

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

HIGHLAND PARK BOARD OF
EDUCATION,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-82-32

HIGHLAND PARK EDUCATION
ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation, adopting the recommendations of a Hearing Officer, removes department chairpersons from a unit that includes nonsupervisory teaching employees. The Director concludes that the supervisory duties of department chairpersons have substantially increased in the past several years and that the chairpersons' continued inclusion in a unit which also includes classroom teachers, whom they supervise and evaluate, presents a conflict of interest. The Director rejects the Association's claim that an "established practice" of including department heads and teachers in the same unit prior to 1968 would justify the continued inclusion of department chairpersons in the unit. Assuming that there was such practice, it would be negated by the substantial increase in supervisory responsibilities assumed by the department chairpersons in recent years.

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ASSOCIATION,

Employee Representative.

Appearances:

For the Public Employer-Petitioner
Cassetta, Brandon & Taylor Associates
(Bruce Taylor, Labor Relations Consultant)

For the Employee Representative
Klausner & Hunter, attorneys
(Stephen B. Hunter of counsel)

DECISION

On November 20, 1981, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission ("Commission") by the Highland Park Board of Education ("Board") raising a question concerning the composition of a collective negotiations unit comprised of certain employees represented by the Highland Park Education Association ("Association"). ^{1/}

^{1/} The Association had filed Docket No. CU-81-72 seeking to clarify its negotiations unit to include the title "Title VII Director" and Docket No. CU-82-21 seeking to clarify the unit description to include the title "Director of Athletics." Both of these cases were withdrawn by the Association at the hearing and only the titles raised in Docket No. CU-82-32 remained in dispute.

The Board seeks to have the position "Department Chairpersons" removed from the Association's negotiations unit on the grounds that they are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and that a potential and actual conflict of interest exists between the supervisory and nonsupervisory employees in the mixed unit. ^{2/}

Pursuant to a Notice of Hearing, hearings were held before Commission Hearing Officer Joan K. Josephson on January 11, March 9, April 26, April 27, September 22, September 23 and October 15, 1982 in Trenton, New Jersey at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both parties submitted briefs; the last of which was received by December 22, 1982. The Hearing Officer submitted her Report and Recommendations on May 13, 1983, a copy of which is attached hereto and made a part hereof. Thereafter, on June 2, 1983, the Association filed exceptions to the Hearing Officer's Report and Recommendations.

The undersigned has carefully considered the entire record herein, including the transcripts, exhibits, the Hearing Officer's Report and Recommendations, and the exceptions thereto, and finds and determines as follows:

^{2/} The Board does not seek the removal of the business department chairperson. The Board concedes she is not a supervisor within the meaning of the Act since she does not have a supervisor's certificate and does not evaluate teaching staff members.

1. The Highland Park Board of Education is a public employer within the meaning of the Act, is the employer of the employees involved herein and is subject to the provisions of the Act.

2. The Highland Park Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the majority representative of a negotiations unit comprised of Board personnel including department chairpersons and teachers.

4. The Hearing Officer recommended that the department chairpersons were supervisors within the meaning of the Act and should be removed from the negotiations unit containing nonsupervisory teachers. The Hearing Officer noted that while the parties stipulated that department chairpersons had been included in the teachers' negotiations unit prior to 1968, the Board had not stipulated that Department Heads (the predecessor title) were supervisory personnel prior to 1968. Nevertheless, she found that the question of their supervisory/nonsupervisory status pre-1968 was not dispositive of the unit placement issue because of the chairpersons' changed duties and the current conflict of interest between chairpersons and the teachers whom they supervise.

The Association takes exception to the Hearing Officer's finding that changed circumstances and conflict of interest considerations negated the continuation of a pre-1968 practice of including

department chairpersons in a negotiations unit with nonsupervisory teachers. It states that such a finding is not supported by the record. The Association concedes that pursuant to In re Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., D.R. No. 81-26, 7 NJPER 119 (§ 12048 1981) and In re Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (§ 12247 1981), supervisory department chairpersons may be removed from a nonsupervisory negotiations unit, notwithstanding a pre-1968 negotiations relationship, if the supervisory responsibilities of the chairpersons have been significantly upgraded or if there was evidence that actual conflicts of interest had developed between supervisors and nonsupervisors. The Association contends, however, that the supervisory responsibilities of the department chairpersons under examination herein have not been significantly upgraded and that no impermissible conflict of interest exists. The Association therefore urges that the requirements of Ramapo and Paramus not having been met, the chairpersons should be allowed to remain in the existing negotiations unit.

The undersigned has engaged in a careful review of the record.

Initially, the undersigned will consider the Association's contention that the statutory exception permits the continued inclusion of department chairpersons in the unit containing teachers.

N.J.S.A. 34:13A-5.3 states in part:

... nor except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same,

have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership ... and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; ...

A review of the record and the Hearing Officer's Report indicates that the parties did not stipulate and the Hearing Officer did not make a factual finding with regard to the supervisory status of department heads prior to 1968. The statutory exception of established practice is applicable only in those situations where the disputed employees functioned as supervisors during the pre-1968 period. In re W. Paterson Bd. of Ed., P.E.R.C. No. 79 (1973). The Hearing Officer's recommendation assumes the existence of the condition precedent to the invocation of the statutory exception and proceeds to an analysis under the Ramapo and Paramus standard.

Under Ramapo and Paramus the existence of a pre-1968 established practice is not controlling where there is evidence of a significant change in supervisory responsibilities. Accordingly, in review of this record and the exceptions thereto, the undersigned has focused upon evidence concerning the increase in supervisory responsibilities of the department chairpersons and the existence, if any, of a conflict of interest between the chairpersons and teachers.

The record indicates that department chairpersons effectively recommend the hiring of teachers and are responsible for

the evaluation of tenured and nontenured teaching staff members using evaluation/observation forms. Department chairpersons also complete an Annual Teacher Evaluation Form for each teacher in their respective departments. These forms include a provision for the development of a Professional Improvement Plan for each tenured employee. Department chairpersons, as part of this evaluation process, recommend whether nontenured teaching staff members should be reappointed or receive tenure or whether tenured teachers should be granted increments. In addition, department chairpersons are required to possess a supervisor's certificate pursuant to N.J.S.A. 18A:7A-1 et seq. Accordingly, there is ample evidence in the record to find that department chairpersons are currently functioning as supervisors within the meaning of the Act.

The testimony also reveals that over a period of time the role of department chairpersons in the observation and evaluation of teaching staff members has changed considerably. For example, Principal Donahue testified that prior to 1968 department chairpersons did not evaluate teachers, but rather merely observed them and even then only with regard to nontenured teachers. He further testified that the role of department chairpersons changed over time from being an observer to being a primary evaluator of teaching staff members. Superintendent Gumbs testified that prior to 1977 irregular observation of teachers was carried out by department chairpersons, building principals and vice principals. This irregular pattern of observation was confirmed by department

chairperson Gillman who testified that the building principal had irregularly observed teachers but that since 1978 she, as department chairperson, is more responsible for observation and evaluation of both tenured and nontenured teachers and that she conducts more regular visits to tenured teachers. Department chairperson Yanowitz testified that during the 1979-80 school year, when she did not have a supervisor's certificate, she could not sign in-class observations of teachers. However, in 1980-81, after having received her certificate, she could both observe teachers and write their evaluations. The record also reveals that only chairpersons who have obtained a supervisor's certificate evaluate teaching staff members, and a chairperson who does not have a supervisor's certificate does not perform the evaluative function.

Additionally, the record reveals that department chairpersons now have greater input with regard to the hiring of teaching staff members. Superintendent Gumbs testified that beginning in 1973 he, as a school principal, no longer required department chairpersons to forward the names of two or three job applicants to him for final selection. Rather, he merely instructed department chairpersons to send him the name of the person the chairperson wanted for the position.

Accordingly, there is ample evidence in the record to support the Hearing Officer's finding that the department chairpersons' supervisory responsibilities have substantially increased.

The undersigned has had occasion to review the issue presented herein. In In re Waldwick Bd. of Ed., D.R. No. 82-5,

7 NJPER 498 (¶ 12221 1981) the undersigned pointed out that:

The mere finding of a pre-1968 established practice or prior agreement does not necessarily mandate the continuation of a mixed supervisory/nonsupervisory unit. West Paterson (citations omitted) holds that the subsequent occurrence of an event constituting a substantial conflict of interest will terminate the continued applicability of the statutory exception. See also In re River Dell Bd./Ed., P.E.R.C. No. 78-85, 4 NJPER 252 (¶ 4128 1978). Additionally, the mixed unit may not continue to be preserved where the supervisory status of the individuals involved has been substantially altered. In In re Ramapo-Indian Hills Reg. H.S. Bd/Ed, [supra], the undersigned stated:

Logically, the statutory exceptions which preserve preexisting relationships are not applicable where the circumstances underlying the preexisting relationship no longer exist, as in the instant matter where the scope of the Director's supervisory responsibilities have been significantly upgraded, thus creating a potential conflict of interest between the Director of Guidance and other unit employees. The circumstances relevant to the narrow statutory exception having been removed, the Act's policy prohibiting mixed supervisory/nonsupervisory employee units is preeminent.

Accordingly, on the basis of this record the undersigned concludes that the circumstances relevant to invoking the statutory exception have been removed by virtue of the significant increase in supervisory responsibilities assigned to department chairpersons. Once the statutory exception is negated, ordinary principles of supervisor/nonsupervisor conflict of interest prevail.

Conflict of interest is inherent in a unit of supervisors and nonsupervisors where, in fact, the supervisors exercise their

supervisory responsibilities as to nonsupervisory members in the unit. An examination of this record confirms such conflict.

The parties' collective negotiations agreements from 1979 through 1984 have provided that teachers shall first discuss their grievances with their department chairpersons. In addition, the record indicates that a number of grievances have been filed by teachers complaining of actions taken by department chairpersons. These grievances include those dealing with, for example, a teaching assignment as well as a negative evaluation of a teacher by a department chairperson. With regard to the evaluation grievance, department chairperson Gillman, against whom the grievance was filed, testified that she felt that she was in conflict with the grievant and, in addition, since the Association represented the grievant, Gillman believed she received no representation from the Association, and resigned from the Association.

In its exceptions, the Association argues that all of the grievances were settled at relatively low levels of the grievance procedure, thereby indicating that no conflict existed, and further, that any conflict experienced by Gillman was purely subjective on her part. The Association also argues that had Gillman requested representation by the Association during the processing of the grievance against her the Association would have provided such representation. This claim is not borne out by the record. Gillman's testimony is that she was told by the Association's building representative that the Association would not represent her. In fact, the person to whom Ms. Gillman turned for assistance subsequently

represented the grievant in the complaint against Gillman's actions. This incident is representative of the conflict of interest inherent in a mixed unit of supervisors and those whom they supervise.

Accordingly, the undersigned finds that the disputed department chairpersons are supervisors within the meaning of the Act, that their supervisory responsibilities have increased significantly, and therefore adopts the Hearing Officer's recommendations and determines that department chairpersons shall be removed from the Association's unit. ^{3/} The record reveals that the collective negotiations agreement between the parties, which was operative at the time the Petition was filed, has expired. Accordingly, the instant determination is effective immediately. ^{4/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

DATED: July 19, 1983
Trenton, New Jersey


Carl Kurtzman, Director

^{3/} The undersigned notes the Association's contention that the Hearing Officer's report was incomplete in its treatment of seminal issues so as to warrant a remand for more detailed findings of fact and conclusions of law. The undersigned rejects this contention and notes that seven hearings were held in the instant case over a period of ten months at which an exhaustive inquiry into this matter was conducted and which resulted in more than sufficient evidence to support the Hearing Officer's findings of fact and conclusions of law based on the record as a whole. As noted, the undersigned has reviewed the entire record herein, and further recourse to the Hearing Officer for the issuance of an amended report is unnecessary. Additionally, the Association has excepted to the Hearing Officer's purported removal of the business department chairperson from the unit. The Hearing Officer did not so recommend, and for the reasons stated in her report the within decision does not affect the continued inclusion of the business department chairperson in the unit.

^{4/} In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

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-and-

Docket No. CU-82-32

HIGHLAND PARK EDUCATION ASSOCIATION,

Employee Representative.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that subject matter department heads be removed from a non-supervisory teachers negotiations unit. While the parties stipulated that department heads had been included in the teachers negotiations unit prior to 1968, that fact was not dispositive because of changed duties and conflict of interest. The Hearing Officer concluded that under the T & E Laws the department head's supervisory duties had increased as evidenced by a requirement that they possess a supervisory certificate in order to evaluate teachers in their department. The Hearing Officer also found actual conflict of interest evidenced by grievances processed against department heads and that that conflict negated the continuation of the negotiations relationship.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

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(Bruce Taylor, Labor Relations Consultant)

For the Employee Representative
Klausner and Hunter, Esqs.
(Stephen B. Hunter, Esq., of Counsel)

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

A Clarification of Unit Petition was filed on November 20, 1981 with the Public Employment Relations Commission (the "Commission") by the Highland Park Board of Education (the "Board") seeking a clarification of a negotiations unit of its employees represented by the Highland Park Education Association (the "Association"). ^{1/} The Board seeks to have the position "Department Chairpersons" removed from the Association's negotiations unit because they are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") and that a

^{1/} The Association had filed CU-81-72 seeking to clarify their negotiations unit to include the title "Title VII Director" and CU-82-21 seeking to clarify the unit description to include the title "Director of Athletics." Both these cases were withdrawn by the petitioner at the hearing and only the titles raised in CU-82-32 remained in dispute.

potential and actual conflict of interest exists between the supervisory and non-supervisory employees in the mixed unit.

Hearings were held before the undersigned on January 11, March 9, April 26, April 27, September 22, September 23 and October 15, 1982 in Trenton, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and argue orally. Both parties submitted briefs; the record was closed December 22, 1982.

Based on the entire record in these proceedings, the undersigned finds:

1. The Highland Park Board of Education is a public employer within the meaning of the Act, is the employer of the employees involved herein and is subject to its provisions.

2. The Highland Park Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the majority representative of a negotiations unit comprised of Board personnel including department chairpersons and teachers.

4. The parties stipulated at the hearing on September 22, 1982 that there was an established practice pre-dating 1968 of "including department heads in a unit of non-supervisory teaching staff members" and agreements between the Board and the Association were reached concerning terms and conditions of employment "after exchange of proposals and counterproposals and negotiations concerning same." (Tr 9/22/82-p. 72-3)

5. The Board notes that while it agreed to the stipulation that the department chairpersons were included in the Association's unit prior to 1968, the stipulation did not include that department heads were supervisors prior to 1968. They argue that assuming arguendo they were supervisors prior to 1968, there has been a substantial increase in the scope of their supervisory duties mandated by the Public School Education Act of 1975 (N.J.S.A. 18A: 7A-1 et seq.) (the "T and E law") and specifically N.J.S.A. 18A:27-2.1 et seq. (re-evaluation of nontenured personnel) and N.J.S.A. 18A:1-1 and N.J.A.C. 6:11-3.4 (re-evaluation of tenured personnel). This increase in supervisory duties has increased the potential for a substantial conflict of interest between the supervisory and non-supervisory employees in the unit, the Board argues, and points to evidence in the record of actual conflicts of interest that have occurred.

6. The Association argues that the negotiations history falls within the statutory "established practice" exception embodied in N.J.S.A. 34:13A-5.3 which permits supervisors to be included in units with non-supervisors. Further, it argues that there is no actual or potential substantial conflict of interest to prohibit the continuation of the admittedly mixed supervisory/non-supervisory unit. The Association argues that the chairpersons' supervisory responsibilities have not increased sufficiently to disturb the existing unit.

Since the enactment of the T & E law department heads have been required to possess supervisory certificates and all except one of the department heads in Highland Park have complied

with that requirement. Pursuant to the statutory requirements of the T & E law department heads observe and evaluate all tenured and nontenured teaching staff members in their departments, except the head of the Business Department who is the one department head who does not possess a supervisor's certificate. As part of this evaluation all department heads (except Business) recommend whether the teacher should be reappointed or receive tenure, when applicable, for nontenured teachers and granting or withholding of increment for tenured teachers. The high school principal, William Donahue, evaluates the business teachers and for that reason the Board is not requesting that the head of the Business Department be removed from the teachers unit. The Association argues that the department heads' evaluation of their teachers has remained substantially unchanged since 1968.

The Commission has considered many cases concerning the role of department chairpersons or equivalent positions under laws and regulations in the past few years which have sought to strengthen supervisory controls over the teaching process under the T & E law. In each case, department chairpersons were found to be supervisors within the meaning of the Act. Under the T & E law school boards have developed more structured observations and evaluation systems, required department heads to obtain certification as supervisors and delegated more responsibility to department heads. This case is no exception. The fact that they high school principal performs evaluation of the business teachers because that department head does not possess the certification now required by statute makes this clear. If the role of department heads was unchanged after

they were required to obtain supervisors certificates, the head of the business department would evaluate teachers.

The undersigned believes, based on the present evaluative role of department heads, that the facts of this case are consistent with the many other department head cases the Director has considered and therefore would recommend on that basis alone that the unit be clarified to remove the department heads.

Additionally, the undersigned feels there was sufficient evidence presented of conflict of interest that would negate the continuation of the negotiations relationship. The Director of Representation Procedures pointed out in Waldwick Bd/Ed, D.R. No. 82-5, 7 NJPER 498 (¶12221 1981):

The mere finding of a pre-1968 established practice or prior agreement does not necessarily mandate the continuation of a mixed supervisory/nonsupervisory unit. West Paterson (citations omitted) holds that the subsequent occurrence of an event constituting a substantial conflict of interest will terminate the continued applicability of the statutory exception. See also In re River Dell Bd/Ed, P.E.R.C. No. 78-85, 4 NJPER 252 (¶4128 1978). Additionally, the mixed unit may not continue to be preserved where the supervisory status of the individuals involved has been substantially altered. In In re Ramapo-Indian Hills Reg. H.S. Bd/Ed, D.R. No. 81-26, 7 NJPER 119 (¶12048 1981), the undersigned stated:

Logically, the statutory exceptions which preserve preexisting relationships are not applicable where the circumstances underlying the preexisting relationship no longer exist, as in the instant matter where the scope of the Director's supervisory responsibilities have been significantly upgraded, thus creating a potential conflict of interest between the Director of Guidance and other unit employees. The circumstances relevant to the narrow statutory exception having been removed, the Act's policy prohibiting mixed supervisory/nonsupervisory employee units is preeminent.

See also In re Cinnaminson Tp. Bd/Ed, D.R. No. 81-39, 7 NJPER 274 (¶1211 1981).

Under the Association's collective negotiations agreements with the Board (C-2, 3, 4 in Evid.-contracts from 1979 to 1984) the department head may be the respondent at the first step of the grievance procedure which provides that a "teachers...shall discuss it first with his/her...department head..." (C-4 in Evid.) A number of grievances have been filed by teachers against actions of department heads. If the grievance is not resolved at the first level, it proceeds to step two which is submitted in writing to the principal. Evidence of three written grievances against actions of department heads was placed in the record (PE-10, ^{2/} PE-13 and PE-14). In PE-13 a teacher filed a grievance because of the teaching assignment that was made by the department chairperson for the ensuing year. In PE-14 a teacher grieved what she described as a "negative evaluation statement" by her department head on the teacher's evaluation form. The Department Head, Irene Gelman, testified about this grievance:

...I was naive in terms of thinking the Association was supportive of me also. I mean, it had always been my association. It was the first time I realized that when I was in conflict with the teacher I was the Department Chairperson and I was in conflict with the Teacher and I had no representation. (Tr 4/27, pp. 133, 134)

Ms. Gilman discussed the grievance with the Association's grievance chairperson who ultimately represented the grievant in the grievance against the action of Ms. Gilman. Ms. Gilman went on to testify concerning this grievance:

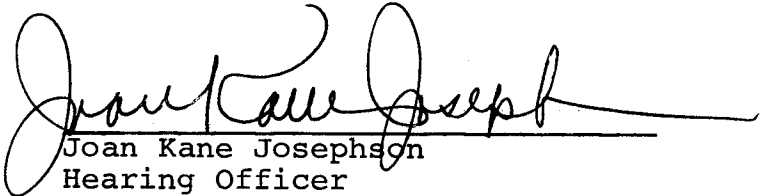
2/ PE-10 was not filed "against" a department head. It is a grievance "Re: Class Adjustments." The only mention of the Department Head is that he received a copy of the grievance. PE-10 was filed after this clarification of unit petition was filed by the Board. Cf. PE-14 filed prior to this CU petition which states: "Pursuant to Article III, Grievance Procedure, Mrs. Irene Gelman [Department Head] violated the Agreement as follows..."

...eventually because I felt without legal representation, I left the association..., I cancelled my membership...I was management and they could not Rep me... (Tr 4/27, p. 141)

These grievances concern the department heads' assignment of personnel to teaching responsibilities and an evaluation of a teachers, both of which constitute supervisory responsibilities. The undersigned concludes that these incidents constitute a substantial conflict of interest that "terminate the continued applicability of the statutory exception." Waldwick Bd/Ed, supra.

Therefore, based on the upgrading of the supervisory responsibilities of the department heads and the evidence of actual conflict of interest between the supervisors and non-supervisors, I recommend that the Director clarify the negotiations unit to exclude the department heads from the Association's negotiations unit. ^{3/}

Respectfully submitted,


Joan Kane Josephson
Hearing Officer

Dated: May 13, 1983
Trenton, New Jersey

^{3/} The ten departments are: Art, Music, Physical Education, Science, English, Social Studies, Foreign Languages, Mathematics, Guidance and the DEAL Department. The Board does not seek to remove the head of the Business Department because the current head of that department lacks a supervisor's certification. This decision is based on more than evaluation of teachers, but the undersigned confines her recommendation to the ten department heads included in the Board's petition.