unit work without the Union=s agreement. I have carefully considered all other arguments raised by the parties and they do not warrant a change in the result. Because the issue in this case is essentially one of unit clarification, I do not recommend a cease and desist order nor the posting of a notice to employees. *Macomb County Road Comm=n*, 1978 MERC Lab Op 848, *Michigan State University*, 1999 MERC Lab Op ___ (issued 12/28/99). I recommend that the Commission issue the order set forth below:

Order

Respondent Bloomfield Hills School District and its agents, officers and assigns, shall:

1. Recognize the Bloomfield Hills Support Personnel Association/MESPA as the bargaining representative for the accounts payable coordinator position.

2. Upon demand, bargain with the Bloomfield Hills Support Personnel Association/MESPA concerning the accounts payable coordinator=s wages, hours, and other terms and conditions of employment.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____