

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIVER DELL BOARD OF EDUCATION,  
Public Employer-Petitioner,

Docket No. CU-87

-and-

RIVER DELL EDUCATION ASSOCIATION,  
Employee Organization.

SYNOPSIS

In an interlocutory decision on a request to review a decision of the then Executive Director in a petition for clarification of unit, the Commission reaffirms 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 unit of supervisors and non-supervisors relate to events antedating P.L. 1968, Chapter 303. Applying this holding to the facts in this case, the Commission affirms the findings of fact of the Hearing Officer and Executive Director that such a pre-existing situation exists in this case and that the relationship of the supervisors and non-supervisors from the inception of the unit to the close of the hearing does not reveal a sufficient conflict to warrant the cessation of the mixed unit.

However, the Commission does order the reopening of the proceeding for the limited purpose of investigating the Board's allegation that events subsequent to the issuance of the Hearing Officer's Report and Recommendations have now led to a conflict which does require the division of the combined unit. The Commission points out that its holding in West Paterson was not intended to mean that once having found that circumstances existed, including a pre-Chapter 303 relationship, which warranted a mixed unit, that subsequent events could not be brought to the Commission's attention which might require a reversal of that prior certification. While normally such a showing would be made by commencing an independent proceeding based upon these new circumstances, the Commission will allow the reopening of this proceeding in an effort to afford the employees an expeditious resolution to this already lengthy dispute.

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Appearances:

For the Public Employer-Petitioner, Stein & Rosen, Esqs.  
(Mr. Marc Joseph, on the Request for Review)

For the Employee Organization, Ruhlman and Butrym, Esqs.  
(Mr. Paul T. Koenig, Jr., on the Memorandum in Opposition)

INTERLOCUTORY DECISION ON REQUEST FOR REVIEW

By Decision dated April 6, 1976 the then Executive Director <sup>1/</sup> dismissed the petition in this clarification of unit proceeding (E.D. No. 76-28, 2 NJPER 89). By Order dated June 22, 1976 the Commission granted the motion of the Public Employer-Petitioner, River Dell Board of Education (the "Board"), unopposed by the Employee Organization, River Dell Education Association (the "Association"), for an extension of time within which to file a request for review of the Director's Decision (P.E.R.C. No. 76-47, 2 NJPER 220). Thereafter the Board filed a timely request for review, and the Association filed a timely letter memorandum in opposition thereto. See N.J.A.C. 19:15-2.1 et seq.

<sup>1/</sup> On June 22, 1976 the then Executive Director, Jeffrey B. Tener, was sworn in as full-time Commission Chairman. See N.J.S.A. 34:13A-5.2, as amended by Section 3 of P.L. 1974, c. 123, effective January 20, 1975. Effective immediately thereafter, the Commission approved the elimination of the Executive Director position, and named the Director of Unfair Practices and Representation, Carl Kurtzman, as its designee to perform those functions in unfair practice proceedings and representation proceedings which the Executive Director had theretofore performed. See N.J.S.A. 34:13A-6(f).

The Board urges Commission review on the following grounds:

1. A substantial question of law and policy exists concerning interpretation of the Act and in particular N.J.S.A. 34:13A-5.3 and 6(d);

2. The Executive Director's decision affirming the Hearing Officer's findings of the existence of an "established practice" concerning inclusion of Department Chairmen within the Bargaining Unit and the absence of any "conflict of interest" between the Department Chairmen and the people they supervise was clearly erroneous both on the state of the record and in view of events, including a teachers' strike, which occurred after the close of the hearings, and such error clearly prejudiced the rights of petitioner;

3. That the determination of the Hearing Officer, over the objections of petitioner, to reopen the hearing and take additional testimony some two years after the completion and closing of the hearing resulted in prejudicial error; and

4. That in view of subsequent events there are compelling reasons for the consideration of the Commission's policy with regard to inclusion of supervisors within a bargaining unit together with the employees over whom they exercise such supervision.

The Association opposes review, protesting the Board's "attempt to inject facts which have not been made part of the record herein". With particular reference to the Board's arguments concerning a strike in the fall of 1975, the Association contends that the strike "occurred long after the hearings and briefs in this matter were submitted for decision. These concerns were not considered in formulating the decision, and should not be considered in reviewing the matter." With respect to the pre-strike events passed upon by the Hearing Officer and the Executive Director, the Association argues that the result reached below is supported by the facts and the law.

Based upon a careful consideration of the request for review and the memorandum in opposition thereto, the Commission

determines that substantial legal and factual issues have been raised sufficient to warrant review, and the request for review is accordingly hereby granted. With respect to pre-strike events we feel it appropriate to proceed to the merits at this time.

N.J.S.A. 34:13A-5.3 provides in pertinent part that the "negotiating unit shall be defined with due regard for the community of interest among the employees concerned" and that "except where established practice, prior agreement or special circumstances, dictate the contrary, [no] supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, [shall] have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership." Similarly N.J.S.A. 34:13A-6(d) provides in pertinent part that in representation cases the Commission "shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes...both supervisors and nonsupervisors."

In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971) the Supreme Court passed upon the propriety of including all supervisors in the same unit, regardless of their status with respect to each other. The Court held 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." 57 N.J. at 427. While Wilton did not involve application of the statutory exceptions to mixed units of supervisors and nonsupervisors, the Court did point out that "[a]side from these [exceptions], the nature of the negotiating unit is to be determined generally 'with due regard for the community of interest among the employees concerned\*\*\*'." Id. at 424.

The Commission passed upon the statutory exceptions in light of the Wilton decision in In re West Paterson Board of Education, P.E.R.C. No. 77 (September 14, 1973), modified on reconsideration, P.E.R.C. No. 79 (December 28, 1973). P.E.R.C. Nos. 77 and 79, read together, hold that: the statutory exceptions of "established practice" and "prior agreement" relate to pre-Chapter 303 circumstances, and; upon a finding of established practice and/or prior agreement, the history of the parties' relationship will be examined to determine whether a conflict has been demonstrated so as to render unacceptable the continuation of a mixed unit. As stated in P.E.R.C. No. 77 at page 16: "Wilton considerations provide a frame of reference for identifying those situations where circumstances mitigate against, rather than dictate, the preservation of a mixed unit, i.e. where past experience reveals compromise of interest or significant detriment to the rights of either party, to the employees or segment thereof. Under this approach, neither a finding of established practice, prior agreement, nor an acknowledgement of possible future

conflict would necessarily dispose of the question of the mixed unit's appropriateness. The history of the relationship would have to be examined."

In the instant case, the Board seeks the exclusion of Department Chairmen from an existing unit containing both Department Chairmen and teachers. The Hearing Officer recommended on March 17, 1975 -- prior to the strike upon which the Board now relies -- that these Department Chairmen are supervisors within the meaning of the Act; that there exists a pre-Chapter 303 established practice within the meaning of the Act as interpreted in West Paterson, and; that an examination of the parties' relationship from inception, pursuant to West Paterson, does not reveal a conflict such as to require the cessation of the mixed unit. The Executive Director agreed, finding that the record supports the Hearing Officer's findings of fact, and the Hearing Officer properly analyzed and applied West Paterson. We affirm, substantially for the reasons stated by the Hearing Officer and the Executive Director. We are not persuaded by the Board that our interpretation of the Act and of the Wilton decision, as set forth in our previous West Paterson decisions, should be disturbed. We re-affirm West Paterson for the reasons expressed therein, unnecessary to repeat at length at this time.<sup>2/</sup>

<sup>2/</sup> The Board's objection to the reopening of the hearing, requested by the Association in February 1974, does not persuade us. Primarily, the Board never raised this before the Executive Director, and pursuant to N.J.A.C. 19:14A-4.2(b) should therefore be deemed to have waived the issue. Nevertheless, we point out that the West Paterson decisions were issued after the initial hearing herein, and properly necessitated the reopening of this matter in order to develop facts relevant thereto.

We turn now to the Board's arguments concerning the strike in the fall of 1975. The Board claims that Department Chairmen participated in the strike along with the teachers, and along with the teachers were found guilty of contempt of court for refusal to obey an injunction against picketing and other strike activity and were sentenced to a jail term. The Board argues that "at a time when the department chairmen's services would have been invaluable to the Board in an effort to keep the schools operating, they were instead participating with and engaging in strike activity with the very people they were supposed to supervise." The Board argues that even if there were no conflict prior to the date of the Hearing Officer's decision, the Commission's West Paterson decision "should be modified so that when, as here, an actual conflict injurious to the public interest subsequently arises (e.g. the strike) then it should be the Commission's policy, regardless of whether established practice or any of the statutory exceptions has previously been determined to exist, to again review, upon an appropriate application, the surrounding facts and circumstances to determine if the continuation of the supervisory personnel within the mixed bargaining unit can still be tolerated."

The Board has apparently misread our reasoning in West Paterson. To conclude that a finding of mixed unit appropriateness under West Paterson bars future application to the Commission to show that actual conflict has in fact subsequently occurred, is to posit an illogical result. Clearly that was not our intention in West Paterson, for there we pointed to the history of the parties'

relationship as the most appropriate barometer of the propriety of a continued mixed unit. History by its very definition is not limited to any fixed period of time, and if it can be demonstrated that actual conflict has subsequently arisen, an appropriate application is warranted. Cf., In re Sterling Board of Education, P.E.R.C. No. 80 (February 5, 1974).

As neither the Board's allegations nor the legal ramifications thereof have been subjected to the investigatory process envisioned by our rules, it would be improper for us to comment further at this time. While under different circumstances we might suggest the commencement of a separate proceeding, we conclude that under the circumstances of this case, and particularly the delay heretofore associated herewith, it will best serve the interests of the parties and the affected employees to resolve the Board's claim as expeditiously as is practicable. We will accordingly reopen the proceedings for the limited purpose of entertaining the Board's allegations and legal arguments concerning the strike activities in the fall of 1975, and retain jurisdiction in the interim.

In accordance with the foregoing, it is hereby ordered that the instant proceedings are reopened with respect to the limited issues as aforesaid, and the Deputy Director of Unfair Practices and Representation, Joel G. Scharff, is assigned as Hearing Officer to conduct the investigatory processes relative thereto. The parties are directed to attend a pre-hearing conference on September 8, 1976, at a time and place to be determined by the Hearing Officer,



for the purpose of clarifying the issues and developing stipulations of fact. In the event that the matter can be submitted on stipulated facts without a hearing, the case shall be transferred to the Commission for decision on the stipulated facts and the parties' briefs, which are to be served and filed within twenty-one days after execution of such stipulations.

In the event that there remain unresolved issues of fact which to the Hearing Officer appear to be substantial and material, an investigatory hearing shall be held on September 20, 1976 at a time and place to be determined by the Hearing Officer. The hearing shall be conducted in accordance with the Commission's rules to the extent applicable and except as otherwise stated herein. The parties are to serve and file with the Hearing Officer their post-hearing briefs, and any proposed findings and/or conclusions, within fourteen days after receipt of the transcript. The Hearing Officer is to transmit to the parties, and file with the Commission, his report and recommendations as expeditiously as possible after receipt of the parties' post-hearing submissions. The parties are to serve and file with the Commission any exceptions thereto, and any briefs in support of exceptions, within fourteen days after receipt of the report.

Requests for postponements or adjournments of the pre-hearing conference or the hearing, or for extensions of time within which to serve and file post-hearing or post-report submissions, are to be addressed to the Hearing Officer, who shall not grant the same in the absence of clear and compelling circumstances unless

the same shall have been consented to by both parties. There shall be no oral argument before the Commission unless so ordered by the Commission, either on its own motion or on motion of a party showing compelling reasons therefor.

BY ORDER OF THE COMMISSION

  
Charles H. Parcels, Commissioner

Chairman Tener and Commissioners Hipp and Hurwitz did not participate in this matter.

Commissioners Hartnett and Parcels voted for the Decision. Commissioner Forst was not present.

DATED: Trenton, New Jersey  
August 24, 1976

ISSUED: August 25, 1976