STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

BUENA VISTA SCHOOLS,
Public Employer-Respondent,

Case No. C02 B-051

-and-

BUENA VISTA EDUCATION ASSOCIATION, MEA/NEA,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Masud, Patterson & Schutter, P.C., by Gary D. Patterson, Esq., for the Respondent

White, Schneider, Young, & Chiodini, P.C., by William F. Young, Esq., for the Charging Party

DECISION AND ORDER

On February 21, 2003, Administrative Law Judge Julia C. Stern issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that if cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exc eptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated: _____

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APPEARANCES:

Masud, Patterson & Schutter, P.C., by Gary D. Patterson, Esq., for the Respondent

White, Schneider, Young, & Chiodini, P.C., by William F. Young, 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), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan, on June 6 and 7, 2002, 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 August 9, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Buena Vista Education Association, MEA/NEA, filed this charge against the Buena Vista Schools on February 22, 2002. Charging Party represents a bargaining unit of certified classroom teachers and other professional employees employed by the Respondent. The charge first alleges that on or about November 19, 2001, Respondent violated Section 10(1)(a) of PERA when Charging Party President Ronald Starland's principal sent him a letter about his use of union leave. Second, Charging Party alleges that in October 2001, Respondent unlawfully discriminated against David Dowdell and Herbert Herd because of their union activities by refusing to hire either for the position of high school boys' varsity basketball coach. Charging Party also alleges that Respondent violated its duty to bargain by the following

unilateral actions: (1) implementing a signing bonus for new teachers; (2) paying a stipend to a member of the bargaining unit for serving as "science consultant"; (3) establishing the stipend to be paid to middle school coaches for coaching a second team. Finally, Charging Party alleges that Respondent violated Sections 10(1)(a), (c) & (e) by manipulating the work assignments of long term substitutes to avoid placing them in the bargaining unit.

I. Alleged Interference:

Facts:

Under Article XVI (K) of the parties' 2001-2006 collective bargaining agreement, Charging Party's local officers are allowed a total of 20 full days of leave per year to attend to union business, provided that Charging Party reimburses Respondent for the cost of substitutes. Article XVI (K) permits one representative to use all 20 days.

Ronald Starland is a teacher in Respondent's high school. He has been Charging Party's president since about 1999. Around the beginning of the 2001-2002 school year, Starland notified Imo Taylor, his principal, that he would be using Article XVI leave on 10 specified dates between September 19, 2001 and April 30, 2002. On November 19, 2001, Taylor sent Starland a letter complaining about the number of union leave days he had requested. Taylor stated:

> There has to be someone other than you (namely vice-president, treasurer, etc.) that can attend these meetings so the students are not missing valuable instruction time from the teacher.

Respondent allowed Starland to take the leave he requested. Respondent did not discipline Starland for his use of union or other leave.

Discussion and Conclusions of Law:

Under Section 10(1)(a), it is unlawful for an employer to "interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in Section 9," including their right to engage in union activity. An employer violates Section 10(1)(a) by threatening, overtly or implicitly, to take adverse action against an employee because of his or her activities protected by Section 9. However, a single statement by a supervisor expressing a negative opinion of an employee's union activity does not, by itself, constitute unlawful interference, restraint or coercion. For example, in *City of Detroit (Lake Huron Water Treatment Plant)*, 1999 MERC Lab Op 211, an administrative law judge (ALJ) for the Commission found that a water plant superintendent did not violate Section 10(1)(a) when he told the union steward that the union's health and safety complaints to state agencies, and its many grievances on these issues, could cause problems because they were making the plant "look bad downtown." In *Greenhills School*, 1977 MERC Lab Op 1135, an ALJ concluded that the employer did not violate Section 10(1)(a) when a supervisor told employees that their petition objecting to certain personnel policies might "hurt the school." In this case,

Starland's use of the union leave to which he was entitled under the contract annoyed Taylor. She expressed that annoyance in her November 19 letter. However, the letter contains no explicit or implied threat to take adverse action. I conclude that the statements in Taylor's November 19, 2001 letter did not violate Section 10(1)(a) of PERA.

II. Alleged Discrimination:

Facts:

During the years 2000 and 2001, Charging Party filed a lawsuit against Respondent and approximately 60 grievances involving matters related to the lawsuit. In August 2000, Arbitrator John McCormick held an arbitration hearing on one of these grievances. In June 2001, Respondent and Charging Party entered into a lengthy settlement agreement covering 60 grievances and the lawsuit.

Herbert Herd, a school social worker, has been Charging Party's grievance chairperson since about 1995. From about January 2001 until January 2002, Herd was on a leave of absence from Respondent to serve an internship with the MEA. In August 2001, while Herd was still serving his internship, Taylor told Herd that as a result of the internship Herd would "definitely know how to fight against the administration now." The record contains nothing about the conversation in which this remark was made other than the statement itself.

Between 1995 and 2000, Herd coached boys' and girls' junior varsity basketball at Buena Vista. During the 1999-2000 season, Herd coached the boys' high school varsity basketball team. In the spring of 2000, Herd filed a grievance when he was not reappointed to this position for the 2000-2001 school year. In addition to filing his own grievance and grievances on behalf of others, Herd testified as a witness for Charging Party at the arbitration hearing held before McCormick in August 2000. Herd's personal grievance was among the grievances covered by the settlement agreement entered into by Respondent and Charging Party in June 2001.

David Dowdell is a high school teacher. Dowdell has coached high school sports for approximately 25 years, both for Respondent and for the Bridgeport Public Schools. Dowdell served as Respondent's athletic director for six years. He also coached wrestling, boys' track, and girls' track. At Bridgeport, he coached girls' junior varsity basketball, girls' varsity basketball, boys' junior varsity basketball, and football. Before May 2001, Dowdell had unsuccessfully applied to be Respondent's high school varsity boys' coach six or seven times.

Dowdell had approximately eight grievances settled by the June 2001 agreement. Among these were grievances protesting Respondent's refusal to reappoint him as track coach and as athletic director for the 2000-2001 school year. Like Herd, Dowdell was a witness at the arbitration held in August 2000.

Every spring, Respondent takes applications for all its coaching and other athletic positions for the following school year. On May 8, 2001, Respondent posted the positions for the 2001-2002 school year.

Both Herd and Dowdell applied for the position of high boys' varsity basketball coach. Dowdell also applied to be athletic director. Taylor interviewed all applicants for athletic positions at the high school. Taylor presented her recommendations to Respondent's School Board. Taylor recommended that the Board reappoint the individual who had coached the boys' high school varsity basketball team during the 2000-2001 school year. The Board, however, rejected all Taylor's recommendations. On June 19, 2001, all athletic positions at the high school were reposted. Dowdell and Herd resubmitted their applications. Herd's second application was misplaced and he was not interviewed in this round. Taylor again recommended to the Board that it reappoint the varsity basketball coach from the previous season. She also recommended that Dowdell be appointed athletic director. This time, the Board accepted Taylor's recommendations for all positions except boys' varsity basketball coach and freshman boys' basketball coach. These two positions were posted for the third time on September 14, 2001.

Six individuals, including Dowdell and Herd, responded to the third posting for the boys' varsity basketball position. A panel consisting of Taylor, high school assistant principal Thomas Haskell, and a student athlete interviewed the applicants. Each interviewer scored each applicant on the same list of factors, and the scores were totaled and averaged. Herd had the third highest score, only slightly below the second-ranked candidate. This candidate, a young local police officer, had less coaching experience than either Dowdell or Herd. However, he had played on the team when he was in high school. Dowdell had the lowest score. After the applicants had been ranked, Taylor reviewed their qualifications. She testified that she wanted to be sure that the new coach's regular schedule would allow him to consistently make it to practices on time, especially since the beginning of the season was only a few weeks away. Taylor decided not to recommend the applicant with the highest score because of his schedule. She testified that she also wanted a coach who would enforce good sportsmanship and appropriate conduct on the basketball court. Taylor testified that she had doubts about Herd's availability since he was on a leave of absence, even though Herd had maintained in his interview that he would be available for practices. She also testified that the panel felt that while Herd had the basketball qualifications, he had not provided the team with enough structure when he had been coach. Taylor recommended that the applicant with the second highest score receive the position. In early October, the Board adopted her recommendation.

Discussion and Conclusions of Law:

To establish a prima facie case that an employee has been unlawfully discriminated against because of his or her union activity, a charging party must show: (1) that the employee engaged in union activity; (2) that the employer knew of the activity at the time it took the adverse action; (3) that the employer had anti-union animus or was hostile to the employee's exercise of his protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discrimination. Even if the employee has engaged in extensive union activities, a prima facie case is not established unless there is evidence of a connection or link between the activities and the alleged discrimination. *North Central Community Mental Health Services,* 1998 MERC Lab Op 427; *City of Detroit (Community Development Dept),* 1981 MERC Lab Op 585, 388. See also the ALJ decision in *Battle Creek P.D.,* 1998 MERC Lab Op 727, 736-738.

Both Herd and Dowdell had grievances that were part of the parties' June 2001 settlement, and both testified on Charging Party's behalf in at the hearing before Arbitrator McCormick in August 2000. In addition, Herd held the union office of grievance chairperson and, at the time Respondent selected its basketball coach for the 2001-2002 school year, was serving an internship with the MEA. However, the only indication in this record that Respondent had animus toward the union or toward the employees' protected activities was Taylor's August 2001 remark to Herd that, after serving his internship, he "would definitely know how to fight against the administration." As indicated above, the record contains no context for this remark. I find Taylor's statement, standing alone, insufficient to establish that Taylor was hostile to Herd's union activities. Moreover, nothing else in the record, including the timing of Respondent's decision1, suggests a link between Herd's and Dowdell's union activities and Respondent's failure to appoint either of them to coach its basketball team. I find that Charging Party did not establish a prima facie case of unlawful discrimination under the Act, i.e., it failed to show that Herd's or Dowdell's union activities were a motivating factor in Respondent's decision to select another candidate for the position of boys' high school varsity basketball coach for the 2001-2002 school year.

Charging Party relies heavily on a comparison of Herd's and Dowdell's credentials with those of the candidate selected. Once a prima facie case of discrimination is made, the burden shifts to the employer to provide evidence that it would have made the same decision in the absence of any union activity. *Michigan Educational Support Personnel Association, V. Evart Public Schools*, 125 Mich. App. 71 (1983); *lv denied* 417 Mich 1100 (1983). However, unless Charging Party meets its initial burden of demonstrating some causal connection between Respondent's decision and Herd's or Dowdell's union activities, the qualifications of the applicant selected are irrelevant. I conclude, therefore, that Respondent did not violate Section 10(1)(c) of PERA in this case.

III. Alleged Unilateral Changes:

Facts:

Signing Bonus:

On about May 15, 2001, Respondent's Board voted at a public meeting to offer a $2,000 signing bonus, to be paid over two years, to prospective teachers. The Board did not inform Charging Party that it was considering offering a signing bonus, and did not notify Charging Party of its May 15 action. In July 2001, Respondent hired a new superintendent, Henry McQueen. McQueen learned of the bonus from Respondent's teacher recruiter after Respondent had hired several teachers on the promise of a bonus. According to Charging Party President Starland, the Union first learned of the signing bonus in the fall of

1 Respondent takes applications and interviews applicants for its athletic positions every year. Herd held the position of boys' varsity basketball coach only for the 1999-2000 season, and Dowdell had never had this job. Therefore, no inference regarding Respondent's motivation can be drawn from the fact that Respondent's failure to appoint Herd or Dowdell as basketball coach occurred shortly after the June 2001 grievance settlement.

2001, when several new teachers approached Starland to ask how the bonus was to be paid.

Charging Party and Respondent have a review board, a committee of administrators and union representatives created to discuss and resolve problems before they give rise to formal grievances or litigation. Starland first raised the issue of signing bonuses with McQueen at a review board meeting in November or December of 2001. Starland asked for information about the signing bonus, including what Respondent had offered, what agreement was reached at the time of hire, and how it was to be paid. Starland also demanded to bargain over this and any other monies that were being paid to teachers outside of the contract. Respondent subsequently sent new teachers a memo clarifying that the first installment of their bonus was to be paid at the beginning of the second semester of their first year. Respondent did not provide Charging Party with the other information it requested until after it filed the instant charge. At the February review board meeting, McQueen told Starland that Respondent would not discuss any matter that was covered by the instant unfair labor practice charge.

Science Consultant Stipend:

Schedule B of the collective bargaining agreement sets out the stipends to be paid to teachers for certain duties performed in addition to their regular teaching duties. These include dramatic director, senior high marching band director, vocal music director, North Central Association accreditation chairperson, school improvement team chairperson, homecoming advisor, department chairpersons, elementary and secondary team leaders, and co-op job placement coordinator.

Since the 1996-1997 school year, Respondent has paid a stipend to a teacher to serve as science curriculum consultant. This stipend is included in the teacher's individual contract with Respondent, but is not listed in Schedule B of the collective bargaining agreement. According to Starland, the union first became aware of the stipend in September 2001, when a member of the unit brought it to his attention. Respondent's assistant superintendent for federal programs, who supervises the science consultant's activities, testified that she frequently discussed the science consultant and his stipend with the Respondent's former superintendent, and that the superintendent met regularly with Charging Party's representatives. However, the assistant superintendent could not say definitely that the former superintendent had ever told Charging Party about the science consultant stipend.

Starland raised the issue of the science consultant stipend at the same review board meeting where the signing bonus was discussed. McQueen told him that Respondent had been paying the stipend since before McQueen came to the district in May 2001. As noted above, Starland made a general demand at this meeting to bargain over this stipend and any and all other monies being paid to bargaining unit members outside of the contract. Starland also told McQueen that he wanted the science consultant stipend to be included in Schedule B.

Middle School Coaching Stipend:

Schedule C of the collective bargaining agreement establishes the pay for 17 middle school coaching

and athletic positions, including boys 8th grade basketball coach, girls 8th grade basketball coach, boys 7th grade basketball coach, and girls 7th grade basketball coach. The pay for Schedule C positions is set out in the agreement as a percentage of the base salary for a teacher under the contract.

At the beginning of the 2000-2001 school year, Respondent had to divide each of its four middle school basketball teams into A and B teams to remain part of the local area league. The individuals appointed to the Schedule C positions were required to coach both the A and B teams. Sometime between the spring of 2000 and the fall of 2001, McQueen's predecessor recommended to the Board that it pay these coaches a flat $1,000 stipend, in addition to their Schedule C pay, for coaching a second team. The Board adopted this recommendation at a public board meeting sometime before the start of the 2000-2001 school year. The middle school basketball coaches were paid in accord with the Board's resolution for their work during the 2000-2001 season. However, there is no evidence that Respondent informed Charging Party of its action. According to Starland, the Union first learned that middle school basketball coaches were being paid $1,000 for coaching a second team sometime in the fall of 2001, when the middle school assistant principal approached him for help in getting Respondent to pay that year's stipends.2

At a review board meeting in September or October of 2001, Starland took the position that coaches with two teams should receive two Schedule C salaries. Starland demanded to bargain over this issue. Superintendent McQueen told Starland that he would consider Starland's demand. However, Starland did not hear anything more from McQueen until February 2002, when McQueen told Starland that Respondent would not discuss any matters covered by the unfair labor practice charge.

Discussion and Conclusions of Law:

Under Section 11 of PERA, Respondent has an obligation to bargain with the exclusive bargaining representative over wages, hours, and terms and conditions of employment. Respondent does not dispute that the signing bonus, science consultant stipend, and middle school coaching stipend are "wages" paid to bargaining unit members and, therefore, are mandatory subjects of bargaining. Respondent asserts, first, that the allegations that Respondent unilaterally implemented these changes in compensation are untimely under Section 16(a) of PERA. It also argues that Charging Party did not make a timely demand to bargain over the signing bonus, the science consultant stipend, or the middle school coaching stipend. Finally, Respondent maintains that it never refused to bargain over these issues.

The six-month limitation period in Section 16(a) of PERA commences when the aggrieved party "knows of the act which caused his injury and has good reason to believe that the act was improper or done in an improper manner." *City of Huntington Woods v Wines*, 122 Mich 650 (1983). Respondent's Board approved the signing bonus at its May 15, 2001 regular meeting. According to Respondent, the charge is untimely as to this allegation because the charge was not filed until February 2002, more than six

2 In the 2001-2002 school year, Respondent also split its middle school boys' and girls' volleyball teams into A and B teams. Like the basketball coaches, the volleyball coaches received $1,000 for coaching a second team.

months after the alleged unfair labor practice. Respondent asserts that Charging Party either knew or should have known of the Board's action because it took place at a public meeting, and because Charging Party representatives often attend board meetings. Alternatively, Respondent argues that since Charging Party knew or should have known about the signing bonus in May 2001, it waived its right to bargain by waiting until November or December 2001 to demand bargaining.

Charging Party maintains that neither Starland nor any representative of the union knew of the signing bonus until September 2001. Respondent presented no evidence to refute this claim. The fact that the decision was announced at a public board meeting does not establish that the Charging Party knew of it, and there was no evidence that any Charging Party representative was present at this particular meeting. I conclude that the record does not support a finding that Charging Party representatives knew of the unilateral change before the time that Starland claimed to have learned about it. The same is true of the science consultant and middle school coaching stipends. Respondent has been paying the science consultant stipend since 1995. The science stipend is not listed in Schedule B of the collective bargaining agreement. Respondent's assistant superintendent for federal programs could not say definitely that Charging Party had been informed of this stipend. Respondent's Board approved the payment of a $1000 stipend to middle school basketball coaches for coaching a second team sometime before the 2000-2001 school year. Although this action occurred at a public meeting, there was no evidence that Charging Party representatives attended that meeting, and no evidence that Charging Party representatives knew of this stipend until Starland learned of it in the fall of 2001. Because I find that Charging Party did not know of the signing bonus, the science consultant stipend, or the middle school coaching stipend before the fall of 2001, I conclude that the charge was not untimely as to these allegations.

Respondent also maintains that Charging Party waived its right to bargain over the signing bonus, science consultant stipend, and middle school coaching stipend by failing to make a timely demand to bargain. However, insofar as the record discloses, these three changes were approved by Respondent's Board and implemented without notice to Charging Party or an opportunity to demand bargaining. The Commission has consistently held that a union has no duty to demand bargaining over a unilateral change when that change is presented as a fait accompli. *Allendale Public Schools,* 1997 MERC Lab Op 183, 189; *County of Wayne*, 1985 MERC Lab Op 833, 839 I conclude Charging Party did not waive its right to bargain over the signing bonus, science consultant stipend, or middle school coaching stipend.

As for Respondent's claim that it did not refuse to bargain over any of these three items, an employer violates its duty to bargain by altering wages, hours, or terms and conditions of employment without giving the union notice and an opportunity to demand bargaining at a time when meaningful bargaining can take place. *City of Detroit (F.D.),* 2001 MERC Lab Op 359, 365. See also *Alpha Biochemical Corp.*, 293 NLRB 793, n. 1 (1989). In this case, the record indicates that Respondent implemented the signing bonus, science consultant stipend, and middle school coaching stipend without giving Charging Party timely notice and an opportunity for meaningful bargaining over these issues. I conclude that Respondent violated its duty to bargain in good faith by unilaterally implementing the science consultant stipend, the $1000 stipend to middle school basketball coaches for coaching a second team, the signing bonus for new teachers in May 2001.

V. Alleged Manipulation of Substitute Work Assignments:

Facts:

Section 1236 of the School Code, MCL 380.1236, states that if a teacher is employed as a substitute teacher with an assignment to one specific teaching position, after 60 days in that assignment a school district must pay the teacher a salary not less than its minimum teacher salary for the duration of that assignment, and must also give the teacher leave time and other privileges granted to regular teachers.

Charging Party's bargaining unit includes certificated teachers and other professional employees. Its recognition clause specifically excludes "daily substitutes." However, the parties bargain over the rate paid to "daily substitutes" and certain other terms and conditions of their employment. Article XXIV sets out the per diem rate to be paid to daily substitute teachers, and provides that substitute teachers employed for five or more consecutive days are to be paid at a higher per diem rate. It also enumerates the contractual provisions that are to apply to daily substitutes, including the grievance procedure, but excluding the clause requiring bargaining unit members to pay union dues or fees. Article XXIV states that "unless specifically provided for in this Article, the other provisions of the Master Agreement do not apply to daily substitute teachers in the system."

It has been the parties' practice to treat all substitute teachers as daily substitutes unless and until the substitute is employed in one teaching assignment for 60 days. As noted above, under Section 1236 of the School Code, Respondent is required at this point to pay the substitute the salary and provide the benefits and other privileges it provides to teachers in the bargaining unit. Per the parties' practice, the substitute is then considered part of the bargaining unit and is covered by all provisions of the contract applicable to regular teachers.

During the 2001-2002 school year, Charging Party heard that some substitutes with long-term assignments had been taken out of their classrooms for short periods before they had taught for 60 consecutive days. After a temporary assignment of one or two days, these substitutes were returned to their original assignments. Respondent continued to pay them the per diem rate for daily substitutes, and these substitutes received no benefits. Charging Party requested Respondent's records through April 2002, and these records were entered into the record in this case. Respondent's records substantiate what Charging Party was told. For example, at the beginning of the 2001-2002 school year, Ms. L, a substitute, was assigned to fill a 6th grade science position for which Respondent had not been able to hire a regular teacher. Ms. L taught 6th grade science until November 5, 2001. During this same period, Mr. B, another substitute, taught the language arts classes of a middle school teacher on a leave of absence. On November 6 and November 7, 2001, Ms. L was assigned to Mr. B's language arts classes, Mr. B was assigned to the middle school exploratory reading room, and a daily substitute taught Ms. L's 6th grade science classes. On November 8, Ms. L returned to her science assignment, and Mr. B to his language arts classes. On January 28 and 29, 2002, Mr. B was assigned to teach word processing, Ms. L was assigned to the exploratory reading room, and Ms. P, a substitute who had previously had short-term assignments, taught Ms. L's

science classes. On January 30, Mr. B again went back to his language arts classes, and Ms. L returned to her science assignment. Ms. P was assigned to the exploratory reading room. Mr. B, Ms. L and Ms. P continued in these assignments through April 26, 2002. Respondent paid Mr. B, Ms. L and Ms. P the rate paid to a daily substitute under the contract for all the days they worked during the 2001-2002 year. None of these substitutes received benefits.

Respondent conceded that it removed some substitute teachers from their long-term assignments, gave them short-term assignments lasting a day or so, and then returned them to their original assignments. Respondent denies, however, that it did this to prevent these substitutes from becoming part of the bargaining unit. Rather, according to Respondent, it did this for the benefit of the district, i.e. to avoid having to pay them the salary and benefits due to substitute teacher under Section 1236.

Discussion and Conclusions of Law:

The Commission has no authority to enforce statutes other than PERA, the LMA, or the Compulsory Arbitration Act. A violation of Section 1236 of the School Code would not constitute an unfair labor practice under Section 10 of PERA. Charging Party argues, however, that Respondent's actions violated Sections 10(1)(a) and 10(1)(c) of PERA because Respondent's motivation in manipulating the assignments of its long-term substitutes was to avoid placing them in the bargaining unit.

Charging Party's argument assumes that substitutes are excluded from the bargaining unit until they have served in a single assignment for 60 days. As noted above, the parties' practice has been to exclude substitutes from the unit until they qualify under Section 1236. However, this practice was premised on the expectation that substitutes holding the same assignments for more than 60 days would receive the salary, benefits and privileges of a regular teacher under Section 1236. There is no indication that Charging Party ever agreed to exclude from its unit substitute teachers who hold the same assignment for three, four, or more months within a school year, even if this assignment is interrupted by short-term assignments so that the substitute does not meet the requirements of Section 1236. The fact that Respondent continues to refer to teachers in these circumstances as "daily substitutes," and to pay them on a per diem basis, does not establish that the parties have agreed to their exclusion from the unit. I find that substitutes teaching in the same assignment for more than 60 days in the same school year, even if these 60 days are not consecutive, have not been excluded from Charging Party's unit. I conclude, therefore, that Charging Party has a right to demand bargaining over the wages, hours, and terms and conditions of employment of individuals. This does not mean that Respondent is automatically obligated to pay these teachers the salary or fringe benefits provided to regular teachers under the collective bargaining agreement. Rather, Respondent must, on demand, bargain with Charging Party over these issues to impasse or agreement.

I find that Respondent did not violate Section 10(1)(a) or (c) of PERA by manipulating the assignments of long term substitute teachers, because Respondent's motivation was not to discourage union activity, but to avoid having to provide these teachers with the benefits and privileges required by Section 1236 of the School Code. As noted above, I conclude that Respondent has an obligation to bargain with Charging Party over these long-term substitutes. However, since I can find no evidence that Charging Party

demanded to bargain over the terms and conditions of employment of these substitute teachers, I conclude that Respondent did not violate its duty to bargain over these issues.

VI. Summary:

In sum, for reasons set forth above, I conclude that Respondent did not unlawfully interfere with Ronald's Starland's exercise of his rights under Section 9 of PERA when Starland's principal, Imo Taylor, sent him a letter on November 19, 2001 complaining about his use of union leave. I also conclude that Respondent did not discriminate against Herbert Herd or David Dowdell in violation of Section 10(1)(c) of PERA when it selected another candidate for the position of boys' varsity high school basketball coach in October 2001. I conclude that while Respondent did manipulate the schedules of certain substitute teachers with long term assignment to avoid paying them the salary and benefits required by Section 1236 of the School Code, this action did not violate Sections 10(1)(a) or (c) of PERA.

I find, however, that Respondent violated its duty to bargain under Section 10(1)(c) of PERA by unilaterally instituting signing bonuses for new teachers, unilaterally implementing a "science consultant" stipend to be paid to a member of the bargaining unit in addition to his regular salary, and unilaterally establishing a $1,000 stipend for middle school coaches to compensate them for coaching a second team. I also conclude that substitute teachers who are assigned to one specific teaching position for more than 60 days within the same school year are not excluded from Charging Party's bargaining unit, even if these teachers do not hold these positions for 60 consecutive days. Therefore, Respondent has a duty to bargain with Charging Party over the wages, hours, and terms and conditions of employment of substitute teachers whose assignments exceed 60 days. I conclude that Respondent did not violate its duty to bargain over the terms and conditions of employment of substitutes in this category only because the record does not show that Charging Party demanded to negotiate these issues.

In accord with the findings and conclusions of law above, I recommend that the Commission issue the following order:

RECOMMENDED ORDER

Respondent Buena Vista Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from paying or offering to pay a signing bonus to newly hired teachers pending satisfaction of its obligation to bargain with Charging Party Buena Vista Education Association under Section 10(1)(e) of PERA.

2. Cease and desist from paying or agreeing to pay a stipend to any member of Charging Party's unit for services as a science consultant pending satisfaction of its obligation to bargain with Charging Party Buena Vista Education Association under Section 10(1)(e) of

PERA.

3. Cease and desist from paying or agreeing to pay a stipend to middle school coaches beyond that provided for in the collective bargaining agreement pending satisfaction of its obligation to bargain with Charging Party Buena Vista Education Association under Section 10(1)(e) of PERA.

4. Upon demand, bargain with the Buena Vista Education Association over signing bonuses for new teachers and stipends paid to members of the bargaining unit over the above their regular salaries, including the stipends paid to the science consultant and to middle school coaches for coaching a second team.

5. Post the attached notice to employees in conspicuous places on the Respondent's premises, including all places where employee notices are customarily posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____