P.E.R.C. NO. 88-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUSSEX-WANTAGE BOARD
OF EDUCATION,

Public Employer,

-and-

SUSSEX-WANTAGE CHILD
STUDY TEAM ASSOCIATION,

Docket No. RO-86-32

Petitioner,

-and-

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Intervenor.

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-86-40-165

MARILYN BREG, ET AL.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a representation petition and complaint, based on an unfair practice charge, filed by the Sussex-Wantage Child Study Team Association. The Child Study Team Association seeks to represent the child study team in a separate unit and contends that the Sussex-Wantage Education Association did not fairly represent its members. The Commission finds that the Education Association did not violate its duty of fair representation to the child study team members and the existing broad-based unit should be continued.

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Intervenor.

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-86-40-165

MARILYN BREG, ET AL.,

Charging Parties.

Appearances:

For the Public Employer, Robert Clark, Superintendent

For the Respondent, John W. Davis, UniServ Representative, New Jersey Education Association

For the Petitioner & Charging Parties, Gaetano M. De Sapio, Esq.

DECISION AND ORDER

On September 23, and October 1, 1985, the Sussex-Wantage Child Study Team Association ("Petitioner") filed a Petition for Certification of Public Employee Representative. The petitioner

seeks to represent the five child study team members in a separate negotiations unit. These employees are currently represented by the Sussex-Wantage Education Association ("Association") in a unit of all professional employees of the Sussex-Wantage Board of Education ("Board"). The petition alleges that the Association was unwilling to represent child study team members in grievances or negotiations.

On October 9, 1987, the Board advised that it had no objection to the proposed unit and consented to a secret ballot election.

On October 15, 1987, the Association intervened, pursuant to N.J.A.C. 19:11-2.7. It objects to the proposed unit and does not consent to a secret ballot election, contending that it should continue to represent the petitioned-for employees.

On December 11 and 31, 1985, the members of the child study team filed an unfair practice charge and an amended charge, respectively, against the Association. The charge, as amended, alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2) and (5),[1/] by discriminating against child study team members; not properly

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1/ These subsections prohibit employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (5) Violating any of the rules and regulations established by the commission."

representing them in grievances and negotiations; filing grievances against their interest and not informing them of these grievances. It alleges that the Association sided with the district's special education and preschool teachers against child study team members.

On April 29, 1986, the cases were consolidated and a Complaint and Notice of Hearing was issued. On May 19, 1986, the Association filed its Answer denying the Complaint's allegations. It contends it properly represented the child study team and that the charge is untimely. It also contends that the representation petition should be dismissed.

On June 16 and 17 and November 18, 1986, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On July 24, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-6, 13 NJPER 667 (¶18252 1987). He first concluded that child study team members should be severed from the unit of professional employees because the existing relationship is unstable; the Association had not responsibly represented these employees and had intentionally processed a grievance against their interests and the Association had not notified them of that grievance. He based these conclusions on these factors: (1) a conflict of interest exists between team members and special education teachers because the team members interview and observe teachers and make recommendations affecting their employment; (2) the Association filed a grievance seeking more

duties for the team members and failed to notify them of the adverse impact the grievance could have on their workload; (3) the Association president refused to meet with team members to discuss their dispute with special education teachers, instead siding with those teachers, and (4) the Association officers attended an "Advisory Council" meeting and criticized team members. Based on these factors, the Hearing Examiner concluded that "severance is necessary here to protect the interests of team members and to enable the Union to eliminate the divisiveness within the unit." 13 NJPER at 673. He also cited the Association's failure to propose demands requested by team members in negotiations and the Board's willingness to consent to a separate unit as additional factors supporting severance. He recommended a secret ballot election among team members.

The Hearing Examiner then considered the Complaint. He found the unfair practice charge to be timely because it related back to the filing of the representation petition, which included the same allegations. He then concluded the Association breached its duty of fair representation to the team members and thereby violated the Act when it: (1) failed to attempt to resolve the problems between team members and special education teachers; (2) sided with the special education teachers, and (3) pursued to arbitration a grievance seeking additional duties for team members and did not notify the members of the grievance. As a remedy for these violations, he recommended a cease and desist order and a posting.

On August 21, 1987, after an extension of time, the Association filed exceptions. It contends the Hearing Examiner erred in finding that: (1) the unfair practice charge was timely; (2) a conflict of interest exists between the child study team and other employees; (3) the Association did not fairly represent child study team members, and (4) the Association should no longer represent the child study team.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-23) are accurate. We adopt and incorporate them here.

This is a combined unfair practice and representation case. The matters have been consolidated because there are common facts: the duty of fair representation unfair practice allegations may also be relevant to whether the unit should be redefined. See Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971). But as we have recently emphasized, that the incumbent organization may have breached its duty of fair representation does not necessarily mean the employees must be severed from the existing unit. Passaic Cty., P.E.R.C. No. 87-73, 13 NJPER 63 (¶18026 1986). Rather, in cases of this kind we must be careful to distinguish between the two proceedings. In the unfair practice context, our obligation is to determine whether the majority representative has violated the Act. N.J.S.A. 34:13A-5.4(b)(1). In the event we find a violation, we order the violator to cease and desist and "take such reasonable affirmative action as will effectuate the policies of this Act."

N.J.S.A. 34:13A-5.4(c). Only in rare cases would this relief altering an established unit's composition. As we just said in Passaic:

> Our policy has been, and experience has confirmed, that under most circumstances broad-based units best serve the statutory goal of promoting permanent public employer-employee peace and the health, welfare, comfort, and safety of the people of New Jersey, N.J.S.A. 34:13A-2, and that undue fragmentation of units is to be avoided. Thus, in one of our earliest cases, State v. Prof. Ass'n of N.J. Dept. of Ed., P.E.R.C. No. 68 (1972), we dismissed a representation petition seeking to exclude registered nurses from a state-wide unit of professional employees. The Supreme Court affirmed this determination. 64 N.J. 231 (1974). See also Hudson Cty., P.E.R.C. No. 84-85, 10 NJPER 114 (¶15059 1984). [13 NJPER at 65]

Thus, finding an unfair practice will only warrant severance under the unusual circumstances that the relationship is so unstable and the majority representative has so consistently failed to provide responsible representation, that negotiations would most likely produce instability rather than harmony. This, of course, does not mean that charging parties are without a remedy. Rather, it only means that a remedy redefining an appropriate negotiations unit would, absent compelling circumstances, generally not "effectuate the policies of this Act." This is especially true where a severed unit would ordinarily be considered to be inappropriate based on traditional standards of unit determination. Therefore, in cases of this kind we start with the unfair practice allegations. If a violation is found, we then decide whether the violation warrants

severance based upon our representation principles and our obligation to determine the appropriate negotiations unit.

The unfair practice charge alleges that the Association violated its duty of fair representation towards the child study team members. Thus, we must decide whether it acted arbitrarily, discriminatorily or in bad faith. Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984).

The charging parties first allege that the Association violated the Act when it filed a grievance asserting that the Board did not assign non-teaching duties "as equally as possible" to all teaching staff members. The Association specifically stated, in its grievance, that child study team members had not been assigned non-teaching duties. We do not believe this action violated the Act. The Association cannot be found to have acted unlawfully by policing the contract and insuring that assignments are made on an equitable basis. Nor do we believe that the mere fact that child study team members were mentioned establishes a violation. A union, in carrying out its collective responsibilities, sometimes must take actions which affect individual members differently. For instance, a grievance that alleges that seniority was not followed for one employee would necessarily affect a junior member of the unit. But this does not mean that the junior member had his rights violated. See AAUP (Donahue), P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985). Nor do we infer, that the grievance was "deliberately filed to harass team members" because the grievance mentioned only team

members. The Association was aware that team members had not been receiving assignments. Filing a grievance to rectify a perceived violation of the contract, under these circumstances, does not violate the Act. Finally, we stress that the grievance was not frivolous; rather, it was sustained, in part, by the Superintendent who directed that building principals "make non-teaching assignments that fall outside the defined workday to be made on an equal basis." This determination was sustained at arbitration. Nor, under the circumstances, do we believe that not formally notifying team members of the grievance violated the Act. The members were notified by the Superintendent and were present and testified at the arbitration hearing. The Association did not withhold this grievance information. Rather, it was announced at union meetings and mentioned in the Association's newsletter. Therefore, we need not decide whether the notice requirements in Saginario v. Attorney General, 87 N.J. 480 (1981) are applicable, although we doubt whether receiving a duty assignment would adversely affect one's employment interests. See Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987).

Team members have also alleged that the Association's siding with special education teachers violated the Act. We agree with the Hearing Examiner that Bergensten's testimony that the Association took no part in this dispute was not plausible. Rather, the record reveals friction between these two groups. Uncertainty about the team's role in the classroom apparently caused that

friction. Further, we find that the Association had a role at the March 27, 1987 meeting and that Bergensten and other Association officials took the side of the special education teachers at the Advisory Council meeting. The Hearing Examiner thus concluded that "the [Association] had the responsibility to resolve the differences between team members and special education teachers as a neutral." 13 NJPER at 673. But the Act does not require such a lofty and unrealistic view of the Association's role. The Association has an obligation to act in good faith. It does not have an obligation to do whatever one faction demands or to decline to act simply because one faction might suffer. That would paralyze the Association from discharging its statutory responsibility.

In this case, the Association met with the special education teachers. It then brought the dispute to the Advisory Council, an informal group established to resolve disputes outside of the formal collective negotiations context. The team was also at the Council meeting and presented its position. In short, the Association recognized that a problem existed between two unit factions; it investigated the problem's cause and it brought the problem to the attention of the Advisory Council. The team established only that it disagreed with how the Association attempted to resolve the dispute. It did not show that the Association violated the Act.

The final allegation is that the Association violated its duty of fair representation by not proposing a twelve-month school year, additional vacation or sick leave benefits for the team members. The team members requested these proposals because its members often worked during the summer. Under the contract, employees working additional days in the summer received a per diem rate. The Association reasonably declined and instead presented proposals which would benefit, to the extent possible, all rather than some of its members. This does not violate the Act. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976).

For all of these reasons, we find that the Association did not violate its duty of fair representation to the team members. Therefore, we dismiss the Complaint.

The foregoing all but resolves the representation proceeding. The broad-based unit has a long history of collective negotiations. It has been an appropriate unit and continues to be so. Of course, there have been differences, sometimes heated, among unit members. But this does not mean that a negotiations unit of only child study team members is appropriate under our Act. Judicial precedent, from the inception of our Act, has been to the contrary. State v Prof. Ass'n of N.J., Dept. of Ed., 64 N.J. 231, 258 (1974). See also Camden Bd. of Ed., P.E.R.C. No. 87-53, 12 NJPER 847 (¶17326 1986) (psychologists should be in the unit with other child study team members in a unit of professional employees).

In recommending severance, the Hearing Examiner relied on the Board's willingness to consent to a separate unit. That, however, cannot be dispositive. We must decide which unit will best serve the Act's purpose. Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 416 (1971); Town of W. New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987). Finally, the Hearing Examiner also found a conflict of interest because child study teams had the responsibility to insure that individual education programs be properly implemented. These teams would occasionally, and as a last resort, advise the principals of teachers that had not properly implemented the plans. We do not believe this factor warrants severance. The team teachers are not supervisors and have no direct role in evaluating teachers. The record establishes only one instance where a team recommended that a teacher not receive tenure. That recommendation, however, was not followed by the Board of Education.

ORDER

The representation petition and unfair practice complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

H.E. NO. 88-6

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

In the Matter of

SUSSEX-WANTAGE BOARD OF EDUCATION,

Public Employer,

-and-

SUSSEX-WANTAGE CHILD STUDY TEAM ASSOCIATION,

Petitioner,

Docket No. RO-86-32

-and-

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Intervenor.

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-86-40-165

MARILYN BREG, ET AL,

Charging Party.

SYNOPSIS

In a consolidated matter a Hearing Examiner of the Public Employment Relations Commission recommends that the Commission approve a severance petition for a unit of Child Study Team employees. The Hearing Examiner found that the Commission's severance standards were met, that the incumbent union provided irresponsible representation and that the existing unit structure was unstable. The Hearing Examiner recommended that a secret ballot election be directed.

The Hearing Examiner further recommended that the Commission find that the Sussex-Wantage Education Association violated §5.4(b)(1) of the New Jersey Employer-Employee Relations Act by failing to fairly represent Child Study Team employees, by discriminatorily filing a grievance against the employment interests of Team employees, and by failing to adequately notify Team members of the grievance.

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

H.E. NO. 88-6

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

In the Matter of

SUSSEX-WANTAGE BOARD OF EDUCATION,

Public Employer,

-and-

SUSSEX-WANTAGE CHILD STUDY TEAM ASSOCIATION,

Petitioner,

-and-

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Intervenor.

SUSSEX-WANTAGE EDUCATION ASSOCIATION,

Respondent,

-and-

MARILYN BREG, ET AL,

Charging Party.

Docket No. RO-86-32

Docket No. CI-86-40-165

Appearances:

For the Public Employer, Robert Clark, Superintendent

For the Respondent, John W. Davis, NJEA
Uni-Serv Representative

For the Petitioner & Charging Party
Gaetano M. DeSapio, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

A Petition for Certification of Public Employee Representative (RO-86-32) was filed with the Public Employment

Relations Commission (Commission) on September 23, 1985 and amended on October 1, 1985 by the Sussex-Wantage Child Study Team Association (Petitioner) seeking to sever the Child Study Team (Team) members who are employed by the Sussex-Wantage Board of Education (Board) from the existing teachers unit represented by the Sussex-Wantage Education Association (Respondent or Intervenor or Union) and to represent them in a separate negotiations unit.[1/]

An Unfair Practice Charge (CI-86-40-165) was filed with the Commission against the Respondent by Marilyn Breg on behalf of herself and the other Team members (Charging Parties) on December 11, 1985 and amended on December 31, 1985, alleging that the Respondent violated subsections 5.4(b)(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[2/]

1/ The amended petition inadvertently had a Commission date stamp on it as being filed on September 31, 1985. Since there are only 30 days in September I find that the amended petition was actually filed on October 1, 1985.

2/ These subsections prohibit employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; and (5) Violating any of the rules and regulations established by the commission."

The Child Study Team consists of two learning consultants, one social worker, and one psychologist. They are currently represented for collective negotiations by the Intervenor in a unit including all certified employees of the Board including teachers, librarians and nurses (J-1, J-2). The Petitioner seeks to sever the Team from the Intervenor's unit and represent employees on the Team in a separate unit. The Petitioner alleged that the Intervenor was unwilling to represent the Team in negotiations and grievance matters.

By letter of October 4, 1985 Board Superintendent Robert Clark indicated that the Board had no objection to the Petition, and he expressed the Board's willingness to consent to a secret ballot election in the petitioned-for unit. By letter of October 7, 1985 the Intervenor refused to consent to an election.[3/] The Intervenor argued that it has represented the Team in negotiations and in the processing of grievances.

The Charging Parties, who are the employees holding the Team positions which are the subject of the Petition, alleged that the Respondent failed to fairly represent them in the exercise of their protected rights. The Charging Parties alleged that the Respondent filed a grievance against their interest, and did not

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3/ The October 4 and October 7 letters were not admitted into evidence, but I have taken administrative notice of those documents pursuant to N.J.A.C. 19:11-2.6 because they were obtained during the investigation of the Petition.

represent their interests in negotiations. The Charging Parties include Marilyn Breg and William Debiec, learning consultants; Donna Cohrs, social worker; and Avanente (Van) Tamagnini, psychologist.

A Complaint and Notice of Hearing and an Order Consolidating Cases was issued on April 29, 1986. The Respondent filed an Answer to the Charge on May 19, 1986 denying any violation of the Act. The Respondent also argued that the Charge was untimely filed.

Hearings were held in these matters on June 16 and 17, 1986. By letter of July 2, 1986 filed on July 7, 1986 (C-3) the Charging Party-Petitioner moved to reopen the hearing to present what was alleged to be newly discovered evidence. On July 30, 1986 the Respondent-Intervenor objected to reopening the hearing (C-5). On October 9, 1986, the Charging Party submitted an affidavit in support of its motion (C-6), and on October 17, the Respondent again objected to reopening the record (C-7). By letter of October 20, 1986, I granted Charging Parties' motion to reopen the record (C-8), but limited consideration of the evidence to the Petition, not the Charge. The additional hearing was held on November 18, 1986.[4/]

4/ The transcript from June 16 will be referred to as TA, June 17 as TB, and November 18 as TC. The cover page of TC recorded the date of that hearing as Tuesday, November 16, 1986. November 16, however, was a Sunday. The hearing was held on Tuesday, November 18.

Both parties filed post-hearing briefs, the last of which was received on February 10, 1987.

Upon the entire record I make the following:

FINDINGS OF FACT

1. The Board is a public employer within the meaning of the Act and is the employer of the employees who are the subject of the Petition. Currently there are only two units of Board employees: the Intervenor's unit and a unit of teacher aides (TA204).

2. The Intervenor and Petitioner are employee representatives within the meaning of the Act.

3. The employees comprising the Charging Party are public employees within the meaning of the Act and are the employees involved in the Petition.

Conflict of Interest

4. The Team is responsible for classifying students who have special needs, and for developing an individualized educational program (IEP) to address the special needs of each student requiring their assistance. Each such student is assigned to a special education teacher.

The Team is also responsible for making certain that each IEP is properly implemented. A Team member is assigned to manage each particular case, but any other Team member may also become involved in making certain that an IEP is properly implemented (TA33).

In managing the IEP's, Team members often observe students and teachers in the classroom (TA33). In performing that function Team members have determined that some special education teachers have not properly implemented the IEP's (TA68-TA69, TA140-TA141). In those instances where special education teachers have not properly implemented IEP's, the Team members have reported teachers to the school principal (TA34-TA35, TA38, TA70, TA141). Team members have also reported teachers to Superintendent Clark (TA158), who was also the Coordinator of the Child Study Team until July 1986 (TA70, TC23-TC24).

Some of the observations (for IEP purposes) by Team members of special education teachers have resulted in recommendations affecting the teachers' employment in the district. During the 1984-85 academic year, for example, Dr. Van Tamagnini, the Team psychologist, had often reported to the principal that teacher Sharon O'Brien had not been properly implementing IEP's (TA141-TA143). Tamagnini's action was a significant factor in causing the principal and superintendent to recommend to the Board that O'Brien's employment not be renewed (TA141-TA143, TA159-TA160). But the Board did not adopt their recommendation (TA143). Tamagnini further testified, however, that as a result of his recommendation another teacher, Mr. Coat, was reassigned the following school year (TA124, TA145, TA162-TA164).

5. The record shows that at least two Team members have participated in interviewing candidates for teacher positions and

have made hiring recommendations to school principals as a result of such interviews (TA145-TA146; TA165-TA166; TA205). Superintendent Clark testified that although the principals are primarily responsible for evaluating teachers (TC80), a principal has asked a Team member to observe a teacher on his (the principal's) behalf (TC79). Clark also testified that special education teachers have resisted Team members in the implementation of some IEP's (TA207), and he believes that there is a strained relationship between the teachers and the Team members (TA207). Clark further testified that the Board was not opposed to the severance petition filed by the Petitioner (TA220).

The Grievance

6. Partly as a result of the conflict that existed between special education teachers and Team members, the Respondent, on December 18, 1984, filed a grievance against the Board alleging a violation of Article 8, Para. B of the collective agreement between the Board and Respondent. Article 8, Para. B of the 1982-85 agreement (J-2) provides:

> All instructional employees are to accept teaching assignments as given by the Superintendent, and perform such additional duties as assigned by the building principal. These duties are to be distributed as equally as possible among the teaching staff.

The grievance filed by the Respondent was specifically directed at the Child Study Team members. The grievance stated in pertinent part that:

> Article VIII paragraph B of the current contract is not fully upheld in that non-teaching duties are not

> assigned as equally as possible to all teaching staff members. A specific case in point is that those members of the teaching staff assigned to the child study team are not assigned non-teaching duties.

The Written Grievance asked as a remedy:

> The S.W.E.A. asks that the Superintendent direct the principals of each building to make non-teaching duty assignments on an equal basis and specifically direct that these assignments include members of the child study team based on a ratio comparative to the time each individual spends assigned to a particular building.

The Respondent's officers did not advise Team members of the grievance nor explain to them that the grievance specifically referred to the Team and could adversely impact on them (TA54, TA154). The Superintendent informed Team members of the grievance and that it referred to them (TA54, TA108).

The grievance was denied at the first step and proceeded to the Superintendent at the second step. The Superintendent first discussed the grievance with Respondents' representatives and informed them that he thought that the grievance should be directed to a broader group than just the Team members because he believed the clause in question covered more people than just the Team, and he specifically mentioned nurses and possibly librarians (TA202, TA218). Despite the Superintendent's suggestion, however, the grievance continued to be directed at only the Team members (TA203, TA218).

The Superintendent then issued a decision primarily denying the grievance, but clarifying when non-teaching duties may be assigned to all employees. He concluded that Team members are not

scheduled in the same way as teachers and have a different workday which makes them unavailable for non-teaching duties during the contractually defined workday. He decided, however, that since all personnel are available for non-teaching assignments that fall outside the workday, principals should make such (outside the workday) assignments on an equal basis. The Respondent appealed the Superintendent's decision to the Board which concurred in his decision.

The Respondent then filed for arbitration. The arbitration hearing was held on June 13, 1985. Breg and the other Team members appeared at the hearing and Breg was called as a witness by the Board (TA109). She was cross-examined at that hearing by John Davis, the Respondent's UniServ Representative, and when--at the instant hearing--she was asked about the tone of Davis' questions at the arbitration hearing, Breg responded: "Not as a friend and not as my representative, that's for sure." (TA55)[5/]

The arbitrator upheld the decision rendered by the Superintendent and issued his award (C-1A) on July 1, 1985. What was particularly significant about the arbitrator's decision was that based upon the wording of the grievance and upon the way the Respondent presented its case during the arbitration, he agreed with

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5/ Davis did not testify in this matter and there was no evidence to contradict Breg's testimony about the tone of his questions. I therefore credit Breg's testimony to show that Davis did not question her in a manner she would have expected from her union representative.

the Superintendent that the grievance was directed only at the Child Study Team members. In the first paragraph of his discussion the arbitrator held:

> It became clear during the processing of the grievance prior to its submission to arbitration, starting with the proposed remedy asked for by the Union in the written grievance, and again during the course of the arbitration hearing, that the Union's complaint had to do only with its claim that the Child Study Team members were not being assigned the "additional duties"...,(C-1A)

The arbitrator also concluded that the Respondent had failed to prove that the Superintendent's directive at step two of the grievance had not been implemented.

Trudy Bergensten was president of the Respondent at the time the grievance was filed and remained president until June 30, 1985 (TB95, TB104). Bergensten testified that at the time the grievance was filed she was unaware that the Team was specifically mentioned in the grievance, and that she did not learn of that until just before the arbitration hearing (TB90, TB95-TB96). Bergensten also testified that by filing the grievance the Respondent was seeking assurances that assignments would not only be given to classroom teachers, but anybody including the computer person (TB98). I do not credit her testimony.

Bergensten's testimony that she did not know that the Team was mentioned in the grievance until just before the arbitration is not believable. Bergensten testified that she was familiar with the background of the grievance and that the grievance chairperson reports to the union executive committee of which she was a member

(TB89-TB90). Given the fact that she knew that a grievance was filed, knew of the "background" of the grievance, and given my finding that the grievance was intentionally directed at the Team, I can only conclude that Bergensten knew from the start that the grievance mentioned the Child Study Team.

I similarly reject Bergensten's testimony that the Respondent, by filing the grievance, was only seeking a fair distribution of assignments to anybody including the computer person. The grievance specifically listed the Child Study Team and sought additional assignments for Team members. No other particular title or group of employees (including the computer person) was listed in the grievance. The Superintendent specifically suggested to the Respondent that it broaden the grievance to cover nurses and librarians but the Respondent did not do so. Its failure to broaden the grievance to employees besides Team members demonstrated the Respondent's intent to limit the grievance to Team members.

Both Breg and Tamagnini testified that after the arbitrator's decision they did not receive additional after-hours non-teaching assignments (TA112, TA177). But there was no showing that there had been an imbalance of after-hours non-teaching assignments prior to the grievance or arbitration award, or that any after-hours non-teaching assignments were given to any teacher(s) after the arbitration award. I can only infer therefrom that there had been no imbalance of after-hours non-teaching assignments prior to the filing of the grievance. Based upon the above facts, I conclude that the Respondent's only purpose for filing the grievance

was to force the Board to give additional assignments to Team members.

Requests for Assistance

7. As a result of the conflict that existed between special education teachers and Team members, and as a result of the grievance filed in December 1984, rumors apparently began to circulate in early 1985 about the relationship between the special education teachers and Team members. On March 19, 1985, Breg discussed the matter with Bergensten and asked for her assistance as Union president to set up a meeting to discuss the problem (TA40, TB23). Bergensten responded that she did not believe that it was a Union matter but that she would get back to her (Breg)(TA40, TB23, TB63). Two days later, March 21, Breg again asked for Bergensten's assistance in dealing with the rumors (TA40, TB23), and Bergensten replied that by then Breg should have worked out the problems (TA40, TA43).

Prior to the March 21 meeting, however, Bergensten had discussed the matter with several teachers who suggested that there be a meeting with special education teachers to discuss the problems with the Team (T25). When Bergensten met with Breg on March 21 she (Bergensten) knew of the scheduled meeting with the special education teachers (TB65), and she informed Breg of the meeting (TB64-TB65). Breg requested that Team members be allowed to attend the meeting with special education teachers (TB27). But rather than use her influence as Union President to assist Breg, Bergensten

responded that she did not believe that it was a Union matter and she told Breg to ask the special education teachers (TB27).

The meeting of special education teachers was held on March 27, 1985. The Team members were not invited and were not in attendance. Bergensten and other Union officials were in attendance (TB66-TB69).

On March 28, 1985 Breg again met with Bergensten and requested her help as Union president in arranging a forum to resolve any problems with the teachers (TA42-TA43, TA88). Bergensten refused to help and told Breg that the Team had had sufficient time to work things out (TA43, TA88). Breg explained to Bergensten that no teachers had raised concerns with her and Bergensten replied that: "I don't believe you." (TA88)[6/] Then Bergensten informed Breg that the Union intended to take the matter (regarding the Team) to the District Advisory Council (TA44, TA89).[7/] When Bergensten told Breg of the Advisory Council

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6/ Bergensten testified that her conversation with Breg became quite heated (TB28). When she was asked on direct examination whether she used the words, "I don't believe you," she responded, "I don't think I did." (TB28). Bergensten's answer did not deny that she made the remark; it only shows that she could not remember. Breg, however, was certain that Bergensten had made the remark and I credit Breg.

7/ The District Advisory Council was created by agreement of the Board and Respondent Union outside the realm of the collective agreement, presumably to deal with problems that were not inherently negotiable. The Council was composed of six teachers chosen by the Union, three principals and the Superintendent representing the administration, and three Board members (TA197). Bergensten was a member of the Council (TB83).

meeting, Breg asked for some means to resolve the problem because she (Breg) was concerned about how her own Union would take her before the Council, and she asked Bergensten for Union assistance and representation in connection with the Council meeting (TB44-TB45; TB87). Bergensten refused to give Breg assistance and told her she could call the "NJEA" (TB87-TB88).[8/] Breg then telephoned the Respondent's UniServ Office several times to speak to Mr. Davis, but received no response (TA45-TA46).

On April 2, 1985, Breg again asked for Bergensten's assistance as Union president to resolve the problems between the Team and special education teachers (TA46, TB33-TB34). Bergensten refused. She told Breg that she did not think it was a Union matter and that she could not set up such a meeting (TB34).

Bergensten intended to pursue the Advisory Council meeting. On April 3, 1985, she tried to schedule the meeting before Easter vacation, at a time which would have conflicted with Breg's vacation plans (TA46, TB34). Bergensten had been aware of Breg's vacation plans (TA46). Breg sought the Superintendent's assistance in

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8/ Bergensten testified that on March 28 when Breg asked for Union assistance regarding the Council meeting, she (Bergensten) told her (Breg) it was unnecessary because the Council had no authority to do anything, that she (Breg) would have an opportunity to talk, and that "both sides" would be protected (TB87-TB89). I infer from this testimony that "both sides" referred to the special education teachers on one side and the Team on the other. Since Bergensten, nevertheless, went to the Council meeting on behalf of special education teachers, she thus chose to represent the special education teachers and not Team members in relation to that meeting.

scheduling the Advisory Council meeting at a time Breg would be available, and the meeting was scheduled for April 15, 1985, after Easter vacation (TA47, TB34-TB35).

The March 27 Meeting

8. The meeting of special education teachers regarding Team members was held at the home of one of the special education teachers and Team members were not invited (TA42). The meeting was held to discuss complaints that special education teachers had about Team members and about actions Team members may have taken against those teachers (TA87, TA179).

Bergensten, Union President; Joan Elder, Union Grievance Chairperson; and Barbara Smith, Union Negotiations Chairperson, none of whom were special education teachers, also attended the meeting (TB67-TB68, TA181). Bergensten testified, however, that she did not attend the meeting as a Union officer; rather, she attended the meeting as an Advisory Council member (TB29, TB35, TB66, TB87). I do not credit that testimony.

It is blatantly naive to suggest that Bergensten attended the March 27 meeting merely in her role as an Advisory Council member. When asked on cross-examination whether she was asked to come to the March 27 meeting as a Council member Bergensten responded one time by saying, "Probably, yes." (TB66), and responded to that question another time by saying, "I guess." (TB87) The fact is that three Union officers, Bergensten, Elder and Smith, attended the meeting and all three spoke at the meeting (TA152, TB71-TB72),

and Bergensten suggested raising the issues about the Team to the Advisory Council (TB72). I find that Bergensten (as well as Elder and Smith) attended the meeting in their roles as Union officers and that the Union thus sanctioned the meeting. I do not credit Bergensten's testimony.

After the meeting on March 27, Breg again spoke to Bergensten seeking her assistance in resolving any problems with special education teachers (TA88-TA89). Bergensten would not assist Breg and told her to talk to the teachers. Bergensten testified regarding Breg's request as follows:

> It wasn't my responsibility to tell her anything. I wasn't there as president. It wasn't anything to concern me. I felt that she had a problem, she should discuss it with them. (TB86)

The Advisory Council Meeting

9. On April 4, 1985 Superintendent Clark sent a memorandum (CP-4) to Advisory Council members scheduling the next meeting for April 15 to discuss the Child Study Team.[9/] Team members attended the meeting (CP-4; TA48). Breg had asked Bergensten for Union representation at the meeting but Bergensten refused (TB87-TB88). Bergensten called upon several special education teachers at the meeting to talk about the Team members (TA48-TA50).

9/ There had been some discussion of the Team's role regarding teachers in previous Council meetings (CP-1, CP-2, CP-3).

Although the Advisory Council apparently found no problem with the Team and nothing in particular to follow up on (TA50-TA51, TA105), the Superintendent characterized the meeting as being adversarial (TA216). In fact, Bergensten testified that the meeting did not resolve the issues or problems between the Team and the special education teachers (TC36, TC46), that the teachers were put on the defensive by the Superintendent and Team members (TC44), and that by defending their own actions, Team members caused teachers to be intimidated (TC42).

On June 10, 1985, Bergensten sent a letter (CP-9(B)) to the Board on behalf of the Union's Executive Committee criticizing the Superintendent and the Child Study Team for their actions and behavior at the April 15 Advisory Council meeting. The June 10, 1985 letter is as follows:

> The SWEA wishes to express its concern and dismay concerning the above referenced meeting dealing with the role of the
> Child Study Team and the Special Education program.
>
> The SWEA welcomed the Board of Education's suggestion for such a meeting to take place and approached this avenue with a sincere desire to express concerns and obtain a better understanding of all areas of responsibilities. The total objective, from the SWEA's position, for this meeting was to discover improved procedures for rendering better services to pupils in the program.
>
> Unfortunately, both the tenor and the atmosphere set in place by the Superintendent and the Child Study Team members structured a setting of defending and shielding examination of problems perceived to be found in the program and diverting total focus on staff members charged with the classroom instructional responsibilities.

> More specifically, the SWEA objects to the demeaning treatment afforded our unit members in attendance at this meeting. Rather then fostering a cooperative approach to resolve issues, the meeting was relegated into a means of insulating from review the problems and engendering an attack on the classroom teachers.
>
> Regrettably, the meeting was non-productive as to resolving issues related to the Special Education program. However, it was a revealing experience and provided vast insight into the numerous hurdles that were created by the Superintendent and the Child Study Team to avoid examining the concerns of the teaching practitioners.
>
> We certainly will avoid duplication of this fiasco in the future!

By cover letter, Bergensten requested that the letter be read into the minutes of the Board's June meeting (CP-9(A)).

Bergensten testified that she did not actually write CP-9(B) but she did sign it as Union president (TC38). She further testified that the intent of CP-9(B) was to point out that the staff, including teachers and Team members in attendance at that meeting, were not treated well by the Superintendent and the Board President (TC38-TC39). But I do not credit Bergensten's testimony to show that CP-9(B) was intended as a criticism of only the Superintendent. I find that it was also intended as a criticism of the Team members.

Bergensten did not review or discuss CP-9(B) with Team members before it was sent (TC48). In fact, she testified that in the third paragraph of that letter she was saying that the Superintendent and Team members "together" set up a structure "defending and shielding examination of problems" from the teachers

(TC41). I find that the intent of the language in CP-9(B) was to criticize both the Superintendent and the Child Study Team members and to divide their (Team) interests from those of the special education teachers.

Negotiations Proposals and Offers to Negotiate

10. The Union's 1982-85 contract (J-2) does not contain a specific work year definition, but in Article 10 Para. B it refers to teachers employed on a ten-month basis. There is, however, no reference in J-2 (or J-1) concerning eleven or twelve-month employees, nor is there any reference to summer employment or how unit employees who work during the summer are to be paid, or whether they receive vacation or any other particular benefits for the summer.

The work year for the average teacher, including special education teachers, is ten months. But the work year for Team members is between eleven and twelve months because they must do student evaluations and other preparatory work to be ready for school in September (TA55-TA56, TA148-TA149). Most, if not all, Team members work 20 or more days during the summer and are paid on a per diem basis; but they receive no additional sick, personal or vacation time (TA57, TA113-TA116; TA149, TA173). During the last few years, Tamagnini has worked all but one week during the summer (TA146).

Tamagnini testified that as early as 1981 or 1982, he asked then-Union President, Shirley Syracusa, to allow him to join the

Union's negotiations team. He also asked her to make proposals on behalf of the Team for a twelve-month contract, compensation for vacation, additional sick days and to allow Team members to do some work during Christmas and Easter vacations to allow them more time off in the summer (TA57, TA147-TA148). Tamagnini testified that Syracusa's response was: "Over my dead body you'll get treated differently" (TA147, TA149).10/

When asked whether the Union negotiating team ever made proposals on behalf of Team members during negotiations leading to J-2 and J-1, Bergensten could not recall (TB102-103). But Superintendent Clark, who has been involved in all negotiation meetings with the Union on behalf of the Board for the last ten years, testified that the Union has never presented a proposal particularly regarding Team members (TA196).

Both Bergensten and Kathleen Farrell, who became Union President effective July 1, 1985 (TB106), testified that with regard to negotiations leading to J-1 (1985-87), no Team members requested any specific proposals (TB101, TB123). But Bergensten acknowledged that she knew that Team members worked during the summer (TB101-TB102).

11. On September 23, 1985, the Team members sent Farrell a

10/ I credit Tamagnini's testimony regarding his requests to Syracusa and her response. The Union offered no rebuttal to that testimony and I otherwise found Tamagnini to be a credible witness.

memorandum (R-3) criticizing the Union for not advising Team members about the then-recent settlement of the 1985-86 collective agreement. On September 27, 1985 (R-2), Farrell responded to R-3 generally explaining that Team members had not responded to a Union survey seeking input for negotiations, nor had they discussed their concerns with the Union negotiations chairperson.11/ The Team responded to R-2 by memorandum of October 2, 1985 (CP-7), informing Farrell that Team members had responded to the survey but that the survey questionnaire did not address Team needs. The Team, in CP-7, also explained that Team members have offered to be on the negotiations committee. The Team members concluded that memorandum by explaining why they believed that the Union had not fairly

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11/ R-2 provides as follows:

> All staff of the Sussex-Wantage Regional School District have always been apprised of contract negotiations in the same manner.
>
> A survey form was distributed to all staff throughout the district prior to commencement of actual negotiations in order to ascertain the necessary scope of concerns, needs, etc. in order to effectively negotiate a contract reflective of those wishes. No member of the Child Study Team responded to that survey.
>
> During the course of actual negotiations, some Child Study Team members discussed various items with a member of the SWEA negotiating committee. They were also invited and counselled by that member to discuss any concern still further with the SWEA negotiations chairperson. No member of the Child Study Team availed themselves of that opportunity.
>
> The SWEA is in full compliance with our responsibility to negotiate for all Sussex-Wantage Regional School District staff. We intend to continue to fulfill that responsibility.

represented them, and requesting that they (as a Team) be removed from the Union.[12/] Copies of R-3, R-2, and CP-7 were sent to the Superintendent.

In October or November 1985, Farrell distributed a memo (CP-5) to unit members which in part asked people to notify her if they were interested in negotiating the 1986-87 collective agreement

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12/ CP-7 provides as follows:

> In response to your memo of 9-27-85, we would like to make the following points:
>
> 1. Some Child Study Team members did, in fact, comply with the questionnaire distributed concerning negotiations. No signatures were mandated on the sheet but some Team members did comply.
>
> 2. We would like to point out that the questionnaire does not, however, reflect the needs of the CST members. For example, we have a longer work year and different responsibilities. As per the recent arbitration agreement, it is clearly stated that our responsibilities are different and the Association has not recognized that fact.
>
> 3. In the past, CST members have offered to participate on the negotiations committee and past Presidents have not acted on these requests.
>
> Past history has shown that the SWEA has been unwilling to represent our needs at grievance level, particularly after receiving persistent requests for representations. The SWEA has attacked the CST members through the advisory committee and they have called meetings to discuss the CST personnel without their being present. It is clear through these incidents that the SWEA has directly attempted to defame CST members' professional and personal reputations.
>
> The SWEA clearly does not fulfill its responsibility to fairly represent the needs and rights of the CST.
>
> The CST is requesting that it be removed from the SWEA.

(TB129) In response to CP-5, Tamagnini, by memorandum of November 5, 1985 (CP-6), informed Farrell of his desire to participate in negotiations for 1986-87 (TB129). Tamagnini's request was not honored (TB130). Farrell testified, however, that by then J-1 had been ratified for 1985-87 (TB141).

By memorandum of March 26, 1986, addressed to Farrell (CP-8), Tamagnini again requested that he be allowed to serve on the Union's negotiations team, this time for the 1987-88 contract. Farrell responded to CP-8 by letter of May 14, 1986, addressed to Tamagnini (R-4), denying his request because of the lawsuit (presumably the instant charge) the Team had filed against the Union.

ANALYSIS

The record supports a finding that the Team should be severed from the Intervenor's negotiations unit. The inclusion of Team members in that unit has resulted in an unstable relationship among employees in the unit, which has contributed to an unstable relationship between the Union and the Board. The record further shows that the Intervenor has not provided responsible representation to Team members in a variety of circumstances.

The record also supports a finding that the Respondent violated the Act by intentionally processing a grievance against the interest of Team members, and by failing to adequately notify them of the grievance.

The Petition--Severance Standards

It is well established that the Commission favors broad-based, employer-wide units rather than narrowly defined units

organized along occupational or departmental lines, and that undue fragmentation of units is to be avoided. State v. Prof. Ass'n of N.J. Dept. Ed., P.E.R.C. No. 68 (1972), aff'd 64 N.J. 231 (1974) (State Nurses case). The Commission has also established a standard by which cases requesting severance of employees from an existing unit must be determined. It requires a finding that an existing relationship is unstable and/or that the incumbent union has not provided responsible representation. In Jefferson Tp. Bd.Ed., P.E.R.C. No. 61 (1971)(Jefferson), the Commission stated:

> The question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

In Passaic Co. Tech. and Vocational H.S.Bd.Ed., P.E.R.C. No. 87-73, 13 NJPER 63, 65 (¶18026 1986)(Passaic County), the Commission after citing Jefferson, explained that the examination must be based upon the parties' entire relationship. The Commission held that:

> ...[a]ssuming that a community of interest exists for the unit sought, we must decide whether the existing relationship is unstable or that the [Union] has not provided responsible representation. To answer that

> question it is not sufficient to merely examine one aspect of the parties' relationship; nor does a finding that the incumbent organization has breached its duty of fair representation on one occasion necessarily mean that employees must be severed from the existing unit. If this were the case, units would be constantly subject to redefinition and labor instability would inevitably result. Rather, determining whether an incumbent organization has provided responsible representation entails a review of the parties' entire relationship, not just isolated occurrences.

Generally, the Team members share a community of interest with the teachers in the unit. But the facts here show overwhelmingly that there is both an unstable relationship within the unit, particularly between Team members and special education teachers, and that the Intervenor has been irresponsible in its representation of Team members.

The first element of instability is the obvious actual conflict of interest that exists between Team members and special education teachers as a result of the need for Team members to enforce the proper implementation of IEP's. In carrying out that function, Team members have made recommendations affecting teachers' employment status, and there is every reason to believe that such situations may be repeated.

An additional conflict exists between Team members and teachers because of the quasi-supervisory role that Team members occasionally play by participating in the interviewing of teachers for employment, and by occasionally observing teachers on behalf of principals. I am not here finding that Team members are supervisors within the meaning of the Act. Rather, I am finding that there is

actual evidence that Team members have performed supervisory duties vis-a-vis teachers, and given the extent to which Team members are relied upon in the District, such incidents may recur. Given the strained relationship between Team members and special education teachers over the IEP's, the quasi-supervisory role of Team members significantly enhances the conflict that already exists and makes for an unstable relationship within the unit.

In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 426 (1971), the New Jersey Supreme Court held that:

> While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest.

The conflict here is more than just de minimis. It is, in fact, the degree of conflict that would continue to erode the relationship between two factions of the unit if the severance were not granted.13/

13/ The Commission has distinguished "conflict of interest" from "competing interests." County of Hunterdon, D.R. No. 86-19, 12 NJPER 309 (¶17118 1986); Clifton Bd.Ed., D.R. No. 80-18, 6 NJPER 38 (¶11020 1980). In Clifton, the Director of Representation held that:

> ...in situations where two groups of employees within the same unit have different views of economic or noneconomic interest, the undersigned has declined to find a conflict of interest. Rather, this not infrequent occurrence raises an issue of "competing interests" as opposed to "conflict of interest" and, therefore, does not warrant the severance of employees from an appropriate unit. Clifton, at p. 39.

Footnote Continued on Next Page

In addition to the unit instability caused by conflict, the Union's filing of the grievance, participation in the private house meeting, participation in the Advisory Council, and its failure to assist Breg on numerous occasions, when considered together, contributed to the unstable relationship between Team members and special education teachers, and was evidence of irresponsible representation.

In its post-hearing brief, the Intervenor argued that the grievance was filed because some teachers had been given duties in excess of what they previously had, and it argued that librarians, head-teachers, Team members and nurses had no such duties. But the Union presented no evidence that teachers had been given more duties, and when given the opportunity by the Superintendent to add librarians and nurses to the grievance, the Union left the grievance as is.

That action by the Union, particularly in view of the remedy sought in the grievance, evidenced the Union's intent to file the grievance only to obtain more duties for the Team members. Even the

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13/ Footnote Continued From Previous Page

Competing interests as used in the above context, concern differing opinions on a variety of subjects affecting labor relations. That is not the case here.

The instant case involves a more classic conflict of interest issue where the duties and responsibilities of one title can seriously affect the employment status of another title. Here the conflict is actual and obvious and, if allowed to continue, would only exacerbate an already divisive relationship.

arbitratior found that the grievance only concerned Team members. Those facts support a finding that the Union was not seeking additional duties for librarians, nurses or a computer person, but only the Team members. I infer therefrom that the grievance was deliberately filed to harass Team members by attempting to force the Board to assign them additional duties. That action by the Union was both irresponsible and unlawful, and contributed to the instability that already existed in the unit due to the presence of conflict.

The Union's processing of the grievance was also irresponsible vis-a-vis the Team members because it failed to notify the Team members of the grievance and of the possible adverse impact that the grievance would have on their workload. The Union, during this hearing and in its post-hearing brief, argued that since the grievance was discussed during general Union meetings, it provided adequate notice of the grievance to any interested Union member, including Team members. I reject that argument. Such "general membership notice" does not comport with the more specific notice that I believe was necessarily pursuant to the Supreme Court's decision in Saginario v. Attorney General, 87 N.J. 480 (1981) (Saginario).

The Union's failure to provide responsible representation is further evidenced by Bergensten's consistent refusals to assist Breg in resolving problems she believed existed with teachers, and her (Bergensten's) participation in the March 27 meeting and the

Advisory Counsel meeting against the interests of Team members. Breg had virtually pleaded with Bergensten on March 19 and 21 to assist her in resolving rumors regarding Team members, but Bergensten refused saying it was not a Union matter. Yet, despite that assertion, Bergensten and other Union officials attended and participated in the March 27 meeting which was critical of Team members. Bergensten alleged that she only attended that meeting as an Advisory Council member, but I do not credit that response. Generally, I did not find Bergensten to be a believable witness, and that particular explanation was not plausible. Bergensten, Elder and Smith went to that meeting as Union officers. Had Bergensten really believed that it was not a Union matter, she should not have attended the meeting. Her presence there, however, sanctioned the meeting and only further divided Team members from special education teachers.

After the March 27 meeting, Breg again asked for Bergensten's help, and again Bergensten refused. When Breg was informed of the Advisory Council meeting, she again sought Bergensten's assistance, but by then Bergensten had clearly sided with special education teachers against Team members, and she refused Breg's request.

Bergensten then deliberately attempted to reschedule the Advisory Council meeting in an attempt to harass Breg. At the meeting itself, Bergensten sided with the special education teachers in their complaints against Team members.

All of these incidents show conclusively that the Union seriously breached its duty to provide Team members with responsible representation. Where there were problems between two factions within the unit, it was the Union officers' responsibility to remain as neutral as possible and assist the members in resolving their differences. To suggest that a problem between two groups of unit members which was threatening to divide the unit was not a Union matter is beyond reason. Bergensten had the responsibility to resolve the differences between Team members and special education teachers as a neutral, not by taking sides and widening the rift that already existed.

Bergensten's letter (CP-9(B)) to the Board regarding the Advisory Council meeting finally showed that the rift between the special education teachers and the Union leadership on one side and the Team members on the other side, was now complete; Bergensten considered the Team allied with the Superintendent. The Team had become ostracized by the teachers, in part, because of Bergensten's own failure to assist Breg and the Team as a whole in resolving problems. The Union presented no evidence (except Bergensten's, which I do not credit) to show that it was the Team members or the Superintendent who caused that meeting to become so divisive. As evidenced by CP-9(B), by June 1985, the Union's unit structure was seriously unstable, and it was no longer realistic to expect the Union to be capable of providing the Team members with objective and responsible representation. Severance is necessary here to protect

the interests of Team members and to enable the Union to eliminate the divisiveness within its unit.

The evidence regarding the negotiations proposals and offers to negotiate may not, in and of itself, justify a severance, but when viewed in conjunction with the other facts, it contributes to the need for severance.

In the context of a challenge to a union's representation in the negotiations of a collective agreement, the United States Supreme Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 346 U.S. 330, 338 (1953); see also Humphrey v. Moore, 375 U.S. 335 (1964). This test has been specifically adopted by the Commission in In re Lawrence Twp. PBA Local 119, P.E.R.C. No. 84-71, 10 NJPER 41 (¶15023 1983); In re City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99 (¶13040 1982).

Similarly in Hamilton Tp. Ed. Assn., P.E.R.C. No. 79-20, 4 NJPER 476, 478 (¶4215 1978), the Commission said:

> ...a negotiated agreement that results in a detriment to one group of employees as opposed to other unit members, i.e. a lesser salary increase than the other employees or a longer workday than others, does not establish a breach of duty of fair representation on the part of the majority representative. Absent clear evidence of bad faith or fraud, unions have been

> permitted to make temporary compromises that may adversely affect certain members of a negotiations unit for the benefit of all unit members or a majority of these individuals.

Thus, the Union's failure to propose a twelve-month year, vacation benefits, and additional sick time for Team members was not, in and of itself, sufficient to justify a severance. But Syracusa's response to Tamagnini's request to negotiate for those items, and the above facts demonstrating the Union's failure to provide responsible representation, demonstrate that Union officers have had the frame of mind to resist requests to make proposals benefiting Team members.

Given the instability that now exists among teachers and Team members it is not likely that the Union would exert much effort to secure benefits for just Team members. A severance would permit the Team to finally raise in negotiations those proposals of significant importance to their particular circumstances.

In determining the severance question, the Board's willingness to consent to a separate unit of Team members is another significant factor. The Commission in State Nurses began a policy to avoid undue fragmentation of units. That policy was intended to permit a public employer to avoid being faced with negotiations responsibilities with a myriad of labor organizations. It is particularly important for a public employer with a small employee complement to be able to avoid such fragmentation.

But it is the public employer, not an incumbent union, to whom the fragmentation argument is significant, and it is the

employer who must raise the argument. Where, as here, the Board is unopposed to the fragmentation sought by the Petitioner, one of the more important elements generally construed against severance petitions is absent. When the facts of unit instability and irresponsible representation by the Intervenor are considered in the absence of a fragmentation defense advanced by the Board, I find no significant factor to prevent the processing of the Petition.

The instant case is similar to the case in County of Camden, D.R. No. 81-3, 6 NJPER 415 (¶11209 1980)(Camden County), where a severance petition was approved, but distinguishable from the recent decision in Passaic County, where a severance petition was recently denied.

In Camden County, the Director of Representation approved a petition seeking to sever registered nurses from a broad-based county-wide unit. The County was not opposed to the severance petition and the Director found that the incumbent union had not provided responsible representation to the nurses regarding the processing of grievances and in negotiations. The incumbent had failed to advise the nurses that a grievance they had filed would not proceed to arbitration and why it would not proceed to arbitration. The nurses also found it necessary to circumvent the incumbent and meet with the County to resolve other disputes because the incumbent failed to do so on the nurses' behalf.

Similarly, in the instant matter, the Board is not opposed to the petitioned-for severance; the Intervenor failed to

specifically notify the Team members that it had filed a grievance which could adversely impact on them; and the Team members found it necessary to circumvent the Union and obtain the Superintendent's assistance to maintain a specific date for the Advisory Council meeting, and to support their (Team members') actions with respect to the issues raised about them (Team members) by Bergensten at that meeting.

In Passaic County, shop teachers and teachers of technical subjects sought to sever themselves from a broader teachers unit. Although the Commission found that some action by the incumbent against the petitioning employees was disturbing, it, nevertheless, found that, on the whole, the incumbent's representation had not been irresponsible, nor was there an unstable relationship. Passaic County primarily concerned an allegation of irresponsible representation in regard to negotiations. The Commission, however, has held that an employee organization does not necessarily breach its duty of fair representation when it secures a benefit for one sub-category of employees over another. See Belen v. Woodbridge Twp. Bd.Ed., 142 N.J. Super. 486 (App. Div. 1976); PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983).

In Passaic County, unlike the instant matter, there was no evidence of conflict of interest, no evidence that the incumbent had filed a grievance against the interests of a group of unit members or failed to notify those members of the grievance, and no evidence that the incumbent failed to represent a faction of unit members

after repeated requests for representation in specific circumstances. Passaic County was limited to the union's actions in negotiations, but here the Union's actions also involved an unlawful grievance, and there was independent evidence of conflict and several refusals to represent the affected employees. Thus, the facts here even went beyond the severance facts in Camden County, making it easy to distinguish them from the facts in Passaic County. Therefore, severance here is warranted.

In sum, the Petition should be found appropriate, and the petitioned-for employees should be entitled to vote for separate union representation.

The Charge-The Failure to Fairly Represent

The Act at subsection 5.4(c) provides the following six-month statute of limitations:

> "...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person...was prevented from filing such charge..."

The Respondent argued that the instant Charge was untimely filed. I do not agree.

In Kaczmarek v. N.J. Tpk. Authority, 77 N.J. 329 (1978)(Kaczmarek), the New Jersey Supreme Court held that the statute of limitations set forth in the Act should not be narrowly or strictly applied. In that case, a plaintiff had filed an action in Superior Court within six months of the occurrence of the relevant events over a matter of which the Commission had exclusive jurisdiction. Several months later there was a move to dismiss the

Court action which caused the plaintiff to file a charge with the Commission. That charge was filed outside the six-month period which prompted the Commission to dismiss the charge. The Court permitted the filing date of the Superior Court action to be the operative date for statute of limitations purposes, and it ordered that the charge be processed. The Court held that the filing of the lawsuit showed the proper diligence by the plaintiff that the statute of limitations was intended to insure, and it held that the respondent(s) had not shown that they were prejudiced by the plaintiff's otherwise late filing because they had had timely notice of the charges as a result of the court action. 77 N.J. at 341.

The Court held that the primary purpose of a statute of limitations:

> ...is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend, Union City Housing Auth. v. Commonwealth Trust Co., 25 N.J. 330, 335 (1957); another is to stimulate litigants to pursue their causes of action diligently and to prevent the litigation of stale claims. 77 N.J. at 337.

The Court held further that it would be derelict for a court to apply a statute of limitations strictly and uncritically:

> ...without considering conscientiously the circumstances of the individual case and assessing the Legislature's objective in prescribing the time limitation as related to the particular claim. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 426, 85 S.Ct. at 1053, 13 L.Ed. 2d at 944; White v. Violent Crimes Comp. Bd., 76 N.J. 368, 379 (1978). 77 N.J. at 338.

In examining this particular statute of limitations, the Court found that the Legislature intended "to permit equitable considerations to

be brought to bear. It [the Legislature] did not couch the period of limitations in terms of a flat and absolute bar..." 77 N.J. at 339. The Court then concluded that.

> ...the fact that the Legislature has...recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon the fairness of imposing the statute of limitations. 77 N.J. at 340.

In applying the holding expressed by the Court in Kaczmarek, I find that the instant Charge was timely filed with respect to the grievance, and with respect to any events occurring on March 23, 1985 and thereafter. An examination of the Charge and Petition in these consolidated matters shows that the Charge is based upon, and was filed with, the exact same statement of position that was filed in support of the Petition. The Petition was filed on September 23, 1985 and the statement of position alleged that the Union failed to represent Team members with regard to the March 27 meeting, Breg's request to Bergensten and Davis on March 28, Breg's request to Bergensten of April 2 and April 3, and Breg's request to Bergensten regarding the Advisory Council meeting of April 15.[14/] The statement of position also alleged facts regarding the grievance, and the arbitration set for June 13, 1985. When the Charge was filed on December 11, 1985 it contained nothing more than what had already been alleged on September 23.

14/ The Amended Petition filed on October 1 did not allege new facts. It merely corrected the name of the petitioning organization.

Thus, on September 23, the Union became aware of all of the details that were to support the Charge. I analogize the filing of the instant Petition to have the same effect in this case as the Superior Court filing had in Kaczmarek with respect to the statute of limitations. Since the Charging Party and Petitioner are composed of the same people it cannot be said that the Charging Party slept on its rights or was not diligent in filing the Charge. The Respondent could not have been prejudiced by the Charging Party's later filing of the Charge because it had timely notice of the substance of the Charge as a result of the Petition. See 77 N.J. at 341. Thus, the Charge was timely filed with respect to incidents from March 23 and thereafter, but the incidents prior to March 23, particularly the incidents of March 19 and 21, can be considered as background in determining whether the other incidents violated the Act.

The timeliness of the Charge with respect to the grievance is even stronger. Although the grievance was filed in December 1984, Team members were not notified of the grievance. The Union's argument that its membership was "notified" of the grievance was insufficient to constitute notice to the Team members, but more important, the Union did not show that any Team members were actually aware of the grievance when it was filed. Moreover, the Union did not show when Team members actually became aware of the grievance. Although the Superintendent told Team members of the grievance and conducted a second-step grievance hearing, the

Respondent did not show when Team members were informed of the matter. Since the Respondent was asserting the statute of limitations as a defense, it was the Respondent's burden to make the record regarding that defense. Having failed to prove Team knowledge of the grievance at a time outside the statute of limitations period, I find that the Team members were in fact "prevented" from filing the Charge until they were made aware of the arbitration hearing: the arbitration hearing was within six months of the filing of the Charge. Actually, I would find the Charge timely filed regarding the grievance also because the arbitration was part and parcel of the grievance procedure as a whole. Through arbitration, the Union was seeking a result adverse to the interests of Team members, and since I found that the filing of the grievance was illegally motivated, the demand for arbitration in this context was equally illegally motivated. Thus, by filing the Charge not more than six months from the arbitration hearing the Charging Party was proceeding in a timely manner.15/

15/ I am aware that in State of New Jersey and Council of New Jersey State College Locals, P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (1977) and State of New Jersey (Sachau), D.U.P. No. 84-28, 10 NJPER 216 (¶15110 1984), the Commission (and the Appellate Division) and Administrator of Unfair Practice Proceedings, respectively, held that the filing and processing of a grievance does not toll the Commission's statute of limitations. Those cases, however, are distinguishable from the instant matter. In both the State College and Sachau cases the State took some action against employees; in State College, it refused to reappoint a professor, and in Sachau, it denied an increment. In both cases the affected employee filed a grievance over the action

Footnote Continued on Next Page

Having found that the Charge was timely filed I now consider the merits of the Charge.

With respect to the fair representation issues, I have already found that Bergensten's failure to assist Breg on March 27 and 28, and April 2 and 3, 1985; and Bergensten's attendance at and participation in the March 27 private house meeting and the April 15 Advisory Council meeting against the interests of Team members after she had told Breg they were not really Union matters, were violations of the Union's duty of fair representation.

With respect to the grievance, I note that in AAUP (Donahue), P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985), the Commission held that a union that files and pursues a grievance in good faith and without a discriminatory motive does not violate the

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15/ Footnote Continued From Previous Page

but did not file a charge until more than six months from notification of the action. The employees argued that the charges were timely because they diligently pursued their contractual rights. The Commission and Administrator, however, refused to issue complaints. The Commission established a policy, affirmed by the Appellate Division, that the filing of the grievance would not toll the statute.

Those cases are significantly different from the instant case. First, in this case the alleged discriminatory filing and processing of the grievance by the Union was itself the unfair practice complained of, and it was the Respondent, not the Charging Party, who filed the grievance. Second, here, unlike the above cases, the Charging Party was essentially prevented from filing the charge within the first operative date (the filing of the grievance), but did file the charge within six months of the arbitration hearing (the second operative date) of which it had notice. I, therefore, believe that the instant charge was timely filed.

Act even though the grievance may adversely affect a unit member. In that case, the AAUP had filed a grievance based upon a contractual principle contesting the employer's appointment of Donahue to a faculty position and seeking his removal therefrom. The AAUP did not notify Donahue of the grievance because it expected the employer to notify him and protect his interests. The employer did notify him of the grievance.

The Commission concluded that the AAUP had not acted arbitrarily, and that it had a reasonable basis to pursue the grievance because it had a contractual principle it needed to protect. Although it found in the context of those facts that the AAUP did not violate the Act even though it did not notify Donahue of the grievance, the Commission, citing to Saginario in note 5, raised the question of whether it is a violation of the Act when a union fails to notify a unit member of a grievance which may adversely affect his or her employment interests. 13 NJPER at 377.

The instant case, however, is the antithesis of AAUP (Donahue). I have already found that the Union had a discriminatory motive for filing the grievance. Its allegation that the grievance was filed to properly implement Art. 8 Para. B was not supported by the evidence. Any grievance filed by a union seeking additional duties (but not additional money) for certain unit members is inherently suspect. Where the union has a rational and believable explanation for its actions, however, the grievance would not be improper. But where, as here, the Union's grievance intentionally

targeted only one group of employees when there were other employee groups (nurses and librarians) who should also have been the subject of the grievance, the Union's explanation for filing the grievance was neither logical nor plausible. Since the grievance was illegally motivated in the first instance, the filing and processing of the grievance was a violation of the Act.

In conjunction therewith, I find that based upon the instant facts the Union also violated the Act by failing to specifically notify Team members of the grievance. By having no notice, the Team members were effectively prevented from being represented during steps of the grievance procedure that could have adversely impacted on their employment status.

In Saginario, an employee had been promoted and the union filed a grievance alleging that the promotion violated the collective agreement. The employee was not notified of the arbitration, and the arbitrator agreed with the union and upheld the grievance. The Court held that the employee was entitled to participate in the arbitration proceeding and it ordered the matter be resubmitted to arbitration with the employee's participation.

In reaching its decision, the Court recognized that:

> ...the [employee] has an important interest at stake and he, as other public employees, should be treated fairly and evenly. His union representative cannot represent him since the union position is in direct conflict with his. Moreover, the employee should not have to rely on the public employer to present his contention, for their interests are not identical. 87 N.J. at 493-494.

The Court concluded its analysis by holding that the employee was entitled to be heard during the processing of the grievance through his personal representative or pro se if his interests conflicted with those of the union.

> In summary we hold that where a public employee has a substantial interest arising out of the agreement entered into between the State and the majority representative of the employees as a result of collective negotiations and the agreement provides for a grievance mechanism to resolve disputes arising out of the agreement including the particular dispute of the public employee, then the public employee is entitled to be heard within that dispute mechanism either through his majority representative or, if his position is in conflict with the majority representative, then through his personal representative or pro se. 87 N.J. at 496-497.

Notice was an important element in Saginario and the Court concluded that no notice had been given. Notice was also important in AAUP (Donahue), but the Commission concluded that the employee had adequate notice. Notice is also important in the instant case. Although the Superintendent eventually notified Team members of the grievance, that was after the grievance processing had begun and it is not clear that the Team members had adequate notice to prepare for the arbitration. I believe that Saginario and AAUP (Donahue) support a holding that where a union files a grievance knowing that it seeks a result adverse to certain unit members, it has an obligation to personally notify the affected employees of the grievance and give them the opportunity to appear throughout the grievance steps to protect their interests. The Union here failed to so notify Team members and I find that action violated the Act.

The 5.4(b)(2) and (5) Allegations

The Union did not violate subsections 5.4(b)(2) and (5) of the Act. There was no showing that the Union interfered with the Board, and no showing that the Union violated any Commission rule or regulation. Those aspects of the Complaint should be dismissed.

CONCLUSIONS OF LAW

1. The Respondent violated §5.4(b)(1) of the Act by failing to fairly represent Child Study Team members; by discriminatorily filing a grievance against the interest of Child Study Team members; and by failing to adequately notify Team members of the grievance.

2. The Respondent did not violate §§5.4(b)(2) and (5) of the Act by any of its actions.

Based upon the entire record and above analysis I make the following:

RECOMMENDATIONS

A. I recommend that the Comission:

1. Find that the petitioned-for unit is appropriate and that the unit specifically be defined as a unit of all Child Study Team members including learning consultants, social workers, and psychologists, but excluding the Coordinator of the Child Study Team, classroom teachers, special teachers, librarians, nurses, supervisors within the meaning of the Act, confidential and

managerial employees, and all other Board employees.[16/]

2. Direct that a secret ballot election be conducted among the petitioned-for employees who shall vote on whether they desire to be represented for the purpose of collective negotiations in a separate unit by the Sussex-Wantage Child Study Team Association, the Sussex-Wantage Education Association, or neither.[17/]

B. I recommend that the Commission ORDER:

1. That the Respondent cease and desist from:

a) Interfering with, restraining or coercing Child Study Team employees in the exercise of the rights guaranteed to them by the Act, particularly by failing and refusing to represent and assist Team members during the conduct of several meetings, by discriminatorily filing a grievance against the

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16/ By this decision I am not suggesting that child study teams in general be allowed to sever from broad-based professional units. This decision is based on the particular facts developed at hearing.

17/ I only recommended that the Intervenor appear on the ballot in the instant severance election because they were an official Intervenor on the Petition, and because the intervenor in the Camden County severance election appeared on the ballot. This raises an issue, however, as to whether an intervenor in a case such as this is really entitled to be on the ballot. An appearance on a ballot is an indication that the labor organization will responsibly and fairly represent the petitioned-for employees. Given the above facts, I doubt whether the Intervenor can provide such representation for Team members even in a separate unit. I leave for the Commission to decide whether, in a severance/charge situation such as this, it is wise or fair to allow the Intervenor to appear on the ballot.

employment interests of Team members, and by failing to adequately notify Team members of the grievance.

2. That the Respondent take the following affirmative action:

a) Post in all places where notices to unit members and other Board employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.18/

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

18/ In the event that the Commission finds a violation and directs the recommended election and does not allow the Intervenor to appear on the ballot, then it may not be necessary for the unfair practice notice to include the second paragraph since that paragraph connotes a continuing relationship between the Union and the Team members. However, if an election is not directed, or if it is directed but the Intervenor appears on the ballot, and the Commission finds an unfair practice, then the notice should include both paragraphs.

3. That the §§5.4(b)(2) and (5) allegations of the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: July 24, 1987
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing Child Study Team employees in the exercise of the rights guaranteed to the by the Act.

WE WILL cease and desist from failing and refusing to represent and assist Child Study Team members, from discriminatorily filing grievances against the employment interests of Team members, and from failing to adequately notify Team members of grievances particularly affecting their interests.

Docket No. CI-86-40-165 SUSSEX-WANTAGE EDUCATION ASSOCIATION

Dated_____ By_____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.