**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:
GOODRICH AREA SCHOOLS,
Respondent in Case No. C06 I-232,
Public Employer in Case No. UC06 I-030,

-and-

GOODRICH CMT ASSOCIATION, MEA/NEA,
Labor Organization- Charging Party in Case No. C06 I-232,
Petitioner in Case No. UC06 I-030.
_____/

APPEARANCES:

Thrun Law Firm, PC, by William G. Albertson, Esq., for the Goodrich Area Schools

Law Offices of Lee and Clark, by Michael K. Lee, Esq., for the Goodrich CMT Association

## DECISION AND ORDER

On December 18, 2007, 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. Further, the ALJ found that the position at issue cannot appropriately be included in Petitioner's bargaining unit and recommended that the Commission deny the unit clarification petition.

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

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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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, this case was heard at Detroit, Michigan on January 11, 2007, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on May 14, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Petition:

On September 29, 2006, the Goodrich CMT Association, MEA/NEA (the Union) filed a unit clarification petition and an unfair labor practice charge against the Goodrich Community Schools (the Employer). The petition and charge were consolidated for hearing. In both its petition and charge, the Union alleges that the Employer improperly removed a position from its bargaining unit and thereafter refused to bargain with it over the position's terms and conditions of employment. The Employer asserts that the position at issue, custodial supervisor, is a new position. It also maintains that, as a supervisory position, the custodial supervisor cannot appropriately be included in the Union's bargaining unit of nonsupervisory employees.

Findings of Fact:

## Background

On May 16, 2006, the Union was certified as the bargaining representative of full-time and regular part-time nonsupervisory bus drivers, custodians, maintenance employees and mechanics employed by the Employer, replacing the former bargaining representative, AFSCME Council 25 (AFSCME). This unit currently consists of four maintenance and grounds workers, twenty-four transportation employees (bus drivers and mechanics), and three custodians.

The Employer utilizes an outside contractor to clean all its buildings except its high school. Four full-time custodians work in the high school. Until March 2006, the custodians were supervised by high school assistant principal Elizabeth Walberg. Walberg interviewed applicants for custodial positions and effectively recommended their hire, disciplined them, and served as the Employer's representative at the first step of the grievance procedure. As an assistant principal, Walberg also had supervisory authority over teachers in the high school.

In late 2005, Walberg informed the Employer that she would be taking a maternity leave the following spring. In January 2006, Employer superintendent Kim Hart notified AFSCME that the Employer planned to create a new position to assume Walberg's supervisory responsibilities for the custodians. This position would also perform unit work on a daily basis. The AFSCME representative suggested that Respondent create a temporary leader position and post it for bid.

On February 28, the Union filed a petition for a representation election with the Commission. In early March, custodian Doug McAbee complained to Betty Butterworth, then an AFSCME steward and later the Union's president, that another custodian, Brenda Holderbaum, had started giving him orders. Butterworth contacted the AFSCME representative. The AFSCME representative told her that the Employer was going to create a temporary team leader position to take over for Walberg while she was on maternity leave. He said that the leader would assign work and order supplies, but would not hire, fire or discipline.

On March 14, 2006, the Employer posted a position titled "temporary custodial group leader." Holderbaum applied for the position. On March 23, Walberg began her maternity leave sooner than expected. The Employer immediately assigned Walberg's duties to Holderbaum. On April 18, the AFSCME representative told Hart that he believed that the "newly created position of temporary custodial unit group leader" should not be in the AFSCME unit because of its supervisory duties. He suggested that the Employer take steps to remove the position from the unit.

On May 1, 2006, Holderbaum signed a contract with Respondent for employment in the position "custodial supervisor." The contract stated, "The custodial supervisor is responsible for overseeing the supervision, discipline and evaluation of the district custodial staff a well as cleaning, ordering, and scheduling. . . This position is supervisory in nature, but will require cleaning of a district custodial zone in addition to supervisory duties." The contract stated that the position was intended to be temporary, and that the custodial supervisor was an at-will employee.

As noted above, on May 15, 2006, the Union replaced AFSCME as the certified bargaining representative. On about May 19, Union UniServ representative Diane Bregenzer told Hart that she did not believe that the custodial supervisor position should "exist in its present makeup." Bregenzer said that if the Employer did not agree to discuss the issue, the Union would file a unit clarification petition. Hart said that the Employer intended to keep the position as it was. The parties had subsequent discussions about the position, but could not agree on its duties or whether it should be in the bargaining unit. When Walberg returned to work in the fall of 2006, she took a new job as a school principal. According to Hart, the Employer decided at that point to make the custodial supervisor position permanent.

Duties and Authority of the Custodial Supervisor

The custodial supervisor reports directly to Hart, the superintendent. She is paid on an hourly basis, approximately $1.65 more per hour than the unit custodians. Most, but not all, of her fringe benefits are the same as those of employees in the Union's bargaining unit.

As noted above, all the Employer's custodians, including the custodial supervisor, work at the high school. All four custodians work an eight hour shift, five days per week; the custodial supervisor works more overtime than the other custodians. The high school is divided into four cleaning zones and each of the four full-time custodians is assigned a zone. The custodial supervisor spends between six and seven hours per day cleaning her assigned zone, and the remainder of her time on the duties of a custodial supervisor. The custodial supervisor inspects the work done by the other custodians. If administrators in the high school have complaints about the custodians' work, they direct them to her. She also inspects the work done by the outside contractor who cleans the Employer's other buildings. If a building principal has a complaint or request for the contractor, he or she communicates this through the custodial supervisor. The custodial supervisor also meets with representatives of groups renting space in the Employer's buildings to discuss their complaints and concerns about cleaning issues. She is also responsible for ordering janitorial supplies, although she does not sign contracts with suppliers.

Custodians are assigned their zones at the beginning of a new school year and generally keep that assignment the entire year. Each summer, the custodial supervisor examines the zones and decides if they need to be modified, with the object of keeping the custodians' work loads as similar as possible. At the end of August, the custodial supervisor posts the new zones, and the custodians submit their preferences by order of seniority. The custodial supervisor has the authority to change a custodian's assignment during the school year if she deems it necessary. She also may assign extra work to a custodian at any time.

During school breaks, the custodians perform nonroutine cleaning duties. The principals of all the Employer's schools submit lists of jobs they would like done during the breaks to the custodial supervisor. With the input of the other custodians, the custodial supervisor determines what nonroutine jobs will be done during which break and by which custodian at the high school, and informs the contractor what the Employer wants it to do in the other buildings during breaks.

The Employer maintains a list of substitute custodians who are called when a custodian is absent, or on days when there is an unusual amount of cleaning work. The substitute custodians are not included in the Union's bargaining unit. The custodial supervisor determines when substitutes are needed, how long they need to work, and what their responsibilities will be. The custodial supervisor also has the authority to assign overtime to unit members. However, at the time of the hearing, all the Employer's supervisors were under direction from the Employer's school board to keep overtime to the minimum.

The custodial supervisor holds monthly meetings with the other custodians. Sometimes she uses this meeting to communicate information from the Employer's personnel office. The custodial supervisor checks and signs the time cards of the other custodians. She authorizes vacation and other time off, although time-off requests are also reviewed by Hart. In June 2006, Hart told Holderbaum to rescind her approval of a custodian's request for time off around the date of the high school graduation ceremony.

The custodial supervisor is responsible for hiring new employees for the substitute list. She selects whom to interview from among the applicants, conducts the interviews using a list of questions she has created, calls applicants' references, and decides who to hire without input from Hart or any other administrator. Between March 2006 and January 2007, Holderbaum hired four substitute custodians. Hiring of full-time employees requires the approval of the superintendent. No full-time custodian position became vacant between the date Holderbaum assumed the custodial supervisor position and the date of the hearing. However, both Holderbaum and Hart testified that when a vacancy occurs, the custodial supervisor will draft the job posting; interview the applicants; check their references or, in the case of an applicant who has been employed as a substitute, the quality of their work and attendance record; and recommend who should be hired. Hart testified that she does not expect to interview custodian applicants but to rely on Holderbaum's recommendation.

Hart testified that the custodial supervisor is responsible for the enforcement of work rules, for determining whether discipline is necessary, meeting with the employee to discuss the discipline, and issuing any written discipline. Hart also testified that the custodial supervisor is not required to obtain her approval or the approval of any administrator before initiating disciplinary action. Between March 2006 and the date of the hearing, Holderbaum issued several disciplinary actions over her signature. On June 5, 2006, she sent an e-mail to two custodians reprimanding them for criticizing an absent staff member during a staff meeting. On June 6, she sent an email to custodian Chris Thoroman warning him that he would be disciplined if he did not turn in a work schedule form. On August 21, she issued a three day suspension to custodian Doug McAbee for failing to attend a scheduled meeting and for refusing on multiple occasions to complete his work assignments. On this same date, she issued a formal written reprimand to Thoroman for failing to complete his assignments. On August 22, she issued a disciplinary warning to McAbee for allegedly leaving wax stripper on a floor for an entire day. On September 16 and October 2, she reprimanded McAbee by e-mail for failing to notify her when he was going to be tardy. On December 12, she issued a disciplinary warning to McAbee for coming in late without notifying her in advance and missing too much time due to doctor's appointments without bringing her a doctor's slip. The record also includes examples of notes written by Holderbaum on employees' time cards reminding them

not to be late, or reminding them that they could not have another employee punch or sign them in. On at least one occasion, a custodian has requested union representation when called to a meeting with Holderbaum.

The Union maintains, however, that the Employer has not given Holderbaum the authority to discipline. It asserts that while Holderbaum's name was on the above disciplinary actions, in each case the decision to discipline was actually made by an administrator. Bregenzer testified, that based on the writing style, she believed that all of the disciplinary memos and e-mails were written by Brian Walton, the Employer's director of special services. Bregenzer also testified that while Holderbaum was present at meetings held with the Union to discuss these reprimands, Walton did most of the talking and seemed to be making the decisions. Union president Butterworth also testified that either Hart or Walton was present at all the meetings she had with Holderbaum to discuss disciplinary actions or grievances. According to Butterworth, Holderbaum asked a few questions, but the meetings were clearly being conducted by Hart or Walton.

As another example of Holderbaum's lack of supervisory authority, the Union points to a note written by Walton to McAbee on January 4, 2007. During his shift on the evening of January 3, 2007, custodian Doug McAbee left Holderbaum a note stating that he was taking forty-five minutes off to "investigate a possible union grievance." Holderbaum testified that she was confused by the note, and called Walton the next day to ask whether McAbee had the right to take time off for this purpose. Walton replied in the negative. Holderbaum testified that since she was not at work that day, she asked Walton to tell McAbee that he should handle union business before or after his shift. Later that day, Walton gave McAbee a note stating that since the grievance procedure had been revoked until the Employer reached a new contract with the Union, McAbee could not file a grievance and could not take time off to investigate one.

Holderbaum testified that she personally wrote all the disciplinary memos and e-mails in dispute. Holderbaum admitted that she copied some of the language from prior reprimands written by Walberg that Holderbaum found in her files. According to Holderbaum and Hart, Hart suggested that another administrator be present during Holderbaum's meetings with the Union because of her inexperience and because of the Union's challenge to Holderbaum's supervisory status. Holderbaum admitted that because she was flustered by Bregenzer's arguments, she may have let Walton take over the discussion at these meetings.

Discussion and Conclusions of Law:

Neither PERA nor the Labor Mediation Act (LMA), MCL 423.1 contains a definition of the term "supervisor." In *East Detroit School District*, 1966 MERC Lab Op 60, the Commission adopted the definition of that term contained in Section 2(11) of the National Labor Relations Act (NLRA), 29 USC 152(11):

> The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to 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 use of independent judgment.

Although the possession of any of the above powers is sufficient to make an individual a supervisor, the Commission has held that an individual is not a supervisor under PERA if his or her authority is limited to the routine direction of the daily work of other employees and/or making work assignments of a routine nature. See, e.g., *Detroit Dept of Parks and Recreation*, 1966 MERC Lab Op 661; *Bloomfield Hills Sch Dist*, 2000 MERC Lab Op 363, 365. The fact that employees grant time off and/or sign time cards is not sufficient to make them supervisors under the Commission's definition if they perform these duties in a routine manner. *Wayne Co Cmty College Dist*, 20 MPER 55 (2007); *Village of Ortonville*, 17 MPER 46 (2004).

In *MEA v Clare-Gladwin Intermediate Sch Dist*, 153 Mich App 792 (1986), the Court of Appeals upheld the Commission's finding that a new position, coordinator of programs for the gifted in a school district, was a supervisor under the above definition. At the time of the hearing before the Commission, the coordinator had not yet assumed all the responsibilities that the employer intended her to have and had not yet exercised any of the supervisory authority that she had on paper. The Commission dismissed the union's argument that the coordinator's supervisory authority was merely speculative because it had not been exercised, and agreed with the employer that the coordinator was a supervisor because she had been delegated supervisory authority. The Court, at 797, commented as follows:

> The federal courts have consistently held that 29 USC 152(11) is to be read in the disjunctive with the existence of any one of the statutory powers, regardless of the frequency of its exercise, being sufficient to confer supervisory status on the employee, as long as the existence of the power is real rather than theoretic. *NLRB v Pilot Freight Carriers, Inc*, 558 F2d 205, 207 (CA 4, 1977), *cert den* 434 US 1011 (1978). Said another way, it is not the exercise of authority, but the delegation of authority, which is indicative of the attributes of a "supervisor."

In this case, the authority of the custodial supervisor clearly extends beyond routine direction and assignment of work. The custodial supervisor's employment contract states that she is responsible for "discipline and evaluation of the district custodial staff." In the first six months of her tenure, Holderbaum issued several written warnings and one suspension to her three subordinates. The Union argues that someone other than Holderbaum made the decisions to issue this discipline. However, Holderbaum testified knowledgeably about the incidents giving rise to these disciplinary actions and her reasons for issuing them. I credit Holderbaum's testimony that she made the decision to discipline in each instance and also her testimony that she wrote all the disciplinary actions issued over her name. Parts of these disciplinary memos and e-mails, particularly those issued before September 2006, do appear to have been written by someone other then Holderbaum. However, Holderbaum admitted that she copied some of the language in these memos from old disciplinary actions issued by Walberg. I see no significance in the fact that Holderbaum deferred to other administrators when meeting with the Union regarding these disciplinary actions. In 2006, Holderbaum was an inexperienced supervisor. Her status was being challenged by the Union, which evidently objected to a position with disciplinary authority doing unit work. The record also

indicates that Holderbaum was encountering difficulty getting the other custodians to accept her authority. I find that Holderbaum's reticence in meetings with the Union under these circumstances does not establish that she lacked authority to make disciplinary decisions.

In addition to disciplinary authority, I find that the custodial supervisor has the authority to hire or effectively recommend the hiring of unit employees. The custodial supervisor has hired non-unit substitute custodians. Although she had not yet an occasion to do so, the record indicates that the Holderbaum will be responsible for reviewing the applications of applicants for full-time custodian positions, interviewing them, and making the recommendation as to who should be hired to the superintendent. Based on the position's authority to discipline and to effectively recommend the hiring of unit employees, I conclude that the custodial supervisor is a supervisor as the Commission has defined that term.

In *Oakwood Health Care, Inc*, 348 NLRB No. 37 (2006), the National Labor Relations Board (NLRB) undertook a new and more specific interpretation of the terms "assign," "responsibly to direct," and "independent judgment" in Section 152(11) of the NLRA. The Employer urges the Commission to adopt these definitions and apply them in this case to find Holderbaum to be a supervisor. However, as discussed above, I conclude that Holderbaum is a supervisor as the Commission has historically defined that term. It is, therefore, unnecessary for me to make a recommendation to the Commission as to whether it should apply the NLRB's expanded definition of a supervisor under Section 152(11) to public employees covered by PERA.

As a supervisor, the custodial supervisor cannot appropriately be included in the Union's bargaining unit of nonsupervisory employees. Accordingly, I find that the Employer did not violate its duty to bargain in good faith by refusing to bargain with the Union over this position, and that the Union's request to clarify its unit to include this position should be denied. I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

The unfair labor practice charge is dismissed in its entirety and the Union's petition for clarification of its unit to include the position custodial supervisor is denied.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____