

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIVER DELL BOARD OF EDUCATION,

Public Employer-Petitioner,

-and-

Docket No. CU-87

RIVER DELL EDUCATION ASSOCIATION,

Employee Organization.

SYNOPSIS

In 1976, the Commission, in affirming a decision of the Executive Director, held that department chairpersons employed by the River Dell Board of Education were supervisors within the meaning of the Act, that there was an "established practice" of including department chairpersons in a negotiations unit with nonsupervisory employees (teachers), and that the record failed to establish a "conflict of interest" which would require a severance of the department chairpersons from the mixed unit. At the same time, the Commission ordered a reopening of the record for the purpose of investigating whether a strike which had taken place after the close of the hearing established the type of conflict which would require the division of the combined unit.

The Commission, in agreement with the Hearing Officer, concluded that where, as here, a strike occurs and the board chooses to operate rather than close the schools during the strike, the supervisory department chairpersons were necessarily subject to an irreconcilable division of loyalties resulting from their responsibilities to their employer and their allegiance to their majority representative. Thus, the department chairpersons are ordered to be excluded from the negotiations unit effective immediately.

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Employee Organization.

Appearances:

For the Public Employer-Petitioner, Stein & Rosen, Esqs.
(Mr. Marc Joseph, of Counsel and Mr. Marc Joseph and
Mr. Lewis M. Lefkowitz on the Exceptions)

For the Employee Organization, Ruhlman & Butrym, Esqs.
(Mr. Paul T. Koenig, Jr., of Counsel)

DECISION

In an Interlocutory Decision on a request to review a decision of the then Executive Director in a Petition for Clarification of Unit, In re River Dell Board of Education, P.E.R.C. No. 77-10, 2 NJPER 286 (1976), the New Jersey Public Employment Relations Commission (hereinafter "Commission") reaffirmed the holdings of its decisions in In re West Paterson Board of Education, P.E.R.C. No. 77, as modified on reconsideration by P.E.R.C. No. 79, that the statutory exceptions of "established practice" and "prior agreement" which would allow for a mixed negotiations unit of supervisors and non-supervisors relate to events antedating P.L. 1968, Chapter 303. Applying the principles established in the West Paterson decisions to the facts in the River Dell case, the

Commission affirmed the findings of fact of the Hearing Officer and the Executive Director that such a pre-existing negotiations relationship existed and that the relationship of supervisors and non-supervisors, from the inception of the unit to the close of hearing, did not reveal a sufficient conflict of interest and loyalties to warrant cessation of the mixed unit. However, the Commission ordered the reopening of the record in that proceeding for the limited purpose of investigating the Petitioner's allegations that events subsequent to the issuance of the Hearing Officer's Report and Recommendations established the existence of the type of conflict which required the division of the combined unit.

The Commission's Deputy Director of Unfair Practices and Representation, Joel G. Scharff, was assigned as a Hearing Officer to conduct further proceedings consistent with the order of the Commission. In a valid exercise of his discretion, the Hearing Officer, in the absence of a stipulated record, convened an investigatory hearing on September 20, October 7 and November 10, 1976, at which the parties were afforded an opportunity to examine and cross-examine witnesses, present evidence and argue orally. Both the River Dell Board of Education (hereinafter "Board") and the River Dell Education Association (hereinafter "Association") were represented by legal counsel. Both parties filed briefs with the Hearing Officer.

Consistent with our directive, a Hearing Officer's Report and Recommendation, H.O. No. 78-15, 4 NJPER (para. ___ 1978),

which is attached hereto and made a part hereof, was filed with the Commission on April 13, 1978. The Report found that in 1975 the occupants of the titles in question, Department Chairmen, participated in a strike along with other unit employees against the employer.^{1/} The Report also found that the employer attempted to keep schools open and would have desired that Department Chairmen play a management role in the strike. The Hearing Officer recommended a finding that the Department Chairmen were thus placed in a position of divided loyalty in which the integrity of the interests of management, the employee representative and the Department Chairmen could not be reconciled. For the reasons stated therein, the Hearing Officer recommended to the Commission a finding that the strike situation produced and was evidence of a substantial conflict of interest which warranted the removal of Department Chairmen from the mixed supervisory and non-supervisory unit, notwithstanding a pre-1968 established practice of inclusion. Both the Board and the Association filed exceptions to the Hearing Officer's Report and Recommendations.

The thrust of the Association's exceptions is that the Hearing Officer exceeded his limited mandate. It is argued that owing to the fact that the Hearing Officer found that the Board did not prove the four factual issues it raised, i.e. 1) that the Department Chairmen failed to participate in and assist the employer's Superintendant in the preparation of strike contingency plans; 2) that the employer wanted to use the Department Chairmen to keep schools open during the strike; 3) that Department Chairmen

^{1/} The Commission notes that due to a typographical error the attached Hearing Officer's Report and Recommendation states that the strike in issue took place in 1976. Our notation and correction of that error in the body of this decision shall serve to remedy the error for the purposes of the record herein.

influenced and coerced fellow teaching staff members in their departments to go on strike; and 4) that Department Chairmen discriminated against the one teacher who did not go on strike; that the Hearing Officer should have ended his report at that point rather than continuing his investigatory process and legal analysis. The Association proffers that Hearing Officer's consideration of whether the Department Chairmen's participation in the strike was a per se conflict of interest warranting dissolution of the mixed unit was a legal rather than factual conclusion, beyond the scope of the proceedings authorized by the Commission and that it ignored the initial determination made by the Executive Director and the Commission in this matter.

We have considered the Association's exceptions and find them to be without merit. As we have previously stated, in the absence of a full stipulation of facts by the parties and in the face of conflicting substantial and material factual issues, such as those contained in the Board's above-mentioned allegations which were contested by the Association, the Hearing Officer, consistent with our directive, correctly exercised his discretion in convening an investigatory hearing.^{2/} In addition, the Hearing Officer, in his Report and Recommendation, properly considered all relevant evidence, including the initial determination, and in considering that evidence set forth a recommended finding as requested by the Commission.^{3/} It should be noted that a representation proceeding is quasi-legislative, as opposed to quasi-judicial

^{2/} See In re River Dell Board of Education, P.E.R.C. No. 77-10 at page 8.

^{3/} In re River Dell Board of Education at page 7.

in nature, and no burden of proof is attached thereto.^{4/} In such a proceeding, a Hearing Officer is charged with developing a full and complete evidentiary record upon which the Commission or its designee may base its decision.^{5/} The Hearing Officer's duties are not confined to resolving the conflicting factual contentions raised by the parties and his recommendations are not delimited by the proposed findings and legal theories expounded by the parties. Based upon our review of our charge to the Hearing Officer we conclude that the scope of his inquiry and the breadth of his recommendations were well within the parameters set down by the Commission.

We observe that the Association, in its exceptions, acknowledges the correctness of the Hearing Officer's conclusion that the occurrence of a strike where the employer has attempted to continue operations utilizing the supervisory employees in question, presents a circumstance mitigating against preservation of a mixed unit,^{6/} albeit criticizing this conclusion as beyond the pale of his function and arguing that the Department Chairmen were not notified of the Board's desire to use them to operate the schools.^{7/} In this regard we adopt the further conclusion of the Hearing Officer that the issue of the notice given by the Board to the Department Chairmen is of little importance, given

^{4/} State v. Professional Assn., 64 N.J. 231 (1974). Additionally, contrast N.J.S.A. 34:13A-6(d) on representation question with N.J.S.A. 34:13A-5.4(c) on unfair practices.

^{5/} N.J.A.C. 19:11-6.3(a) and N.J.A.C. 19:11-7.1.

^{6/} H.O. No. 78-15 at page 15.

^{7/} The Association neither denies the occurrence of the strike nor the participation of supervisors and non-supervisors in the strike activity.

the traditional role of supervisors vis-a-vis management. Thus, the Association's argument that Department Chairman would somehow be absolved of their duties to management during the strike owing to a lack of notice is hardly plausible. We acknowledge, as did the Hearing Officer, the Association's assertion that Department Chairmen may have struck even if they had not been included in the unit. However, we believe, in agreement with the Hearing Officer, that the likelihood of such an occurrence would have been diminished if the Department Chairmen were not included in a negotiations unit with teachers where they were necessarily outnumbered, where the teachers were responsible for negotiating on their behalf, and where the issue of divided loyalties became acute when the unit went on strike.

The exceptions filed by the Board to the Hearing Officer's Report and Recommendations essentially argue the validity of the four factual allegations asserted during the hearing, which we have previously set forth. The Board also contends the existence of a conflict of interest demonstrates the validity of the mixed supervisory and non-supervisory negotiations unit and requests that the result reached by the Hearing Officer be adopted by the Commission, with the proviso that it be made effective immediately. In view of our previous comments and our decision herein we find it unnecessary to address further the merits of the exceptions filed by the Board.

Based upon the entire record in this matter, including the stenographic record, the Hearing Officers Report and Recommen-

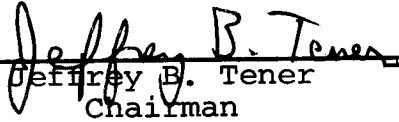
dations, the briefs and exceptions filed by the parties, we find and determine, consistent with the Hearing Officer's discussion, that both supervisory and non-supervisory employees in the Association's combined negotiations unit engaged in a strike against the Board in 1975. Where, as here, the Board chose to operate rather than close the schools during the strike, the supervisors in the mixed unit were necessarily subject to an irreconcilable division of loyalties resulting from the responsibilities they owed to their employer and their allegiance to their majority representative.^{8/} Continuation of the combined supervisory and non-supervisory unit under these conditions, notwithstanding the existence of the statutory exceptions of "established practice" or "prior agreement", N.J.S.A. 34:13A-5.3, is inconsistent with the effectuation of peaceful and stable labor management relations in the public sector.^{9/} Accordingly, the Commission adopts the recommendation of the Hearing Officer and clarifies the Association's negotiations unit to exclude supervisors within the meaning of the New Jersey

^{8/} We find nothing in our decision herein which limits or modifies the conclusions reached in the West Paterson decisions, supra. On the contrary, we again reaffirm the holdings in these cases and believe that the result reached in the instant matter is fully consistent with the spirit and letter of these decisions.

^{9/} N.J.S.A. 34:13A-2. This result also is totally consistent with our Supreme Court's decision regarding divided loyalties and conflict of interest in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971).

Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-5.3.
This determination shall be effective immediately.^{10/}

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for this decision. None opposed. Commissioners Graves and Schwartz abstained. Commissioner Hipp was not present.

DATED: Trenton, New Jersey
June 30, 1978
ISSUED: July 5, 1978

^{10/} By making this determination effective immediately, we are acting consistent with the Director's decision in In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) that, "in all cases where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, or where the dispute is reserved and referred to the Commission in the parties' negotiations agreement or other joint written agreement, the clarification of unit determination shall be effective immediately."

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DOCKET NO. CU-87

RIVER DELL EDUCATION ASSOCIATION,

Employee Representative-Respondent.

SYNOPSIS

A Hearing Officer recommends that department chairmen, who are supervisors, be removed from a negotiations unit which includes non-supervisory employees at the expiration of any currently existing collective negotiations agreement that includes supervisors in its coverage. In 1976, the department chairmen participated in a strike along with other unit employees against the employer. Since the employer attempted to keep schools open and would have desired that department chairmen play a management role in the strike, the department chairmen were placed in a position of divided loyalty in which the integrity of the interests of management, the employee representative, and the department chairmen could not be reconciled. Therefore, the Hearing Officer recommends that the Commission consider this strike situation as having produced a substantial conflict of interest which warrants the removal of department chairmen from a mixed supervisor/non-supervisor unit notwithstanding a pre-1968 established practice of inclusion.

The Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. This matter was remanded to the Hearing Officer by the Commission with instructions to report directly to the Commission. Accordingly, the case is transferred to the Commission which reviews the Report and Recommendations, 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.

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Appearances:

For the Public Employer
Stein, Joseph & Rosen, Esqs.
(Marc Joseph, of Counsel)

For the Employee Representative-Respondent
Ruhlman & Butrym, Esqs.
(Paul T. Koenig, Jr., of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

By Decision dated August 24, 1976, ^{1/} the Public Employment Relations Commission (the "Commission") ordered the instant proceedings reopened for the limited purpose of developing an evidentiary record with respect to activities surrounding an alleged strike of employees of the River Dell Board of Education (the "Board"). The Commission directed that the undersigned Hearing Officer submit a Report and Recommendations

1/ In re River Dell Bd. of Ed., P.E.R.C. No. 77-10, 2 NJPER 286 (1976).

as to whether the facts elicited at the hearing established an actual substantial conflict of interest among department chairmen and teachers warranting the removal of department chairmen from the River Dell Education Association's (the "Association") mixed supervisor/non-supervisor negotiations unit notwithstanding the existence of an established practice. Hearings were held on September 20, October 7, and November 10, 1976 at which the parties had the opportunity to examine and cross-examine witnesses. Briefs were filed by both parties.

In the earlier proceedings, the Board sought to exclude department chairmen from the existing unit composed of department chairmen and teachers. Overruling the exceptions filed by the Board to the Hearing Officer's Report and Recommendations, the Executive Director affirmed the findings of fact and conclusions of law of the Hearing Officer that, although the department chairmen are supervisors within the meaning of the New Jersey Employer-Employee Relations Act, (the "Act") ^{2/} there was an "established practice" predating the enactment of Chapter 303, Laws of 1968 of having the department chairmen in the negotiations unit with the teachers, and there was insufficient evidence of a substantial actual conflict of interest to nullify the established practice. ^{3/} In requesting review by the Commission the Board alleged that events subsequent to the issuance of the Hearing Officer's Report and Recommendations

^{2/} N.J.S.A. 34:13A-1 et seq.

^{3/} In re River Dell Bd. of Ed., E.D. No. 76-28, 2 NJPER 89 (1976)

had led to an actual conflict which would require a division of the combined unit of teachers and department chairmen. The Commission ordered the reopening of the proceeding for the limited purpose of investigating whether strike activities by the department chairmen had led to a substantial conflict of interest requiring that the department chairmen be separated from the unit of teachers.

From October 6 to October 20, 1976, three units of employees were on strike in the River Dell Regional School District. One unit represented by the Association consisted of classroom teachers and department chairmen who also have classroom teaching duties. The other two units consisted of secretaries and building maintenance people. Department chairmen, as part of the teachers unit, participated in the strike. It is the contention of the Board that the fact of and the repercussion of this strike established a substantial actual conflict of interest among the department chairmen with respect to their duties and obligations to the employer, and that the conflict is directly attributable to their inclusion in the mixed unit. Therefore, the Board contends, it is inappropriate to continue to include both of these groups within a single collective negotiations unit.

As authority for this position, the Board cites the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971):

"...we hold that where a substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other, the requisite community of interest among them is lacking, and that a unit which undertakes to include all of them is not an appropriate negotiating unit within the intendment of the statute." at p. 427. (emphasis supplied)

In the circumstances presented therein, Wilton involved a proposed unit consisting exclusively of supervisors. But, because of the breadth of the reasoning contained in Wilton the Commission thereafter applied Wilton principles to virtually all representation situations. The application of Wilton principles to circumstances similar to the matter herein became complicated, however, because the Act expressly permits mixed units to remain intact where there is an "established practice, prior agreement, or special circumstance." ^{4/} Nevertheless, in its decision, In re West Paterson Board of Education, P.E.R.C. No. 77 (1973), the Commission adopted a modification of the Wilton reasoning and applied it to "established practice" units. The decision held:

"And that is, we think, what the Legislature intended: the preservation of mixed units where, ... the experience of the parties has demonstrated their ability to negotiate and administer agreements while at the same time protecting the integrity of their interests...Relating this

^{4/} N.J.S.A. 34:13A-5.3. The Commission in In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973) (supplementing P.E.R.C. No. 77) interpreted "established practice" and "prior agreement" as conditions existing prior to the enactment of Chapter 303, New Jersey Employer-Employee Relations Act in 1968.

interpretation to the Wilton formula, the effect of such an experience is to eliminate from significance what the Court described as potential conflict of interest..." at p. 16.

Therefore, a mixed unit of supervisors and non-supervisors, even though appropriate under the statutory exceptions, will not be permitted to remain intact if a substantial actual conflict of interest exists.

To establish a substantial actual conflict of interest, the Board offered evidence on four issues: the lack of participation by the department chairmen in the Superintendent's contingency plans, the Board's desire to utilize department chairmen during the strike, the use of influence and coercion by the department chairmen on fellow teachers, and the discrimination of a department chairmen against a teacher.

According to his testimony, Superintendent Ronald Perry prepared contingency plans to keep the schools open in the event of a strike. Part of this plan consisted of a list of assignments ^{5/} to be performed by administrators. It was Mr. Perry's intent that the department chairmen were included as administrators. When cross-examined as to whether or not the department chairmen were in fact made aware of these assignments in the event of a strike, Mr. Perry could only state that he followed the usual chain of command by instructing the school principals.

^{5/} These assignments were: to collect keys, to maintain an inventory of books, etc., T. (9/20); p. 23, 35.

It was the duty of the school principals to notify the department chairmen. ^{6/} No testimony was given that any department chairmen had received notice of these assignments. Therefore, it is not possible to conclude, as the Board would like, that the failure of the department chairmen to perform these assignments is evidence of an actual conflict of interest where the department chairmen, after actual notice, had to compromise or neglect their duties to the Board.

Dr. Perry also testified that the department chairmen were responsible to supply emergency lesson plans so that in the event of a strike the school could function as normally as possible. Dr. Perry further testified that no such lesson plans were available during the strike. This testimony is contradicted by the testimony of Al Naples, a department chairman and a mathematics teacher. He stated that he received a directive concerning the submission of emergency lesson plans, as did all teachers, at the commencement of the school year. It does not appear that the directive was addressed to Mr. Naples as a reminder of his responsibilities under his job description as a department chairman to insure the availability of teacher lesson plans for substitutes. ^{7/} Accordingly, the undersigned cannot conclude that department chairmen disregarded a specific Board order directed in anticipation of the strike.

^{6/} T. (10/7); p. 56 and following.

^{7/} T. (9/20) p. 39, 40. T. (10/7); p. 86, 87, 92.

Additionally, the Board contended that it relied upon the department chairmen, whom it considered as administrators, to act on behalf of the Board throughout the strike. Dr. Perry testified in this regard upon direct examination (T. 9/20, p. 65, 66):

"Q: Without going into great detail, would the Board have relied upon the presence of the Department chairmen to assist in discharging its responsibility as regards to the safety of the students in school during the strike?

A: Yes.

Q: As you have indicated, was the School Board, the public employer prejudiced to the extent that the Department chairmen were not present?

A: Yes, they were not available to help us with our staffing and assignment of teachers [i.e., substitutes] in the proper places."

The record does not reveal, however, that department chairmen were informed of the Board's reliance.

The Board also alleged that the department chairmen influenced, coerced and lead the strike. No such conclusion can be drawn from the record. By his own admission, the Board's only witness, Dr. Perry, stated that he did not observe any department chairmen leading or coordinating any activities during the strike. No evidence was produced which can lead the undersigned to conclude that the department chairmen influenced teachers in their department. Conversations between

department chairmen and teachers are normal occurrences. In fact, the likelihood of a teacher approaching a department chairman when a strike appears imminent is not unusual. But, absent testimony to the contrary, it is not possible to find that these conversations were attempts to influence or coerce teachers. Mr. Naples' testimony indicates that he did not use any influence as a department chairman to urge staff to participate on the picket line and that his participation in the strike did not differ in any way than the participation of other staff members. In view of the entirety of the evidence, I judge Mr. Naples' testimony as credible in this area. ^{8/}

Finally, the Board relies on the alleged discrimination against Mr. Fowler, a teacher who did not participate in the strike. ^{9/} The Board alleged that subsequent to the strike, Mr. Fowler was assigned to teach two new courses even though there were other teachers more qualified, and that Mr. Fowler was given an extra heavy duty of monitoring a study hall. The Board, through the testimony of Dr. Perry, contended that these changes in schedule were retaliatory tactics in response to Mr. Fowler's cooperation with the Board during the strike. Mr.

^{8/} T. (10/7); p. 89. See particularly the testimony respecting Mr. Naples' phone conversation with a teacher concerned about strike reprisals, beginning at p. 107.

^{9/} Mr. Fowler was on sabbatical leave that semester, and in pursuit of his graduate degree, he was assigned as an Administrative Intern in River Dell. T. (11/10); p. 6.

Fowler did not testify, ^{10/} Mr. Perry's testimony gives pause as to the post-strike treatment accorded to Mr. Fowler. The undersigned cannot conclude, however, that the post-strike treatment of Mr. Fowler was motivated by retaliation for not participating in the strike. While the undersigned finds Mr. Perry a credible witness, his testimony in this area is admittedly at times opinionative, of a remote hearsay nature, and is not supported by any direct evidence of actual knowledge of discrimination. ^{11/}

Discussion

The instant matter presents a novel issue for determination by the Commission, that is, whether the participation by supervisors, albeit lower level supervisors, in a strike against an employer, has created a substantial conflict of interest to warrant removal of the supervisors from an existing mixed unit notwithstanding the grandfather clause embodied in the statute. Consistent with the guidance of the Supreme Court

^{10/} Mr. Fowler left the school district shortly after his return from sabbatical.

^{11/} Mr. Perry did not elect to directly pursue the matters brought to his attention of which he inferred possible discrimination. See T. (11/10); p. 185. He testified forthrightly about his discomfort in describing the events which raised the concern about discrimination in his mind. The Board did not complement the testimony of Dr. Perry by calling any other witnesses. The Association chose not to call any witnesses with regard to this area of testimony.

in Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970), the undersigned has examined the relevant statutory and caselaw of other jurisdictions. Because of the uniqueness of New Jersey's labor law in this area, the undersigned has not found completely apposite situations. The National Labor Relations Board's approach to representation issues involving supervisors, while not analagous to the New Jersey context, is nevertheless helpful in that it provides a frame of reference for the discussion herein.

Under the National Labor Relations Act as presently enacted, the Board may not certify bargaining units containing supervisors. Even before the adoption of the 1947 Taft-Hartley Amendments to the National Labor Relations Act, wherein the definition of employee in the Act was amended to specifically exclude supervisors, the Board vacillated on the representational rights of supervisors. Prior to 1943, the Board permitted the creation of bargaining units limited to supervisory employees. ^{12/} In 1943, however, in Maryland Drydock Co., ^{13/} the Board stated that notwithstanding the status of supervisors as employees, units of supervisors were not appropriate for collective bargaining purposes. In 1945, in Packard Motor Car Co., ^{14/} the Board again reversed itself on the issue of the representational rights of supervisors, finding that supervisors constituted an appropriate bargaining unit, at least when represented by an

^{12/} Union Collieries Coal Co., 41 NLRB 961, 10 LRRM 140 (1942); Godchaux Sugars, Inc., 45 NLRB 105, 11 LRRM 122 (1942).

^{13/} 49 NLRB 733, 12 LRRM 126 (1943).

^{14/} 61 NLRB 4, 16 LRRM 43 (1945).

independent, unaffiliated organization. At no time prior to the Taft-Hartley Amendments did the Board sanction mixed supervisor/non-supervisor units. The Board did, however, recognize that mixed units existed through employer recognition, and, even in the Maryland Drydock case, stated that it did not intend to disrupt the rights that supervisors may have gained under various collective bargaining agreements.

The Congressional intent of removing supervisors from employee status under the Taft-Hartley Amendments was noted by United State Supreme Court in Beasley v. Food Fair, Inc., ^{15/} In Beasley, the Court noted various House and Senate reports which clearly indicate the congressional intent to shield the employer for the requirement to bargain with supervisors in any type of bargaining unit regardless of organizational affiliation or non-affiliation. The Court referred specifically to the House report which stated in part, "there must be in management and loyal to it persons not subject to influence or control of unions..." ^{16/} The Court thereafter concluded that the purpose of the amendments respecting supervisors "was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the positions of serving two masters with opposed interests." ^{17/}

While the New Jersey Employer-Employee Relations Act is generally patterned after the National Labor Relations Act, ^{15/} 86 LRRM 2196 (1974).

^{16/} Id., at 2199 (H.R. Rep. No. 245, 30th Cong., 1st Sess., 16 (1947)). The House Report does, however, specifically state that the bill does not preclude employers from recognizing a supervisors unit.

^{17/} Id.

the New Jersey Act permits collective negotiations units of supervisors, and countenances the existence of mixed supervisor/non-supervisor units where the statutory exceptional circumstances are present. Inherent in the New Jersey approach must be the concept that the loyalty owed by a supervisor to represent management interests does not necessarily preclude supervisors from representing their own interests during negotiations with the employer. In this regard, the New Jersey Act parallels the concern recognized by the NLRB in the pre-Taft-Hartley Packard case, supra, n. 14, wherein the Board states:

"In any event, there is nothing in the statute which as designed or administered protects disloyal or inefficient employees and the Company may always resort to its normal disciplinary powers to insure faithful and efficient job performance by its employees of all ranks. Moreover, it is to be noted that this kind of loyalty is really not involved in the question raised by the present petition. The foremen here are seeking to establish their right to bargain collectively with their employer regarding matters relating to their wages, hours and conditions of work. With respect to these matters, the foreman owes no duty of loyalty to his employer, for in this aspect of his employment relationship, he deals with management at arms length and must rely ultimately upon his own bargaining power to gain concessions just as any rank and file employee." at p. 48

This does not mean that issues related to divided loyalties are without application to unit determination under the Act. To the contrary, in Wilton, the Court construes the

Act as inherently prohibiting substantial conflict of interest situations in unit formation. The Court directly relates conflict of interest considerations to divided loyalty situations. Wilton, supra, 57 N.J. at 425. The Commission, further, has applied the conflict of interest rationale to mixed unit situations, notwithstanding the grandfather clause included in the Act. However, the Commission has given reasonable meaning to that provision limiting the removal of supervisors from a mixed unit only where an actual substantial conflict of interest has occurred. The Commission's policy is consistent with entirety of the Act, insofar as established practice and prior agreement relate to pre-Act (1968) voluntary recognition agreements, and insofar as the Commission's policy is to encourage such recognition. ^{18/} The Commission's reluctance at reforming such units, unless an actual change in the climate contending the existence of such units has been demonstrated, is well founded. Thus, where divided loyalty is merely a potential, or where in actual tests of such loyalty the integrity of the employer's, the representative's and the employee's interests are maintained, the status quo of the agreement should remain.

Applying the Commission standard to the instant matter, the undersigned concludes that the record evidence does not establish that the department chairmen were aware that their activities

^{18/} The Act, in fact, prevents the Commission from intervening in unit recognition situations in the absence of a dispute. N.J.S.A. 34:13A-5.3.

were insubordinate to any of the Board's directives to supervisory personnel. Nor does the evidence indicate that the department chairmen influenced, encouraged, coerced or lead the strike. Further, the Board's evidence that the department chairmen discriminated against a staff member for working during the strike is of a remote hearsay nature, vague, and essentially expresses the opinion of a third person removed from the alleged discriminatory conduct. There is no direct evidence supporting the claim of discrimination.

There is no dispute, however, that department chairmen participated in a strike against the Board. Accordingly, the issue herein, as perceived by the undersigned, is whether such participation in and of itself constitutes a substantial actual conflict of interest which should warrant the removal of supervisors from the negotiations unit.

In evaluating the arguments pro and con, the undersigned initially notes for reasons analyzed above that the argument that supervisors owe an undivided loyalty to management is not completely apposite. Contrary to the experience of the private sector, the New Jersey Act recognizes the supervisors may stand at arms length with the employers in matters involving employment negotiations, and certainly in a mixed unit, may participate mutually with non-supervisors in these endeavors. With respect to the duty and allegiance owed by a supervisor to the employer, the fact that a strike of public employees is illegal is not very relevant, since such concerted conduct would be illegal whether supervisors are in a separate unit or are in a mixed unit.

Rather, the instant matter is one concerning unit appropriateness. What is germane herein are community of interest considerations and conflict of interest considerations. Without a doubt the most sensitivity in the interrelationship of these considerations is exposed when employees choose to strike, whether legally or illegally. In a strike situation, tensions exist between employee and fellow employee, as well as between employee and management. In such circumstances, supervisors are torn between their community with fellow employees and their community with management, for it can hardly be disputed that the divided loyalty question arises most acutely where the supervisor's duty to management includes performing management responsibilities during a strike which involves fellow employees in the same negotiations unit.

In West Paterson, supra, p. 4, the Commission stated that "Wilton considerations provide a frame of reference for identifying those situations which circumstances mitigate against, rather than dictate, the preservation of a mixed unit, i.e., where past experience reveals a compromise of interest or significant detriment to the rights of either party, to the employees or segment thereof", at p. 16. For the reasons stated herein, the undersigned concludes and recommends to the Commission that the occurrence of a strike, where the employer has attempted to continue operations utilizing the supervisory employees in question, presents a circumstance mitigating against preservation of a mixed unit.

Of particular concern to the undersigned, utilizing

the Commission's analysis, is that a strike experience reveals a "compromise of interest or significant detriment...to the employees or segment thereof." The undersigned's concern specifically is with the dilemma faced by supervisors faced with a "compromise of interest" because of a duality of interest. Applied to the situation herein, department chairmen, as supervisors, are faced with divided loyalties. They have a loyalty to their association and a loyalty to effectuate management's policies. This divided loyalty is accentuated by the occurrence of the strike in which the department chairmen are faced with the dilemma of their duty to management to aid in keeping the schools open and their duty of loyalty and sympathy, indeed, association with, striking teachers. Under these circumstances, the undersigned cannot see how this substantial conflict of interest can be reconciled.

It may be argued that the department chairmen herein were not sufficiently advised by the Board of their management duties to prior to the strike, and that, therefore, the issue of loyalty never arose in their minds. In view of the traditional role of supervisors, any assumption by department chairmen that their management loyalties would somehow be absolved is hardly plausible. Regardless, such argument has little relevance to the instant determination, since even had the supervisors had actual, forthright notice of their responsibilities, the unit composition at that time exaggerated the actual conflict that arose. Whatever the confusion then, the circumstances did, in fact, arise to an actual substantial conflict in loyalty, and

the Board's purpose herein is not to lay blame, but to clarify the unit so that the actual conflict does not arise again.

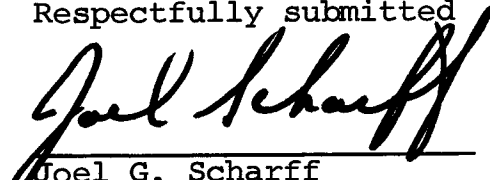
A separation of supervisors from the unit does not solve the supervisor's fundamental conflict, at least from the Board's perspective. Even in a separate unit, the department chairmen may vote to strike. However, the undersigned concludes that separation is the preferred conclusion, insofar as it provides supervisors with independence of expression in this area without fear of retaliation. In a separate unit, department chairmen, by a vote of their own fellow chairmen, not by a vote of the usual overwhelming majority of non-professional employees, may decide what loyalty to choose. This may be accomplished without fear that during the administration of the agreement or during contract negotiations the majority representative will remember the role of department chairmen during a strike. Thus, the creation of a separate unit of supervisors, while not eliminating the chairmen's divided loyalty, is the means most likely to insure that the decision of department chairmen is screened from interests upon which the decision should not rightfully be based.

Accordingly, the undersigned recommends to the Commission that where supervisors have been expected to play a management role in a strike situation, and where they have participated in a strike as part of a mixed unit, an actual substantial conflict of interest has developed, and supervisors

should thereafter be removed from the unit. The removal of supervisors from the unit, however, should be consistent with their contract coverage. Thus, if the strike culminated in an agreement which included supervisors, and the employer had not reserved the right to seek to exclude supervisors from the unit, the Commission's decision should not be inconsistent with the agreement of the parties. Supervisors would then be excluded at the termination of the agreement, rather than immediately, due to these "special circumstances" ^{19/} unless the parties in their successor negotiations agree to the continuation of the supervisors in the unit.

The undersigned, therefore, recommends that the Commission clarify the instant unit to exclude supervisors therefrom at the conclusion of any present agreement that includes the coverage of supervisors in the unit.

Respectfully submitted


Joel G. Scharff
Hearing Officer

DATED: April 13, 1978
Trenton, New Jersey

^{19/} See In re Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2,
3 NJPER 248 (1977).