I.R. NO. 87-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANVILLE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-87-326

MANVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee denies the application of the Charging Party for interim relief, namely, for an order upon the Respondent Board to cease and desist from seeking to require that a Department Head, Dorothy Story, resign from her position as a Vice-President of the Association. Story is a Supervisor under the Act. The designee concluded that under the present state of the law even a low-level supervisor such as a Department Head may be covered by Camden Cty. Bd. of Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983) and, thus, be barred from holding office in a non-supervisory unit while employed as a Department Head in a separate supervisory unit. Accordingly, the Charging Party has not satisfied the standard that it establish a substantial likelihood of success on the merits as to the law.

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Appearances:

For the Respondent
Cassetta, Taylor & Whalen, Consultants
(Garry M. Whalen)

For the Charging Party
Klausner, Hunter & Oxfeld, Esqs.
(Stephen E. Klausner, Esq.)

INTERLOCUTORY DECISION AND ORDER

On May 8, 1987, the Manville Education Association (hereinafter the "Charging Party" or the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the Manville Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et

seq. (hereinafter the "Act"), in that[1/] Dorothy Story (hereinafter "Story"), a Department Head in the High School, is a supervisor within the meaning of the Act; the job description for Department Head provides, inter alia, that a Department Head, at the request of the Principal or the Superintendent, interviews candidates for teaching positions and makes specific recommendations, assists the Principal by observing and evaluating teachers through classroom visitations and the completion of the evaluation documents; the Association represents a unit of teachers, secretaries and custodians, which excludes therefrom Department Heads in the High School such as Story; however, Story is included within a unit of Department Heads recognized by the Board in a collective negotiations agreement with the Department Heads Association, of which Story is the Secretary; although Story is within the Department Heads unit, and is Secretary of its Association, she has for some years been the Vice-President of the Association; Story as a statutory supervisor does not have the power to recommend the hiring, firing or disciplining of employees, which authority is vested in the Board, Story being three steps removed from Board level; on May 1, 1987, the Board's Superintendent sent a memo to Story, advising her that her serving as Vice-President of the

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1/ Hereinafter follows the uncontroverted facts elicited at the Interim Relief Hearing on June 15, 1987, infra, as derived from the allegations in the Unfair Practice Charge, a supporting affidavit and an attachment to the Board's response in opposition to the application for interim relief.

Association constituted a direct conflict of interest with her responsibilities as a supervisor in the school district, i.e., he advised her that she serves as the administration's first step of the grievance procedure, carries out of the policies of the Board and evaluates employees; accordingly, the superintendent directed Story to cease and desist from any leadership role in the Association, adding that she was free to grieve this directive under the collective negotiations agreement between the Board and the Department Heads Association; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[2/]

In response to the Charging Party's application for interim relief the undersigned issued an Order to Show Cause on May 8, 1987, returnable June 15, 1987, at which time a hearing on the application was held with both parties present. Based upon the written submissions of the parties, certain stipulations reached at the

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2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (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."

hearing and the oral argument of the parties on June 15th, it is clear that there no dispute as to any of the material facts set forth above.

DISCUSSION AND ANALYSIS

The Applicable Standard

As an example of one of many decisions on interim relief where the applicable standards for the grant thereof are set forth, see City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981). In that case it was stated once again that the test for the grant of relief is twofold: there must be (1) a substantial likelihood of success on the merits both as to the facts and the law; and (2) irreparable harm if the requested relief is not granted.

Commission designees have more recently been admonished to address these standards in the light of the New Jersey Supreme Court decision in Crowe v. DeGoia, 90 N.J. 126 (1982) where the above-stated test is substantially the same, supplemented, however, by an additional requisite, namely, that a court or as here, an administrative agency, must consider the relative hardship to the parties if the requested relief is granted or denied.

It is clear that the Charging Party has satisfied the requisite that there must be a substantial likelihood of success on the merits as to the facts since, as noted several times above, the essential facts are not disputed at this stage of the proceeding. However, there remains the question as to whether or not the standard of a substantial likelihood of success on the merits as to

the law has been satisfied, leaving aside for the moment the matters of irreparable harm and the relative hardship to the parties.

The State Of The Law

Both parties have briefed extensively the applicable law as to whether or not an employee such as Story may, while being an officer and member of a supervisory unit of employees, i.e. Department Heads, also be a Vice-President of an employee organization representing non-supervisory employees.3/

The cases cited by the Charging Party deal only with Commission decisions while those of the Respondent deal with Commission decisions as well as from other public sector jurisdictions and the private sector.

The starting point is Bergen Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 69 (1971), which was a representation case where the substantial issue was whether or not one of several petitioning employee organizations could participate in an election because of the dual position held by one Louise Brizzi, who was President of one of the petitioning organizations (Council 5) at the same time that she was employed as the Superintendent of a Child Welfare Home. As stated in the decision, the question was whether or not this "duality of roles" constituted employer domination of

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3/ The above undisputed facts do not indicate what Story's duties are as a Vice-President of the Association. Query: Does she participate in negotiations on behalf of the Association's unit members? This may have to await a plenary hearing on the subject matter of the Association's Unfair Practice Charge.

Council 5, thus, barring it from participating in a representation election as an employee representative. Based on the facts set forth hereinafter, the Commission concluded that Brizzi's position as President of Council 5 arose from her membership therein and from the internal procedures of Council 5 and "...not from an act of the Employer..." The Commission then stated that under the Act, i.e., the §5.3, there was clearly no basis for the conclusion "...that simply by elevating a supervisor member to the status of officer, the organization's right to represent is nullified..." (Emphasis supplied). Thus, notwithstanding Brizzi's dual functions, Council 5 was deemed an employee representative within the meaning of the Act. Finally, and most importantly, the Commission stated that its conclusion was "...limited to the right of an employee organization in the circumstances described and no inference is intended as to what rights an individual or an employer may have..." (Emphasis supplied).

This holding of the Commission in Bergen Cty., supra, was based upon the following essential facts regarding Brizzi's status as Superintendent: She had no authority to hire, fire, discipline or effectively recommend such action; she was in charge of the day-to-day operations of the Welfare Home, having a staff of 50 employees; she annually submitted a budget request and submitted monthly reports of expenditures and income; she interviewed job applicants but made no recommendations; she had no responsibility for an employee's change in job classification since personnel and pay policies were established by the Freeholders; she could

authorize overtime within guidelines; while she was expected to report employee infractions she made no recommendations on discipline since disciplinary hearings were conducted by the Freeholders. Based on the foregoing facts, the Commission concluded that Brizzi was not a managerial executive, lacking substantial involvement in the formulation and determination of policies designed to achieve the employer's principal objectives.

Again, note that the issue before the Commission in Bergen Cty. was whether the employer had dominated Council 5 by the fact that Brizzi served as both President of Council 5 and as Superintendent of a Child Welfare Home with the duties and responsibilities set forth above. The case at bar arises in an unfair practice context as opposed to a representational context and, thus, the one-to-one applicability of Bergen Cty. to the resolution of the issues presented herein at the interim relief stage is less than clear.4/

A clear case on the issue at hand is Camden Cty. Bd. of Freeholders, H.E. No. 83-13, 8 NJPER 654 (¶13311 1982), aff'd P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). The uncontested facts briefly were that one Mildred DiFante was the President of an employee organization (Council 10), of which the individual charging

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4/ In so stating at this point, the Hearing Examiner is aware of the fact that Bergen Cty., supra, has been cited only once since its issuance in 1971, namely, in fn. 7 of Camden Cty. Bd. of Freeholders, H.E. No. 83-13, 8 NJPER 654 (¶13311 1982), infra.

party was a member, while at the same time DiFante was a Personnel Assistant, that position being the second highest personnel position in Camden County. DiFante, as President of Council 10 and Personnel Assistant of the County, was enmeshed in the grievance procedure and, thus, the rights of the individual charging party in that case were abrogated. While it was not established at the hearing exactly what DiFante's duties were, clearly she held a high-level administrative position with the County while simultaneously serving as President of Council 10. The Hearing Examiner found that the individual charging party had challenged County policy regarding new employees filling vacant positions, and that DiFante, as the County's Personnel Assistant, had applied this policy. This situation undeniably placed DiFante at odds with the interests of County employees such as the charging party. The Hearing Examiner determined that DiFante's actions, in opposing the interests of the charging party, were the actions of a "managerial executive." Numerous decisions from the private sector were cited,[5/] all of which indicated that DiFante's position vis-a-vis the individual charging party demonstrated an inherent conflict in her holding the two positions, supra. The bottom line, affirmed by the Commission, supra, was that DiFante's functions as a managerial executive in the administration of the County's labor relations policies warranted

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5/ See, for example, NLRB v. Bell Aerospace, Co., 416 U.S. 267, 85 LRRM 2945 (1974).

the conclusion that the County dominated and interfered with the administration of Council 10 in permitting DiFante to serve in the dual capacities of Personnel Assistant and President of Council 10.[6/]

The Respondent Board points to such cases as Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 339 (¶12153 1981) to demonstrate the evils in the crossing over of supervisors into non-supervisory units. The Board also, refers to decisions in other public sector jurisdictions on the same issue: see, for example, Village of Pewaukee, 3 NPER 51-12088 (Wisc. 1981) and Broward Co. Sheriff's Dept., 5 NPER 10-14044 (Fla. 1982). The Respondent also cites private sector decisions such as Western Exterminator Co., 223 NLRB No. 181, 92 LRRM 1161 (1976) where an employer violated §8(a)(2) of the NLRA by permitting a supervisor to serve as union president while retaining his supervisory status.

It appears to the undersigned that a distributive reading of the Commission decisions, beginning with Bergen Cty., and the decisions from the private sector and other pubic sector jurisdictions, supra, indicates that the law is less than clear that the Charging Party has demonstrated a substantial likelihood of

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6/ It was in this context that Hearing Examiner Edmund G. Gerber cited Bergen Cty., supra, at fn. 7, making the distinction between a high-level supervisor such as DiFante and that of a low-level supervisor such as Brizzi in Bergen Cty. The undersigned reached the same result, relying on Camden Cty., in City of Union City, H.E. No. 85-52, 11 NJPER 473 (¶16170 1985), aff'd P.E.R.C. No. 86-35, 11 NJPER 593 (¶16209 1985).

success on the merits as to the law. In so concluding, the undersigned notes that Bergen Cty. was adjudicated in a representational context and that the Commission decisions in Camden Cty. and City of Union City involved managerial executives. The Commission may well decide to make a distinction between Bergen Cty., Camden Cty. and City of Union City in a case such as that at bar. As previously stated, it is only appropriate to grant interim relief when a substantial likelihood of success on the merits has been established as to both the facts and the law. While the facts appear to be clear, the state of the law at this point in time does not satisfy the interim relief standard. Thus, the undersigned will recommend that interim relief be denied.7/

INTERLOCUTORY ORDER

For all of the reasons set forth above, the undersigned concludes that interim relief must be denied because the Charging Party has failed to satisfy the standard that it has demonstrated a substantial likelihood of success on the merits as to the law.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Alan R. Howe
Commission Designee

Dated: June 23, 1987
Trenton, New Jersey

7/ Accordingly, the Hearing Examiner does not reach the question of whether the irreparable harm standard has been met nor does he balance the equities as to the relevant hardship between the parties.