

P.E.R.C. NO. 2019-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-223

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 68-68A-68B, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's report and recommended decision concluding that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by transferring the unit work of head custodians to non-unit custodial supervisors.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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INTERNATIONAL UNION OF OPERATING
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Charging Party.

Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Gregory J. Franklin, of counsel and on the brief; Matthew J. Giacobbe, of counsel and on the brief)

For the Charging Party, DeCotiis, Fitzpatrick, Cole & Giblin, LLP, attorneys (Lesley Sotolongo, of counsel)

DECISION

On March 24 and April 14, 2014, the International Union of Operating Engineers, Local 68-68A-68B, AFL-CIO (Local 68) filed an unfair practice charge and amended charge against the West Orange Board of Education (Board) alleging that the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2),

(3), (5) and (7),^{1/} when it transferred unit work by replacing head custodians with non-unit custodial supervisors.

PROCEDURAL HISTORY

On May 28, 2015, the Director of Unfair Practices issued a complaint and notice of hearing on the a(1) and (5) allegations only; the a(2), (3) and (7) allegations were dismissed. On July 7, the Board filed an answer. A hearing was held on December 5 and 6, 2017.^{2/}

On May 8, 2018, the Hearing Examiner issued a report and recommended decision concluding that the Board violated subsections 5.4a(1) and (5) of the Act when it transferred the unit work of head custodians to non-unit custodial supervisors in/around March 2014. H.E. No. 2018-11, 44 NJPER 426 (¶120

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act"; "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative"; and "(7) Violating any of the rules and regulations established by the commission."

2/ "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, following by the page number(s). "CP" represents Charging Party exhibits and "R" represents Respondent exhibits.

2018). Accordingly, the Hearing Examiner recommended that the Board be ordered to transfer the unit work of non-unit custodial supervisors back to head custodians.

On May 31, 2018, the Board filed the following exceptions to the Hearing Examiner's report and recommended decision:

- the Hearing Examiner erred in concluding that Local 68's unfair practice charge was not time barred;

- the Hearing Examiner erred in determining that none of the exceptions to the unit work rule applied because the Board had a managerial prerogative to reorganize the way it delivers government services and the Board did not have a duty to negotiate because non-unit employees have historically performed the disputed unit work.

On June 22, 2018, Local 68 filed opposition to the Board's exceptions. In sum, Local 68 maintains that the Hearing Examiner accurately found that the unfair practice charge was timely filed and that none of the exceptions to the unit work rule applied.^{3/}

We have reviewed the record. The Hearing Examiner's findings of fact are supported by the record and we adopt them. (H.E. at 2-13).

^{3/} On July 24, 2018, at the Commission's request, the parties submitted supplemental briefs regarding the impact of the Workplace Democracy Enhancement Act (WDEA), N.J.S.A. 34:13A-5.11 et seq., if any, on the instant matter. We find that no discussion is warranted as a result of the WDEA.

SUMMARY OF FACTS

Local 68 represents Board employees specified in the recognition clause (Article I) of the parties' collective negotiations agreement (CNA) including head custodians, assistant head custodians, crew chiefs, custodians, full-time bus drivers, utility and maintenance workers; excluding all executive, clerical and professional personnel. The Board and Local 68 are parties to a CNA in effect from July 1, 2011 through June 30, 2015 and a successor agreement in effect from July 1, 2015 through June 30, 2019. (CP-1; CP-2).

The West Orange school district is comprised of one high school, three middle schools, eight elementary schools, and two additional buildings. Each school is assigned a head custodian^{4/} or a non-unit custodial supervisor^{5/}; custodians working various shifts; and non-unit substitute custodians assigned on an as-

4/ Head custodian is a twelve-month position that reports to the Director and supervises all custodians and substitute custodians assigned to a particular facility. Head custodians "oversee the custodial operations of individual school facilities and ensure a safe, clean and comfortable school environment"; they are also responsible for "carry[ing] out administrative tasks required to maintain and operate the plant to the required stations." (CP-3).

5/ Custodial supervisor is a twelve-month position that reports to the Director and supervises custodial staff and substitute custodians. Custodial supervisors "perform as a supervisor while assisting in maintaining the physical school facilities in a condition of operating excellence"; they are also responsible for "developing an on-going program of preventive maintenance of school facilities." (R-6).

needed basis. The Director of Buildings and Grounds is responsible for supervising head custodians and custodial supervisors. (1T49:10 thru 1T51:7; 2T6:16 thru 2T7:7; 2T27:8 thru 2T32:23; 2T37:14 thru 2T38:5; H.E. at 3-4).

In 2008, Robert Csigi (Csigi) became the Director of Buildings and Grounds. At that time, head custodians were assigned to all of the district's schools; the custodial supervisor title did not exist. School principals were responsible for evaluating both head custodians and custodians; however, head custodians provided verbal input to school principals, primarily upon request, regarding evaluations and disciplinary action. In 2010, the evaluation system was changed and head custodians began providing verbal evaluations directly to Csigi or Operations Foreman Mike Hanley (Hanley). Head custodians also began providing recommendations regarding disciplinary action, verbally and via email, directly to Csigi or Hanley. (1T22:4-8; 1T45:23 thru 1T46:21; 1T51:23 thru 1T52:6; 1T55:25 thru 1T57:8; 1T90:25 thru 1T92:9; 1T96:25 thru 1T100:15; 2T5:6 thru 2T6:21; 2T8:11 thru 2T15:10; 2T20:8-17; 2T42:24 thru 2T44:9; H.E. at 4-9).

In 2011, the Board created the non-unit custodial supervisor title without discussing the title or associated job duties with Local 68. Csigi admitted that he never had a discussion with Local 68 about the custodial supervisor title until 2014.

(1T25:18 thru 1T26:25; 2T47:20 thru 2T48:7; H.E. at 9). Csigi testified that "[t]he initial intent was for the custodial supervisor at the district level to assist head custodians until eventually every school had a custodial supervisor" and "if the head custodian needed assistance or made a decision that was . . . wrong . . . the custodial supervisor could overrule that." (2T15:11-13; 2T16:1 thru 2T17:12; H.E. at 6-7).

Csigi went on to offer the following reasons for creating the custodial supervisor title:

To have a differentiation between the craft, meaning the workers in the union and non-union management. The need came about because the head custodians were not willing to do evaluations or do disciplinary action, or, more importantly, put things in writing, and that's what I needed from that position. A verbal - verbal responses to needs did not work, okay, there is no paper trail and we did need a paper trail.

* * *

[H]ead custodians had no - really, no input, that I could see, to the principal, and the principal's giving such an excellent rating to everyone, it was kind of a moot point to kind of have an evaluation. So to better evaluate the employee, we felt that the custodial supervisor, because the head custodians didn't have any interest in doing that, didn't refuse to do it but weren't doing it, so we moved in that direction.

* * *

The feedback to me [regarding why head custodians were not initiating discipline against custodians] from several of the head custodians was, we are in the same union, we can't write up an employee that works for us because we are in the same union.

* * *

Initially, when I came in, like I did in every district that I went to, took it slow and evaluated what was going on within the district. As time went on, it was evident that head custodians would not put things in writing against another employee. And I said, I need that in writing, whether it's an e-mail, whether it's a note, anything, to justify that it came from you. Anything verbal didn't work, and that's when I was getting things verbally, and I would take it from that point to do the write-up myself, and then it became problematic . . . It became problematic that I was being challenged by the person who I was writing up that those weren't the facts of what happened. So, thus, the conflict of how do I go back now and justify what was told to me, and when I did go back the story changed. And so how it changed or why it was changed is immaterial that the write-up was not valid. So that's when I started to ask that I need things in writing and was not getting that from them, thus, implementing the custodial supervisor position which would truly have managerial rights to discipline and evaluating.

[2T8:2-10; 2T10:23 thru 2T11:9; 2T12:7 thru 2T13:18; 2T13:20 thru 2T15:13; H.E. at 6-9.]

Csigi admitted that the job description for head custodian is similar and/or identical in some respects to the job description for custodial supervisor (i.e. head custodians and custodial supervisors are both responsible for overseeing custodial operations in their assigned buildings). Csigi also admitted that although custodial supervisors provide written evaluations and written recommendations for disciplinary action, head custodians still recommend disciplinary action verbally. Csigi acknowledged that he is the ultimate disciplinary

authority. (1T44:25 thru 1T46:24; 2T15:14 thru 2T23:25; 2T36:2-23; 2T40:5 thru 2T44:9; CP-3; R-6; H.E. at 7-9).

Both before and after the custodial supervisor title was created, Csigi inquired with head custodians about becoming custodial supervisors. In 2010, Csigi approached head custodian Claudio Raglievich (Raglievich) about becoming a custodial supervisor. Raglievich declined because he did not want to make less money and wanted to remain in Local 68. In 2011, Csigi approached head custodian Jim Smith (Smith) about becoming a custodial supervisor. Smith declined because he wanted to remain in Local 68. According to Csigi, although some custodial supervisors currently employed by the Board make less than head custodians, the salary offered to Raglievich and Smith was not going to be less than they were making at the time. (1T63:22 thru 1T64:14; 1T94:6 thru 1T95:22; 2T42:7-23; H.E. at 9-10).

Prior to 2014, Local 68's Business Representative Michael Lewis (Lewis) and others were aware that the Board had hired three custodial supervisors. However, Local 68 considered each position unique and concluded that the unit work being performed, if any, was incidental. Specifically:

- In 2011 or 2012, Local 68 discovered that the Board hired Tony Avia (Avia) as a custodial supervisor at West Orange High School to replace head custodian Mike Facchiano (Facchiano) who was transferred to another school. Local 68 concluded that the new title was created only for the high school because it has 10-12 programs in the

evenings as well as different activities during the day. This conclusion was validated when Lewis discussed his concerns with then-Superintendent Dr. Anthony Cavanna (Cavanna) and was assured that the position was only for the high school. Accordingly, Local 68 did not challenge the new title.

-Also in 2011 or 2012, Local 68 discovered that maintenance worker Ed Cassidy (Cassidy) was appointed as custodial supervisor at the administration building. Local 68 concluded that Cassidy's work was unique to the requirements of the administration building and particularly related to inventory control and supplies. Accordingly, Local 68 did not challenge the new title.

-In 2012, Local 68 discovered that the Board hired Moshe Mitchell (Mitchell) as a district-wide night custodial supervisor. Initially, Mitchell worked the 3:00 p.m. to 11:00 p.m. shift and was assigned all of the district's schools to inspect custodial work, provide written evaluations of custodians, and provide written recommendations for disciplinary action of custodians if necessary; Mitchell's responsibilities did not include evaluating head custodians. Mitchell would inform head custodians who supervised the custodians in their buildings of his findings because it was the responsibility of head custodians to oversee the work of custodians. Local 68 concluded that Moshe's work as district-wide night custodial supervisor was inherently different than the day-shift head custodians. Accordingly, Local 68 did not challenge the new title.

(1T25:18 thru 1T29:13; 1T35:18 thru 1T39:8; 1T54:18 thru 1T55:18; 1T57:9 thru 1T59:18; 2T44:10 thru 2T45:8; 2T50:19 thru 2T52:10; 2T54:1 thru 2T91:8; R-8 thru R-15; H.E. at 10-12).

In March or April 2014, Local 68 shop steward/head custodian Jerry Companion, Sr. (Companion) complained to Lewis for the

first time about the Board replacing head custodians with custodial supervisors. Companion noticed that the number of custodial supervisors doubled from the initial three in 2011-2012 to approximately six in 2014; that custodial supervisors were being appointed to work in elementary/middle schools with 400-500 students; and that custodial supervisors were actually doing unit work. Specifically:

-In or around March 2014, Companion learned that mid-shift custodian Victor Cardone (Cardone) applied and was appointed custodial supervisor at Gregory Elementary School.

-In or around March 2014, Companion learned that head custodian Mike Facchiano (Facchiano) was transferred and demoted and that his position at Betty Maddalena Early Learning Center (BMELC) was filled by custodial supervisor Robert Sabino (Sabino).

-As of the 2015-2016 school year, Companion learned that district-wide night custodial supervisor Moshe Mitchell (Mitchell) was assigned to act as custodial supervisor at Roosevelt Middle School. Mitchell's responsibilities were/are now confined to inspecting, evaluating, and recommending discipline of the four custodians assigned at Roosevelt Middle School just as head custodians are responsible for their custodial staff. Mitchell no longer has district-wide supervisory responsibilities with respect to the custodians at the district's other schools.^{6/}

6/ There is no evidence that the Board hired or appointed another district-wide custodial supervisor with district-wide responsibilities.

(1T29:14 thru 1T31:8; 1T47:9 thru 1T49:5; 1T52:20 thru 1T54:23; 1T57:25 thru 1T58:6; 2T52:11 thru 2T53:20; 2T90:2 thru 2T91:8; H.E. at 12-13).

Presently, seven schools have head custodians and five schools have custodial supervisors. Most custodial supervisors were new hires replacing head custodians who retired or were moved (e.g., the head custodian at Roosevelt Middle School retired and was replaced by custodial supervisor Moshe Mitchell; the head custodian at Gregory Elementary School retired and was replaced by custodial supervisor Victor Cardone; the head custodian at Hazel Avenue Elementary School retired and was replaced by custodial supervisor Jerry Companion, Jr.; the head custodian at West Orange High School was moved and replaced by custodial supervisor Jose Arce). (2T24:2 thru 2T35:25; 2T37:16 thru 2T40:3; 2T45:20 thru 2T46:21; R-7; H.E. at 4).

In the spring of 2014, Lewis and Companion met with Interim Superintendent James O'Neill to discuss their concern that head custodians were being replaced with non-unit custodial supervisors. The Board took no action in response. (1T31:11 thru 1T32:9; H.E. at 13).

On March 24 and April 14, 2014, Local 68 filed the instant unfair practice charge and amended charge. (C-1).

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision is set forth in pertinent part at N.J.S.A. 52:14B-10(c):

The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.^{7/}

See also New Jersey Div. of Youth and Family Services v. D.M.B.,
375 N.J. Super. 141, 144 (App. Div. 2005) (deference due

7/ N.J.A.C. 19:14-7.2 provides:

The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

factfinder's "credibility determinations and . . . feel of the case based upon his or her opportunity to see and hear the witnesses"); Cavalieri v. Bd. of Trustees of the Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004) (it is the factfinder's "credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole").

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial

business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). We have held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

ANALYSIS

The Board’s first exception challenges the Hearing Examiner’s determination that Local 68’s unfair practice charge was timely filed. We reject this exception.

N.J.S.A. 34:13A-5.4(c)^{8/} establishes a six-month limitations period for unfair practice charges. The Commission has held that

8/ N.J.S.A. 34:13A-5.4(c) provides in pertinent part:

[N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

"[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed" and "[i]n determining whether a party was 'prevented' from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim." State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff'd 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). "Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge." Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)).

The Hearing Examiner acknowledged that the non-unit custodial supervisor title was created in 2011 and that Local 68 was aware that the Board had hired three custodial supervisors from 2011-2012. (H.E. at 6, 10-12, 17). However, she also found that neither the Board nor Csigi discussed the custodial supervisor title or associated job duties with Local 68 when the new title was created; and that Csigi did not have a discussion with Local 68 about the custodial supervisor title until the

issue was raised with him in 2014. (H.E. at 9). Further, the Hearing Examiner determined that even if the custodial supervisors hired in 2011-2012 occasionally performed ancillary duties that were also performed by head custodians, Local 68 received certain assurances from the superintendent and did not have enough conflicting evidence at that time to conclude that custodial supervisors were exclusively performing unit work and/or were in fact replacements for head custodians. (H.E. at 10-12, 17-19).

We agree with the Hearing Examiner's determination that the operative event triggering the six-month limitations period was the Board's replacement of three head custodians with three custodial supervisors in the school district's elementary and/or middle schools, which Local 68 did not learn about until March 2014. (H.E. at 12-13, 18-19). Unlike the three custodial supervisors hired from 2011-2012, the three custodial supervisors hired thereafter perform job duties that were/are substantially similar, if not identical, to the job duties performed by head custodians in other elementary and/or middle schools. (H.E. at 10-13, 17-19). Accordingly, we agree that Local 68's unfair practice charge filed in March 2014 was timely.

The Board's second exception contends that the Hearing Examiner erred in finding that none of the exceptions to the unit work rule applied, asserting that the Board had a managerial

prerogative to reorganize the way it delivers government services and did not have a duty to negotiate because non-unit employees have historically performed the disputed unit work. We also reject this exception.

In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-576 (1998), the New Jersey Supreme Court analyzed the transfer of unit work under both the Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982) balancing test and the unit work rule. Notably, the unit work rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services." Jersey City, 154 N.J. at 577.

With respect to the Board's assertion that it had a managerial prerogative to reorganize the way it delivers government services, we agree with the Hearing Examiner that under the Local 195 balancing test, Local 68's interest in preserving head custodians' unit work outweighs the Board's concerns regarding head custodians' unwillingness to adequately perform the supervisory duties assigned to them. The Board and/or Csigi could have required head custodians to provide written evaluations and recommended disciplinary actions for

custodians; progressive discipline could have been imposed in response to any continued reluctance. The Board and/or Csigi also could have filed a clarification of unit petition seeking to remove head custodians (purported supervisors) from Local 68's unit based upon an asserted conflict of interest with custodians (nonsupervisors). See infra pp. 20-28. Instead, rather than instituting a genuine reorganization, the Board elected to create a new, non-unit custodial supervisor title with job duties that were/are substantially similar, if not identical, to the existing head custodian unit title; proceeded to unilaterally establish terms and conditions of employment for the custodial supervisor title; and ultimately began transferring unit work by replacing head custodians with non-unit custodial supervisors. (H.E. at 19-25).

The Board's reliance on Freehold Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984) is misplaced. In that case, the local board abolished the non-supervisory head and assistant head custodian unit titles and created the new non-unit titles of building custodial services supervisor and assistant supervisor in order "to improve the supervisory structure for custodial employees and to assure that employees with clear supervisory responsibility were on duty when custodians were working." 11 NJPER at 47. According to their job descriptions, building custodial services supervisors and assistant supervisors

were required to perform supervisory duties that were not previously performed by head and assistant head custodians (i.e., evaluate custodial staff and recommend discipline) as well as non-supervisory duties that were previously performed by head and assistant head custodians. The Commission found that the case predominately involved the local board's right to reorganize its supervisory structure for custodial employees and restrained arbitration, noting that there was no dispute that "the new positions truly entail[ed] supervisory responsibilities" and indicating that "such a dispute . . . would be appropriately resolved through a unit clarification or unfair practice charge." 11 NJPER at 48. (H.E. at 20-22).

Unlike Freehold Reg. H.S. Dist. Bd. of Ed., in this case the Board did not abolish the head custodian unit title, and the non-unit custodial supervisor title is required to perform job duties that were/are substantially similar, if not identical, to the job duties performed by head custodians. Moreover, as we indicated in Freehold Reg. H.S. Dist. Bd. of Ed., in this case the Hearing Examiner appropriately resolved a unit work dispute regarding whether head custodians and custodial supervisors truly perform different supervisory responsibilities through an unfair practice charge. (H.E. at 20-22).

With respect to the Board's assertion that it did not have a duty to negotiate because non-unit employees have historically

performed the disputed unit work, we agree with the Hearing Examiner that - consistent with our determination regarding the operative event triggering the six-month limitations period set forth above - custodial supervisors did not perform job duties that were/are substantially similar to the job duties performed by head custodians until March 2014. Given that the instant unfair practice charge was filed on March 24, 2014, we agree that the Board has failed to demonstrate that the job duties performed by head custodians have been shared with custodial supervisors on a regular, on-going basis. Contrast Town of Dover, H.E. No. 89-6, 14 NJPER 555 (¶19233 1988), rev'd P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989) (dismissing an unfair practice charge alleging that the town transferred unit work by terminating three civilian dispatchers and assigning their work to non-unit police officers where the record demonstrated that police officers had performed dispatching duties alone or in conjunction with civilian dispatchers for 25 years). (H.E. at 25-27).

We also agree with the Hearing Examiner that the issue of whether non-unit substitute custodians have historically performed the unit work of custodians is irrelevant to the instant unfair practice charge. The Board failed to present any relevant evidence demonstrating that substitute custodians have

historically performed the unit work of head custodians. (H.E. at 26-27).

Accordingly, we agree with the Hearing Examiner and find that the Board violated subsections 5.4a(1) and (5) of the Act when it transferred the unit work of head custodians to non-unit custodial supervisors.

ORDER

The West Orange Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, specifically by transferring the unit work of head custodians to non-unit custodial supervisors.

2. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by transferring the unit work of head custodians to non-unit custodial supervisors.

B. Take the following action:

1. Transfer the unit work of non-unit custodial supervisors back to head custodians.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by

the Respondent's authorized representative, be posted immediately and 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.

3. Notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: October 25, 2018

Trenton, New Jersey



NOTICE TO 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 employees in the exercise of the rights guaranteed to them by the Act and from refusing to negotiate in good faith with the International Union of Operating Engineers, Local 68-68A-68B, AFL-CIO, concerning terms and conditions of employment of employees in that unit, specifically by transferring the unit work of head custodians to non-unit custodial supervisors.

WE WILL transfer the unit work of non-unit custodial supervisors back to head custodians.

WE WILL post in all places where notices to employees are customarily posted, copies of this notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by 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.

WE WILL notify the Chair of the Commission within twenty (20) days of receipt of this decision what steps the Respondent has taken to comply with this order.

Docket No. CO-2014-223

West Orange Board of Education
(Public Employer)

Date: _____

By: _____

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 Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830