



DETERMINATION OF THE APPROPRIATE SUPERVISORY BARGAINING UNIT

The question of supervisors' bargaining has been a thorny issue for many boards of education. While understanding the bargaining rights of their department chairpersons, supervisors of instruction, subject area coordinators, vice principals and principals, board members have been perplexed by the issue of the appropriate bargaining unit for their districts' supervisory positions. PERC decisions appear to offer contradictory and confusing messages as to what constitutes an appropriate bargaining unit for supervisors. For example, the Commission has prohibited the inclusion of supervisors in a bargaining unit composed of nonsupervisors when those supervisors evaluate fellow unit members; yet, PERC has also authorized and supported broad-based administrators' units, even when some supervisors evaluated other members of the bargaining unit. These seemingly contradictory rulings do make sense, however, when the specific and unique standards used to assess supervisors' bargaining units are understood. Therefore, a review of the distinct standards utilized by PERC in defining supervisors' bargaining units can provide boards of education with guidelines that may be helpful in determining the appropriate unit for their administrators who choose to exercise their bargaining rights.

Units Containing Supervisors and Nonsupervisors

New Jersey's Employer-Employee Relations Act very specifically addresses the composition of bargaining units that include both supervisory and nonsupervisory staff. *N.J.S.A. 34:13A-5.3* provides:

Nor, except where established practice, prior agreement or special circumstances dictate to 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 its membership....

This specific legislative prohibition was designed to avoid the inherent conflict that can occur within a unit when some of its members are superior to others and can make

decisions that affect the continued employment of their subordinates. To that end, the law establishes a clear-cut division between supervisors and nonsupervisors. Thus, PERC's first response to disputes questioning the composition of a bargaining unit that includes both nonsupervisory and supervisory positions is to examine whether the district's supervisors are "true" supervisors under the Act.

Definition of "True" Supervisors

PERC has consistently held that the section of the Act cited above expresses clear legislative intent to separate only "true" supervisors—that is, those who have the actual "power to hire, discharge, discipline, or to effectively recommend the same...." In accordance with its interpretation, PERC has held that true supervisory status under the Act does not stem from a title or a certificate, but from evidence that a district's supervisors actually possess the authority and responsibilities delineated in the provisions of the Act. In other words, PERC has not, and will not, automatically remove all staff members who hold supervisory titles from a unit that primarily includes nonsupervisory employees. Rather, when faced with these unit disputes, PERC will conduct a careful case-by-case scrutiny of the actual functions performed by each challenged supervisory position to determine whether the position is truly supervisory under the Act.

In its case-by-case analysis of supervisors' responsibilities, PERC will examine the positions' job description; however, boards must expect that the Commission will place far greater emphasis on the supervisors' actual performance of their responsibilities. For example, in *Ogdensburg Board of Education*, D.R. No. 91-25, 17 *NJPER* 22075, PERC's Director of Representation found that the Director of Buildings and Grounds was a true supervisor under the Act as, even though his job description did not articulate these functions, his actual job duties involved actual, ongoing involvement in discipline, hiring and evaluating nonsupervisory unit members. Conversely, functions listed in job descriptions, but not routinely performed may not be sufficient to lead to a finding of "true supervisory" functions. For example, while the evaluation of fellow unit members may be seen as a true mark of a supervisor, PERC has held

that occasional or sporadic evaluative functions are not sufficient to demonstrate true supervisory status; rather, to be deemed a true supervisor under the Act, supervisors must be responsible for *ongoing and regular* evaluations of the nonsupervisory members of the bargaining unit.¹

PERC will also examine the degree of the supervisors' input into the district's employment decisions. Supervisors can be found to be making "effective recommendations" concerning employment decisions when: their evaluations become part of employees' personnel records and are regularly instrumental in the district's determinations to withhold increments, to renew contracts, or to terminate employment;² and when their recommendation to hire or discipline staff are consistently accepted by higher positions in the district's chain of command.³

It is important to remember that PERC's definition of a "true supervisor" is not based on job titles or valid certification. Rather, the Commission's case-by-case review of the actual and regularly performed functions of the job will define each position's "true" supervisory status under the Act. In turn, the finding of a true supervisory role determines whether or not the position should be severed from a nonsupervisory unit.

Severance of True Supervisors

PERC's definition of a true supervisor is the first step in determining the validity of a unit composed of supervisory and nonsupervisory positions. If PERC finds that, in spite of their titles and appropriate certification, the supervisors' functions in a particular district do not actually involve evaluative responsibilities that lead to effective employment recommendations, PERC will allow the "supervisors" to remain in the unit.⁴ If PERC's analysis reveals that some, but not all, of the district's supervisory positions function as true supervisors, PERC will order the removal of the true supervisors from the bargaining unit, but will not disturb the inclusion of the other titles that are not involved in primary evaluations or in effective employment recommendations.⁵ And, if PERC finds that all supervisors are primary evaluators, it will order the removal of all supervisors from the nonsupervisory bargaining unit.⁶

Once deemed to be a true supervisor under the Act, a position will be removed from a unit composed of nonsupervisory employees even if the position is less than

full time. For example, department chairpersons who taught a number of classes each day were found to have truly supervisory responsibilities and thus the Commission ordered their removal from the teachers' bargaining unit.⁷

A finding of true supervisory status can also be sufficient to disturb a unit that has been composed of supervisors and nonsupervisors for many years. This is particularly true when changing district circumstances have slowly, over the years, increased the evaluative and administrative functions of supervisors and the board now questions the continued validity of the longstanding unit.⁸ PERC has also found that even the adoption of a new supervisory job description that has not yet been implemented but that simply establishes truly evaluative functions under the Act holds the *potential* for conflict that can be sufficient to warrant severance of supervisors from a unit of nonsupervisors.⁹

It must be remembered that PERC's decisions to sever true supervisors from a nonsupervisory unit are based on the specific provisions of the PERC Law. This strong tradition of avoiding the conflict between those who supervise and those who are supervised is, however, not predominant in the assessment of bargaining units that include only supervisory employees.

All Supervisory Bargaining Units

The Public Employment Relations Act's prohibition of bargaining units that include employees and their supervisors is distinctly and specifically reserved for units composed of supervisors and nonsupervisors. The Act does not extend this separation to bargaining units which are composed of all supervisory positions. The Act's only restriction to the formation of all supervisory bargaining units is the general direction of Section 5.3 which states that all bargaining units "shall be defined with due regard for the community of interest among the employees concerned..."

Thus, in interpreting the Act, PERC has held that an all supervisory unit which includes primary evaluators of other unit members is not an automatically illegal or inappropriate bargaining structure.¹⁰ In resolving disputes over the appropriate composition of an all supervisor bargaining unit, PERC places far less emphasis on the

¹ *County of Essex*, D.R. No. 89-6, 14 *NJPER* 19279.

² *Ogdensburg Board of Ed.*, *supra.*, *Waldwick Board of Education*, D.R. No. 82-5, 7 *NJPER* 12221.

³ *Cliffside Park Board of Education*, D.R. No. 83-10, 8 *NJPER* 13128.

⁴ See, for example, *Edison Township Board of Education*, D.R. No. 82-8, 7 *NJPER* 12249.

⁵ *Ramapo-Indian Hills Regional Board of Education*, D.R. No. 81-26, 7 *NJPER* 12048.

⁶ See, for example, *Delaware Valley Regional High School*, D.R. No. 82-11, 7 *NJPER* 12234.

⁷ See, for example, *North Arlington Board of Education*, D.R. No. 92-31, 18 *NJPER* 23133; *Kearny Board of Education*, D.R. No. 92-36, 18 *NJPER* 23139.

⁸ See, for example, *Watchung Hills Regional High School Board of Education*, PERC No. 85-116, 11 *NJPER* 16130.

⁹ *Cinnaminson Board of Education*, D.R. No. 81-39, 7 *NJPER* 12122.

¹⁰ See, for example, *Mainland Regional Board of Education*, PERC No. 87-79, 13 *NJPER* 18032.

evaluative relationship that exists within the unit. Rather, PERC's benchmark in resolving these disputes rests with its assessment of the Act's required "community of interest."

The Community of Interest Standard

A unit's "community of interest" is a well-accepted standard of unit determination in both the private and public sector. It is a standard that requires that positions within a bargaining unit share similar employment needs and experiences that support a unified and cohesive bargaining effort. In determining whether the required community of interest exists, PERC and other labor agencies examine a number of factors including the positions' obligation to the employer as well as the commonality of supervision and similarity of work objectives.

PERC's application of the standard to all supervisor units has resulted in findings that supervisory titles share the required community of interest even though some positions evaluate and supervise other unit members. For example, in *Long Branch Board of Education*, E.D. No. 47 (1974), the Commission held that a unit composed of principals, vice principals, and supervisors was appropriate since: all administrators were under a common supervisory structure; the board recognized the employees as a management team, and the titles shared common work objectives. In *Lakewood Board of Education*, D.R. No. 78-44, 4 *NJPER* 4105, a community of interest was found among department chairpersons, educational specialists, assistant principals and principals as all of these supervisors worked together in areas of curriculum development and teacher evaluation.

However, a community of interest among all supervisors will not always be found. A case-by-case analysis may reveal that the required community of interest is shattered by the actual interaction of a specific group of supervisors which results in an impermissible conflict of interest.

Conflict of Interest The presumption that all supervisors share a community of interest cannot be applied automatically or universally. In *Board of Education of West Orange v. Wilton*, 57 *N.J.* 404 (1971), the New Jersey Supreme Court held that not all supervisors in a school system possess a *per se* community of interest which require or justify their inclusion in the same unit. Rather, the Court found that each unit question must be examined on a case-by-case basis to determine the supervisors' relationship to each other and to their employer. The Court held that the specific "performance of the obligations or powers delegated by the employer to a supervisory employee" can create an actual or potential substantial conflict between the interests of a particular supervisor and the other supervisors within a unit. Under these circumstances, the Court ruled that the community of interest required for inclusion in the supervisors'

unit could not be found to exist. The Court specifically stated that:

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

Accordingly, in its determinations of the appropriate supervisory unit, PERC applies the *Wilton* standard to assess the existence and degree of conflict among unit members.

Actual or Potential Conflict A major element in determining the appropriateness of including, or retaining, a supervisory position in an all supervisor bargaining unit is the existence of a conflict of interest among unit members. In accordance with *Wilton*, PERC reviews the facts of each case to determine whether the alleged conflict is "actual" or "potential." In this review, the unit's bargaining history is closely scrutinized and PERC generally places greater emphasis on evidence of actual conflict. In the face of a long-standing, successful bargaining history, PERC will reject an allegation of a "speculative conflict" in favor of the parties' "actual experience."¹¹

PERC will also rely on an existing unit's bargaining history to assess the impact of the addition of new supervisory positions. Thus, in *Lakewood Board of Education, supra.*, PERC's Director of Representation rejected the board's argument that it would be inappropriate to add department chairpersons and educational specialists to an existing unit of principals and assistant principals as the principals evaluated the lower level supervisors. Having established a community of interest among all the positions, the Director concluded that the issue of evaluations would not disrupt the proposed unit's unity as principals had evaluated assistant principals for years without a conflict of interest.

While PERC looks to evidence of an "actual" or "potential" conflict, these considerations are secondary to the assessment of the substance of the conflict.

Substantial Conflict PERC's assessment of the degree of conflict is based on the Court's definition of what constitutes an impermissible substantial conflict. According to *Wilton*, a substantial conflict exists when some supervisors' specific job functions and responsibilities towards the employer can lead to divided allegiances or "split loyalties" that can shatter the unit's cohesiveness in negotiations. These differences are most likely to occur when the assigned duties of a particular supervisor are so intimately related to the district's management and policy-making functions that he is set apart from line supervisory personnel who are in a different or lower echelon of authority.

PERC has interpreted the judicial definition to apply generally to situations where district-wide administrators

¹¹ See, for example, *City of Trenton*, D.R. No. 83-33, 9 *NJPER* 14172.

are included in a unit primarily composed of building level administrators. For example, in *Parsippany-Troy Hills Township Board of Education*, D.R. No. 79-4, 4 NJPER 4177, the district-wide directors of secondary and elementary education were severed from a unit composed of principals and supervisors as PERC found that the functions of the district-wide administrators were more related to the managerial responsibilities of assistant superintendents than to the duties of the building level unit members. The distinction in functions, based on the administrators' different positions within the district's organizational structure, was found to create a sufficiently significant conflict to warrant severance from the unit.

The distinction based on levels of authority parallels the distinction in the PERC Law's definition of "supervisory" and "managerial" functions. While *N.J.S.A. 34:13A-5.3* defines supervisors as those employees who have "the power to hire, discharge, discipline, or to effectively recommend the same, section 3 (f) defines managerial functions as involving the formulation and effectuation of policies and practices.¹² Thus, a finding that some supervisory positions are more closely aligned to the district's policy-makers than to the rest of the unit will generally result in a finding of a substantial conflict of interest.

Each case is determined on the specific positions in a district's unit and its particular factual pattern. However, a substantial conflict has rarely been found in a unit that consists only of building level supervisors, even when the included supervisors represent various levels of authority within a district's chain of command. In those situations, PERC has found that the employees' duties and obligations to the employer are similar and that the differences that may exist among the heterogeneous unit simply reflect different bargaining demands, or "competing interests," that do not rise to the level of an impermissible conflict of interest.¹³ In addition, conflicts that may arise because of the formal functions of certain positions within the unit are frequently found, within the total circumstances, to be "de minimis."

The De Minimis Conflict The *Wilton* standard clearly establishes that a *de minimis* conflict in a supervisors' bargaining unit can be tolerated and does not warrant a disruption of an existing unit. PERC has frequently found that the actual or potential conflict that is demonstrated

in a unit composed of all building level administrators is, at best, *de minimis* and does not support a separation of the different levels of supervisors. Specifically, PERC has generally found that the fact that some unit members evaluate other lower level supervisors is a *de minimis* conflict which does not disturb the supervisors' substantial community of interest.¹⁴

PERC has also found that, under the particular facts of the case, a principal's role in the informal resolution of grievances of other unit members was *de minimis* and did not warrant the removal of the position from its longstanding inclusion in the administrators' unit.¹⁵ PERC further held that the board could minimize the negative impact of this tolerable conflict by requiring the superintendent to approve the principal's informal resolution of grievances.¹⁶

PERC's acceptance of these *de minimis* conflicts is obviously authorized by the court's decision in *Wilton*. In addition, PERC's conclusions are buttressed by its stated policy of supporting broad-based bargaining units and avoiding a proliferation of bargaining units. However, all PERC's unit determinations, while guided by these underlying principles, will be based on its case-by-case review of the particular and specific circumstances of each situation. Thus, even when finding that a unit of different levels of supervisors would not be marked by a substantial conflict of interest, PERC has on rare occasion authorized separate bargaining units for a classification of supervisors. For example, PERC authorized a separate unit of principals when neither the board nor the existing unit's majority representative objected to the severance of the positions.¹⁷ PERC also authorized a separate unit of department heads after those positions were severed from a teachers' unit and the majority representative of the existing supervisory unit objected to the inclusion of those positions in its unit; under these circumstances, the Director of Representation stated: "I will not require an employee organization which refused to represent department heads to negotiate terms and conditions on their behalf."¹⁸

Summary PERC's standards for the determination of an all supervisors' bargaining unit differ from the criteria for determining an appropriate unit that includes both supervisors and nonsupervisors. The traditional conflict inherent in the evaluation of fellow unit members will

¹² Under the Act, school managerial executives (defined as the superintendent and assistant superintendent) do not have the right to participate in collective negotiations; in addition, confidential employees whose job functions give them advance knowledge of the board's negotiations strategies may not be included in a bargaining unit for the purposes of collective negotiations.

¹³ *Roselle Park Board of Education*, PERC No. 87-80, 13 NJPER 18033.

¹⁴ See, for example, *Lakewood Board of Education*, *supra.*; *Edison Board of Education*, D.R. No. 82-8, 7 NJPER 12249; *North Bergen Board of Education*, PERC No. 87-79, 13 NJPER 18032.

¹⁵ *Mainland Regional Board of Education*, *supra.*

¹⁶ Note, however, that employers who permit their supervisors to process grievances of other supervisors may be found to have violated the Act. See further discussion of this issue in the *Implications for Boards of Education* section later in this article.

¹⁷ *Paterson Board of Education*, D.R. No. 88-12, 13 NJPER 1830.

¹⁸ *Kearny Board of Education*, D.R. No. 92-36, 19 NJPER 23139.

not be seen to disturb the community of interest of an all supervisor unit. Rather, PERC will accept a bargaining unit composed of different levels of building supervisors and will generally only find a substantial conflict when the unit includes higher level supervisors whose greater affiliation with the district's policy-making establishes a different relationship to the employer.

The Supervisory Unit's Majority Representative

The PERC Law authorizes bargaining units to freely select the agents that will represent the unit in negotiations. Thus, supervisors, like other public employees covered by the Act, have the right to select their unions. PERC decisions, affirmed by the courts,¹⁹ have held that supervisors can choose to be represented by an affiliate of a statewide union that represents nonsupervisory employees. Thus, in *Essex County Vocational-Technical Board of Education*, PERC rejected the board's challenge to the Director of Representation's order of an election among the district's newly formed administrators' unit to determine whether the unit wished to be represented by the NJEA. The board contended that since the NJEA also represented the district's certificated nonsupervisory unit, that organization could not also represent the supervisory unit without creating a conflict of loyalties. PERC found that the NJEA had met the threshold requirements of *City of Camden*, PERC No. 82-89, 8 *NJPER* 13094 as it had certified that: the unit would not have nonsupervisory members; that the organization would be separate from any organization that represented the district's nonsupervisory employees; and that the supervisors' organization would control the negotiations and contract administration affecting the district's supervisory employees.

PERC further held that, in light of this certification, the board's pre-election concern that the unit would be dominated by nonsupervisors was premature. PERC concluded that if subsequent facts warranted the board's concern of nonsupervisory domination, the board could always raise its claims in unfair practice proceedings.

Guidelines for Boards of Education

PERC's standards in determining an appropriate bargaining unit for a district's supervisory staff can help boards to assess the merits of their concerns over their districts' proposed, or actual, supervisory bargaining structure. The standards described above can provide boards with general guidelines to anticipate PERC's ruling in a specific dispute over supervisors' appropriate organization for bargaining. In weighing their options, boards should keep the following points in mind.

PERC's Representation Procedures Although the composition of a bargaining unit can frequently be defined by local negotiations, boards must not forget that PERC has specific, nonadversarial procedures to determine and certify appropriate bargaining units. Boards should not be reluctant to initiate these proceedings by filing the appropriate petition with the Commission.²⁰ Indeed, it is far more beneficial to use these available procedures than to agree to a unit which includes supervisory titles to the detriment of the board's operations. For example, if an association disputes the board's assertion, boards should always seek PERC's expertise in severing true supervisors from a unit of rank and file nonsupervisory employees and in excluding managerial or confidential employees from an all supervisors' unit. An understanding of the standards that PERC will use in resolving the disputed positions can help boards of education to assess the merits of their positions and their chances of success before PERC.

Case-by-Case Determination While the general principles summarized in this article can provide broad guidelines to anticipate PERC's determination, boards must keep in mind that each case will be determined on its own factual patterns. PERC will not base its holding on positions' assigned titles but will rather carefully scrutinize the actual responsibilities of the challenged positions, their relationship to the district's management and to other unit members, as well as the unit's bargaining history. Boards must therefore engage in the same kind of analysis and must be prepared to raise the very specific circumstances which can support a finding of a conflict of interest within their district's unit.

Excluding Supervisors from a Nonsupervisors Unit Given existing case law, it is far easier for a board to support a petition to sever supervisors from a unit composed of nonsupervisors. In these cases, all a board needs is evidence that the full-time or part-time supervisors are true supervisors under the Act. However, boards need to be prepared that their petitions to sever supervisors will not be successful if the district's "supervisors" do not function as primary evaluators and are not involved in effectively recommending hiring, firing and discipline.

Seeking Severance from an All Supervisors Unit Under existing case law, including PERC's policy of avoiding a proliferation of bargaining units, it will be far more difficult for boards to support their petitions to sever supervisory positions from an existing bargaining unit or to successfully object to a broad-based supervisors' unit. In these circumstances, boards may succeed if they can demonstrate that: some supervisors are confidential employees; and/or that others are so closely affiliated with

¹⁹ *Hudson County*, D.R. No. 85-7, aff'd App. Div. Dkt. No. A-989-84T7 (11/1/85); *Essex County Vocational-Technical Board of Education*, PERC No. 94-48, aff'd App. Div. Dkt. No. A-1019-93T3 (1/23/95), cert. den. ___NJ___.

²⁰ For a full discussion of the rules governing the filing of an appropriate and timely petition, please see chapter 2 in *The Public Employment Relations Law*, Vol. 6 of NJSBA's School Board Library Series which can be found in your board office.

top management as to make their inclusion in a unit of middle managers inappropriate. However, unless the unit is marked by an unusual adversarial history, boards may have little chance of success in demonstrating a substantial conflict of interest in a unit that includes only building level supervisors.

Given existing precedent, this can be a difficult task that may be complicated by a number of factors, including: the unit's majority representative opposition to the board's position; and the possibility that the board's position would exclude only one supervisor from the unit—since a bargaining unit must consist of at least two persons, the excluded supervisor would be precluded from exercising his bargaining rights. Thus, under certain circumstances, boards may be required by PERC to negotiate with a supervisors' unit that is marked by a *de minimis*, but legally tolerable, conflict of interest.

The Board and The Unit's Conflict A board may have objected to the composition of its supervisors' unit. However, once the unit has been certified by PERC, the board has a responsibility to assure that its grievance procedure does not add to the unit's *de minimis* conflict. A board must make sure that it does not permit one of its supervisors to serve as a representative of the district in processing other administrators' grievances when that supervisor also serves as an officer of the supervisors' association. For example, in *Camden County College*, PERC No. 93-90, 19 *NJPER* 24107, a director, who was also the president of the supervisors' association, disciplined a fellow unit member. The employee grieved the discipline and the director processed the grievance in his capacity as the immediate supervisor. Then, in his role as the association president, the director participated

in the association's decision to not pursue the grievance to arbitration. PERC held that:

An employer cannot permit its supervisors to participate in any aspects of a union's decision on how to pursue a grievance contesting discipline initiated by that supervisor. The conflict of interest is readily apparent. ... By permitting [the director] to participate in the processing of the [employee's] discharge grievance, the College violated subsection 5.4 (a)(1) of the Act.

Therefore, boards would be well-advised to assure that their supervisors' grievance procedures avoid these types of conflicts. Guidance may be found in *Mainland Regional, supra.*, where PERC noted that the board could protect against the possibility of a conflict within the unit by conditioning the principal's informal resolution of unit members' grievances upon the superintendent's approval.

Relying on Your Resources The issue of the appropriate supervisors' bargaining unit can be a complex issue for boards of education. The unit's determination can impact on the negotiations process, the administration of the supervisors' contract, the board's ongoing relationship with its supervisors and their association as well as the district's operations. Given the importance of the issue and the importance of the specific circumstances of each case in the application of the general principles described above, boards would be well-advised to discuss their particular situations and their options with their legal and labor resources, including the NJSBA's Labor Relations Department.