

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

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL  
BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. CU-77-55

FREEHOLD REGIONAL HIGH SCHOOL  
EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a collective negotiations unit represented by the Association to exclude the Department Supervisors and District Supervisors, who are supervisors within the meaning of the Act. The employees in question occupy titles that were created through a Board reorganization. The Association contended that the employees still retained teaching functions, and, therefore, there existed "prior agreement" to continue the inclusion of the employees in the teachers unit. The Director finds that the Association's proposed application of "prior agreement", an exception that permits continued inclusion of supervisors in units with non-supervisors, is at variance with the Commission's definition of that term, which presupposes a pre-1968 negotiations relationship including both supervisors and non-supervisors in one unit. The Director also finds that it is not unusual that supervisors also perform non-supervisory duties; therefore, an exception for "special circumstances" does not apply. The Director also finds that the substitution of a Hearing Officer which occurred in the course of the matter was in accordance with the Commission's rules.

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Petitioner.

Appearances:

For the Public Employer  
Murray, Meagher & Granello, Esqs.  
(Robert Emmet Murray, of Counsel)

For the Petitioner  
Chamlin, Schottland, Rosen & Cavanagh, Esqs.  
(Michael Schottland, of Counsel)

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a negotiations unit represented by the Freehold Regional High School Education Association (the "Association"), hearings were held before J. Sheldon Cohen, a Commission Hearing Officer on August 11, August 18, and September 12, 1977. <sup>1/</sup> At the hearings all parties were given an

1/ It should also be noted that in addition to filing a Representation Petition, the Association filed an Unfair Practice Charge coupled with a request for interim relief. Interim

opportunity to examine and cross-examine witnesses, present evidence and to argue orally. Both parties submitted post-hearing briefs. On October 31, 1977, the undersigned substituted Bruce Leder as Hearing Officer pursuant to N.J.A.C. 19:11-6.4. The Hearing Officer issued his Report and Recommendations on January 23, 1978, a copy of which is attached hereto and made a part hereof. The Association filed combined exceptions and supporting brief to the Hearing Officer's Report and Recommendations on February 8, 1978. The Freehold Regional High School Board of Education (the "Board") has not filed exceptions to the report; and has not filed an answering brief to the exceptions.

The undersigned has carefully considered the entire record in this proceeding and on the facts in this case finds and determines as follows:

1. The Freehold Regional High School Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., as amended (the "Act"), is the employer of the employees who are the subject of this proceeding, and is subject to its provisions.

2. The Freehold Regional High School Education Association is an employee representative within the meaning of the Act

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1/ (Cont'd)

relief was denied by the Special Assistant to the Chairman of the Commission. The Charge addresses the instant subject matter from the point of view of an alleged violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 et seq. The Charge is still pending before the Commission. The instant decision relates solely to the representation proceeding.

and is subject to its provisions. The Association is the recognized exclusive majority representative of a unit of employees, employed by the Board, which includes the following: teachers, media specialists, secretaries, nurses, attendance officers, security guards, head guidance counselors, special service personnel, and guidance counselors.

3. On March 2, 1977, the Association filed a Petition for Clarification of Unit seeking a determination that the titles of building department supervisor, district supervisor, and lead building department supervisor, created pursuant to the Board's December 20, 1976 reorganization decision, should be included in the Association's negotiations unit. It is undisputed that the duties of the aforementioned titles include, but are not limited to, teaching (with the exception of district supervisors) and evaluating the performance of teachers. Uncontroverted evidence, adduced at the hearings, indicates that the evaluations that are conducted by the employees holding the above titles include an effective recommendation concerning the retention or non-retention of non-tenured teachers.

4. The Board's position in this matter is that the employees holding the above titles are supervisors within the meaning of the Act (N.J.S.A. 34:13A-5.3). In the alternative, the Board argues that the doctrine of "conflict of interest", enunciated in Board of West Orange v. Elizabeth Wilton, et al., 57 N.J. 404 (1974), precludes the inclusion of these employees

in the Association's unit.

5. The Hearing Officer concluded that the employees are supervisors within the meaning of the Act, and, in the alternative, concluded that there exists a sufficient conflict of interest to bar the inclusion of the employees in the Association's collective negotiations unit. The Hearing Officer based his recommended conclusions on the record evidence that said employees effectively recommend the hiring of teaching personnel, and, through the evaluation process, effectively recommend the continuation or non-continuation of non-tenured teachers. Further, the Hearing Officer stated that a Clarification of Unit Petition is not the appropriate vehicle to challenge the propriety of the Board's decision to reorganize. Finally, the Hearing Officer found it unnecessary to rule upon the Board's motion for summary judgment, as the recommended decision was consistent with the relief requested by the motion.

6. The Association excepts to the Hearing Officer's Report and Recommendations on two grounds. First, the Association excepts to the undersigned's substitution of a Hearing Officer at the close of hearing. It is alleged that this substitution is a denial of administrative due process, since the substituted Hearing Officer did not have the opportunity to observe the demeanor of the witnesses. Additionally, the Association proffers that the Hearing Officer unduly restricted the meaning of the statutory exceptions of "prior agreement" and "special circumstances",

N.J.S.A. 34:13A-5.3 and (6)(d). The Association asserts that the collective negotiations agreement between the parties recognizes the Association as the exclusive representative of all "teachers." The Association argues that the creation of titles with hybrid status (i.e., teacher/supervisor), coupled with the aforementioned contractual language, satisfies the requirements of "prior agreement" and "special circumstances" within the intendment of the Act.

7. The undersigned has carefully considered the exceptions filed by the Association. With regard to the substitution of a Hearing Officer, the undersigned notes that this action was taken in strict accordance with N.J.A.C. 19:11-6.4. The claimed denial of due process is without foundation. At no point, either in the brief or in the exceptions, does the Association object to any of the factual conclusions reached by the Hearing Officer. Additionally, the Hearing Officer did not render any credibility determinations. In fact, a review of the entire record reveals that the parties to this matter do not dispute the essential facts; rather, they are arguing the legal conclusions that are to be drawn from the facts.

In its second exception, the Association claims that "prior agreement" or "special circumstances" are applicable to the matter herein for the following reasons:

"It is submitted that in the instant matter not only does the prior agreement dictate the contrary, but also there exists special circumstances.

The recognition clause of the Collective Bargaining Agreement between these parties recognizes the association as the exclusive bargaining agent for all teachers within the district. The testimony before the hearing examiner was uncontradicted that the individuals involved will spend approximately one-half of their working day performing teaching functions. Thus, it is submitted that the agreement satisfies the exceptions to the statutory bar set forth above.

Moreover, the type of hybrid position created in this district amounts to the special circumstances which also are exceptions to the non-inclusion rule. The vast majority of individuals involved have been in the past represented by the association, and, in fact, are the subject of the present Collective Bargaining Agreement. They continue to perform many of the functions that they performed prior to the reorganization; yet, because their duties have been glossed with additional functions that are facially supervisory in nature, they have been unilaterally deprived of the rights and benefits afforded by their membership in that unit."

N.J.S.A. 34:13A-5.3 provides that no unit containing supervisors and non-supervisors may be appropriate for collective negotiations unless there exists established practice, prior agreement or special circumstances. The Commission has interpreted the term "prior agreement" as referring to the existence of a written executed agreement between a public employer and employee organization, which includes both supervisors and non-supervisors, and which was entered into prior to the passage of the Act in 1968. In re West Paterson Board of Education, P.E.R.C. Nos. 77 and 79 (1973).

"Special circumstances" has rarely been found. In re New Jersey Turnpike Authority, P.E.R.C. No. 24 (1969), the Commission found that special circumstances were present to warrant the inclusion of craft personnel in a unit including non-craft maintenance personnel. The history of the parties' pre-1968 negotiations relationship indicated that the craft employees and non-craft employees in the maintenance department negotiated as a mixed unit with the Turnpike from 1961 to 1964, until the parties were prohibited from engaging in collective negotiations by court injunction. The Commission was satisfied that had there not been an injunction, the relationship would have been continued. Recently, the undersigned has found that where a clarification dispute is raised after the execution of a collective negotiations agreement and the clarification concerns titles existing prior to the agreement, the situation may present a special circumstance which would warrant, at least until the expiration of the agreement, the temporary continued inclusion of personnel who should rightfully be removed from the unit. In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977). In the appropriate context, the existence of a contract covering the affected personnel would present a special circumstance needed to preserve the stability of the parties' negotiations relationship during the existence and administration of the agreement.

It is apparent that the application of "prior agreement" or "special circumstances" suggested by the Association is at

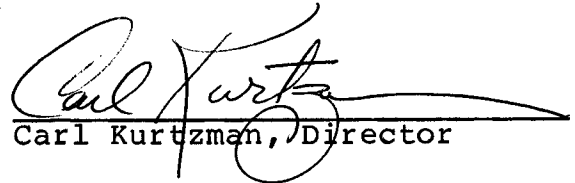


variance with the interpretation and application accorded to the statutory exceptions by the Commission. As noted above, the Commission has determined that the term "prior agreement" was intended by the legislature to preserve the composition of a pre-Act negotiations unit which, if formed subsequent to the date of the Act, would otherwise be inappropriate. The facts herein do not reveal, nor does the Association allege, the existence of a written executed collective negotiations agreement between the parties, prior to 1968, in which the Association was recognized as the representative of both non-supervisory and supervisory personnel. To the contrary, the record reveals that the Association has never represented supervisors in its unit. Further, the Commission has found the existence of a "special circumstance" only in a situation of unusual nature and the undersigned has expanded the use of that term only in limited situations as described in the Clearview matter supra. It is not unusual for supervisors to perform non-supervisory tasks among their other duties. Nor is it unusual to find that a particular employee's duties are primarily non-supervisory in nature and that only a certain portion of those duties are supervisory. In determining the status of employees performing both supervisory and non-supervisory functions, the Commission has adopted a policy of excluding the employee from the unit as a supervisor within the meaning of the Act, unless other circumstances present in the case meet the standards of established practice, prior agreement or special circumstances.

See In re River Dell Regional High School Board of Education, P.E.R.C. No. 77-10, 2 NJPER 286 (1976), aff'g E.D. No. 76-28, 2 NJPER 89 (1976); In re Montville Township Board of Education, E.D. No. 76-43 (1976). This is not the case herein. Therefore, the undersigned finds that the exceptions filed by the Association are without merit.

8. Based on the entire record in this matter, the undersigned finds and determines in agreement with the Hearing Officer and essentially for the reasons cited by him, that the titles in dispute are supervisors within the meaning of the Act and that their inclusion in a unit with non-supervisors is inappropriate. Accordingly, building department supervisors, lead building department supervisors, and district supervisors may not be included in the Petitioner's negotiations unit. <sup>2/</sup>

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

  
Carl Kurtzman, Director

DATED: May 1, 1978  
Trenton, New Jersey

<sup>2/</sup> The undersigned notes that the finding of supervisory status herein is based upon testimony concerning program concept, job descriptions, and the duties assigned to predecessor titles. The instant determination is governed by the principles set forth by the Commission in In re Sterling Board of Education, P.E.R.C. No. 80 (1974), and is subject to reexamination under the circumstances described therein.

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SYNOPSIS

On the basis of the evidence taken at a hearing in a representation proceeding, the Hearing Officer recommends that Department Supervisors and District Supervisors employed by the Freehold Regional High School Board of Education not be included in the existing negotiations unit. The Hearing Officer finds that the employees in these titles will effectively recommend the hiring of teaching personnel and will effectively recommend the continuation or non-continuation of non-tenured teaching personnel. The Hearing Officer also found that there is a substantial conflict of interest between these employees and the employees in the existing unit which bars the inclusion of these employees from the existing unit.

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

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Appearances:

For the Public Employer, Murray, Meagher & Granello, Esqs.  
(Robert Emmet Murray, of Counsel)

For the Petitioner, Chamlin, Schottland, Rosen & Cavanagh, Esqs.  
(Michael Schottland, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on March 7, 1977, by the Freehold Regional High School Education Association (the "Association") seeking a clarification regarding the composition of a unit of employees represented by the Association. The Association is the recognized exclusive representative of a unit of employees which includes the following titles: teachers, media specialists, secretaries, nurses, attendance officers, security guards, head guidance counselors, special service personnel and guidance counselors. The Freehold Regional High School Board of Education, by resolution dated December 20, 1976, created the job titles of Building Department

Supervisor and District Supervisor. Another title created was lead position in the title of Building Department Supervisors. This position is held by one of the Building Department Supervisors. Any reference herein to Building Department Supervisors will include the lead position. No testimony was offered which would necessitate a separate consideration of that title. The position of the Association is that the employees holding these new titles should be included in the existing unit. The Board argues that these employees are supervisors within the meaning of the New Jersey Employer-Employee Relations Act (the "Act").<sup>1/</sup> In the alternative, the Board cites the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404:

"...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 427.

The Board avers that there is a conflict of interest, and therefore, a unit including teachers and these new supervisory titles would be inappropriate.

Pursuant to a Notice of Hearing dated July 8, 1977, hearings were held before Hearing Officer J. Sheldon Cohen on August 11, August 18 and September 12, 1977,<sup>2/</sup> at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both parties submitted post-hearing briefs in this matter.

It should also be noted at this time that the Association has filed an Unfair Practice Charge with the Commission. In the charge, the Association is challenging the Board's action in reorganizing the schools' supervisory structure. This reorganization, alleges the Association, has created a conflict

<sup>1/</sup> N.J.S.A. 34:13A-1 et seq.

<sup>2/</sup> On October 31, 1977, the Director of Representation substituted the undersigned as Hearing Officer pursuant to N.J.A.C. 19:11-6.4.

of interest and such action is contrary to the Act.<sup>3/</sup> By mutual agreement of the parties, the unfair practice charge is being held in abeyance until the decision in this instant clarification of unit petition is issued.

In the opening remarks of the Board, at the hearing on August 11, 1977, counsel for the Board made a motion to dismiss. The Hearing Officer reserved ruling on this motion and a discussion of that motion will appear infra.

On August 18, 1977, during the course of the hearing it came to the attention of the Hearing Officer for the first time that various other organizations existed which might claim a representational interest in the titles which were the concern of these hearings. Thereafter, the Hearing Officer adjourned the hearing on August 18, 1977 to permit an investigation of this matter. At the subsequent hearing date, on September 12, 1977, certain documents were submitted as Commission exhibits. These exhibits included a packet of letters sent by the Commission to the named parties and other various organizations requesting a statement as to claims of representational interest. Another exhibit was composed of responses to the Commission's letters. There were no responses claiming a representation interest by any organization not represented at prior hearings.

On that same hearing date the Association, through counsel, requested interim relief.<sup>4/</sup> The Hearing Officer denied such relief on the basis of lack of authority to order interim relief.<sup>5/</sup>

Upon the entire record in this proceeding, the Hearing Officer finds:

(1) The Freehold Regional High School Board of Education is a Public Employer within the meaning of the Act, is subject to its provisions, and is the employer involved in this proceeding.

(2) The Freehold Regional High School Education Association is an Employee Representative within the meaning of the Act and is subject to its provisions.

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<sup>3/</sup> Tr. I, p. 8.

<sup>4/</sup> Tr. II, pp. 16 and 17.

<sup>5/</sup> Tr. II, p. 18.

(3) None of the employees who are the subject of this petition are managerial executives or confidential employees within the meaning of the Act.

(4) All of the employees who are the subject of this petition are professional employees within the meaning of the Act.

#### Background

For ten years prior to July 1, 1977, the job titles of District Coordinator and Department Chairman existed. These titles were not represented by the Association. The duties of a District Coordinator as testified to by Mr. Robert Winston, a witness for the Association and a District Coordinator, were:

"My duties involved all the schools in the district, the supervision of the students -- of teachers, excuse me -- under me, the development of a budget, curriculum development. Various other acts which would involve the coordination of the entire social studies program for Freehold Regional District."<sup>6/</sup>

Mr. Winston further stated that District Coordinators did not teach students in a classroom situation. The District Coordinator was a twelve-month position. He also testified that as a District Coordinator he evaluated non-tenured teachers a minimum of three times per year and tenured teachers a minimum of once per year. His recommendations as to hiring and firing were used in determining whether or not re-employment would be offered to non-tenured teachers.<sup>7/</sup>

Mr. Winston also testified that prior to July 1, 1977, there also existed the job title of Department Chairman. The difference between these titles centered on the amount of time devoted to their particular jobs. The Department Chairman position was only a ten-month position, but Department Chairmen were paid on per diem basis for work performed during the summer. According to Mr. Winston, in the smaller departments in the school district instead of the position of District Coordinator, there existed the position of Department Chairman. Usually these chairmen did not teach, but Mr. Winston did testify

<sup>6/</sup> Tr. I, p. 16.

<sup>7/</sup> Tr. III, p. 28.

that the Art Department Chairman had taught students in a classroom situation. The duties of supervision and evaluation were similar for Department Chairmen and District Coordinators.

A third position which existed prior to the reorganization was Building Liaison Person title. The individual holding this title was an assistant to the District Coordinator. The major function of this person was to gather information. The Building Liaison Person had classroom teaching responsibilities and received a release period for the conduct of liaison duties.

By resolution dated October 18, 1976, the position of department chairman was changed to coordinator.<sup>8/</sup> By resolution dated December 20, 1976, the positions of District Coordinator and Building Liaison Person were abolished. The new positions created were a ten-month Building Department Supervisor in most subject areas with one position in each subject area being a twelve-month lead position and a ten-month District Supervisor in Art, Music, Home Economics and Special Education.<sup>9/</sup> The duties of the new positions were similar to the duties of the old positions and were reclassified "to conform to statutes concerning the function of a person who evaluates another employee."<sup>10/</sup>

Under this new system, the school day for the Building Department Supervisors was divided into classroom instruction periods and supervisory periods. This division was based on the number of teachers which the Building Department Supervisor was required to supervise. District Supervisors do not have any classroom instruction responsibilities. The job description for these new titles provided:

- "(B) Assists in recruitment, screening, hiring, retention, training and assigning of department personnel.
- (7) Observes and participates in evaluating department personnel pursuant to schedule established by high school administration." <sup>11/</sup>

<sup>8/</sup> Exhibit E-4.

<sup>9/</sup> Exhibit E-5.

<sup>10/</sup> Tr. III, p. 71.

<sup>11/</sup> Exhibit E-6.



By the uncontroverted testimony of Dr. Crespy, employees in the titles of Department Supervisor and District Supervisor would be required to conduct eight observations per year for non-tenured teachers and four observations per year for tenured teachers.<sup>12/</sup> In addition, due to their expertise in a specific subject area, these people "would be conducting the primary selection procedure" in evaluating those teachers applying for a job in the school district for the first time.<sup>13/</sup>

A comparison between the "old" District Coordinators and the "new" Building Department Supervisors was best summarized by Mr. Winston when he testified:

"District coordinator has responsibilities to five schools and they worked out of a central office under the direct supervision of the assistant superintendent of schools. That of a lead supervisor would be responsible for one school, however, (he would) have an advisory capacity to other supervisors particularly in the social studies department in this instance in other schools; however, their major allegiance would be to the single school working under the building principal and the assistant principal of that school. Its functions of evaluation would be similar, but, of course, that of a building supervisor would be restricted alot more than that of a district wide coordinator."<sup>14/</sup>

#### Discussion

The sole issues placed before the undersigned are whether these new titles are supervisory within the meaning of the Act, or whether there exists a conflict of interest as defined by Wilton, supra, between these employees and employees within the Association's unit.

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."

<sup>12/</sup> Tr. III, p. 102.

<sup>13/</sup> Tr. III, p. 77.

<sup>14/</sup> Tr. III, p. 30.

N.J.S.A. 34:13A-6(d) states that "except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors..."

The Commission has determined that the Act, in effect, defines supervisor as one having the authority to hire, discharge, discipline, or to effectively recommend any of the foregoing.<sup>15/</sup>

After careful consideration of the entire record herein, the undersigned concludes that the employees holding these new titles are supervisors within the meaning of the Act.

In uncontested testimony by witnesses for both the Association and Board, the record reveals that the Building Department Supervisors and District Supervisors are and will be responsible for the observation and evaluation of current personnel within the supervisor's department and the interviewing of prospective personnel. The record contains many references to the integral role that Building Department Supervisors and District Supervisors will play in the hiring and disciplining of teachers.

By the testimony of Dr. Crespy, "the Department Supervisor will interview, screen and recommend to the Building Principal his choice of person."<sup>16/</sup>

Dr. Crespy stated that the Department Supervisor would conduct the first interview and those applicants who received favorable recommendations would subsequently be interviewed by a building administrator and a district administrator.<sup>17/</sup> Due to the Department Supervisor's expertise in a particular subject area versus the more general knowledge of an administrator, Dr. Crespy felt it necessary that the Department Supervisor conduct the initial interview to determine an applicant's depth of knowledge in a specific subject area. It appears from the record that an applicant who is not given a favorable recommendation by the Department Supervisor would not receive further consideration for the job.

<sup>15/</sup> In re Cherry Hill Dept. of Public Works, P.E.R.C. No. 30, p. 4 (1970). See also, In re Twp. of Teaneck, E.D. No. 23, p. 5 (1971).

<sup>16/</sup> Tr. III, p. 77.

<sup>17/</sup> Tr. III, p. 104.

Mr. Winston testified that as a District Coordinator (the old title) he wrote evaluation reports which contained recommendations on whether or not non-tenured teachers should continue to be employed. He envisioned that as a Department Supervisor he would continue to make such recommendations.<sup>18/</sup> The testimony of Dr. Crespy agreed with this testimony. His testimony stated that Department Supervisors will "ultimately be making a recommendation dealing with the continuation or non-continuation of employment" of non-tenured teachers.<sup>19/</sup>

Therefore, the undersigned finds these employees to be supervisors under the Act. The evidence clearly supports this finding in that these employees will effectively recommend the hiring of teaching personnel and, through the evaluation process, will effectively recommend the continuation or non-continuation of non-tenured teachers.

In the alternative, the undersigned concludes that there exists a conflict of interest herein sufficient to bar the inclusion of these employees from the existing negotiations unit.

The Supreme Court in Wilton, supra, held that "where the performance of the obligations or the powers delegated by an employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for the inclusion of such supervisor is not present." at p. 425.

The potential for conflict is evidenced throughout the record. In addition to the evaluation of non-tenured teachers, Department Supervisors and District Supervisors will observe and evaluate tenured teachers. These "supervisors"

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<sup>18/</sup> Tr. III, pp. 16 and 17.

<sup>19/</sup> Tr. III, pp. 80 and 81.

will be making recommendation to grant or to withhold increments.<sup>20/</sup> Additionally, they will "have a say" concerning the involuntary transfer of teaching personnel in their respective departments.<sup>21/</sup> Scheduling and particularly teaching assignments will be the responsibility of these "supervisors."<sup>22/</sup> The final decision, though, rests with the building supervisor.<sup>23/</sup> Preparation of the budget is another function of the employees in these titles.<sup>24/</sup> Finally, by the testimony of both witnesses, it appears that these employees will by virtue of day-to-day contact with the teaching personnel in the individual departments be in a position to discipline and to offer constructive criticism.<sup>25/</sup>

The totality of these factors can only lead to the conclusion that the potential for conflict is substantial. These employees in the performance of the above duties will owe a degree of loyalty to the employer. To include these employees in the existing unit would place them in the position of choosing at times between the obligations owed to the employer and the loyalty owed to members of the negotiating unit. This is exactly the situation which the court in Wilton, supra, sought to have avoided. This divided obligation is best illustrated by referral to a provision of the collective negotiations agreement for the years 1976-78. That agreement provides that grievances shall first be discussed with the principal or department head (District Supervisor or Department Supervisor) in an attempt to resolve the matter informally.<sup>26/</sup> Therefore, it

<sup>20/</sup> Tr. III, pp. 81-82.

<sup>21/</sup> Tr. III, pp. 84-85.

<sup>22/</sup> Tr. I, p. 30.

<sup>23/</sup> Ibid.

<sup>24/</sup> Tr. I, p. 29.

<sup>25/</sup> Tr. I, p. 39; Tr. III, p. 115.

<sup>26/</sup> Tr. I, p. 41. See also, Agreement 1976-1978 at pp. 3 and 4 (Exhibit -3).

could happen that a department supervisor would have to defend against a complaint made by an organization of which the department supervisor is a member. The potential for divided loyalties is clearly obvious.

Therefore, assuming arguendo that the employees in these new titles are not supervisors under the Act, the record clearly indicates that these employees cannot be included in the existing unit due to the potential conflict of interest as defined in Wilton, supra.

Finally, an analysis of a clarification of unit petition is necessary. The Association through this clarification of unit petition is challenging the reorganization promulgated by the Board. This is an incorrect use of this type of a petition.

The purpose of a clarification of unit proceeding is to resolve any confusion or disputes concerning unit definition and identification of personnel within a specific unit. This principle was established in In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977):

"The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the

scope of the unit definition and the matter relates primarily to identification. In such cases, for example, the Commission might be asked to determine whether a "road foreman" is a blue collar employee included within the general classification of "blue collar employees" or whether a foreman is a "supervisor," and thereby excluded under the exclusionary terms of a recognition or certification.

Occasionally a change in circumstances has occurred which alters an employee's job functions and may result in the inclusion of such function within the intent of the unit description. Alternatively, a new title may have been created by the employer entailing job functions similar to functions already covered by the unit and therefore warranting inclusion in the unit. In a similar vein, the employer may have created a new operation or opened a new facility, and then staffed the operation or facility with employees who function similarly to currently represented employees. In these circumstances, a clarification of unit proceeding is appropriate.

In other situations, a clarification of unit may result in persons being removed from the unit. This is so because the statutory framework of the Act renders certain negotiations relationships improper. Persons identified as managerial executives and confidential employees are not employees under the Act. In addition, the Act provides that, unless certain exceptions are present, supervisors cannot be in units with non-supervisors; nor may police be in units with non-police employees."at 251.


In the instant matter, a change in title has occurred and a question has arisen concerning the placement of certain personnel. The Building Department Supervisors and District Supervisors cannot be included in the existing unit due to the statutory prohibition (N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d)) and/or due to the finding of a Wilton-type conflict of interest. If the Association is attempting to use this clarification of unit petition to challenge the propriety of the creation of these titles, that is an inappropriate use of the clarification petition and no determination is reached concerning the propriety or impropriety of the action of the Board in the creation of these new titles.

No decision is reached concerning the motion for summary judgment by counsel for the Board. As this decision reaches a conclusion which is consistent with the requested relief of the motion, it is unnecessary to rule on that motion.

RECOMMENDATION

Upon the entire record herein, and for the above-stated reasons, it is the undersigned's recommendation that it is inappropriate to include the Building Department Supervisors, the lead position in that title, and the District Supervisors in the existing unit.

Respectfully Submitted,



Bruce D. Leder  
Hearing Officer

DATED: January 23, 1978  
Trenton, New Jersey