

D.R. NO. 2018-16

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

In the Matter of

ACADEMY URBAN LEADERSHIP CHARTER
HIGH SCHOOL,

Public Employer,

-and-

Docket No. RD-2018-001

ACADEMY URBAN LEADERSHIP
EDUCATION ASSOCIATION,

Intervenor,

-and-

KRYSTAL HARGRAVE,

Petitioner.

SYNOPSIS

The Acting Director of Representation determines that a challenged ballot determinative of the outcome of a secret ballot decertification election among a unit of certificated non-supervisory employees shall be opened and counted, with the designation entered on a Tally of Ballots. Over the public employer's objection, the Director determines that the challenged voter - whose name did not appear on the employer-provided list of eligible employees - is a non-supervisory certificated employee whose inclusion in the petitioned-for unit will not create an impermissible conflict of interest. The Acting Director ordered that the challenged ballot be opened, counted and tallied promptly. Two other challenged ballot voters were determined to be ineligible to vote; one is not a certificated employee and the other, a certificated, non-supervisory employee, was hired after the payroll period for eligibility.

The Acting Director advised of a right to request review, pursuant to N.J.A.C. 19:11-8.1.

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Appearances:

For the Public Employer,
Jackson Lewis, LLP, attorneys
(James Gillespie, of counsel)

For the Intervenor,
Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld Kanef, of counsel)

For the Petitioner,
(Krystal Hargrave, pro se)

DECISION

On December 18, 2017, we conducted an on-site secret ballot election among a collective negotiation unit of about sixty-three "regularly employed non-supervisory Department of Education-certified employees including teachers, nurses, guidance counselors and child study team members" employed by the

the Academy for Urban Leadership Charter School (Academy), pursuant to our Decision directing the election, D.R. No. 2018-13, 43 NJPER ___ (¶ 2017), as amended by our November 27, 2017 letter. Among those excluded from the unit are managerial executives, confidential employees and supervisors within the meaning of the Act. Eligible employees voted on whether they wished to continue to be represented for purposes of collective negotiations by the Academy Urban Leadership Education Association (Association), based upon a timely, valid representation petition seeking to decertify the Association as majority representative (Docket No. RD-2018-001). During the election, three Academy employees whose names did not appear on the Academy-provided list of eligible voters, sought to cast their respective ballots. A Commission election agent permitted the employees to cast "challenged" ballots, pursuant to Commission guidelines. N.J.A.C. 19:11-10.3(e).

A tally of ballots that was provided to the parties recorded a 25-25 tied vote, in addition to the three challenged ballots (that remained sealed and uncounted). N.J.A.C. 19:11-10.3(g). On December 19, 2017, we issued a letter, notifying the parties that the election was inconclusive because the challenged ballots were determinative of the outcome of the election. Accordingly, we advised of an administrative investigation to determine the facts concerning the status of the challenged voters. N.J.A.C. 19:11-

10.3(k). We requested that statements of position and supporting documents be filed by December 27, 2017, setting forth employment details of the three challenged voters, including certifications from those with personal knowledge of facts relevant to their eligibility.

We specifically requested the parties to address the following matters:

1) Cathy Jo Lombardi stated to the election agent that she is a "teacher/supervisor" who began her employment with the Academy in September 2013. Please advise regarding Ms. Lombardi's job duties and responsibilities since she was hired in 2013. Please advise regarding whether Ms. Lombardi is certificated, and if so, please describe her certification. Please advise regarding whether Ms. Lombardi is a supervisor, and if so, when she began supervising, what types of supervisory activities she performs, and what employees she supervises. Please provide any and all specific examples demonstrating the performance of supervisory functions as defined by N.J.S.A. 34:13A-5.3 ("the power to hire, discharge, discipline, or to effectively recommend the same") that you may have to support your position, including but not limited to a Certification from Ms. Lombardi. See also City of Burlington, D.R. No. 2004-7, 29 NJPER 501 (¶158 2003) (Commission requires evidence that supervisory authority is regularly exercised, and not just job description or bald assertion that employee has authority to hire, discharge, discipline, assign, evaluate, or promote other employees).

2) Salim Williams stated to the election agent that he is a paraprofessional who began his employment with the Academy in January 2015. As paraprofessionals do not appear to be included in the unit description, please

advise regarding your position on Mr. Williams' job title, inclusion in or exclusion from the unit, and eligibility to vote in this election.

3) Tatiana Pereira stated to the election agent that she is a teacher who began her employment with the Academy in December 2017. As this start date appears to be outside the period of eligibility for this election, which ended on November 15, 2017, please advise regarding your position on Ms. Pereira's start date, job title and her eligibility to vote in this election.

On December 21, 2017, the Association and the Academy jointly requested an extension of time to January 5, 2018 to submit their responses. The request was approved. A second extension of time was jointly requested by the same parties and approved. Their responses were filed on January 8, 2018.

On January 3, 2018, petitioner Krystal Hargrave submitted a position statement dated December 22, 2017. Hargrave wrote that Lombardi ". . . currently supervises the 7th grade students and staff" for the Academy. Hargrave also wrote that Williams is a paraprofessional and ineligible to vote, and that Pereira was hired after the eligibility deadline of November 15, 2017, and is also ineligible to vote.

On January 8, 2018, the Association filed a letter regarding the three challenged ballots. It concedes that Williams and Pereira are ineligible because Williams is a paraprofessional aide, a title not included the Association's negotiations unit, and Pereira was hired beyond the payroll period for eligibility.

See N.J.A.C. 19:11-10.3(c). The Association contends that Lombardi is “. . . eligible to vote and her vote must be counted.” The Association wrote that Lombardi is a physical education teacher employed by the Academy, and “receives a teacher’s salary plus a stipend which the school calls a ‘supervisor’ stipend” but she “does not perform any of the duties normally associated with supervisory status.”

The Association asserts that Lombardi is assigned to Academy’s Division Street building and has responsibility to “. . .unlock the building, turn on the heat and the lights, unlock the Chromebook cabinets, and stay until everyone has left the building.” She also purportedly “accesses the supplies to provide the staff with what they need,” “greet[s] all visitors,” and “communicate[s] via phone, text or email with the main campus and High Street location, if needed.” The Association disputes that Lombardi “makes managerial decisions.”

The Association further contends that Lombardi “coordinates sub-lessons and attendance,” but “does not approve time off for any employees,” and “[s]taff members have never been advised either verbally or in writing that Lombardi is their supervisor.” The Association asserts that Lombardi, “. . . has no input on employee evaluations,” and although she “attends faculty meetings,” she “does not attend any management meetings.” The Association also asserts that Lombardi “is not responsible to

address student or parent concerns and only relays them to the vice principal Ms. Paz" who is located in a separate building. The Association asserts that Lombardi "does not act as an administrator or supervisor" at faculty meetings, nor does she "play any role with regard to the hiring or firing or disciplining of any employee." The Association argues that although Lombardi has a supervisor title, she does not supervise employees, as "her role is more akin to a supervisor of students."

In its January 8, 2018 submission, the Academy concurred with Hargrave and the Association that Williams is ineligible to vote because he is a paraprofessional aide and that Pereira is ineligible to vote because she was hired on November 29, 2017 (after the eligibility deadline of November 15, 2017). Specifically, the Academy provided copies of its Trustees' meeting minutes showing the roll call approval of Williams' hiring as a "paraprofessional" and of Periera's hiring as a "middle school Spanish teacher" on November 29, 2017.

The Academy argues that Lombardi is a supervisor and ineligible to vote. It asserts that Lombardi is a "Department of Education (DOE) certified Supervisor" who is "employed as the only Supervisor at [the Academy's] Division Street campus." The Academy attached a copy of a New Jersey DOE "Supervisor" certificate issued to Lombardi in July, 2007.

N.J.A.C. 6A:11-5.1(b) requires a charter school to employ or contract with,

A lead person or another person who holds a New Jersey Standard school administrator or supervisor certificate. . . to direct and guide the work of instructional personnel including, but not limited to, the supervision and evaluation of staff and the development and implementation of curriculum.

N.J.A.C. 6A:11-1.2 provides:

'Lead person' means the person who performs the organizational tasks necessary for the operation of a charter school. Where a group of individuals shares the organizational tasks, the person designated as responsible for completion of the tasks required by the rules is the lead person.^{1/}

The Academy asserts that in the 2016-2017 school year, Lombardi was employed as both a physical education teacher and the "building supervisor" in the Division Street building where only physical education classes were taught. Lombardi wrote on her evaluation form for that year that she was the "physical education supervisor." As of the start of the current school year, the Academy writes, Lombardi is "no longer assigned to teach physical education or any other classes" and that her "full-time position is that of Supervisor of the Division Street campus and its new twelve-employee staff and 96 students." The

^{1/} On the Academy's website (aulcs.org), Dr. Norton Collazo is identified as "Lead Administrator." Other titles identified under "Administration" are business administrator, principal and vice-principal.

Academy asserts that Lombardi fulfills the DOE regulatory function at the Division Street campus, and is the only "administrative presence" at the campus.

The Academy writes that Lombardi's "regular responsibilities include ensuring consistent application of the Academy's policies and procedures among the staff and students; assigning teachers and support staff duties; scheduling, conducting and evaluating safety drills; authoriz[ing] payment to outside vendors, etc." It asserts that Lombardi "holds herself out to others as the Division Street campus Supervisor," and "is evaluated as a Supervisor." Thus, the Academy asserts, "[g]iven Ms. Lombardi's position, responsibilities, and the fact that she is the only administrative person at the Division Street campus, it would be an impermissible conflict of interest to include her in the negotiations unit." The Academy also asserts that as the unit consists solely of "non-supervisory Department of Education certified employees," and as Ms. Lombardi is "employed exclusively" as a "DOE-certified Supervisor," she is "by definition excluded from the unit."

The Academy has attached several printed emails (dated in the fall of 2017) from Lombardi to about twelve teachers, assigning them hall duty and lunch duty; requesting their monitoring of student use of bathrooms and computers; directing them to use certain classrooms; and advising of fire and safety

drills. An Academy vice-principal issued an email to Lombardi requesting her to sign a visiting teacher's time sheet.

The Academy also attached its "supervisor evaluation" form apparently promulgated on March 21, 2016 and signed that date by a Christine Lopac, an "Administrator." Lombardi signed the form on the space designated, "teacher's signature" on June 9, 2016. The form charts twenty-two criteria for evaluation under five categories: direct supervision; safe learning environment; program, planning and data driven decision-making; consultation and contribution to the learning environment; and professional responsibilities. Alongside each criterion, the form solicited and Lombardi wrote (her) "evidence of meeting the criteria."

Under "direct supervision," the listed criteria includes "demonstrates effective management of educational programs," (to which Lombardi wrote: "I support all classes held at [Division Street building] and provide assistance, as needed."); "demonstrates effective management of daily teacher/student interactions," (to which Lombardi wrote: "I try to be aware of students' whereabouts and offset altercations, if possible"); "manages and oversees facility scheduling," (to which Lombardi wrote: "I schedule areas needed. . . and communicate about special schedules and closings").

Under the criterion, "implement best practices for speciality area," Lombardi wrote: " I require that all teachers

follow the current best practices for physical education classes and report any discrepancies to me, as soon as possible." Under the criterion, "demonstrates increased knowledge and skills as a Supervisor," Lombardi wrote: "I am striving to do my best, be my best, offer my best to all parties. I have acquired a lot of information since my first year as a supervisor." A significant number of other criteria is concerned with direct student supervision and liaison responsibilities.

ANALYSIS

_____An issue in this matter is whether Lombardi is a supervisor within the meaning of the Act, rendering her title ineligible for inclusion in the certificated non-supervisory collective negotiations unit. If she is not a statutory supervisor, her title and certification as a teacher shall render her eligible for inclusion, justifying our opening and counting her cast ballot, unless, as the Academy contends, her inclusion will create "an impermissible conflict of interest." Challenged voters Williams and Pereira are ineligible to vote in this election; the former is not a certificated employee and the latter was hired beyond the payroll period of eligibility.

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

. . . except where established practice, 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

employee organization that admits non-supervisory personnel to membership.

A determination of supervisory status requires more than assertion that an employee has or will have the authority to hire, discharge, discipline or effectively recommend such action.

The Commission has consistently maintained:

. . . [T]he bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of the indication on the record that the power claimed possessed is exercised with some regularity by the employee in question, the mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status. [Somerset Cty. Guidance Ctr., D.R. No. 77-4, 2 NJPER 358, 360 (1976)]

The Commission looks beyond a title or job description to ascertain the nature of the authority the employee actually exercises; evidence that the authority is exercised with some degree of regularity is required. Somerset Cty. An "effective recommendation" occurs when that "supervisor's" recommendation is adopted without independent review and analysis by a higher level of authority. See Borough of Avalon, P.E.R.C. No. 84-108, 10 NJPER 207 (¶15102 1984), adopting H.O. No. 84-11, 10 NJPER 149 (¶15075 1984). Acting in a lead capacity, or overseeing and directing the work of other employees, without more, does not make an employee a statutory supervisor. Hackensack Bd. of Ed.,

P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1985), adopting H.O. No. 85-3, 10 NJPER 527 (¶15241 1984).

The Academy has not submitted any facts demonstrating or purporting to demonstrate that Lombardi has exercised the power to hire, discharge, discipline or effectively recommend any of those actions at the Academy. The most that may be said of the Academy's proffer is that Lombardi possesses a "bare" authority at the Division Street building to "assign," "schedule," "evaluate," "authorize payment(s)," "direct and guide work," and "develop and implement curriculum," none of which implicate supervisory status under the Act.

The Academy asserts that Lombardi's unique "administrative" status at the Division Street building creates, ". . . an impermissible conflict of interest" with unit employees. I disagree.

The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., mandates that a negotiations unit be defined, ". . . with due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3. Community of interest factors include a common employer, shared goals, common supervision, job duties and similarity in wages, hours and terms and conditions of employment. See State of New Jersey (State College Locals), D.R. No. 97-5, 24 NJPER 295, 297 (¶29141 1996); West Milford Bd of Ed., P.E.R.C. No. 56, NJPER Supp. 218, 219

(¶56 1971). However, a conflict of interest, other than peripheral or de minimus, among petitioned-for titles in an otherwise appropriate negotiations unit negates the requisite community of interest for that unit. West Orange Bd of Ed. v. Wilton, 57 N.J. 417 (1971). In the context of a proposed supervisors unit, our Supreme Court in Wilton explained:

If performance of the obligations of powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of the particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. [Id. at 426]

A substantial actual or potential conflict of interest among employees in a non-supervisory unit may also violate the community of interest requirement. City of Camden, P.E.R.C. No. 52, NJPER Supp. 195 (¶52 1971) and P.E.R.C. No. 55, NJPER Supp. 216 (¶55 1971), aff'd NJPER Supp. 2d 12 (¶14 App. Div. 1972), certif. den. 62 N.J. 70 (1972). In City of Camden, we explained:

One may have various authorities over other employees, still not be a supervisor as the Commission defines that term, yet be disqualified from unit inclusion because by their nature and exercise such authorities preclude a common bond. Seen from another view, such authorities, though not legally supervisory in character, may nevertheless be seen intimately related to service of the management interest, that failure to recognize such in making a unit determination would tend to or would in fact compromise that interest. [Id. at NJPER Supp. 196]

See also, Mercer Cty Welfare Bd. , D.R. No. 83-28, 9 NJPER 298 (¶14138 1983), req. for review den. P.E.R.C. No. 84-56, 9 NJPER 707 (¶14308 1983); Hamilton Tp. Bd. of Ed., D.R. No. 2015-8, 42 NJPER 1 (¶1 2015).

Lombardi's "various authorities" over a dozen unit teachers -- amounting to less than one-quarter of the combined certificated unit -- appears limited to physically directing them in the Division Street building (lunch duty, hall duty, drills, scheduling and classroom assignments) and to being informed by them of "discrepancies" in "current best practices." No facts, including Lombardi's written remarks, indicate that she has evaluated any unit employee(s). In considering the facts provided, one would have to blindly infer that Lombardi will refer any evaluation or unit disciplinary concerns to higher-placed administrative personnel.

These "authorities" fall short of demonstrating a Wilton conflict of interest. See Roselle Park Bd of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1986); Atlantic Cty. Welfare Div., D.R. No. 94-2, 19 NJPER 408 (¶24179 1993) (contested employee's evaluations of performance of unit employees must amount to something more than recommendation of personnel actions); State of New Jersey (Motor Vehicle Comm.), D.R. No. 2007-14, 33 NJPER 177, 181 (¶62 2007), citing New Jersey Turnpike Auth., P.E.R.C. No. 94-23, 19 NJPER 459 (¶24217 1993) (conducting internal

investigations of co-workers preparing investigations of co-workers and preparing investigative reports for a superior who will advise whether a complaint is "substantiated" does not create a substantial actual or potential conflict when independent action is required at a higher level of authority before unit employee can face adverse job action); Hamilton Tp. Bd. of Ed.

Lombardi shares a community of interest with other unit employees (not only teachers) by being employed by the Academy, receiving comparable wages (except for her added stipend), and working similar hours in the same building(s) under similar terms and conditions of employment. Lombardi also has the same supervisors as other unit employees.

The Academy cites Salem Comm. College, P.E.R.C. No. 85-20, 10 NJPER 532 (¶15244 1984), adopting H.O. No. 85-1, 10 NJPER 457 (¶15207 1984) and Bergen Cty Housing Auth., D.R. No. 88-37, 14 NJPER 449 (¶19185 1988). They are inapposite. In the latter case, the petitioning union and public employer did not ultimately dispute the supervisory status and/or managerial executive status of several petitioned-for titles, enabling the Director to determine that they were "excluded" from the unit. In Salem Comm. College, the Hearing Officer determined that of three disputed Directors (Institutional Development; Instruction; Educational Services and Student Services), one was a managerial

executive (Instructional Development), and two were supervisors within the meaning of the Act (Instruction; Educational Services and Student Services), the latter two also engendering impermissible conflicts of interest. The Hearing Officer's determination of the "conflict" was inextricable from his determination of supervisory status of those titles. H.O. at 14 NJPER 460-461. No analagous showing is demonstrated in this case.

For all of these reasons, I find that "supervisor" Lombardi is a DOE-certified non-supervisory employee of the Academy and is included in the petitioned-for unit and that her challenged secret ballot shall be opened, counted, and her designation entered into a Tally of Ballots in this matter. Challenged ballot voters Williams and Periera are ineligible to vote in this matter for reasons previously set forth.

DECISION AND ORDER

Academy employee and "supervisor" Cathy Jo Lombardi is included in the petitioned-for collective negotiations unit. Her challenged ballot is determinative of the outcome of the election in the above-captioned matter and that ballot, having remained unopened and in our exclusive possession since December 18, 2017, shall be opened and counted under election guidelines on January 19, 2018 at 2:00 P.M. in Commission offices at 495 West State

Street, Trenton, New Jersey. A revised, updated Tally of Ballots shall be issued and the results, certified.^{2/}

/s/ Daisy B. Barreto
Daisy B. Barreto, Esq.
Acting Director of
Representation

DATED: January 17, 2018
Trenton, New Jersey

2/ On or about December 22, 2017, the Association filed "objections" to the election. The alleged objectionable conduct includes the Academy's late posting of a Notice of Election in the 8th grade building three days before the election; its alleged granting of work release time to a named teacher to electioneer against the Association during work hours; and electioneering during the election when petitioner's observer gave a "thumbs-up" signal to a voter upon exiting an election booth.

The Academy has denied the allegations, contending that Notices of Election were timely posted at all three "campuses;" that voter participation exceeded 92%; that the named teacher was not provided "release time" to campaign; and that the parties' election observers wore no identification of the party each represented and the "thumbs up" signal after a voter voted is meaningless.

The Association did not request any relief for any or all of the alleged objections. In the absence of any other facts, I find that the Association's objections, if true, failed to upend the "laboratory conditions" needed for a free and fair election. See, e.g., Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by January 29, 2018.