

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In The Matter of

STERLING BOARD OF EDUCATION
Public Employer

and

Docket No. CU-77

STERLING EDUCATION ASSOCIATION
Petitioner-Employee Organization

DECISION

A hearing was held to resolve a question concerning the composition of a negotiating unit for employees of the Sterling Board of Education (the "Board"). No post hearing briefs were filed. The Hearing Officer issued his Report and Recommendations on June 26, 1973 to which the Board filed timely exceptions. The Commission has considered the entire record, the Hearing Officer's Report and Recommendations and the Board's exceptions and finds as follows:

The Board is a public employer within the meaning of the Act and is subject to its provisions. The Sterling Education Association (the "Association") is an employee representative within the meaning of the Act. It is the incumbent organization representing a unit of certified personnel excluding certain supervisory positions. 1/ By the terms of the 1972-1973 agreement between the Board and the Association, the parties have agreed that the unit status of Department Coordinators "shall be held in abeyance pending disposition..." of the instant proceeding which arises from the Association's petition for

1/ Among others excluded as supervisory are the principal, assistant principal, and assistant to the principal and guidance director.

clarification of the existing unit. By its petition, the Association seeks to include the questioned title within the unit it now represents; the Board contends the title should be excluded.

The record indicates that the Board recognized the Association in December, 1968 as the representative of a unit of teaching personnel including the title Department Chairman. The parties negotiated an agreement covering this unit for the 1969-1970 school year, but in the next agreement, for 1970-1972, there appeared formal notice that this title was being re-evaluated by the Board and that a possible outcome might be the elimination of the title, its elevation to supervisory status or some other change. In June, 1972 the Board adopted policy "creating the supervisory position of Department Coordinator" to replace Department Chairman. The stated purpose of the policy was to establish an administrative position in which the incumbent would perform supervisory functions. The policy incorporated a detailed statement of the duties, requirements and job qualifications of the new title and indicated a progression of three levels, in terms of increasing job qualification and responsibility. 2/ It also provided that those employees holding the title Department Chairman would be encouraged to apply for the new position and be given time to qualify, but that acceptance in the new position would not automatically result. Prior to the change, there had been 8 Department Chairmen. At the time of the hearing in this case, six months after the policy's adoption, there apparently were 7 Department Coordinators, all of whom, it was testified, were within the first level of responsibility outlined in the job description, and most of whom were

2/ In addition to the responsibilities enumerated in the policy, there is provision in the 1972-1973 agreement between the parties that in the event the title is found to be supervisory, the agreement will be modified so that Department Coordinator will replace the Principal as the first step in the grievance procedure for a teacher, the Principal will become the second step. etc.

within the second level of responsibility.

It is the position of the Association that the title Department Coordinator is simply a new name for Chairman, that the authority and responsibilities of the two are substantially the same, that such are not of a supervisory character and even assuming they were, Coordinators should be placed in the unit because by past practice and prior agreement Chairmen had been included and the mere change in name should not operate to exclude them. The Board contends that there are marked differences between the two positions, that the Coordinator has substantially greater responsibility, supervisory in character, and that the position is the product of the Board's specific intent to create a supervisory structure from which future administrators may be drawn, to which teachers may be attracted on a promote-from-within basis, and for the better administration of the district. The Hearing Officer resolved the matter as follows:

"The undersigned finds the Coordinators not to have supervisory powers (as defined in the Act), and to be similar to Department Chairmen. The undersigned finds inclusion of the Coordinators to be within the purpose of the Act because of the present lack of demonstrable conflict as a result of inclusion (as with Department Chairmen) and the establishment of a community of interest with the rest of the unit with respect to terms and conditions of employment.

Accordingly, the undersigned recommends the inclusion of the Coordinators in the unit as an established practice."

The Board's exceptions place in issue virtually every element of the Hearing Officer's conclusion, namely, that Coordinators are not supervisors, that they are similar to Chairmen, that this similarity provides a basis for finding "established practice," and that there is absent evidence of conflicting interest.

The "established practice" aspect will be treated first. After the Hearing Officer's Report issued, the Commission, in another case, 3/ considered those provisions of the statute which specify certain exceptions to the general prohibition against mixed units of supervisors and non-supervisors. 4/ The Commission concluded that "established practice" referred and was limited to representation relationships which existed prior to the 1968 enactment of Chapter 303, and which were characterized by a process of negotiations entered into with an intent to reach agreement on matters concerning the employment relationship. On the record here, although formal recognition of the Association was granted by the Board after the enactment of Chapter 303, it does appear that there was some form of representation prior thereto. There is testimony that prior to 1968 there was a "negotiating committee," that Department Chairmen were members of the committee, that the major concern was salary, but that there were, "very definitely," significant changes in form between the pre and post 1968 experience. What the record fails to establish are the facts underlying these observations. The Commission has consistently declined to rely on the mere assertion that negotiations occurred as proof that such did. To know that Chairmen were on a committee whose principal concern was salary does not meet the minimum requisites described by the Commission in West Paterson as essential to the application of the statute's exceptions; a comparison

3/ West Paterson Board of Education, PERC Nos. 77 and 79.

4/ N.J.S.A. 34:13A-6(d): [The Commission] shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors..."

with the statement of facts in the latter case will clearly establish the deficiency. 5/ Likewise absent is any evidence of 'prior agreement', i.e., there is no pre 1968 document incorporating the parties' agreement on matters negotiated, assuming, contrary to this record, that negotiations took place. The written agreements for 1969-1970 and for 1970-1972 do not qualify as 'prior agreement' under the Commission's interpretation of that term, just as the parties' negotiating experience since 1969 does not qualify as "established practice." In sum there is insufficient evidence of the kind of relationship necessary for the possible application of the statute's exceptions as a means of preserving whatever existed before Chapter 303. Thus whether a Chairman is essentially the same as a Coordinator is irrelevant insofar as that contention attempts to create a link with the experience of the parties before Chapter 303. If Coordinators are supervisors, they may not now be included in the unit even if Chairmen were also supervisors. A comparison of the two jobs may, however, shed light on the status of the Coordinator.

At this point the record reveals another deficiency, namely, little opportunity for experience under the present organization. The title was created in June; as a practical matter the resumption of school in September would mark the beginning of experience; the hearing was held in December. The result is a record which frequently speaks in terms of the Board's intentions and expectations, but which offers less in terms of

5/ See also Town of Kearny, PERC No. 78, a recent case in which the Commission characterized the record as more conclusionary than conclusive on the issue of whether pre 1968 dealings were in the nature of negotiations.

factual accounts of what has happened under the present organization. 6/

The Hearing Officer focused on the hiring and evaluation functions. The record indicates that two teachers were hired following interview and favorable recommendation by the Coordinator. The hiring procedure is said to be as follows. Applications are filtered through the Principal who forwards to the appropriate Coordinator those he considers worthy of interview. The interview is said to be a primary responsibility of the Coordinator since it is he who has the subject matter expertise and who will have to work with the new teacher. 7/ The Coordinator makes a recommendation to the Principal which if favorable produces an interview among applicant, the Coordinator and the Principal, who states he tends to rely on the expertise of the Coordinator; these three then meet with the Superintendent who, he testified, would not expect to reverse a favorable recommendation unless he independently acquired certain derogatory information unknown to the Coordinator. If the applicant masters these steps, the Superintendent then makes a formal recommendation of hire to the Board. Concerning evaluation there were no specific cases cited of teacher evaluation by the Coordinator. 8/ However, in

6/ The petition in this case was filed six months before the Coordinator position was created. When investigation of the petition revealed that the position was still being considered but had not yet been created, the Commission staff recommended that the Association withdraw its petition, without prejudice to a later filing after the position was established and filled and experience developed under it. There was no withdrawal and upon the resumption of school the Association requested the matter be heard. The Board did not oppose.

7/ The job description states the Coordinator "will interview, whenever possible, teacher candidates for assignments in his department."

8/ One witness testified that she had been observed by a Coordinator a week before the hearing but she had not yet seen his written comments. Another witness, Principal and Acting Superintendent Keegan, testified as to the routine procedure for teacher evaluation but also indicated that some Coordinators are less experienced than others so that their recommendations, at least initially, would be subject to more careful examination. A third witness, a Department Coordinator, testified he is making observations and written evaluations of department personnel, but he did not elaborate. He did say hypothetically that he would recommend to the principal the discharge of a non-tenured teacher whom he found generally unsatisfactory.

October, 1972, the Superintendent sent to members of the faculty a letter which states in part:

For the past few weeks the administrative staff and department coordinators have been examining and discussing appropriate criteria to be used in classroom observations.

Our hope is to develop criteria that would help to improve classroom instruction, the primary objective of any observation process. We also hope to develop one (1) set of criteria which will be used by all observers - coordinators, assistant principals, principal and superintendent.

Attached is a tentative list of criteria being proposed by the coordinators and administrators. Please examine it carefully. If you have any reactions, please pass them on to your Department Coordinator..."

The criteria referred to were later adopted. Apparently this is the first time criteria were reduced to writing. "Before, it depended upon who conducted the evaluation, the criteria seemed to vary." The Hearing Officer concluded that while Coordinators have the trappings of supervisors he would not find them to be such, apparently because, as to hiring, there were insufficient instances to know if their recommendations were "effective" and furthermore they did not control the initial screening process; as to evaluations, there had been none and furthermore there seemed to be some uncertainty as to the possible end results of the evaluation inasmuch as the Superintendent indicated he would independently review a negative recommendation on a non-tenured teacher. The Hearing Officer further observed that while these Coordinators' functions raised a potential for conflict, the record was devoid of situations where conflict had occurred. He reasoned that since Chairmen and Coordinators had substantially the same responsibilities in hiring and evaluating, the past experience of Chairmen should be instructive, that since there was no record of demonstrated conflict involving

Chairmen, this was significant evidence that the acknowledged potential for conflict between Coordinators and teachers was minimal. The Hearing Officer's treatment and the Board's exceptions are such as to require an examination of the former title, Department Chairman.

Testimony and documents establish that in the 1960's Chairmen periodically observed and recorded their observations of teachers within their departments, with an annual report being submitted to the Superintendent who, it was believed, included them in his report to the Board. This was done at the direction of the then Superintendent, according to a witness who was then a Chairman. The Board states that if such practice existed it was never authorized; the job description for that time did not include it as a duty; that Superintendent left in or about 1968; he did not testify. During this same period Chairmen also interviewed teacher applicants, though not in every case. There is no evidence concerning the procedures after interview. The Board states that this was simply a courtesy, not a requirement of the job. The job description is silent. Under the successor Superintendent, Chairmen ceased making evaluations and interviewing candidates because he felt it was not an appropriate function for a Chairman. Thereafter these functions were absorbed by the Assistant Superintendent of Curriculum and the Principal who continued to perform them for about the next three years. Upon the creation of the Coordinator position, evaluation and interview became the Coordinator's responsibility in the manner indicated earlier.

In addition to these two areas of responsibility, the job description indicates that the Coordinator will recommend to the Principal teacher assignments in his department; he will, at level 3, (the highest level of responsibility which none has yet attained) "supervise teachers in his department." Finally, in the preface to the job description, the

Board states that if Coordinator positions are not filled from within, the Board will hire from the outside but only those with "at least a Supervisor's certificate." Coordinators are to receive an additional stipend ranging from \$500 to \$1100 annually.

Normally, the Commission would expect to be presented with a record demonstrating sufficient past conduct from which a pattern or routine could be established with reasonable conviction. The record here is not of that kind, but the parties nonetheless urge a determination. In reaching such, we must accept as fact not only that which has occurred but that which the Board asserts to be the elements of its program for Coordinators. Those assertions must be deemed credible in the absence of contrary evidence or inherent improbability. 9/ Given that frame of reference, we find that the Board has established the position of Coordinator as supervisory in concept, to serve administrative needs and to provide a training opportunity for future administrators. Coordinators will interview and recommend upon likely applicants with deference being given to their recommendations. The fact that in the cases of the two teachers hired it is not established that the Coordinator's recommendations were controlling or simply informational neither confirms nor contradicts the assertion. Coordinators will observe and evaluate teachers giving, on request, recommendations on the desirability of continued employment. Negative recommendations will be independently verified. (They have observed and evaluated teachers; recommendations on retention were presumably premature at the time of the hearing.) Coordinators have participated in the formulation of criteria for teacher evaluation. They will recommend on teacher assignments and when fully qualified will supervise teachers. These duties earn additional compensation. They will be the first step of the grievance procedure if the Board's position is sustained in this proceeding. They 9/ This evidentiary standard is of necessity limited to the unique circumstances of this case.

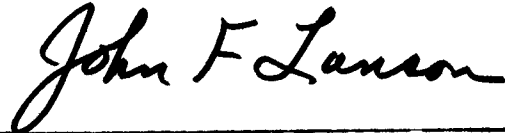
must have a Supervisor's Certificate if hired from outside the faculty. From these facts we draw two conclusions. First and admittedly tenuous, Coordinators effectively recommend on questions of hire. Second and more amply supported, their duties are such as to raise an incompatibility of interest vis-a-vis teachers sufficient to require separate representation. The potential for conflict of interest is a prescribed basis for exclusion 10/ and is not overcome by reference to the experience of Chairmen in the late 1960's. Even assuming that Chairmen in their more active role demonstrated no actual conflict of interest and further assuming those duties were akin to that of Coordinators, those facts would only be relevant to the application of the statute's exceptions in pre-Chapter 303 situations. Cf. West Paterson, supra. Furthermore, in this case there was no continuity of function between Chairman and Coordinator and the three year hiatus described earlier reinforces the conclusion that the Board was embarking upon a new venture. 11/ The Commission concludes that there is not a community of interest between Coordinators and teachers and that it is not appropriate to include the former in the teachers' unit. However, since this determination is based in significant part on the Board's concept of what this program will be rather than what has been, such determination should be subject to reexamination at a later time upon a prima facie

10/ Board of Education of the Town of West Orange v. Elizabeth Wilton, 57 N.J. 404 (1970).

11/ The Association contends that the Coordinator position was created in an attempt to remove the Chairman position from the unit and thus avoid the obligation to negotiate with the Association for these individuals. The Commission is without authority to judge the conduct of the Board in terms of its lawfulness under the Act. Burlington County Evergreen Park Mental Hospital v. Dorothy Cooper, 56 N.J. 579 (1970). That is not to say that in other circumstances clear proof of an improper motive will not affect a unit determination. But such proof is absent here.

showing that the program as conceived has not materialized within a time, beyond the date of this decision, reasonably sufficient for its implementation. The petition is therefore dismissed subject to being refiled under the conditions stated.

BY ORDER OF THE COMMISSION

A handwritten signature in cursive script that reads "John F. Lanson". The signature is written in dark ink and is positioned above a horizontal line.

John F. Lanson
Chairman

DATED: February 5, 1974
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STERLING BOARD OF EDUCATION
Public Employer

and

Docket No. CU-77

STERLING EDUCATION ASSOCIATION
Petitioner-Employee Organization

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A petition was filed with the New Jersey Public Employment Relations Commission January 31, 1972, requesting a clarification of unit. The recognized unit included: "All certified personnel under 10 or 12 months teaching contract with the Board; provided, however, that the following supervisory personnel shall be excluded from membership in, or representation by, the Association: Superintendent, Principal, Assistant to the Superintendent, Secretary-Business Administrator, Assistant Principal, Assistant to the Principal and Guidance Director." 1/ The titles sought to be clarified were the newly created positions designated "coordinator". 2/ From 1968 until the 1971-72 contract year the Department Chairmen were included in the unit with teachers.

Because Petitioner requested some additional time in order to have the actual existence and functioning of the new positions, a Notice of Hearing dated November 16, 1972, and an Order Rescheduling dated December 13, 1972

1/ 1972-73 Contract, evidence I-C -- From the 1972-73 contract, Art. IV, Section 16: "In the event that the supervisory status of the Department Coordinators is confirmed and their exclusion from Association membership is held properly the Public Employees Relations Commission (sic), this Article shall be amended to provide for an additional step in this procedure. In that event, the first step shall be discussed by the grievant with his Department Coordinator prior to the present paragraph 5." Evidence 2-C.

2/ The Board of Education did not formally incorporate the positions of Coordinator until June of 1972 (pg. 6 of transcript).

were issued for a formal hearing which was held December 19, 1972. At the formal hearing held before the undersigned both parties argued orally, presented evidence, examined and cross-examined witnesses, and were given the opportunity to file briefs. 3/

The issue before the Hearing Officer relates to the inclusion or exclusion of Coordinators from the existing unit. Accordingly, it must be determined if Coordinators are supervisors within the meaning of the Act; if they are, it must be determined if any of the exceptions of C.34:13A-5.3(7) 4/ apply. If they are not supervisors, it must be determined whether or not the Coordinators have a community or conflict of interest with the members of the unit.

It is the position of the Sterling Education Association that the Coordinators are simply renamed department chairmen, that they are not supervisors, but even if they are found to be supervisors, they have a community of interest with the entire unit and that special circumstances should prevail (the name change referred to constitutes special circumstances). 5/

The position of the Sterling Board of Education is that Department Chairmen were not supervisors, and that the Department Coordinators are, 6/ thus creating a new relationship which requires excluding the Coordinators from the unit.

Upon consideration of the record, the following appear to be the conditions in the Sterling education system: There has been a history of

3/ At the close of the hearing, both parties waived the right to filed briefs preferring to allow the developed record to represent the sum total of their positions.

4/ "...nor except where established practice, prior agreement, or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership..."

5/ Pages 8 and 9 of transcript.

6/ Page 6 of transcript.

Department Chairmen evaluating the teachers, 7/ although the evaluations were not specifically authorized by the Board. 8/ In the year or two prior to the Board adoption of the Coordinator title, the evaluations were conducted by the Principal and the Superintendent. 9/ Even though the evaluating responsibility shifted in the years prior to 1972, neither party provided the Hearing Officer with instances where there were negative evaluations and appropriate action taken.

The job description for Coordinators calls for the evaluations of teachers, although there is some uncertainty as to the possible end results of evaluations. The response of the Principal to the questioning of the Board's counsel is illustrative:

Q. "Does the evaluation (on teachers) include a recommendation as to retention of a tenure or non-tenure teacher?"

A. Not on the individual form as only a daily observation.

Q. Does he make his recommendation as to tenure teachers?

A. It's usually recommended.

Q. As to non-tenure teachers, does he make a recommendation to you?

A. If requested." 10/

Neither party suggests that any less money would be granted to the individual who might receive an unsatisfactory evaluation. Should the evaluation recommend non-retention of the non-tenured teacher, the Superintendent has testified that the evaluated individual would be subject to an independent review by the Principal or Superintendent. 11/

7/ Pg. 15 and 16 of transcript, B. Haase,
Pg. 109 of transcript, Werkeiser.

8/ Pg. 25 of transcript, Keegan.

9/ Pg. 112 of transcript, Werkeiser.

10/ Pg. 77 of transcript, Keegan

11/ Pg. 106 and pg. 126 of transcript, Denich.

Because there have been no evaluations by which a standard of effectiveness can be measured does not mean that evaluations cannot be given consideration as a potential friction point within the unit. Neither can the history of Chairmen evaluating be ignored; if it was done it must be assumed it was for a purpose. The record has not indicated that when the evaluating duties were passed to the Principal and Vice-Principal and then to the Coordinators the evaluations indicated different results for any members of the unit.

The very fact that the Chairmen did, without restraint, evaluate for a period of time, and pass the evaluations on to superiors has established a supervisory criteria not unlike that now required by the Coordinators.

The hiring process is another consideration. The job description for Coordinators requires that a Coordinator:

"Interview whenever possible, teacher candidates for assignments in his department." 12/

The actual practice of hiring a teacher candidate for a vacancy is as follows: the candidates apply to the school, the Principal selects the applications to be forwarded to the Coordinators to conduct an interview. The Coordinator is not given the applicant's recommendations. 13/

After the Coordinator interviews the candidate, the candidate, Coordinator and the Principal go to the Superintendent for further interviewing. In the past year, the Coordinators have made two recommendations in writing, for the hiring of teachers. The teachers were hired. 14/

The test of "effective recommendation" comes, however, only after a period of time when it can be safely assumed that there were circumstances

12/ Evidence, Job Description.

13/ Transcript, pg. 41.

14/ Transcript, pg. 42.

when different people in the hiring process have had different opinions about a particular candidate. Initial screening of resumes and possibly recommendations by the Principal removes the hiring one step from the Coordinator. The checking of reference and the further interviewing by the Superintendent and Principal removes the process another step from any real concept of control by the Coordinator. Additionally, the job description calls for interviewing "whenever possible." That phrase leaves little likelihood that a candidate would be hired without an interview by the Coordinator, but it is not unlike the situation of Department Chairmen "normally" interviewing the prospective candidates. 15/

The evaluations and hiring processes appear to be the most critical factors in determining whether Coordinators are supervisors within the meaning of the Act, as the parties could not give instances where either the Department Chairmen or Coordinators recommend discipline or discharge of an individual. The developed record demonstrates that the Coordinators do play a role in the hiring process, and do evaluate teachers; the potential for conflict thereby being established, the substantiality of that potential being questionable.

Before proceeding with the dicta of the Act, the Hearing Officer finds that the decision in Wilton 16/ must be considered, particularly as applied in questions of supervisors and non-supervisors: whether their "inclusion in the unit will serve and not subvert the purpose of the Act." Also to be considered is the question raised by the court in Wilton, "To what extent does the reasonable and good faith performance of the obligations a supervisor owes to his employer have capacity, actual or potential, to

15/ Pg. 25 of transcript, Keegan.

16/ Board of Education of the Town of West Orange v. Elizabeth Wilton and Administrators Association of West Orange Public Schools, 57 N.J. 404 (1971).

create a conflict of interest with other (employees) whose work he is obliged to oversee and evaluate for his employer?"

Whether or not the inclusion of the titles in question will "serve and not subvert the purpose of the Act" must be interpreted in terms of the actual or potential conflict of interests if they are included. The undersigned finds that in terms of the practices of the Department Chairmen and Department Coordinators with respect to hiring and evaluating, neither position has demonstrated examples of conflict with the members of the unit, even though both have the trappings of being (or having been) statutory supervisors. Further, the similarity of functions has established the essentials necessary for the defining of "past practice" with regard to those job categories being included in the same unit with teachers and maintaining non-conflicting identities. 17/

The absence of conflict is not enough to mandate inclusion in the unit where it has been demonstrated that conflict is actually lacking, but not necessarily the potential for conflict. The Hearing Officer finds that the historical lack of conflict is evidence that the potential is at best minimal.

The absence of conflict does not translate into community of interest, but upon further examination of the record, the Hearing Officer finds that working conditions for Coordinators and formerly Department Chairmen are not greatly dissimilar from teachers. A teacher has five classes and an assignment such as lunch; Coordinators have four classes and administrative duties. 18/ Coordinators as well as teachers are required to be certified as teachers. 19/ Coordinators have the same benefits as teachers, 20/ but in line with their administrative duties the Coordinators have a key to the book storage room. 21/

17/ City of Camden, PERC No. 52, February 25, 1971.

City of Camden, ___ N.J. Super ___, 1972 cert. denied ___ N.J. ___ 1972.

18/ Pg. 65 of transcript, Keegan.

19/ Pg. 66 of transcript, Keegan.

20/ Pg. 68 of transcript, Keegan.

21/ Pg. 73 of transcript, Keegan.

The undersigned finds the Coordinators not to have supervisory powers (as defined in the Act), and to be similar to Department Chairmen. The undersigned finds inclusion of the Coordinators to be within the purpose of the Act because of the present lack of demonstrable conflict as a result of inclusion (as with Department Chairmen) and the establishment of a community of interest with the rest of the unit with respect to terms and conditions of employment.

Accordingly, the undersigned recommends the inclusion of the Coordinators in the unit as an established practice.

RESPECTFULLY SUBMITTED

A handwritten signature in black ink, reading "Edward C. Marth". The signature is written in a cursive style with a horizontal line underneath the name.

Edward C. Marth
Hearing Officer

DATED: June 26, 1973
Trenton, New Jersey