

P.E.R.C. NO. 91-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (TRENTON
STATE COLLEGE),

Respondent,

-and-

Docket No. CO-H-89-341

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Trenton State College) violated the New Jersey Employer-Employee Relations Act by unilaterally removing the Director of Professional Laboratory Experiences and Assistant to the Dean from the collective negotiations unit represented by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO. The Commission finds that the employee is neither a managerial executive nor a supervisor within the meaning of the Act.

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COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Barbara Hoerner, Staff
Representative

DECISION AND ORDER

On May 17, 1989, Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO filed an unfair practice charge against
the State of New Jersey (Trenton State College). The charge alleges
that the employer violated the New Jersey Employer-Employee
Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection
5.4(a)(5),^{1/} when it unilaterally removed Raye Wheeler, the

^{1/} This subsection prohibits public employers, their
representatives or agents from: "(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."

Director of Professional Laboratory Experiences and Assistant to the Dean, from Council's collective negotiations unit.^{2/}

On June 20, 1989, a Complaint and Notice of Hearing issued. The employer's Answer and amended Answer contend that Wheeler's inclusion in Council's unit is inappropriate because he is a managerial executive and a supervisor within the meaning of the Act.

On October 24, 1989, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by March 16, 1990.

On February 11, 1991, the Hearing Examiner issued her report and recommendations. H.E. No. 91-23, 17 NJPER 124 (¶22050 1991). She found that Wheeler is neither a managerial executive nor a supervisor and that, therefore, the employer violated the Act by unilaterally removing him from Council's unit.

On March 7, 1991, after an extension of time, the employer filed exceptions. It incorporates its post-hearing brief. It contends the Hearing Examiner erred: by finding that Wheeler does not have the authority to decide to what extent the curriculum requires student teaching, internships and practicum experiences; by not recognizing the conflict of interest inherent in Wheeler's deciding that a faculty member would no longer be assigned to a

^{2/} An allegation that the employer failed to provide a job description was withdrawn.

particular school; and by minimizing Wheeler's role in evaluating faculty, formulating policies and procedures, representing the Dean, supervising support staff, and setting the budget.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are accurate. We incorporate them here with these additions.

We add to finding no. 10 that the Dean expects Wheeler to take action should a local school district not want a particular faculty member assigned to supervise student teachers (T91-T94). We specifically agree with the Hearing Examiner that Wheeler's role in evaluating faculty is minimal. Wheeler testified that he had not been told by the Dean what input he would have in evaluating faculty, but that it was conceivable that it would be used for more than determining who will go to a particular school (T43-T44).

The employer acted at its peril when it unilaterally removed Wheeler from Council's collective negotiations unit. It risked committing an unfair practice if its judgment that Wheeler is a managerial executive or a supervisor was wrong. State of New Jersey, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd App. Div. Dkt. No. A-1445-89T1 (1/22/91); Passaic Cty. Reg. H.S. Dist. #1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976). The preferred mechanism for resolving these kinds of disputes is a non-adversarial unit clarification proceeding. State of New Jersey; Passaic.

To determine whether the employer acted lawfully, we begin with the statutory definition of managerial executives. N.J.S.A. 34:13A-5.3 excludes such employees from the protections of the Act and therefore an employer can unilaterally remove them from a collective negotiations unit. N.J.S.A. 34:13-3(f) defines managerial executives as:

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

In light of the Act's policy favoring the organization of all employees desiring it, we have construed this definition narrowly. State v. Prof. Ass'n of N.J. Dept. of Ed., 64 N.J. 231, 253 (1974); Bor. of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977).

In Bor. of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, (¶11259 1980), we elaborated on our standards for deciding whether an employee formulates or directs the effectuation of policy under the statutory definition:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these

purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of the employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. Ibid.

The Appellate Division has approved the Montvale standards. Bergen Pines Cty. Hosp., D.R. No. 83-8, 8 NJPER 535 (¶13245 1982), rev. den., P.E.R.C. No. 83-76, 9 NJPER 47 (¶14022 1982), aff'd App. Div. Dkt. No. A-564-82T2 (10/18/83).^{3/}

We adopt the Hearing Examiner's analysis that Wheeler does not exercise real authority and discretion to make and effectuate policy. Contrast Gloucester Cty. Freeholder Bd., P.E.R.C. No. 90-36, 15 NJPER 624 (¶20261 1989). Wheeler represents the Dean at meetings. He also makes recommendations about policies and procedures within his area of expertise. But having these duties does not mean that Wheeler possesses and exercises a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuating these purposes.

We next examine the statutory definition of supervisor.

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

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

^{3/} We apply these standards case-by-case, with the exception of police chiefs. Egg Harbor Tp., P.E.R.C. No. 85-46, 10 NJPER 632 (¶15304 1984).

employee organization that admits nonsupervisory personnel to membership....

After a thorough review of the record, we are not convinced that Wheeler is a supervisor within the meaning of the Act. He is not involved in hiring, firing or disciplining of unit employees. Nor is he responsible for the actual evaluation of unit members' performance. Dean Ollio will give serious consideration to Wheeler's input into decisions on personnel in student teaching or field experiences. But Wheeler has no specific evaluative duties, and at the time of the hearing could only speculate about any input he would have in evaluating unit members. See State of New Jersey.

Wheeler once removed a faculty member from a placement because of a complaint from the school district. But even that type of input into other unit members' work sites does not make Wheeler a supervisor within the meaning of the Act. Nor does it create an unacceptable conflict of interest. We recognize that sometimes there may be tensions between those who select worksites and those whose worksites are selected. But those kinds of tensions do not make a person who does not hire, fire or discipline employees a statutory supervisor or require exclusion from a non-supervisory collective negotiations unit.

Accordingly, we conclude that the employer violated subsection 5.4(a)(5) by unilaterally removing Wheeler from Council's collective negotiations unit. If there are or have been substantial changes in Wheeler's duties, the employer is free to file a unit

clarification petition seeking his removal as either a supervisor or a managerial executive.

ORDER

The State of New Jersey (Trenton State College) is ordered to:

A. Cease and desist from refusing to negotiate in good faith with Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO concerning terms and conditions of employment, particularly by unilaterally removing the Director of Professional Laboratory Experiences and Assistant to the Dean from Council's collective negotiations unit.

B. Take this action:

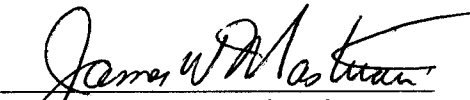
1. Return the Director of Professional Laboratory Experiences and Assistant to the Dean to Council's collective negotiations unit of professional and non-supervisory employees retroactive to January 6, 1989.

2. Negotiate in good faith with Council over terms and conditions of employment of the Director of Professional Laboratory Experiences and Assistant to the Dean.

3. 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: April 19, 1991
Trenton, New Jersey
ISSUED: April 19, 1991



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 refusing to negotiate in good faith with Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO concerning terms and conditions of employment, particularly by unilaterally removing the Director of Professional Laboratory Experiences and Assistant to the Dean from Council's collective negotiations unit.

WE WILL return the Director of Professional Laboratory Experiences and Assistant to the Dean to Council's collective negotiations unit of professional and non-supervisory employees retroactive to January 6, 1989.

WE WILL negotiate in good faith with Council over terms and conditions of employment of the Director of Professional Laboratory Experiences and Assistant to the Dean.

Docket No. CO-H-89-341

STATE OF NEW JERSEY (TRENTON STATE COLLEGE)

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-23

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

In the Matter of

STATE OF NEW JERSEY (TRENTON
STATE COLLEGE,

Respondent,

-and-

Docket No. CO-H-89-341

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the State of New Jersey, Trenton State College committed an unfair practice when it removed the Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education from the professional nonsupervisory unit represented by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-23

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LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Hon. Robert J. Del Tufo, Attorney
General (Melvin E. Mounts, D.A.G.)

For the Charging Party, Barbara Hoerner, Staff
Representative

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On May 17, 1989, the Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice
charge against the State of New Jersey, Trenton State College
("State") with the Public Employment Relations Commission
("Commission") alleging that Trenton State College violated the New
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(5)

("Act").^{1/} The charge alleges that the State engaged in unfair practices when in January 1989 the Council learned that the State had removed the Director of Professional Laboratory Experiences and Assistant to the Dean ("Director/Assistant") from the Council's collective negotiations unit without notice to the Council.^{2/3/}

A Complaint and Notice of Hearing was issued on June 20, 1989, by the Director of Unfair Practices. On June 29 and August 2, 1989 the State filed an Answer and an Amended Answer, respectively. On October 24, 1989, I conducted a hearing, at which the parties examined witnesses and presented evidence. Oral argument was waived. Post-hearing briefs were filed by March 16, 1990.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The State and Council are parties to a collective negotiations agreement effective from July 1, 1986 through June 30,

^{1/} This subsection prohibits public employers, their representatives or agents from: (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."

^{2/} The charge also alleged that the State violated the Act by failing to provide a job description as requested by the Council but this part of the charge was withdrawn. (T6)

^{3/} The transcript of the October 24, 1989 hearing is cited as T. Commission exhibits are cited as C. Joint exhibits are cited as J. Charging party's exhibits are cited as CP and the Respondent's exhibits are cited as R.

1989. This agreement included the title Director of Professional Laboratory Experiences. (T9, J-1) The Council has represented a negotiations unit of the faculty and certain professional staff employed by the College since 1974. (T9)

2. Trenton State College changed the title Director of Professional Laboratory Experiences in January 1989 to Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education (emphasis added) and removed it from the Council's unit. (T10) The Director's generic title is Director III, at range 29; the prior Civil Service title was Director, Professional Laboratory Experiences. In 1986 the College eliminated the position, Assistant to the Dean of Education. In December 1988 the Dean requested the addition of assistant to the Dean duties to the Director title. This request coincided with a change of incumbents in the position.

3. Dr. Robert Gerke occupied the position Director of Professional Laboratory Experiences from April 1973 through December 1988. Dr. Raye Wheeler has occupied the new Director/Assistant to the Dean position since January 6, 1989. (T10)

4. Both Gerke and Wheeler reported directly to Phillip Ollio, the Dean of the School of Education.

5. The Director/Assistant coordinates education majors' laboratory experiences. Laboratory experiences include student teaching, junior and senior experiences in schools, clinics, and hospitals. (T24) He plans, organizes, implements and evaluates all

student teaching and practicum services. He coordinates these programs with other Trenton State College programs and develops effective relationships with outside agencies and institutions. He interprets relevant college policies. (CP-1, R-1) The Director/Assistant maintains a student teacher handbook for students and collects program evaluation data for a three-year experimental model, now in its third year. (T96-97, T118-119)

Both the former and current titles' duties include:

Negotiating with public school districts, day care centers, hospitals and clinics for teaching, practicum and internship experiences for Trenton State College students.

Authorizing the reassignment or withdrawal of student teachers and interns.

Authorizing and preparing payment vouchers for interns, cooperating teachers and practicum personnel.

Scheduling and arranging interviews and visits by college staff and students to public school districts in connection with course requirements.

Providing information about Trenton State College student teaching/intern programs, policies and curricula to schools, hospitals, and clinics.

Researching and conducting surveys to provide data to the Dean on field experiences and education enrollment. (CP-1, R-1)

6. A comparison of the job descriptions of the former Director and the newer Director/Assistant titles shows that the latter no longer has responsibility for reviewing and processing applications for State certification, but has the additional duty of attending meetings of professional organizations. All other duties

in the former description were retained in the Director/Assistant description.

7. The Director/Assistant is working on an expansion and improvement of the relationship between the College and the cooperating schools and other institutions. (T105) He does not have the authority to decide to what extent student teaching, internships and practicum experiences are required in the curriculum. (T25, T30)

8. College supervisors are faculty who supervise students placed in laboratory experiences. The Director/Assistant does not affirmatively select or veto the choice of faculty members for college supervisor positions. His advice to the Dean about the assignment of college supervisors to certain school districts would carry weight. (T37, T98) However, normally such assignments are made by faculty coordinators.

9. Faculty coordinators are faculty who arrange contacts between college supervisors and student teachers. Faculty coordinators, rather than the Director/Assistant, assign college supervisors to particular schools. (T25) The Director/Assistant communicates policy changes to faculty coordinators. (T76) Faculty coordinators are the Director/Assistant's primary source for information about the field program. (T116)

10. An incident occurred wherein the Director/Assistant was asked by a school official not to assign a certain college supervisor to his school. The Director/Assistant communicated this to the faculty coordinator in charge of that college supervisor and

also to the Dean. The college supervisor was not assigned to that particular school. (T92) The Director/Assistant did not know whether that college supervisor was disciplined because of the school official's request. (T45) This type of incident has occurred only four or five times in the last ten years. (T109) The Director/Assistant is expected to investigate and decide whether to honor such requests. The decision not to assign or reassign a college supervisor under these circumstances is clear cut because the College needs to have the continuing cooperation of host schools and institutions and needs to foster good public relations in this area. (T110)

11. The Director/Assistant recommends policies and procedures for the Laboratory Experiences Program to the Dean. These recommendations are given considerable weight. (T97) The Dean approves and directs their implementation. (T64,T67,T68,T73) Most of the laboratory experiences program policies and procedures were developed before Wheeler's tenure as Director and are in a manual which Wheeler will update as necessary. (T76,T77) Wheeler's policy recommendations would not be adopted without review or independent study by Dean Ollio. (T64,T51) Wheeler is currently working on a major project to upgrade the cooperative teacher program. The objective is to develop incentives to improve the college's relationship with these teachers. (T105,T106) Another recommendation Wheeler made was to provide resumes of student teachers to public school districts. (T53) Since Wheeler has only

been in the position for nine months he has recommended few policies and procedures. (T69)

12. The new role of Assistant to the Dean includes representing the college and the Dean at professional organizational meetings and conferences. (T64,65) Examples of such organizations include the New Jersey Association of Teacher Educators; an association of administrators; the New Jersey Association of Colleges for Teacher Education, an association of deans; and the Intercollegiate Council, an organization of professional laboratory directors. (T81-82) The Dean expects Dr. Wheeler to raise questions about issues which may affect personnel issues. The discussions about such issues are information sharing in nature and may result in an organization taking an official position. (T103) These positions may have an indirect effect on Trenton State College's policies and programs. (T103, T104)

13. Wheeler has attended department chairperson meetings for the Dean. He attended a meeting of prospective education majors where faculty unit members were present. At that meeting he presented policies and procedures of the laboratory experiences program. (T68-T69) When Wheeler speaks publicly for the Dean, he clears the content of his statements ahead of time. (T67, T104) To date, the Director/Assistant has not voted for the Dean/College at any organization or department meetings because of his newness in the position. He also has not served as the Dean's representative at State Department of Higher Education meetings, though he will be expected to do this in the future. (T107)

14. The Director has a minor role in evaluating faculty members who supervise student teachers. (T118) The Director does not personally observe and evaluate faculty. (T113) The Dean evaluates faculty. He relies on a list of student teacher visits made; presence of a reason or basis for a student grade; the student's grade; feedback from cooperative teachers, principals, superintendents. Such information may be received by the Director and is forwarded to the Dean. (T114-115) If Dr. Wheeler possesses information about a college supervisor's performance he conveys that information to the Dean. (T92, T94) The Dean would give serious consideration to any information given him by the Director about faculty performance. (T95-96) Because he represents the college in setting up laboratory experiences throughout the state, he is one of the persons who is contacted when a problem with a college supervisor arises. (T37, T38)

ANALYSIS

The Council charges that the State's removal of the Director of Laboratory Experiences and Assistant to the Dean from its unit was a refusal to negotiate with the majority representative. In its defense, the State asserts that it is justified in removing the Director because additional duties assigned to the new incumbent render the title inappropriate for inclusion in the Council's unit because it is now either a managerial executive and/or a supervisor within the Act. Thus,

although raised in the context of an unfair practice charge, the central issues presented here are whether Wheeler functions either as a managerial executive or supervisor within the meaning of the Act.

An employer acts at its peril of committing an unfair practice if its judgment about the exclusion of titles from a unit proves incorrect. Thus, if the State is incorrect about whether the new duties have created a supervisory or managerial position, then it has committed an unfair practice. Passaic County Reg. H.S. Dist. #1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976)(Board held not to have committed unfair practice where it excluded a confidential employee); Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987)(Board committed unfair practice where removed titles were found not to be performing supervisory duties which would have warranted their removal); City of Newark, H.E. No. 88-3, 13 NJPER 621 (¶18233 1987), adopted P.E.R.C. No. 88-24, 13 NJPER 727 (¶18274 1987)(City committed unfair practice when it unilaterally withdrew recognition of police recruits from police bargaining unit).

Initially, I find that the State did not create a completely new position when it added the name "Assistant to the Dean" to the Director's title. The testimony and minimal additions to the written job description support this conclusion. Only the processing of State certification applications was deleted from the position as performed by Gerke, the former incumbent. The new distinguishing duties, participation in meetings with outside

organizations, do not change the character of the position. In fact, Wheeler must clear position statements with the Dean prior to announcing them or answering questions.

Managerial Executive Status

N.J.S.A. 34:13A-5.3 excludes managerial executives from the protections and rights afforded by the Act to public employees.

Under N.J.S.A. 34:13A-3(f) managerial executives are:

persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices....

This definition was applied initially in Borough of Avon, P.E.R.C. No. 78-21, 3 NJPER 373 (1977). There, a lifeguard captain was found not to be a managerial executive although he prepared the beach operations budget, authorized and modified rules and regulations, created the disciplinary system, authorized changes in the workweek, added guards to the payroll in emergencies, participated in management meetings, influenced the Borough's and Mayor's policies, trained and scheduled all guards, managed the beach and supervised guards on a day-to-day basis. The Commission stated:

[T]he term "managerial executive" shall be narrowly construed, and...the relevant National Labor Relations Board precedent...indicates that a wider range of discretion than that possessed by [the lifeguard captain] is needed. [He] was clearly a supervisor and in that capacity could be said to be effectuating management policy, but the Act clearly distinguishes managerial executives --excluded from coverage-- from supervisors--eligible to be represented in appropriate units. Id. at 374. (Emphasis added).

Here, Wheeler is the coordinator of the practicum and student teaching programs. As such he oversees their operation, acts as a liaison to host schools and institutions, and plans modifications to the programs. At present he is charged with improving the College's relations with participating schools and teachers. No evidence was offered which supports that he has the authority to change the direction of these programs or to make changes which widely affect the College's mission. His one area is professional laboratory experiences. He has authority to observe, plan and recommend changes. The one change he implemented, forwarding student teachers' resumes to host schools, is procedural in nature. He is also responsible for monitoring and evaluating these programs but these are administrative or analytical duties, rather than indicative of managerial authority as contemplated by the Act. He appears to have little or no budget authority, and no evidence was produced which indicates he can change rules, regulations, or policies without the Dean's agreement or approval.

An important indicator of the range of his discretion is the existence of a program manual. The student teacher handbook, which contains the policies and procedures of the professional laboratory program, was created prior to his tenure and circumscribes and limits his discretion. Finally, while Wheeler may be expected to handle problems and make decisions without the Dean's authority, to date he has not exercised this authority in a wide

range of policy matters. The testimony and evidence indicates that as to major program policies, the Dean makes these decisions. Effective recommendations are not part of the standard for managerial executives. Avon dictates managerial executives possess a wider range of discretion.

In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507, 508-09 (¶11259 1980), the Commission stated:

A person formulates policies when he develops a particular set of objectives designed to further the mission of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent for reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. Id. at 509. (Emphasis added)

Here, Wheeler does not have authority sufficient to affect broadly the organization's purposes. He does not have authority to decide to what extent student laboratory experiences are required in the curriculum. (T25, T30) Wheeler assists the Dean by recommending procedures. It appears he does not unilaterally determine how policies will be implemented, but rather ensures that standard

operating procedures are followed. Accordingly, I find that he does not formulate policy.

Wheeler's duties involve primarily administrative and coordinative responsibilities. He has some discretion in responding to day to day situations. No evidence was offered regarding the Wheeler's role in collective negotiations or handling grievances.

Montvale states that relative position in the hierarchy is an important factor in managerial status determinations. See, Bergen Pines Cty. Hosp. and Council No. 5, NJCSA, D.R. No. 83-8, 8 NJPER 525 (¶13245 1982), where three titles were held not managerial though they were fourth in the chain of command but had only department-wide, not hospital-wide authority. Similarly, here, Wheeler's policy-making role is limited to the Professional Laboratory Experiences Program in the School of Education.

Supervisory status

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

" . . . nor except where established practice, prior agreement or special circumstances dictate 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."

The Commission has determined that the Act defines a supervisor as one having the authority to hire, discharge, discipline, or to effectively recommend any of the foregoing. "The mere possession of the authority is a sterile attribute unable to sustain a claim of

supervisory status." Somerset Cty. Guidance Center, D.R. 77-4, 2 NJPER 358, 360 (1976). We must review all the circumstances of a particular case to determine whether the employee has and regularly exercises such power. City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987); Cherry Hill Tp. DPW, P.E.R.C. No. 30 (1970). Here, no evidence was presented that Wheeler has hired, discharged, disciplined or effectively recommended the hiring, discharge or disciplining of any employee. He does not select faculty members for college supervisor positions or assign college supervisors to particular schools.

The State asserts that Wheeler's role in evaluating unit employees puts him in an impermissible conflict with those employees. However, the record does not support this. The Director plays a minor role in evaluating Council unit members. While evaluating alone is not one of the statutory criteria, the Commission has considered it as it relates to other actions such as renewal, tenure, promotion and salary. See Watchung Hills Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-116, 11 NJPER 368 (¶16130 1985) and cases cited in H.E. at 18. Evaluations alone do not necessarily create a conflict of interest sufficient to exclude the evaluator from a unit. See, e.g., Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1987).

Here, there were no evaluations in the record. Wheeler may collect some of the data used by Dean Ollio to evaluate faculty members and he may forward information that comes to his attention

and not directly to the Dean. No evidence was presented to show that Wheeler either prepares, discusses or signs evaluations. There is no evidence that Wheeler is in conflict with the other members of the Council's unit because of his role in performance evaluations.

Under all the circumstances of this case, I find that Wheeler is not a supervisor. He has neither the statutorily required power to hire, discharge, discipline or effectively recommend the same nor the type of substantial control of the evaluation process sufficient to require his exclusion from the Council's unit.

A supervisor's role in evaluations can serve as effective recommendations for the statutorily mandated criteria. Data gathering or recommendations for another's evaluations which might then serve as the basis for another's personnel decisions are too far removed from the personnel decisions to create a conflict of interest substantial enough to remove the titles from the unit. Westfield Bd. of Ed., P.E.R.C. NO. 88-3, 13 NJPER 635 (¶18237 1987) Contrast Wilton v. West Orange Bd. of Ed., 57 N.J. 404 (1971).

CONCLUSIONS OF LAW

Accordingly, I conclude that the State of New Jersey, Trenton State College violated N.J.S.A. 34:13A-5.4(a)(5) when it removed the Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education from the unit represented by the Council of New Jersey State College Locals, AFT. The State

acted at its peril when it removed the title from the unit unilaterally. Because I have found that Wheeler's title belongs in the Council's unit, the State violated subsection 5.4(a)(5) when it unilaterally removed the title from the unit. The State should have filed a clarification petition to obtain a determination as to the supervisory and managerial status of the title without running the risk of violating the Act by acting unilaterally. The Commission has established the non-adversarial unit clarification petition as the preferred vehicle to resolve the issues presented here. If in the future there are substantial changes in this Director's duties the State may file a unit clarification petition.

RECOMMENDATIONS

I recommend that the Commission ORDER that the Respondent

A. Cease and desist from:

1. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment.

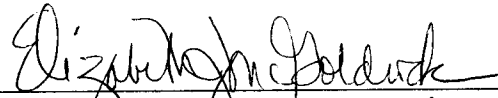
B. Take the following affirmative action:

1. Put the title Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education into the Council's professional non-supervisory unit effective retroactive to January 6, 1989.

2. Upon demand, negotiate in good faith with the Council over terms and conditions of employment of the Director of Professional Laboratory Experiences and Assistant to the Dean.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.


Elizabeth J. McGoldrick
Hearing Examiner

DATED: February 11, 1991
Trenton, New Jersey

NOTICE TO ALL 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 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, particularly by removing the Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education from the Council's negotiations unit.

WE WILL put the title Director of Professional Laboratory Experiences and Assistant to the Dean, School of Education into the Council's professional non-supervisory unit effective immediately retroactive to July 16, 1985.

WE WILL upon demand, negotiate in good faith with the Council over terms and conditions of employment of the Director of Professional Laboratory Experiences and Assistant to the Dean.

Docket No. CO-H-89-341

STATE OF NEW JERSEY (TRENTON STATE COLLEGE)
(Public Employer)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.