STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

SOUTH LAKE SCHOOLS,
Respondent-Public Employer,

Case No. C99 I-163

-and-

MEA/NEA LOCAL ONE, SOUTH
LAKE EDUCATION ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Pollard & Albertson, P.C., by William G. Albertson, Esq., for Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for Charging Party

DECISION AND ORDER

On June 28, 2000, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was 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

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

Pollard & Albertson, P.C., by William G. Albertson, Esq, for the Respondent

Amberg, McNenly, Firestone & Lee, P.C., by Joseph H. Firestone, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on December 7, 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 February 29, 2000, I make the following findings of fact and conclusions of law, and recommend that the Commission issue the following order:

The Unfair Labor Practice Charge:

The charge was filed on September 1, 1999, by MEA/NEA Local 1/South Lake Education Association against the South Lake Schools. Charging Party represents a bargaining unit of professional employees, including teachers, employed by Respondent. Charging Party alleges that Respondent violated its duty to bargain under Section 10(1)(e) of PERA when it unilaterally moved a telephone used for union business from the classroom of Charging Party's grievance chairman. Charging Party also alleges that Respondent violated Sections 10(1)(a) & (c) of the Act by moving the telephone because its motive was to punish Charging Party's members for filing grievances following Respondent's decision to change health insurance carriers.

Facts:

Charging Party has had a phone line for its use on Respondent's premises since about 1972. Since at least 1986, the parties' collective bargaining agreements have contained the following language:

> The Board and Association agree to share on a 50/50 basis the cost of an outside telephone to be installed for the President's use in a location convenient to the President of the Association.

In the 1997-2000 agreement, this provision appeared as Article XVIII, paragraph G.

All Charging Party's officers use this phone from time to time. The officers jointly decide where the phone should be placed. The union phone has had a number of different locations since 1972. Whenever the phone has been moved, Charging Party's treasurer has made the necessary arrangements with the phone company, and Respondent has paid its half of the cost of moving the phone without objection.

From 1972 through 1986, the union phone was always located in the classroom of the union president. From 1984-86, Terry Nelson was the president, and the phone was located in his special education classroom in the high school. During the late 1980s and early 1990s, the president was James Gough, a high school counselor. During that period, the phone was in Gough's counseling office. Robert Ferrario was president from 1992-1994. While Ferrario was president, the phone was located in the high school math department office, next door to Ferrario's classroom. In 1994 Gough regained the office of president, and Nelson took over as vice-president and grievance chairman. Despite the fact that Gough's counseling office is in another part of the building, the phone remained in the math office. At this time the math office was across the hall from Terry Nelson's classroom. In 1996, although Gough remained president, the phone was moved to Nelson's classroom. At the beginning of the 1998-99 school year Nelson changed classrooms, and the phone was moved to his new room. Since the 1996-97 school year, Respondent's telephone directory has listed the phone number as the "SLEA office," with Nelson's name.

As long as the phone has been in his classroom, Nelson has taken calls from members of the unit during teaching hours as well as during his preparation and break periods. In addition, Nelson's supervisor, the director of special education, frequently called him on this line. The director of special education knows Nelson's class schedule, and she was aware that the phone was located in Nelson's classroom. Nelson also received calls on this line from the high school assistant principal, the principal, Personnel Director Bill Putney, and Superintendent Ronald Cook. Nelson surmised that all these individuals knew that the phone was in his classroom and that he was answering it during class hours, but the record did not establish this.

In early 1999, Respondent changed health insurance carriers. Between February 1 and early March 1999, Nelson filed five grievances on behalf of Charging Party or unit members. All of these grievances concerned health insurance. This was an unusually high number of grievances; Charging

Party usually files less than five grievances per year.

Sometime in February 1999 a student complained to the director of special education about Nelson's receiving calls and participating in conversations during class time. The director of special education went to Nelson and asked that the phone be moved. Nelson suggested, instead, that he either not answer the phone while students were in the classroom, or answer and tell the caller to call back. This did not satisfy Nelson's supervisor, and she took the issue to Superintendent Cook. Cook was not aware that the phone was located in a classroom. On March 19, 1999, Cook, Putney, Gough and Charging Party's Uniserv representative were meeting when Putney mentioned that a student had complained about Nelson's using the phone in the classroom. Putney and Cook said that Respondent wanted the phone moved, and asked where Charging Party would like it placed. The Uniserv representative suggested that an answering machine be put on the phone. Gough said that he would talk with Nelson. After the meeting, the president and/or the Uniserv director told Nelson that Respondent wanted the phone out of his classroom. Nelson was upset. He said that an answering machine would be inconvenient. Nelson told the president and/or the Uniserv representative that he would speak to the director of special education again about the issue.

Nelson did not talk to the director of special education about the phone, and Charging Party did not reply to Respondent's request that it chose a new location. On April 25, 1999, Nelson mentioned talking about a grievance on the telephone while testifying at a grievance arbitration. After the hearing, the superintendent approached him and asked if the union telephone was still in his classroom. Nelson replied that it was, that "the union was looking into an answering machine or something." A few days later, the high school principal called Nelson into his office. He told Nelson that the superintendent wanted the phone out of Nelson's classroom. The principal said that the phone could be located anywhere except Nelson's classroom.

On May 5, 1999, Cook sent Gough a memo about the phone. The memo stated that Cook and Putney had left the meeting with the understanding that Gough would talk to Nelson and then "advise them where the phone could be relocated for the president's use that would not create a disruption to students' education." The memo also said, "since the phone has not been relocated yet, I would like to reemphasize our desire to work cooperatively and expediently to address the phone relocation with you." Cook stated that a work order was being processed to remove the service on the phone line in Nelson's room. He added that once a new location that complied with the contract had been designated, the phone could be installed in that location, and that he awaited Charging Party's proposal for a new site. On May 6,[1] Charging Party filed a grievance.

On June 15, 1999, Cook wrote to the Uniserv representative indicating that the phone would be reinstalled in a small room next to the high school cafeteria. Charging Party's officers have keys to this room, which houses file cabinets in which Charging Party stores its records. In August 1999, Respondent had the telephone company install a line in this room. Because Charging Party's officers considered this to be an inconvenient location, they had the service discontinued. This unfair labor

[1] This grievance was later withdrawn.

practice charge was filed shortly thereafter.

Discussion and Conclusions of Law:

Alleged Unilateral Change:

Respondent raises three issues in its response to this allegation. First, is the location of a union telephone a mandatory subject of bargaining? Second, is the dispute in this case merely a dispute over contract interpretation which should be resolved in the forum the parties have provided for this type of dispute, i.e., the grievance procedure? Third, assuming that Respondent had a duty to bargain over the removal of the phone from Nelson's classroom, did Charging Party waive its rights by failing to make a timely demand?

I agree with Respondent that, assuming Respondent had a duty to bargain over the location of the phone, Charging Party waived its right to bargain by failure to make a timely demand. An employer has no obligation to bargain unless and until the union makes a demand that it do so. *SEIU Local 586 v Village of Union City*, 135 Mich App 553, 557 (1984). When a union fails to make a timely demand, it waives any rights it may have unless it can establish that the demand would have been futile. *Ida PS*, 1996 MERC Lab Op 211; *Leelanau Co Bd of Comm*, 1988 MERC Lab Op 590. A union cannot, without penalty, delay its response in hopes that the issues will go away. After the meeting held on March 19, 1999, Charging Party was on notice that Respondent wanted the phone moved from Nelson's office. Between March 19 and late April Gough and Nelson discussed Respondent's desire to move the phone but could not come up with a satisfactory response. Rather than demand that Respondent bargain over the issue, however, they did nothing. In late April Nelson's principal repeated Respondent's demand that the phone be moved. Again, however, Charging Party did not act. On May 5, the superintendent sent Gough a memo indicating that the phone line in Nelson's office would soon be removed, and suggesting that they talk about where the phone should be relocated. Charging Party did not demand to bargain, but instead filed a grievance. I find that Charging Party waived its rights by failing to demand bargaining. Even if the removal of the phone from Nelson's office was a fait accompli by the time of the May 5 memo, Charging Party had ample opportunity between March 19 and May 5 to respond to Respondent's order.

Because I find that Charging Party failed to make a timely demand to bargain, I conclude that Respondent did not violate Section 10(1)(e) of PERA. I will, however, briefly address Respondent's other arguments, with which I do not agree. Respondent contends that the location of the union telephone is not a mandatory subject of bargaining because it does not affect wages, hours or terms of conditions of employment. Respondent argues that the location of the phone relates only to Charging Party's internal communications with its members. Provisions which affect terms and conditions of employment are mandatory subjects of bargaining if they encompass some aspect of the employer-employee relationship and do not relate solely to the internal procedures of the employer or the union. *N.L.R.B. v Borg-Warner Corp.,* 356 U.S. 342 (1958). The Commission has not addressed the question of whether a telephone used for union business or its location are mandatory subjects of bargaining. It has, however, held that paid release time for union officers is a mandatory subject of bargaining because it encourages the collective bargaining process, and thereby vitally

affects the employee-employer relationship. *Central Michigan Univ*, 1994 MERC Lab Op 527, *aff'd* 217 Mich App 136 (1996). Using the same rationale, the National Labor Relations Board (NLRB) has held that the provision of office space and a telephone on the employer's premises for the conduct of union business, and also the location of this office space, are mandatory subjects of bargaining under the National Labor Relations Act, 29 USC § 150, et al. *BASF Wyandotte Corp*, 274 NLRB 978 (1985), *aff'd*, 798 F2d 849 (5th Cir, 1986). See also *American Ship Building Co.*, 226 NLRB 788 (1976). Based on this same reasoning, I conclude that the location of a telephone on an employer's premises which is reserved for communications between a union and members of the bargaining unit is a mandatory subject of bargaining under PERA. [2]

Respondent also contends that it fulfilled any obligation it had to bargain over the location of the phone by negotiating Article XVIII, paragraph G. According to Respondent, the parties' dispute here is merely a dispute over the interpretation of this contract language. There is no question that the parties do disagree over the interpretation of Article XVIII, paragraph G. However, unlike the cases discussed in Respondent's brief, the instant charge does not assert that the employer unilaterally altered a working condition which had been established by contract. Instead, Charging Party contends that the term of employment which was altered was established by a past practice which was broader than the contract language.

The Commission has long recognized that where a contract is silent on an issue, a past practice may ripen into a working condition which the employer cannot unilaterally alter. See, e.g., *Detroit Bd of Ed*, 1975 MERC Lab Op 564. In *Amalgamated Transit Union, Local 1564 v SEMTA*, 437 Mich 441, 454-55 (1991), the Court stated:

> A past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties. The creation of a term or condition of employment by past practice is premised in part upon mutuality; the binding nature of such a practice is justified by the parties' tacit agreement that such a practice would continue. The nature of a practice, its duration, and the reasonable expectations of the parties may justify its attaining the status of a "term or condition of employment."

In *Port Huron EA v Port Huron Area School District*, 452 Mich 309, 325 (1996), the Court held that where a contract is silent or ambiguous on the subject for which the past practice has developed there need only be "tacit agreement that the practice would continue" in order to create a term or condition of employment.

According to Charging Party, Article XVIII, paragraph G is ambiguous on the issue of whether the union phone may be used by union officers other than the president. The contract is also

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[2] Respondent never claimed that the amount of time Nelson spent on the phone significantly interfered with his teaching, but only that it had the potential to do so because it was in a classroom. The question of whether Respondent would have an inherent managerial right to put an end to a practice which interfered with instruction was not presented by this case.

ambiguous, Charging Party contends, on the issue of where the phone may be located. However, according to Charging Party, clear, established practices existed with respect to both issues. Under these practices, the phone was available to all the officers, was used primarily by the grievance chairman, and was installed (with the president's concurrence) at a location convenient to the grievance chairman's use. Charging Party argues that since the contract is ambiguous on these issues, the parties' tacit agreement was sufficient to prevent Respondent from unilaterally changing either of these practices.

The dispute in this case could have been resolved by arbitration, with the arbitrator taking into consideration the past practice in if he or she found the contract language ambiguous. However, because the location of the phone in the grievance chairman's classroom is alleged to have become a term and condition of employment by past practice, not contract, I conclude that this dispute is not merely a contract interpretation dispute, but was properly brought before the Commission. I also agree with Charging Party that Article XVIII, paragraph G is inherently ambiguous with respect to the issues raised here. The phrase "for the President's use" does not unambiguously preclude the president from allowing others to use the phone as well. The phrase "in a location convenient to the President of the Association," might mean "in close proximity to the president's actual worksite." It might also be interpreted as "anyplace the president wants the phone to be placed."

In this case, the union phone has not been located near the union president's actual worksite since 1994, when Gough became Charging Party's president for the second time. The union phone appeared in Respondent's internal telephone directory under Nelson's name, not Gough's. Nelson regularly received phone calls from administrators on this phone, but there was no indication that members of the administration tried to use this phone to contact Gough. I find that Respondent's administrators were aware that for the five years prior to 1999 Nelson, not Gough, was the union officer who most frequently used the phone, and that they tacitly agreed to this practice. As to the location of the phone, except for about four years from 1992 to 1996, the phone has always been in a classroom or counseling office where its ringing might potentially be disruptive. Moreover, the director of special education, Nelson's direct supervisor, knew that the union phone was in his classroom. The phone's placement did not become an issue until Respondent received a complaint from a student. I find that Respondent had also tacitly agreed to the location of the union phone in a classroom.

Alleged Retaliation

The first two elements of a *prima facie* case of unlawful discrimination under PERA are first, union or other protected activity, and second, employer knowledge of that activity. In early 1999 the parties were involved in a dispute over health insurance. During February 1999, Nelson filed an unusually large number of grievances. In filing these grievances Nelson was engaged in activity protected by Section 9 of PERA. Respondent, of course, knew about these grievances. However, the third element, evidence of union animus or hostility toward the protected activity, is not present here. I do not interpret the statement of the high school principal in late April 1999 that "the phone could go anywhere but Nelson's classroom," as indicating hostility toward Nelson's use of the phone to discuss grievances. The fourth element of a *prima facie* case is suspicious timing or other evidence

to support a finding that the protected concerted activity was a cause of the alleged discrimination. Although Respondent raised the issue of the location of the phone the month after these grievances were filed, I find that what might otherwise be considered suspicious timing is adequately explained by the record. The location of the phone first became an issue after one of Nelson's students complained in February 1999 that Nelson's phone calls were disrupting the class. This was a month in which Nelson had filed an unusual number of grievances. From this complaint, Superintendent Cook learned for the first time that the phone was in Nelson's classroom. Cook decided that the phone should not be in a classroom, and the March 19, 1999 discussion was a result of that decision. I conclude that Charging Party did not establish a *prima facie* case that the decision to remove the phone constituted retaliation against Charging Party because it had filed grievances.

In accord with the findings of fact, discussion and conclusions of law set out above, I find that Respondent did not violate Sections 10(1)(a)(c) or (e) of PERA in this case when it moved a telephone used for union business from the classroom of Charging Party's grievance chairman. I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____