

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYEMENT RELATIONS COMMISSION

In the Matter of

MANVILLE BOARD OF EDUCATION,

Respondent-Charging Party,

-and-

Docket Nos. CO-H-87-326
CE-H-87-21

MANVILLE EDUCATION ASSOCIATION,

Charging Party-Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that the Manville Board of Education violated the New Jersey Employer-Employee Relations Act by demanding that Manville Education Association vice-president Dorothy Story sever all ties with the Association. The Commission further finds that the Association violated the Act by permitting Story to serve both as Association negotiator and as an officer empowered to assume the duties of president.

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Charging Party-Respondent.

Appearances:

For the Board, Cassetta, Taylor & Whalen
(Garry M. Whalen, Consultant)

For the Association, Klausner, Hunter & Oxfeld, Esqs.
(Stephen E. Klausner, of counsel)

DECISION AND ORDER

This dispute involves two unfair practice charges. One was filed by the Manville Education Association ("MEA") against the Manville Board of Education ("Board") on May 8, 1987. The second charge was filed by the Board against MEA on May 21, 1987.

MEA alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5),^{1/} when it

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of

demanded that Dorothy Story, MEA member and vice-president, sever her entire relationship with MEA.

The Board alleges MEA violated subsections 5.4(b)(1) and (2)^{2/} by permitting Story, a department head and supervisor, to hold MEA office. The Board also alleges that MEA committed an unfair practice by collecting dues from Story.^{3/}

On June 29, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing and consolidated the charges. MEA filed an Answer denying it committed an unfair practice and asserting that the Board's charge is barred by the statute of limitations. The Board filed an Answer denying it had violated the Act.

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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 employment of employees in that unit, or refusing to process grievances presented by the majority representative."

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."

3/ The Board dropped (Tr. 17-18) an allegation that MEA had controlled the Manville Department Heads Association.

On August 19, 1987, Hearing Examiner Richard C. Gwin conducted a hearing. On September 29, he issued his report and recommended decision. H.E. No. 88-14, 13 NJPER ____ (¶ ____ 1987). He found generally that supervisors may not hold office in unions representing non-supervisors where that role conflicts with supervisory responsibilities. Based on the record, however, he found no conflict between Story's office and her supervisory duties. He also found that the Board did not allege MEA had violated the Act by permitting Story to negotiate and that MEA did not violate the Act by collecting dues from Story. He thus recommended dismissal of the Board's allegations. The Hearing Examiner then recommended that we find that the Board violated the Act by demanding that MEA sever its relationship with Story because the Act protects her right to join MEA.

On October 14, 1987, the Board filed exceptions. It contends the Hearing Examiner erred in finding the Board did not allege MEA had violated the Act by permitting a supervisor to serve as MEA negotiations chairperson and that the matter had not been fully litigated. It further contends the Hearing Examiner misinterpreted or ignored certain decisions of the National Labor Relations Board; ignored cases from other jurisdictions; failed to address West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971), and developed an impractical principle that contradicts this Commission's decisions.^{4/}

^{4/} It also requested oral argument. We deny that request.

On November 2, 1987, MEA filed an answering brief. It asserts that the Board did not allege that MEA permitted Story to negotiate.

On January 15, 1988, the Board filed a statement citing the discussion in Wayne Tp. v. AFSCME Council 52, Local 2192, 220 N.J. Super. 340 (App. Div. 1987) of the potential conflict of interest facing an employee with access to confidential labor relations material. MEA filed a response asserting that Story has no access as department chairperson to confidential labor relations data.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-13) are accurate. We adopt and incorporate them with this modification. We add to finding no. 7 that the principal relies heavily on what the department heads say during the interviewing process. We also correct a typographical error in finding no. 14. The press conference was in 1987.

This dispute centers on Story's respective roles as a department chairperson and MEA vice-president and negotiator. Story is a high school teacher and has been a department head for eleven years. Department heads supervise and evaluate teachers, help develop curriculum, manage the business department's resources, and interview job applicants and discuss their qualifications with the principal. Story also has been MEA vice-president for nine years. Her duties as vice-president include assuming the presidency when the president is absent and occasionally running an MEA meeting or speaking to reporters.

Story has volunteered to negotiate for MEA for all but one of its contracts. She was negotiations chairperson for the 1985-1988 agreement and participated in reopener negotiations for 1987-1988 salaries.

We dismiss the Board's allegation regarding dues deductions. N.J.S.A. 52:14-15.9(e) provides for employee dues deductions to labor organizations. Union Council No. 8 v. Elizabeth Housing Auth., 124 N.J. Super. 584 (Law Div. 1973), held that an employer had to honor requests by its supervisors to deduct dues for an organization that admitted its non-supervisors. Thus, neither N.J.S.A. 52:14-15.9(e) nor 34:13A-5.3 precludes deductions of Story's dues and their transmittal to MEA.

We also find that the Board violated subsections 5.4(a)(1) and (2) when it demanded that Story sever all relationships with MEA. While the Board has a legitimate concern that unlawful conflicts of interest not be present in its relationship with MEA, Story's membership in MEA is permissible and protected. See N.J.S.A. 34:13A-5.3. Supervisors and non-supervisors can belong to affiliated organizations as long as they are represented in separate units. See Bowman v. Hackensack Hospital Ass'n, 116 N.J. Super. 260 (Ch. Div. 1971); Hudson Cty., D.R. No. 85-7, 10 NJPER 623 (¶15297 1984), aff'd App. Div. Dkt. No. A-789-84T7 (11/15/85); cf. Union Council.^{5/}

^{5/} We dismiss the subsection 5.4(a)(3) and (5) allegations. MEA did not prove unlawful motivation or any refusal to negotiate in good faith.

The Legislature did not adopt a per se rule barring supervisors from holding office in organizations representing non-supervisors. However, a supervisor may not participate in union affairs if such participation unduly conflicts with the duty the supervisor owes to the employer or the right of non-supervisory employees to representation without employer interference. See, e.g., Camden Cty., P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983) (conflict when union president handled grievances while personnel assistant); City of Union City, P.E.R.C. No. 86-35, 11 NJPER 593 (¶16209 1985) (conflict when managerial executive processed grievances for members); Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 339 (¶12153 1981) (conflict when superior's negotiations committee appointed by non-superior president). But cf. Bergen Cty., P.E.R.C. No. 69 (1971) (low level supervisor was union president). The facts in each case must determine whether a conflict exists.

In this case, Story's activities as a whole rise to the level of an impermissible conflict of interest. Story was chairperson for the 1985-1988 agreement and was on the negotiations committee for the salary reopener negotiations which concluded with an agreement in March 1987. Story has participated in negotiations on MEA's behalf for all but one of its agreements. Also, by virtue of her office, she runs MEA meetings and becomes president when that officeholder is absent. Under all these circumstances, we find that MEA violated subsections 5.4(b)(1) and (2) by permitting

Story to participate in these activities. Cf. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 425 (1971).^{6/}

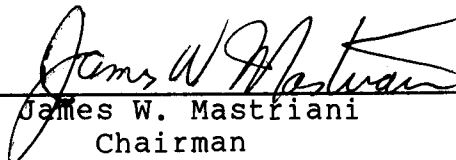
ORDER

The Manville Board of Education is ordered to cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by demanding that Dorothy Story sever all ties with the Manville Education Association.

The Manville Education Association is ordered to cease and desist from permitting Story to serve both as MEA negotiator and as an officer empowered to assume the duties of president.

The Board and MEA shall notify the Chairman of the Commission within twenty (20) days of receipt what steps they have taken to comply with this order.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
August 12, 1988
ISSUED: August 15, 1988

^{6/} We agree with the Board that its charge incorporated an allegation of unlawful participation in MEA affairs and that Story's negotiations role was pled and fully litigated.

H.E NO. 88-14

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Charging Party-Respondent.

SYNOPSIS

The Hearing Examiner finds that the Board violated subsection 5.4(a)(1) by demanding that Dorothy Story sever her relationship with the Association. Story is a department head and supervisor under the Act, and is the Association's vice-president. The Association represents a broad-based unit of the Board's nonsupervisors.

The Hearing Examiner, interpreting the Act, related court decisions and cases decided under the LRMA, concludes that supervisors may not hold office in unions representing nonsupervisors where the two roles conflict. Based on the record before him, however, the Hearing Examiner finds no conflict between Story's Association office and her supervisory duties.

The Hearing Examiner recommends dismissal of the Board's complaint which alleged that the Association violated subsections 5.4(b)(1) and (2) by permitting Story to hold office and by collecting dues from Story. He also recommends dismissal of 5.4(a)(2), (3) and (5) allegations in the Association's complaint.

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. 88-14

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Appearances:

For the Respondent, Manville Board of Education
Cassetta, Taylor & Whalen
(Garry M. Whalen, Consultant)

For the Charging Party, Manville Education Association
Klausner, Hunter & Oxfeld
(Stephen E. Klausner, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 8, 1987, the Manville Education Association ("Association") filed an unfair practice charge and an application for interim relief alleging that the Manville Board of Education ("Board") violated subsections 5.4(a)(1), (2), (3) and (5)^{1/} of

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or

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the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. ("Act"), by demanding that the Association's vice-president, Dorothy Story, sever her relationship with the Association.

On May 21, 1987, the Board filed an unfair practice charge alleging that the Association violated subsections 5.4(b)(1) and (2) 2/ of the Act by permitting Story, a department head and supervisor within the meaning of the Act, to hold Association office. The Board also alleges that the Association committed an unfair practice by collecting dues from Story.

On June 15, 1987, Commission Designee Alan R. Howe conducted an interim relief hearing.

On June 23, 1987, he denied the application because the Association had failed to demonstrate a substantial likelihood of

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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 employment of employees in that unit, or refusing to process grievances presented by the majority representative.

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."

succeeding on the merits of its case. Manville Bd. of Ed., I.R.
No. 87-30, 13 NJPER ____ (¶ ____ 1987).

On June 29, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing and an order consolidating the charges.

On July 17, 1987, the Association filed an Answer denying that it committed an unfair practice and asserting that the Board's charge is barred by the statute of limitations.

On July 27, 1987, the Board filed an Answer generally denying that it had violated the Act.

On August 19, 1987, I conducted a hearing. The Association moved to dismiss the Board's complaint, claiming that it did not allege facts occurring within the limitations period. I denied the motion but directed the parties to brief the issue. The Board moved to amend its unfair practice charge by adding a claim that the Association violated subsection 5.4(b)(3)^{3/} of the Act. I granted this motion.^{4/}

^{3/} This subsection prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

^{4/} In its opening statement, the Board said it intended to prove that the Association had unlawfully dominated the Manville Department Heads Association. I informed the Board that if it intended to raise issues concerning the representation status of the Department Heads Association, I would adjourn the hearing and allow that organization to participate. The Board replied that it would drop the 5.4(b)(3) allegation.

The parties examined witnesses and introduced documents. They waived oral argument but filed briefs, the last of which I received on September 11, 1987.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The Association is an employee organization within the meaning of the Act and subject to its provisions.
2. The Board is a public employer within the meaning of the Act and subject to its provisions.
3. Dorothy Story is a teacher and department head in the Board's high school business department. She has been a department head for about eleven years. The current job description for department heads provides:

DEPARTMENT HEADS

Department Heads shall be under the administrative and supervisory direction of the school principal. Each department head is a teacher, supervisor, and manager with responsibilities in management, supervision, evaluation, curriculum development, and staff development. Department heads shall exercise supervisory and administrative responsibility in one or more subject areas as recommended by the Superintendent and approved by the Board.

I. STAFF SUPERVISION

- A. Work in cooperation with the administration in developing and implementing a systematic process for supervision and evaluation of staff.
- B. Help orient new teachers and assist substitutes.
- C. Monitor staff in their performance of expectations as outlined in the district teachers performance procedures.
- D. Examine, at least monthly, the lesson plans of teachers.

E. Assist in resolving student-teacher concerns.

II. CURRICULUM DEVELOPMENT

- A. Keep informed of current research and perspectives, not only in the department's content area, but in the relationship of this area to all other department areas.
- B. Work with administrative staff and provide department leadership in the development of curriculum.
- C. Work with staff to develop curriculum goals, objectives and strategies consistent with state and community goals, current research, instructional techniques and strategies.
- D. Shall work with administrators, other department chairpersons and department staff to develop and implement a continuous assessment and evaluation process which will:
 - (1) determine school, department and student needs,
 - (2) determine effectiveness of existing programs and teaching strategies,
 - (3) make necessary changes in programs.

III. MANAGEMENT

- A. Work with staff to accomplish the following tasks:
 - 1. Establish procedures and conduct annual inventory.
 - 2. Order materials, supplies, and equipment.
 - 3. Prepare budget requests and account for materials, equipment, and funds.
- B. Prepare necessary data for course scheduling, and shall participate in the development of school schedules.
- C. Act as a liaison between area staff and administration concerning school policies.
- D. Promote and disseminate information concerning the content area.

IV. STAFF DEVELOPMENT

- A. Encourage professional growth by making staff more aware of research, graduate study, conferences, workshops and professional organizations in their field.

- B. Assist in the development and implementation of in-service workshops.
- C. Make area staff aware of a variety of instructional methods, techniques and materials.

V. STAFF EVALUATION

- A. Conforms to the district evaluation processes and procedures.
- B. Develops and implements a viable professional development plan for department members and self.
- C. Makes formal observations and prepares written reports.
- D. Conducts staff conferences regarding observations, professional plans, and prepare final evaluation.

VI. QUALIFICATIONS

Department Heads shall hold a valid teacher's certificate and an administrator's certificate for supervisor. [CP-3].

This job description was adopted in June 1962 and last revised in March 1986. Prior to that revision, the job description provided that department heads shall, "[a]t the request of the principal or Superintendent, interview candidates for teaching positions and make specific recommendations." (CP-4).

Consistent with her job description, Story does classroom observations, prepares evaluations and rates the performance of business department teachers. As part of the evaluation process, Story reviews the teachers' lesson plans and attendance records. She also works with teachers in preparing their performance improvement plans. All teachers in the business department are tenured and are observed three times each school year. (Non-tenured

teachers are observed five times yearly). Both the high school principal and the Superintendent also conduct classroom observations.

5. No Association member has filed a grievance involving Story's activity as a department head. No witness could recall an Association member filing a grievance in the last three years in response to any department head's conduct.

6. Department heads are mentioned in the grievance procedure contained in the collective negotiations agreement between the Board and the Association (J-1). Article III B2 (Grievance Procedure) provides that, "[a]ny employee who has a grievance shall discuss it first with his/her principal, immediate superior, or department head, if applicable, in an attempt to resolve the matter informally at this level "(J-1, p. 3.1).

Despite the language of Article III B2, no department head has been involved in the informal resolution of a grievance during the last three years.^{5/} Level one grievances of unit members are typically presented to the principal. The grievance procedure also permits employees to present written grievances directly to the Superintendent.

7. Story cannot recall being involved in hiring business department teachers--none have been hired in the last several

^{5/} Testimony about department heads' involvement in grievance resolution before the 1983-84 school year is vague. There is no evidence that a department head has ever participated in resolving a grievance but the record does not support such an affirmative finding and I will not make one by negative implication.

years. Story is unaware of any business department teacher being the subject of tenure charges, increment withholdings, suspensions, reprimands or any other form of discipline.

Other department heads have been involved in the hiring process. The Board recently hired twelve new teachers, and department heads screened applications and interviewed some of the candidates. There is no evidence, however, that department heads made specific hiring recommendations. Department heads do discuss the qualifications of applicants with the principal and Superintendent.

8. During the 1985-86 school year, the contracts of a home economics and a social studies teacher were not renewed. It is unclear whether the department heads of these teachers were consulted about the decisions. The social studies teacher resigned, apparently before the Board formally decided not to renew the contract. The Superintendent did not know of a department head's participation in the decision not to renew the home economic teacher's contract. It is clear that department head recommendations were not a controlling factor in the nonrenewals. The Superintendent testified without contradiction that performance evaluations are an important consideration in personnel decisions, including contract renewals.

9. The Association represents a collective negotiations unit of the Board's "classroom teachers, guidance counselors, librarians, reading teachers, nurses, advisors, supplemental

teachers, special teachers, speech teachers, learning disability specialists, social workers, coaches ... secretarial staff ... and custodial staff." (J-1, p 1.1).

Story is Association vice-president and has held that office seven of the last nine years. The record contains little evidence of her duties as vice-president. She assumes the Association presidency when the president is unavailable but that has not occurred in the last several years. As acting president she may be called on to run an Association meeting. She occasionally answers questions from reporters on behalf of the Association.

In May 1987, Story was reelected vice-president. The election was informal--last year's officers ran as a slate and were unanimously reelected. This differs from the usual practice of a committee nominating candidates who campaign and are later elected.

Story is an Association member but, as a department head, is not in its collective negotiations unit. Other department heads are also Association members. As members, they are entitled to vote for Association officers and run for office.

10. Story has participated in negotiations on the Association's behalf for all but one of its collective agreements with the Board. Members of the negotiations committee are not asked or appointed to negotiate by the Association but volunteer for the committee. During negotiations for the 1985-88 agreement she was negotiations chairperson. She also participated in reopener negotiations during the 1986-1987 school year for 1987-88 salaries.

11. Story is in a negotiations unit represented by the Manville Department Heads Association ("DHA"), which, like the Association, is an NJEA affiliate. The DHA was formed "a few years ago" (T 93), apparently in cooperation with the Board, which "wanted [the DHA] to be considered separate ... so [it] formulated a separate contract for [it]." (T 94). Department heads were not represented before the formation of the DHA.

12. The DHA uses an NJEA field service representative to negotiate on its behalf. Its last agreement with the Board expired June 30, 1987. (CP-5) It incorporated the terms of an agreement covering the 1984-85 school year, as modified by later memoranda. The original agreement and each memoranda are signed by Story on behalf of the DHA. The memoranda designate Story as the DHA secretary. Story testified, however, that she was designated secretary by the Board's negotiator as a formality. The DHA has no constitution, bylaws or officers. Story testified that the department heads negotiations team is selected by drawing straws (there are seven department heads) and that she has been a consistent loser in the drawings. She is not on the team negotiating a 1987-88 agreement.

13. Dr. Francis Heelan, the Board's Superintendent, was hired during the 1984-85 school year. In January 1985 Story wrote a letter to Heelan welcoming him to the district. Story signed the letter as vice-president of the Association. Heelan testified that, while he was aware that Story was active in the Association, he was

not certain until recently that she held Association office. Reference to Story's January 1985 letter refreshed his recollection of the term of Story's vice-presidency.

14. In April or May 1985, a press conference was held. It is not clear from the record who scheduled the conference. All department heads attended. Story (and another department head) answered questions from parents and reporters "about the situation that was taking place in Manville at the time" (T 105). Heelan testified that the conference concerned a movement to remove him as Superintendent. The record is silent on further details of the press conference. I do not know who else attended, what the "situation in Manville" was, what Story said or whether any related newspaper accounts were published.

15. Sometime during the 1986-87 school year, Story filed a grievance with the Superintendent. The grievance involved her use of personal time. It was filed on an Association grievance form and she was represented by the Association's grievance chairperson. The grievance was processed to arbitration. The arbitrator issued an award after these unfair practice charges were filed.

16. In 1981 Story signed a dues deduction authorization card (R-1). Under the terms of R-1, the Board is authorized to deduct from Story's salary dues which are distributed to the Association and its county, state and national affiliates. The Board pays Story's dues directly to the N.J.E.A. in Trenton, which then disburses the funds to its national, county and local affiliates.

17. The Board has never asked Story to help it prepare for collective negotiations with the Association.

18. On May 1, 1987, Heelan wrote to the Association president:

It has come to my attention that Dorothy Story is currently serving as Vice President of the MEA. This presents a direct conflict of interest with her responsibilities as a Supervisor in this district. I have directed Dorothy Story immediately to cease her involvement with the MEA.

I am also advising you that the MEA must sever its relationship with Dorothy Story and any other supervisory personnel. Such relationships are in clear violations of the Public Employment Relations Law. Failure to sever this relationship immediately will result in a recommendation by me to the Board that the Board pursue all available avenues to remedy this situation.

[CP-1]

On the same date, Heelan wrote to Story:

It has come to my attention that you are currently serving as the Vice President of the Manville Education Association. This constitutes a direct conflict of interest with your responsibilities as a Supervisor in this school district. As a Supervisor, you serve as the administration's first step of the Grievance Procedure; it is impossible for you to effectively represent management when processing grievances and also serve as an officer in the union representing the grievant. As a Supervisor, you are responsible for carrying out the policies of the Board and Administration in the operation of the district; this puts you in a position of a substantial conflict of interest with the MEA if the latter should oppose those policies. As a Supervisor, you evaluate employees and those evaluations may result in adverse action against those employees whom it represents.

You are hereby advised immediately to cease and desist from any leadership role in the MEA. You are free to grieve this directive under the Agreement between the Board and the Manville DHA, but please note that, pending the outcome of any such grievance, you are obligated by that Agreement, Article III. B.2, to abide by this directive.
[CP-2]

Story testified that she was intimidated by Heelan's letter and considered it a threat to her Association activity.

ANALYSIS

The Association contends that the Board committed an unfair practice when it demanded that Story end her involvement with the Association. The Board asserts that the Association committed an unfair practice by allowing a department head to hold office. The underlying question is whether (or under what circumstances) the Act permits a supervisor to hold office in a union representing a nonsupervisory unit.^{6/}

^{6/} I assume that Story is a supervisor within the meaning of the Act. In its charge, the Association alleges that Story is a supervisor (paragraph 3, C-1), but it argues that her Association office poses no conflict with her department head position. The Board concurs that Story is a supervisor but argues that her supervisory responsibilities conflict with her Association activities.

While this was not litigated as a representation case (where a Hearing Officer must develop a complete record rather than where the charging party must prove that the respondent has committed an unfair practice) the record demonstrates that department heads are supervisors within the meaning of the Act. Department head involvement in the evaluation of teachers and the hiring process (screening and interviewing)

Section 5.3 of the Act provides, in part:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, 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 nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations....

In adopting section 5.3, the Legislature considered conflicts of interest and made several decisions. First, it decided that supervisors, unlike managerial executives^{7/} and confidential

6/ Footnote Continued From Previous Page

is analogous to several cases decided by the Commission in which department heads (or chairpersons) were found to be supervisors and removed from the unit containing the employees they evaluated. Cliffside Park Bd. of Ed., D.R. No. 83-10, 8 NJPER 540 (¶13248 1982), and cases cited therein; Warren Hills Reg. H.S. Bd. of Ed., P.E.R.C. No. 87-115, 13 NJPER 280 (¶18116 1987).

7/ N.J.S.A. 34:13A-3(f): "Managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

employees,^{8/} should not be excluded from the Act and the right to representation. The Legislature also decided that supervisors and nonsupervisors should not be in the same unit, though even that prohibition could be disregarded to preserve a successful pre-Act negotiations relationship. The Legislature also provided that an employee organization should not be allowed to represent supervisors if it admitted nonsupervisors to membership. The Legislature rejected several other more restrictive limitations.

For example, section 5.3 prohibits, with certain exceptions, police from joining an organization that admits employees other than police to membership, regardless of whether that organization represents them. County of Gloucester v. PERC, 107 N.J. Super. 150 (App. Div. 1969), aff'd 55 N.J. 333 (1970); Camden PSOA, P.E.R.C. No. 81-139, 7 NJPER 345 (¶12155 1981) ("Camden PSOA"). The bill enacted as section 5.3 initially contained the same prohibition against supervisors "joining" employee organizations admitting nonsupervisors to membership (Senate No. 746, introduced 5/13/68). The Senate, however, deleted "to join" and substituted "to be represented in collective negotiations by." (Senate No. 746, adopted 6/13/68).

^{8/} N.J.S.A. 34:13A-3(g): "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

In Bowman v. Hackensack Hospital Ass'n, 116 N.J. Super. 260 (Ch. Div. 1971) ("Bowman"), the Court interpreted the provisions of sections 5.3 and 6(d)^{9/} and held that an employee organization could represent nonsupervisors in a separate unit even though it was affiliated with an organization controlled by supervisors.^{10/} The Court stated:

It would appear that our policy, as set forth by the New Jersey Legislature, is not to disqualify an organization from functioning as the collective bargaining representative of nonsupervisory employees because of the fact that there might be supervisors included within its membership. Rather, it would appear that the only prohibition under the New Jersey act is that supervisors not be included within the same unit as nonsupervisors. N.J.S.A. 34:13A-6(d)(1). [Id. at 273].

Bowman shows the Legislature balanced both the common interests of supervisors and nonsupervisors and the conflicts

^{9/} N.J.S.A. 34:13A-6(d) provides in part: "The Commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiations, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes ... both supervisors and nonsupervisor...."

^{10/} While Bowman involved employees of a nonprofit hospital, rather than public employees, the Court looked to sections 5.3 and 6(d) of the Act and Article I, Paragraph 19 of the New Jersey Constitution. The latter paragraph guarantees employees the right to organize and bargain collectively through representatives of their choosing.

between them. The Legislature decided that the common interests required that supervisors and nonsupervisors should both have organizational rights and that nonsupervisors and supervisors should be able to join the same organization. It also decided that the conflicts between them required, generally, separate units and a restriction against supervisors being represented by an organization admitting nonsupervisors.

In Union Council No. 8 v. Housing Authority of Elizabeth, 124 N.J. Super. 584 (L. Div. 1973) ("Union Council No. 8"), the Court interpreted sections 5.3 and 6(d) and held that an employer had to honor dues deduction requests filed by its supervisors and non-supervisors, even though these employees belonged to the same organization. The Court stated:

It is apparent from a review of [Section 5.3] that there is nothing which...prohibits a labor organization from having both supervisory and nonsupervisory personnel among its membership. The statute specifically states that even if an organization has both types of members, it nevertheless may still represent nonsupervisory employees for purposes of collective bargaining negotiations. [Id. at 588].

The Court then quoted Bowman and concluded that although nonsupervisors and supervisors may not be represented in the same negotiations unit, they may join the same organization. Id. at 589.

Consistent with the Act's provisions, Bowman and Union Council No.8, the Commission has a longstanding policy of separating supervisory and nonsupervisory units (except in rare, legislatively-compelled instances) and of requiring an employee organization seeking to represent supervisors to certify that it

does not admit nonsupervisors and that it understands that, if elected, it must prevent nonsupervisory employees from controlling contract negotiations and administration. City of Camden, P.E.R.C. No. 82-89, 8 NJPER 226 (¶13094 1982); State of New Jersey, D.R. No. 81-20, 7 NJPER 41 (¶12019 1980), aff'd P.E.R.C. No. 81-94, 7 NJPER 105 (1981).

Although the Act permits supervisors to be members of employee organizations, it does not define "membership." In this respect it is similar to the Labor Management Relations Act, 29 U.S.C. sec. 141 et seq. ("LRMA"), which does not prohibit supervisors from becoming or remaining union members.^{11/}

In interpreting representational questions arising under the Act, the Commission and New Jersey Courts look to cases decided under the LRMA for guidance. The issue of supervisor participation in employee unions is usually raised before the National Labor Relations Board ("Board") under section 8(a)(2) of the LMRA,^{12/} which prohibits employer interference from or domination of a union, and section 8(a)(1),^{13/} which prohibits employer interference with employees' organizational and bargaining rights.

^{11/} Section 14(a) of the LRMA provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization...." 29 U.S.C. §164(a).

^{12/} 29 U.S.C. 158 (a)(2).

^{13/} 29 U.S.C. 185(a)(1).

In adopting the "Nassau" doctrine, the Board ruled that no supervisor-member can serve on a union negotiation committee and that an employer unlawfully interferes with the administration of a union if it permits a supervisor to negotiate on behalf of the union. Nassau, Suffolk Contractors' Ass'n, 118 NLRB 174, 40 LRRM 1146 (1957). The Board concluded that supervisors cannot be effective negotiators due to their loyalty to management. Although all supervisors are excluded from negotiations, the Board has allowed low-level supervisors to participate in union affairs. Under the Nassau doctrine the Board has permitted low-level supervisors to hold union office so long as the supervisor does not negotiate. Banner Yarn Dyeing Corp., 139 N.L.R.B. 1018, 43 LRRM 1261 (1959), remanded, 276 F.2d 34 (1st Cir. 1960). (The First Circuit affirmed the Board's application of the Nassau doctrine.)

Private supervisors, like New Jersey supervisors, are not statutorily prevented from membership in labor organizations. Private employers, unlike public employers in New Jersey, may nevertheless condition supervisors' employment upon nonmembership or nonparticipation in union affairs. Board cases applying the Nassau doctrine involve employers which permit supervisors to join or retain membership in a labor organization and which resolve conflicts that arise through collective bargaining.

The Commission has yet to rule on whether a supervisor may hold office in or negotiate on behalf of a union representing nonsupervisors. A great deal of consideration has been given,

however, to the underlying issue of the relationship of supervisors and nonsupervisors in the collective negotiations process. I conclude, based on the language of the Act, its legislative history, related Court decisions like Bowman, Union Council No. 8 and Wilton, the Commission's policy of separating supervisory and nonsupervisory units, and cases decided under the LRMA that a supervisor may not hold office in a union representing a nonsupervisory unit where this union role conflicts with the duty the supervisor owes his or her employer. It follows that an employer may insist that a supervisor cease such involvement in a nonsupervisory unit, provided that the employer is not unlawfully motivated and does not interfere with or threaten its employees or their representative in exercising rights guaranteed by the Act.

This suggested standard is not a blanket prohibition against supervisors holding office in a union representing nonsupervisory employees. Employees are free to choose their own representative. See New Jersey Employees Ass'n, Local 409 v. State of New Jersey, App. Div. Dkt. No. A-4164-80T1 and A-3275-80T1 (Nov. 10, 1982), affirming P.E.R.C. No. 82-24, 7 NJPER 510 (¶12228 1981). The Commission has noted, however, that the right of public employees to select their representative must comport with the requirements of the Act, Kearny; Camden, and the Act requires that persons acting on behalf of the chosen representative not be placed in a position of divided loyalties.

A case in which such a conflict was found is Camden County, P.E.R.C. No. 83-117, 9 NJPER 156 (¶14074 1983) ("Camden County"), where the Commission held that the County violated subsections 5.4(a)(1) and (2), and Camden Council #10, NJSCA, subsection 5.4(b)(1), based on their handling of a grievance filed by an employee represented by Council 10. The County unlawfully permitted its personnel assistant to handle the employee's grievance at the same time that the personnel assistant served as president of Council 10. Council 10 breached its duty to represent the employee fairly by permitting its president to refuse to process the grievance while she served as the County's personnel assistant handling the grievance. Part of the Hearing Examiner's recommended remedy was that the County's personnel assistant relinquish her office in Council 10. The Commission modified this remedy, ordering instead that "the County and Council #10 [be barred] from permitting [the personnel assistant] to act both as a personnel assistant and as a Council #10 officer with respect to grievances of employees whom Council #10 represents." *Id.* at 158.

The personnel assistant in Camden County was "the second highest personnel officer in the County [and] played a significant role in hiring, firing, and promoting employees and in effectively recommending these actions." *Id.* at 157. The Commission did not order her to abandon her union office based upon her supervisory status. Instead, the Commission ordered that the parties insure that she never again be placed in a position where her roles as

union officer and supervisor conflicted. The standard that I urge here fits the Commission's remedy in Camden County--a supervisor should not occupy a position in a union representing nonsupervisory employees where that position conflicts with supervisory duties.

There is nothing in the record suggesting that Story's Association vice-presidency has conflicted with her department head duties. Nothing in the record suggests that Story's vice presidency requires her to make decisions about processing grievances, negotiating contracts or anything that places her in a position of divided loyalties. Accordingly, I recommend that the Commission dismiss those portions of the Board's complaint alleging that the Association has committed an unfair practice by permitting Story to hold office.

I conclude that Story's role as an Association negotiator, however, does create a conflict with her supervisory duties. As a department head, Story evaluates and rates the performance of business department teachers. Teacher evaluations are critical in personnel decisions. The parties have also provided that department heads have a role in their grievance procedure. Both evaluation and grievance procedures are mandatory subjects of negotiations. As a negotiator Story is called upon to represent the Association's position on these issues. As a department head she is responsible to the Board in evaluating teachers and resolving grievances. This, in effect, places Story on both sides of the negotiations table.

Because the Board alleged neither that the Association violated the Act by permitting Story to negotiate, nor the dates on which Story negotiated, I find, on this record, no violation of the Act. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

I also conclude that the Association did not commit an unfair practice by collecting dues from Story. The issue was dealt with squarely in Union Council No. 8, and I recommend that the Commission dismiss the related allegations in the Board's Complaint.

I turn now to the Association's charges against the Board. The Association alleges that Heelan's letters interfered with its "right to choose representatives of its own choosing, free from domination or interference" (C-1, para. 8). The Association does not allege or prove that Heelan was unlawfully motivated when he wrote the letters. Heelan wrote the letters within a month of a press conference but there is no proof on the record, other than the timing of the two events, suggesting the letters were a hostile response to the conference (see findings 14 and 18). Nor did the Association allege or prove that Heelan wrote the letters in response to Story's filing of a grievance. Accordingly, I recommend that the Commission dismiss the Association's 5.4(a)(3) and derivative (a)(1) charges. In re Township of Bridgewater, 95 N.J. 235 (1984).

I consider next whether Heelan's letters and the Board's demand that Story and the Association sever their relationship

independently violate subsection 5.4(a)(1). The standard to determine whether an independent 5.4(a)(1) violation has been committed is set forth in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

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 to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1]

It is immaterial that an employer's allegedly illegal conduct did not actually coerce an employee or was not illegally motivated. It is the tendency of the employer's conduct, not its result or motivation which is at issue. Commercial Township; Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984).

In analyzing the independent 5.4(a)(1) question, I must also consider the Act's grant to public employers of the right to express opinions about unionism provided such statements are noncoercive. In Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), the Commission explained that:

A public employer is within its right to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

The record reveals little about events surrounding Heelan's letters. He had known of Story's activities for two-and-one-half years but had not raised the issue with the Association. There is

the closeness in time with the press conference but the evidence about the press conference is very vague. Thus, in analyzing the 5.4(a)(1) issue, I focus primarily on the letters' content.

In his letter to the Association, Heelan states, "I am advising you that the MEA must sever its relationship with Dorothy Story ... Failure to sever this relationship immediately will result in a recommendation by me that the Board pursue all available avenues to remedy this situation." To Story Heelan wrote, "You are hereby advised immediately to cease and desist from any leadership role in the MEA."

I conclude that these portions of Heelan's letters are not protected free speech. Black Horse Pike. At a minimum Story and other department heads have a right to join the Association. That right is granted specifically by the Act. To the extent that Heelan's letter suggests that Story may not even be a member of the Association, it has the tendency to interfere with her protected rights. New Jersey Sports and Exposition Authority.

I have also concluded that the Board cannot insist that Story cease holding office in the Association because there is no proven conflict between her vice presidency and the duty she owes the Board as a department head. In his letters Heelan orders the Association to sever its relationship with Story and Story to cease her leadership role in the Association. Thus, Heelan's letters have the tendency to interfere with Story's right to hold union office absent a conflict of interest. Id.

The Association also alleges that the Board violated subsections 5.4(a)(2) and (5) of the Act. No evidence on the 5.4(a)(5) claim was proffered so I recommend its dismissal. I also recommend dismissal of the 5.4(a)(2) claim because the Association did not prove that the Board actually interfered with or dominated the formation, existence or administration of the Association. Cf. Borough of Middlesex, P.E.R.C. No. 87-27, 12 NJPER 757 (¶17285 1986).

CONCLUSIONS OF LAW

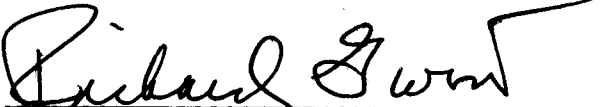
I conclude that:

- 1) The Board violated subsection 5.4(a)(1) of the Act by demanding that Story abandon her membership and office in the Association.
- 2) The Board did not violate subsections 5.4(a)(2), (3) or (5) of the Act.
- 3) The Association did not violate subsection 5.4(b)(1) or (2) of the Act by permitting Story to hold office or by collecting dues from Story.

RECOMMENDED ORDER

I recommend that the Commission order the Board to cease and desist from insisting that Dorothy Story abandon her membership and office in the Association. I recommend that the 5.4(a)(2), (3) and (5) allegations against the Board and the 5.4(b)(1) and (2) allegations against the Association be dismissed. Under all the

circumstances of this case, I do not recommend the posting of a notice.


Richard C. Gwin
Hearing Examiner

Dated: September 29, 1987
Trenton, New Jersey