

H.E. NO. 2018-11

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2014-223

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 68-68A-68B, AFL-CIO,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Board violated 5.4a(1) and (5) of the Act when it transferred the unit work of head custodians to custodial supervisors. First, the hearing Examiner determined that the charge was timely rejecting the Board's argument that the title change occurred in 2011. She also rejected the Board's contention that it had a managerial prerogative to reorganize the supervisory structure of its custodial department finding that under the Local 195 balancing test Local 68's interest in preserving unit work outweighed the concern that the Board raised regarding the head custodians evaluating and disciplining custodians. Moreover, the Hearing Examiner determined that the Board's creation of the custodial supervisor title was a thinly disguised attempt to remove head custodians from the Local 68 negotiations unit and to unilaterally set terms and conditions of employment, including lower salaries. Next, she rejected the Board's argument that the custodial supervisor historically performed unit work. Finally, the Hearing Examiner determined that the parties' argument as to supervisory status and the appropriateness of including custodial supervisors in the Local 68 unit was not before her since the charge focused on transfer of unit work.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Cleary Jacobbe Alfieri Jacobs, LLC
(Gregory Franklin, of Counsel)

For the Charging Party
DeCotiis, Fitzpatrick & Cols, LLP
(Lesley Sotolongo, of Counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On March 24, 2014 and April 14, 2014, International Union of Operating Engineers, Local 68-68A-68B, AFL-CIO (hereinafter "IUOE" or "union") filed an unfair practice charge and an amended (C-1) against the West Orange Board of Education (hereinafter "Board").^{1/} The charges allege that the Board violated the New

^{1/}

Exhibits are marked C- for Commission, J- for joint, CP- for Charging Party and R- for Respondent.

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),^{2/3/} when it transferred the duties of the head custodian position and to a new title, "custodian supervisor" and excluded that title from the bargaining unit.

On May 28, 2015, a Complaint and Notice of Hearing was issued (C-1). On July 7, 2015, the Board filed an answer generally denying it violated the Act (C-2). Hearings were held in this matter on December 5 and 6, 2017.^{4/} The parties submitted post-hearing briefs by February 27, 2018.

Based upon the record, I find the following facts:

FINDINGS OF FACT

1. The West Orange Board of Education and IUOE Local 68, 68A, 68B are, respectively, public employer and public employee representative within the meaning of the Act (1T9).

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

3/ The charge also alleged a violation of 5.4a(2), (3) and (7), however, the Director of Unfair Practices declined to issue a complaint on those allegations, concluding that there were insufficient facts presented to support same.

4/ Transcript cites refer to the days of hearing as 1T and 2T, respectively.

2. During the operative time frame of the events in the charge, the parties had a collective negotiations agreement (CNA) effective from July 1, 2011 through June 30, 2015 (CP-1). The current agreement is effective from July 1, 2015 through June 30, 2019 (CP-2).

Article I, entitled "Recognition," states in pertinent part that the Board recognizes Local 68 as representing "[a]ll employees in the classification of Head Custodian, Assistant Head Custodian, Crew Chief, Custodian, full-time Bus Driver, Utility Worker and Maintenance . . ." (CP-1, CP-2).

Salary ranges for head custodians are set forth in the CNAs and are divided into three steps for each year in the elementary, middle and high schools (CP-1; CP-2). The lowest salary listed for 2011 in the elementary school was \$47,175.00 and the highest was for \$58,216.50; in the middle school was \$47,991.00 and \$59,436.42; and in the high school was \$49,215 and \$60,493.14 (CP-1).

3. There are 12 schools in the district, comprised of one high school, three middle schools and eight elementary schools, plus two additional buildings (2T28-2T32, 2T37). Currently, each school has either a head custodian or custodial supervisor assigned to it. Each school also has custodians working various

shifts as well as substitute custodians who are non-unit employees assigned on an as-needed basis to fill in for custodians who are on vacation, sick leave or taking personal days (1T49-1T51, 2T6, 2T38).

Specifically, seven schools have head custodians while five schools, including the high school which is the largest in size and student population, have custodial supervisors assigned (R-7). Most custodial supervisors were new hires replacing head custodians who retired. At Betty Maddelana Elementary Learning Center (BMELC) which is a new school and at the Gregory School, Custodians Robert Sabino and Jerry Companion Jr. were promoted to positions as custodial supervisors. These two make less money than head custodians elsewhere (2T46).

4. Robert Csigi was hired in 2008 as director of building and grounds (2T5). Reporting directly to Csigi are Operations Foreman Mike Hanley and Office Manager Kathy McCormick (R-7). McCormick has an administrative staff of two reporting to her. Hanley has four men reporting to him who are responsible for maintaining the exterior of the district's 14 buildings and seven men who are electricians and carpenters (R-7; 2T25-2T27). Csigi is ultimately responsible for supervising, among others, head custodians and custodial supervisors (2T7).

5. When Csigi first assumed the duties as director of building and grounds, there were no custodial supervisors, only head custodians assigned to the 12 district schools. Head custodians were responsible for opening up their assigned buildings and during the day handling any issues that arose including instructing custodians as to their job duties (CP-3; 1T21). The official job description for head custodian includes, but is not limited to, the following goals: "to oversee the custodian operations of individual school facilities, and ensure a safe, clean, and comfortable school environment. To carry out administrative tasks required to maintain and operate the plant to the required stations" (CP-3; 1T43). Performance responsibilities include "schedules daily tasks, supervise work of custodians, and participate in daily cleaning of facilities" and "evaluates the performance of custodians in accordance with Board policy" (CP-3; 1T43-1T44).

6. Local 68 Business Representative Michael Lewis as well as Head Custodians Gerard Companion, Claudio Raglievich and Jim Smith all testified that the job description for head custodians accurately describes their duties and responsibilities which are basically managing custodial staff and functions in their assigned buildings (1T20-1T21, 1T41-1T43, 1T61, 1T90-1T91, 1T97, 1T99). As to evaluations, Companion at first consulted with his principal about staff evaluations, but in 2010 when the

evaluation system was changed he consulted with Csigi (1T46, 1T52). Smith also provided verbal evaluations to Csigi of his custodians or to Hanley if Csigi was busy (1T91, 1T97, 1T99). As to discipline, Companion initially went to the building principal but currently suggests discipline by email or telephone to Csigi particularly if a custodian refused to perform his work (1T57). Smith has never needed to initiate discipline against any of the custodians in his building. However, Smith confirms that he could discipline or make recommendations to discipline to Csigi or Hanley (1T97, 1T99-1T100).

7. The title of custodial supervisor was created by Csigi and approved by the Board on May 23, 2011 as a non-unit title (R-6). The impetus for creating the title was Csigi's dissatisfaction with how head custodians were evaluating and disciplining custodians who reported to them. In particular, he observed that head custodians were not putting evaluations and discipline in writing which made it difficult for him to justify taking actions against custodians, if warranted, because there was no paper trail (2T8). After speaking to several head custodians, it was Csigi's opinion that they were reluctant to do so because custodians and head custodians were all represented by Local 68 (2T12-2T13).

8. Csigi's initial intent in creating the custodial supervisor title was to have a district-wide custodial supervisor assist head custodians until every school had a custodial supervisor who could overrule disciplinary decisions of the head custodian if necessary (2T17).

Csigi admits that the official job description for the custodial supervisor (R-6) is similar and identical in some respects to the job description for the head custodian title (CP-3). For instance, the qualifications are identical in all essential ways -- both require high school diplomas, black seal boiler license and supervisory ability. Like head custodians, custodial supervisors report to Csigi as director of buildings and grounds and supervise the custodial staff as well as substitute custodians, although they do not supervise head custodians.

Additionally, both head custodians and custodial supervisors are tasked with evaluating the custodial staff although the custodial supervisor job responsibilities specifically reference annual written evaluations whereas head custodians "evaluate the performance of custodians in accordance with board policy" (R-6; CP-3).

Prior to 2010 when the evaluation system was changed, principals were responsible for evaluating custodians with input from the head custodians (2T8). The evaluation forms at that time had two ratings -- satisfactory and unsatisfactory (2T9). Csigi felt that head custodians were reluctant to give anyone an unsatisfactory rating, therefore, as a result of contract negotiations in 2010, the evaluation system was changed to reflect a rating of 1 to 5, with 1 being unsatisfactory and 5 being outstanding. The 3 rating was considered average, a rating that every employee was expected to attain (2T9-2T10).

Finally, the job description for custodial supervisors, unlike the head custodian job description, requires that they recommend discipline of custodial staff as necessary (CP-3; R-6).

Csigi admits that although custodial supervisors provide written evaluations and written discipline, head custodians still recommend discipline verbally to Csigi (1T46, 1T52, 2T20). Moreover, with the exception of written evaluations and written discipline, head custodians are still responsible for overseeing custodial operations in their assigned buildings (2T17-2T18, 2T43). The following exchange on direct examination of Csigi summarizes what he considers the difference in the duties:

Q. In the normal course of business, Mr. Csigi, is it your experience and testimony, as the director of the department, that head custodians and custodial supervisors have different duties?

- A. Only in the way of disciplinary and evaluations, otherwise, they do pretty much the same job. [2T36]

Csigi is the ultimate disciplinary authority (2T43).

9. In 2011, prior to creating the custodial supervisor title, neither Csigi or the Board discussed the specific job duties of the custodial supervisor with Lewis or anyone representing Local 68, and Lewis was not fully cognizant of what the job responsibilities of the new title were in 2011 (1T26, 2T47). In fact, Csigi never had a discussion with the union about the custodial supervisor title until around 2014 when the union raised the issue with him for the first time (2T48).

However, prior to and after creating the title officially, Csigi approached some of the head custodians about becoming custodial supervisors (2T42). For instance, in 2010, Csigi approached Head Custodian Raglievich about becoming a custodial supervisor. Raglievich declined the offer because he did not want to make less money and because the position would not be represented by Local 68 (1T64). Similarly, Head Custodian Smith was approached by Csigi in 2011 about becoming a custodial supervisor but told him he was not interested because it was a non-unit title (1T94-1T95). According to Csigi, the salary that Csigi offered to Smith and Raglievich was not going to be less than they were making at the time, but some custodial supervisors

currently employed by the Board make less than head custodians (2T42).

10. Before 2014 when Local 68 filed the charge in this matter, Lewis and others were aware that the Board hired three custodial supervisors, but for various reasons, Local 68 considered each position unique and concluded that the unit work, if any, being performed was incidental.

For instance, at some point in 2011 or 2012, Local 68 discovered that the Board hired Tony Avia as a custodial supervisor at the high school (1T26, 1T35). Avia replaced head custodian Mike Facciano who was transferred to another school (1T26). Because the high school has ten or twelve programs in the evenings as well as different activities during the day, Local 68 concluded that the new title was created only for the high school, and that a custodial supervisor might better fit that role than a head custodian (1T26). This conclusion was validated when Lewis discussed his concerns about the custodial supervisor with then Superintendent Dr. Cavanna and was assured by him that the position was only for the high school (1T37). Because of Cavanna's assurance, the union did not challenge the new title (1T37).

Subsequently, that same year Local 68 discovered that Maintenance Worker Ed Cassidy was appointed as a custodial supervisor in the Administration Building. That building also

houses students (1T55, 1T57). According to Companion, the union did not challenge Cassidy's appointment as a custodial supervisor because of the unique duties required by the Administration Building, in particular related to inventory control and supplies (1T57). The union concluded that Cassidy's work was unique to the requirements of that building, not requiring a head custodian (1T58).

Neither Cassidy or Avia held the title of district-wide supervisor. Their responsibilities were confined to their assigned buildings.

11. Moshe Mitchell was hired by the Board in September 2012 as the first district-wide night custodial supervisor (2T45, 2T51). When Mitchell was first hired as district custodial supervisor working the evening shift from 3:00 p.m. to 11:00 p.m., he was assigned to all the schools to inspect custodial work, evaluate custodians and recommend disciplinary action, if necessary. Mitchell provided written reports of these activities (R-8 through R-14; 2T51-2T53, 2T82). He would inform the head custodians who supervised the custodians in their buildings of his findings, because it is the responsibility of head custodians to oversee the work of custodians (2T85, 2T88). Mitchell's responsibilities did not include evaluating head custodians (2T82).

Local 68 did not raise concerns about Mitchell's assignment as district-wide custodial supervisor because Lewis and Companion concluded he was hired as a night supervisor and his responsibilities were inherently different than the day shift head custodians.

12. Based on its conclusion as to the uniqueness of the three appointments -- Avia, Cassidy and Mitchell -- in 2011 and 2012, Local 68 did not file a grievance, unfair practice charge or make any complaint to the Board at that time about the hires (2T48).

13. However, in March or April 2014, Shop Steward/Head Custodian Companion complained for the first time to Lewis about the Board's replacing retired head custodians with custodial supervisors (1T47-1T48, 1T52). Specifically, Companion noticed that custodial supervisors were being appointed to work in elementary schools with four or five hundred students and were actually doing head custodian work -- e.g. unit work (1T58). Companion learned in and around March 2014 that Victor Cardone, who was Companion's mid-shift custodian at Pleasantdale School (now known as the Kelly School), applied and was appointed as the custodial supervisor at Gregory Elementary School (1T48). He also discovered that Head Custodian Mike Facciano was transferred and demoted and his position was filled by a custodial supervisor (1T29-1T30). According to Companion, in 2014 the number of

custodial supervisors doubled from the three initial appointments in 2011-2012 to approximately six (1T49).

14. Also, as of the 2015-2016 school year, Mitchell was assigned at his request to act as custodial supervisor at only the Roosevelt School (2T52). His responsibilities are now confined to inspecting, evaluating and recommending discipline of the four custodians assigned to Roosevelt, just as head custodians in other schools are responsible for their custodial staff (2T53, 2T90-2T91). Mitchell no longer has district-wide supervisory responsibilities in regard to custodians at the 11 other district schools.

There is no evidence in this record that the Board hired or appointed another custodial supervisor with district-wide responsibilities after Mitchell's assignment to the Roosevelt School.

15. In the spring of 2014, Lewis and Companion met with Interim Superintendent James O'Neil to discuss their concerns that head custodians were being eliminated and replaced with non-unit custodial supervisors who were making far less money (1T31-1T32, 1T47). The Board took no action on the union's concerns, so Local 68 filed its unfair practice (1T32).

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the Supreme Court analyzed the transfer of unit work issue under the unit work rule and the balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982). The Court explained that under the unit work rule, the shifting of work from employees within a particular negotiations unit to other public employees outside of the unit is a mandatorily negotiable subject. An employer has an obligation to negotiate with the majority representative before shifting work to employees outside of the unit. The objective of the rule is to provide a majority representative with an opportunity to require negotiations before unit employees are replaced by employees outside the negotiations unit. Id. at 575. See also, Hudson Cty. Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003), recon. den. P.E.R.C. No. 2004-39, 29 NJPER 547 (¶177 2003). Failure to do so violates 5.4a(1) and (5) of the Act. See generally, Passaic County Reg'l High School Dist. No. 1, P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981).

The unit work rule, the Court observed, cannot be applied on a per se basis and, therefore, required the application of a balancing test as set forth in Local 195 to the facts of each

transfer of unit work claim. However, the Supreme Court also recognized that the unit work rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable, namely (1) where the union has waived its right to negotiate the transfer of unit work; (2) historically the job was not within the exclusive province of the unit personnel; or (3) the employer is reorganizing the way it delivers government services. Jersey City at 577.

Here, Charging Party contends that the Respondent violated 5.4a(1)^{5/} and (5) of the Act by transferring unit work -- head custodial duties -- to custodial supervisors at a lower salary and without negotiations. Respondent defends that it had a managerial prerogative to reorganize its custodial supervisory structure.

The Board also asserts that even if unit work was transferred from head custodians to custodial supervisors, two exceptions to the unit work rule are triggered relieving it of any negotiations obligations. First, the Board contends that the duties of the head custodians are not exclusively unit work because they have been historically shared work since the custodial supervisor title was created in 2011. Secondly, the

5/ N.J.S.A. 34:13A-5.4a(1) will be found derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Board asserts that it was reorganizing management's supervisory structure when it created the custodial supervisor title. In that regard, Respondent maintains that the custodial supervisor title is a promotion, requiring custodial supervisors to conduct annual evaluations and initiate discipline of custodians. Any unit work being performed by the custodial supervisors, it is argued, is incidental and permissible as a consequence of its exercise of its managerial prerogative to reorganize its supervisory structure.

The Board next contends that the custodial supervisors are supervisors under the meaning of the Act and, therefore, not appropriately included in a unit with non-supervisory employees such as custodians. Finally, the Board argues that the Act's six-month statute of limitations defeats Local 68's claims as the custodial supervisor's title was created in 2011, and the unfair practice charge was filed in 2014 well beyond the six-month statute of limitations.

The Statute of Limitations

N.J.S.A. 34:13A-5.4c provides in pertinent part that:

. . . no complaint shall issue based upon any unfair practice charge occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was not longer so prevented.

The statute of limitations issue is a threshold issue and must be considered first, because if the charge is untimely, no further analysis is necessary.

The Board opines that Local 68 filed its charge on March 24, 2014, three years after the custodial supervisor title was approved. For instance, Ed Cassidy was hired to fill the position of custodial supervisor in the Administration Building in July 2011. Thus, the charge should be dismissed as well beyond the 6-month period to file.

Local 68 disagrees and asserts that the appointments to fill the initial three custodial supervisor titles were unique and did not implicate similar job duties with the head custodians. Therefore, the unit work rule was not implicated until the Board for the first time in the fall of 2013 started replacing head custodians who retired at the elementary schools with custodial supervisors who were performing the same duties as head custodians.

The facts support that Local 68 learned of Tony Avia's hire as a custodial supervisor at the high school first in 2011 and spoke to then Superintendent Dr. Cavanna who assured them that the position was only for the high school. Local 68 Business Representative Mike Lewis concluded because of the size of the high school and the multitude of activities head custodian duties were not implicated. For Lewis, it was a unique one-time

situation that he decided not to contest. Similarly, upon learning of Maintenance Worker Cassidy's assignment as custodial supervisor at the Administrative Building, Shop Steward Companion concluded that Cassidy's role would be mainly inventory control and supplies, activities unique to that building. This also was not contested.

Finally, Local 68 did not challenge the appointment of Moshe Mitchell as district-wide custodial supervisor when he was appointed in 2012. Local 68 viewed Mitchell's duties as night custodial supervisor as being different from head custodians to the extent that he was not assigned to one school but was responsible for inspection, evaluation and discipline at all district schools. It was not until Mitchell assumed custodial supervisory responsibilities in the 2015-2016 school year at an elementary school that his duties became identical to that of head custodians.

Local 68 argues, therefore, that it was only in 2014 when it learned that as head custodians were retiring at elementary schools and being replaced by custodial supervisors that its charge was ripe to pursue. It was at this time that the number of custodial supervisors doubled from three to six. I agree.

Even if the custodial supervisor positions that were filled in 2011 and 2012 included occasional ancillary duties performed by head custodians at that time, there was not enough in 2011 for

Local 68 to conclude that they were replacements for head custodians and exclusively doing negotiations unit work, especially having been assured by the superintendent in one instance that the new title at the high school was a one-time occurrence.

The operative event triggering the six-month statute of limitations, therefore, was the filling of head custodian positions upon retirement by custodial supervisors in the elementary schools, which Companion testified he learned about on or about in February or March, 2014. The record supports that the duties performed by custodial supervisors in the elementary schools were and are substantially similar, if not identical, to the duties performed by head custodians in other elementary schools. Accordingly, I do not find that the charge filed in March 2014 is untimely.

Managerial Right to Reorganize and Local 195 Balancing Test

An employer does not incur a duty to negotiate with the majority representative where the employer has exercised a managerial right to reorganize the way it delivers government services. Jersey City; Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp. 2d 132 (¶113 App. Div. 1983). In analyzing the application of the unit work rule and the assertion of managerial prerogative, the

Supreme Court required the application of a balancing test to the facts of each transfer of unit work claim. Jersey City.

The Board asserts that it had a managerial prerogative to reorganize the supervisory structure of its custodial staff. Citing Freehold Reg. H.S. Bd. of Ed., P.E.R.C. 85-69, 11 NJPER 47 (¶16025 1984), it contends that it created the custodial supervisor title to provide a more effective supervisory structure to ensure that the work performance of custodians was properly evaluated and discipline recommended where necessary. Although the fact pattern in Freehold is similar, in that both involved the title of head custodian, that case is distinguishable.

In Freehold, the Commission restrained arbitration of a grievance challenging the Board's decision to eliminate head custodian and assistant head custodian titles and to transfer unit work to newly establish non-unit positions of custodial services supervisor and assistant supervisor in order to improve the supervisory structure for custodial employees. The new job descriptions required each title to evaluate custodial staff and recommend discipline, duties not previously assigned to or performed by head custodians and assistant custodians. The new titles were also required to perform some duties of the eliminated positions. The Board assigned a supervisor or an assistant supervisor to each shift.

Although acknowledging that the preservation of unit work is mandatorily negotiable and arbitrable, the Commission in Freehold determined under the Local 195 negotiability and balancing test, the case predominantly involved the Board's right to reorganize its supervisory structure for custodial employees. Therefore, the Board could shift some unit work to supervisory employees outside the unit. The facts in this case are markedly different.

Here, unlike Freehold, the head custodian title required that it perform evaluations and recommend discipline. Those responsibilities were inherently ingrained in the duties and responsibilities assigned to head custodians. At the recommendation of Director Csigi, the Board approved the custodial supervisor title because Csigi was dissatisfied with the performance of head custodians in the evaluation and discipline of custodians. Because head custodians put nothing in writing, Csigi had difficulty supporting his personnel decisions regarding custodians. It was his opinion that head custodians were reluctant to put anything in writing because they were in the same negotiations unit as custodians. His solution, therefore, was to create a non-unit title to perform the same functions as head custodians with the addition that the custodial supervisors were required to provide written evaluations and written recommendations for discipline. In all other respects, the job descriptions were identical. The Board did not eliminate

the head custodian title, as was done in Freehold in order to create a supervisory title. Rather, the Board created a new non-unit title with the same supervisory responsibilities as the unit title.

The Board asserts that custodial supervisors, unlike head custodians, have played a prominent role in monitoring the performance of custodians and head custodians on a daily basis. It produced exhibits to support that written evaluations and written discipline was done by Moshe Mitchell. However, Mitchell held the unique position of district-wide custodial supervisor. In that role, his responsibilities included written evaluations, inspection reports and recommendations for discipline at all district schools (R-1 through R-3, R-5, R-8 though R-15). Those responsibilities, however, were relinquished on a district-wide level when Mitchell was reassigned to the Roosevelt School in the 2015-2016 school year. The district-wide position held by Mitchell was never filled thereafter. Once at the Roosevelt School, Mitchell confirmed that his duties and responsibilities were identical to head custodians at other schools. The Board produced no evidence that custodial supervisors currently assigned to one school produce written evaluations and written disciplinary recommendations as Mitchell did in his role as district-wide supervisor.

Indeed, there is no evidence to support that custodial supervisors assigned to a specific school are providing evaluations or recommendations of discipline differently from head custodians.^{6/} Specifically, because custodial supervisors are not assigned to schools where there are head custodians assigned, I infer that their responsibilities, like those of head custodians, do not extend to monitoring the performance of employees in other schools. Accordingly, the Board, as it contends, has not merely reassigned key supervisory functions, because the supervisory functions are performed by both head custodians and custodial supervisors at their assigned schools.^{7/}

It appears, therefore, that Csigi's initial concern regarding the head custodians' unwillingness to provide him with written support for evaluation and discipline of custodians has not been addressed by the so-called reorganization of the supervisory structure and the creation of the custodial supervisor title. The only thing accomplished by shifting unit

^{6/} Director Csigi admitted and it was confirmed by the credible testimony of Head Custodians Companion and Smith as well as the job descriptions of the two positions (CP-3, R-6) that the only difference between the head custodian title and the custodial supervisor title is that the latter is responsible for written evaluations of custodians and initiating written discipline, while the head custodians perform these tasks verbally.

^{7/} The Board's citing of Op. of Maplewood, P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985), is distinguishable for this reason.

work to the custodial supervisors is the ability to unilaterally set terms and conditions of employment for these non-unit employees, including, in some instances, lower salaries.

On balance, the employers asserted reason for shifting head custodian duties to custodial supervisors does not outweigh the union's right to preserve the work. If management's main concern was the failure of head custodians to perform the supervisory functions assigned to them, namely providing Csigi with written evaluations and written disciplinary recommendations, Csigi could have insisted that they do so or, in the alternative, filed a clarification of unit petition seeking to remove the head custodians from the Local 68 negotiations unit if he felt that head custodians were supervisors within the meaning of the Act and inappropriately included in the Local 68 unit.

Csigi took neither action. Nor did he sit down with Local 68 to discuss alternative solutions to address his concerns. Basically, the change in title was a thinly disguised action to camouflage the removal of unit work without negotiations and to unilaterally set terms and conditions of employment for the custodial supervisors, namely establishing lower salaries for the new title.

I conclude, therefore, under the Local 195 balancing test the union's interest in keeping the head custodian work outweighed the employer's purported concern over the head

custodian's unwillingness to exercise its evaluative and disciplinary responsibilities viz a viz the custodians. This appears to be a case in which the Board is substituting a non-unit employee (custodial supervisor) for a unit employee (head custodian) with no change in the responsibilities or duties attached to the new position, and at least partially to reduce labor costs. See Bergen Pines Cty. Hosp., I.R. No. 91-16, 17 NJPER 236 (¶22102 1991). Accordingly, it had a duty to negotiate the shift of unit work.^{8/}

Historically Shared Work Exception

An employer, also, does not incur a duty to negotiate the shift of unit work if the disputed duties were historically performed by non-unit personnel exclusively or in conjunction with unit employees. See generally, Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989) (employer did not violate negotiations obligation by laying off civilian dispatchers and assigning work to non-unit police officers who previously performed the work for 25 years).

^{8/} The Board cites several cases for the proposition that it had a non-negotiable prerogative to create new job titles, to establish job descriptions and to require employees to perform additional duties in order to realign educational goals (Point III of Respondent's brief). These cases are inapposite as discussed above. The new positions cannot be a subterfuge to transfer unit work without a managerial prerogative to do so.

Here, the employer argues that since custodial supervisors have been performing unit work since 2011, Local 68's claim must be defeated. I disagree.

As explained previously in this analysis (see sub-heading "Statute of Limitations"), until 2014, when the Board began replacing custodial supervisors in the district's elementary schools with head custodians who retired, custodial supervisors were not performing identical duties to unit head custodians. The Board relies on the testimony of Gerard Companion that the duties of the two titles were the same, but Companion's testimony related to the custodial supervisors assigned to the district's elementary schools. Companion distinguished the 2011 and 2012 appointments of three custodial supervisors: one to the high school, one to the administration building, and Moshe Mitchell's appointment as night district-wide custodial supervisor, positions he felt were unique and not essentially the same as his head custodian title. The Board's claim, therefore, that these duties have been shared on a regular on-going basis is not supported by the evidence.

The Board's argument that non-unit substitute custodians are doing head custodian work is immaterial. Substitute custodians are non-unit employees called to work on an as-needed basis to substitute for custodians. The issue before me is not whether custodian work was transferred but whether head custodian unit

work was transferred to custodial supervisors. There is no evidence on the record that substitute custodians were doing head custodian unit work.

Supervisory Status

N.J.S.A. 34:13A-5.3 provides in pertinent part that:

. . .except where established practice, prior agreement or special circumstances dictate to the contrary shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership. . .

Both Charging Party and Respondent set forth arguments regarding the alleged supervisory or non-supervisory status of head custodians and/or custodial supervisors as well as the appropriateness of their inclusion in the Local 68 negotiations unit. Those issues are not before me and, therefore, not addressed in this decision. I have only considered whether unit work was transferred from head custodians to non-unit custodial supervisors as alleged in the charge.

Moreover, even if their duties involve evaluation and discipline of custodians, arguably supervisory functions, there is no testimony in this record regarding whether their inclusion in Local 68 is appropriate by established practice, prior agreement or special circumstance. Therefore, the question raised by the parties as to whether head custodians and/or

custodial supervisors are appropriately included in Local 68's unit can be answered by the filing of a clarification of unit petition.^{9/} N.J.A.C. 19:11(a)4.

CONCLUSIONS OF LAW

Respondent West Orange Board of Education violated 5.4a(1) and (5) when it transferred the unit work of head custodians to custodial supervisors in and around March 2014.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the West Orange Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, by transferring the unit work of head custodians to custodial supervisors.

^{9/} While the Commission favors that disputes over unit inclusion be resolved through a determination of a clarification of unit petition, an employer may act to remove a position from a negotiations unit, but it does so at the peril of violating the Act should its determination of the status of the position in dispute be incorrect. Passaic Cty. Reg. H.S. Dist. #1 Bd. of Ed., P.E.R.C. 77-19, 3 NJPER 34 (1976). Here, the charge does not allege that the head custodians were removed from the Local 68 unit, only that their work was transferred. If such allegation had been before me, then the question of supervisory status would be germane.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by transferring the unit work of head custodians to custodial supervisors.

B. That the Board take the following action:

1. Transfer the unit work of custodial supervisors back to head custodians.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

/s/Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: May 8, 2018
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by May 18, 2018.



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, by transferring the unit work of head custodians to custodial supervisors.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by transferring the unit work of head custodians to custodial supervisors.

WE WILL transfer the unit work of custodial supervisors back to head custodians.

Docket No. CO-2014-223

West Orange Board of Education
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830