

Accordingly, we make the following

ORDER

AND NOW, this 26th day of February, 1974, it is ordered and decreed that the Appeal of Roslyn L. Grossman from the decision of dismissal by the Board of School Directors of the Allentown School District be and hereby is sustained, and the Board of School Directors is directed to reinstate the said Rosylyn L. Grossman to her position as a professional employe without loss of salary.

* * * *

Appeal of George R. Reese, a Professional
Employe, from a decision of the Board of
School Directors of the Ellwood City Area
School District, Lawrence County,
Pennsylvania

In the Office of the Secretary of Education,
Commonwealth of Pennsylvania, at
Harrisburg, Pennsylvania

No. 215

OPINION

John C. Pittenger
Secretary of Education

George R. Reese, Appellant herein, has appealed from a decision of the Board of School Directors of the Ellwood City Area School District terminating his contract and dismissing him as a professional employe.

FINDINGS OF FACT

1. Prior to August 1971, George R. Reese had been a professional employe for the Ellwood City School District employed as a high school teacher.
2. On August 18, 1971, Mr. Reese accepted a position as Assistant High School Principal.
3. At the time he accepted the position of Assistant High School Principal, and up to his dismissal, Mr. Reese was a member of the National Education Association, the Pennsylvania State Education Association, and the Ellwood Area Education Association, organizations permitted to represent public employes by the "Public Employe Relations Act", Act No. 195 of July 23, 1970.
4. On July 13, 1972, charges of incompetence and negligence were preferred against Mr. Reese by the School Board.
5. Notice of the charges was sent on August 10, 1972 and received by Mr. Reese on August 12, 1972.
6. A hearing on the charges was held on August 24, 1972.
7. On September 1, 1972, the Appellant was notified of the decision by the Board of School Directors of his dismissal on the grounds of incompetency and negligence.
8. On September 11, 1972, the Appellant filed an appeal from said decision with the Secretary of Education.
9. On Tuesday, October 3, 1972, a hearing was held on the appeal.

TESTIMONY

At the hearing before the School Board only one witness was called, whose testimony on behalf of the School Board was substantially as follows:

Mr. John DeCaro, Superintendent of Schools, Ellwood City Area School District, testified that Mr. Reese was employed by the district as an Assistant Principal. Acting upon an interpretation

of Act 195, Mr. DeCaro believed that Mr. Reese's membership in the National Education Association, the Pennsylvania State Education Association, and the Ellwood Area Education Association would make him ineligible to engage in the collective bargaining process and the grievance proceedings according to the conflict of interest section of Act 195. His membership therefore made him incompetent to perform all of his duties as Assistant Principal.

On cross-examination Mr. DeCaro admitted that under the collective bargaining agreement in force during the 1971-72 school year, two grievances were filed in Mr. Reese's building, and that Mr. Reese had not been asked to participate in the grievance procedure; nor had he at any time been asked to participate in collective bargaining negotiations. The job description for Assistant Principal did not require participation in grievance procedures or negotiations.

Mr. DeCaro also admitted that an Assistant Principal was a first level supervisor under Act 195. Mr. Reese had not received any unsatisfactory ratings, nor had he ever been formally requested by the School Board to resign from the Education Associations, although the Board's concern had been communicated to him.

DISCUSSION

The basic issue in this appeal is whether membership in an organization which represents public school teachers renders an Assistant Principal or other first level supervisor incompetent to perform his duties by virtue of the conflict of interest provisions of the "Public Employee Relations Act", hereinafter referred to as Act 195, Section 3380 of the School Laws.

The School Board's position is that a man cannot serve two masters. It asks how can the Appellant fairly and honestly represent the Board in matters involving teachers when he is a member of the teacher's associations? The Board argues that membership prevents the Assistant Principal from bargaining, from participating in the grievance procedure and therefore from having access to confidential communications. It bases these conclusions on the conflict of interest provisions of Act 195.

Act 195 evinces a strong public policy that public employes shall have the right to organize, form, join or assist in employe organizations, to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to bargain collectively through representatives of their own free choice. To make this policy effective, public employers are required to negotiate and bargain with employe organizations representing public employes and to enter into written agreements evidencing the result of such bargaining.

Membership rights granted by Act 195 are allowed to public employes, meaning any individual employed by a public employer. Certain categories of employes are excluded from the act, among which are management level employes and confidential employes. However, supervisors of public employes are not excluded from the membership rights afforded by Act 195, although they are subject to special limitations in the exercise of those rights.

Section 604 of Article VI of the Act, on Representation, provides that in determining the appropriateness of the employes' unit, the Pennsylvania Labor Relations Board shall:

"(5) Not permit employes at the first level of supervision to be included with any other units of public employes but shall permit them to form their own separate homogenous units. In determining supervisory status the board may take into consideration the extent to which supervisory and nonsupervisory functions are performed."

Supervisor is defined in Section 301(6) to mean

"...any individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employes or responsibly to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment."

The Act defines first level supervisor as "...the lowest level at which an employe functions as a supervisor", Section 301(19). First level supervisors are limited in the exercise of their rights in that...

"Public employers shall not be required to bargain with units of first level supervisors or their representatives but shall be required to meet and discuss with first level supervisors or their representatives, on matters deemed to be bargainable for other public employes covered by this act." Section 704.

These sections of Act 195 clearly provide that first level supervisors shall have the right to join an employe organization, even though part of their duties involve the handling of employe grievances. The only restrictions are that they cannot be a member of the same bargaining unit as the employes they supervise, and that they cannot be confidential or management level employes.

At the hearing before the School Board, it was admitted that Mr. Reese as an Assistant Principal was a first level supervisor. The right of school principals, and hence assistant principals, to join or form a labor organization as public employes serving as first level supervisors was affirmed by the Order of the Pennsylvania Labor Relations Board in the case of the **Pennsylvania Labor Relations Board vs. The Big Spring School District**, Case No. PERA-C-2248-C (1972).

A problem appears to exist if the first level supervisor's participation in the grievance procedure is termed participation in the collective bargaining process since the conflict of interest section of Act 195, Section 1801(a) provides:

"No person who is a member of the same local, State, national, or international organization as the employe organization with which the public employer is bargaining or who has an interest in the outcome of such bargaining which interest is in conflict with the interest of the public employer, shall participate on behalf of the public employer in the collective bargaining processes with the proviso that such person may, where entitled, vote on the ratification of an agreement."

It is unreasonable to assume that the Legislature intended to include the grievance procedure as a part of the collective bargaining process since it extended the right to membership in employe organizations to supervisors whose duties included the handling of grievances.

The Pennsylvania Labor Relations Board has decided that the handling of grievances by first level supervisors does not include them in the bargaining process and that there is no conflict of interest under Article XVIII of Act 195, **Pennsylvania Labor Relations Board vs. Eastern Lancaster County School District**, Case No. PERA-C-2295-C, and **Pennsylvania Labor Relations Board vs. Big Spring School District**, Case No. PERA-C-2248-C. The Big Spring case involved building principals and the Eastern Lancaster case involved first level supervisors of the school system. Both cases are on point. In each case the Board said:

"The United States Supreme Court, in **Elgin, Joliet, and Eastern Railway Co. v. Burley** 325 U.S. 711 (1945), held that there was a difference between collective bargaining and handling grievances" "The first relates to disputes over the formation of collective agreements or efforts to secure them.... The second class, however,... relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case."

"The Court of Appeals for the 5th Circuit, in **Hughes Tool Co. v. N.L.R.B.** 147 F.2d 69 (1945), held that "...it is plain that

collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment... is distinguished from 'grievances', which are usually the claims of individuals or small groups that their rights under the collective bargain have not been respected."

"Therein, the Court also held that the *procedure* for handling grievances is subject to collective bargaining, but that the actual processing of individual claims is not."

In discussing the provisions of Act 195, the Board said:

"Section 604(5) of the Act allows first-level supervisors to organize into their own homogenous units, and Section 704 gives them the right to meet and discuss with the employer. Both of these sections prohibit said employes from being included in the same *unit* as other employes, but neither contains any prohibition about said employes belonging to a broad-based employe organization which represents different units and job classifications.

"Most first-level supervisors, including the ones in the present case, do possess the power to handle grievances at the first level. Finding this process to be a part of collective bargaining would create the conflict of interest forbidden by Article XVIII of the Act, and would for all practical purposes prevent any first-level supervisors from belonging to any employe organization or union.

"This would appear to be contrary to the legislative intent behind Act 195, which was to give representation to the widest possible number of public employes. It follows the intent behind the Act to allow first level supervisors to be represented by employe organizations, albeit in their own units to meet and discuss."

The Board concluded by stating:

"Circuit Judge Sibley, in *Hughes Tool*, supra, presented a good analogy. He likened collective bargaining to the give and take which produces legislation, and the grievance procedure to the process which handles individual cases under a law after it is passed. This analogy is valid, and is the basis behind the Board's interpretation of the cases cited and the sections of Act 195."

"As determined in the above paragraphs, the Board is of the opinion that the handling of individual grievances under the given procedure is not the contract negotiation process which would lead to a conflict under Article XVIII.

"The Board finds that 'collective bargaining' covers the actual bargaining and negotiation which lead to a contract, while the grievance procedure is a part of the agreement, and is a subsequent phase of employer-employe relations.

"Therefore, there is no conflict for an employe to be a first-level supervisor (thus handling grievances in the initial state) and also being a member of a broad-based employe organization. Since first-level supervisors do not have collective bargaining powers under the Act, they rarely represent either employer or employe in the actual contract negotiations; In the Matter of the Employes of Pocono Mountain School District, PERA-C-816-C and 911-C.

Under the provisions of Act 195 and the above cited Labor Relations Board cases, we find that it is not a conflict of interest for an Assistant Principal or other first level supervisor who is a member of an employe organization to handle grievances involving other members of that organization. Therefore, since there is no conflict of interest, there is no legal basis for finding that George R. Reese was incompetent to perform his duties as Assistant Principal.

In addition, we find no factual basis for incompetency. Mr. Reese had never received any unsatisfactory ratings. Accordingly, he could not be dismissed for incompetency since two unsatisfactory ratings are required, *Appeal of Thall*, 410 Pa. 222, 189 A.2d 249 (1963). It should also be noted that Mr. Reese was never asked to participate in collective bargaining negotiations, that he was never asked to handle grievances, and that such actions were not a part of his job description. The Superintendent's testimony on Mr. Reese's performance as an Assistant Principal showed that he was considered to be highly competent and satisfactory.

However, concerning the question of Mr. Reese being able to participate in the collective bargaining process by virtue of his membership in an employe organization, it should be noted that public employes who are first level supervisors have a right to such membership under Act 195. That right cannot be circumvented by making participation in the collective bargaining process a requirement of the first level supervisor's job position. When a first level supervisor is involved in collective bargaining and is a member of an employe organization Act 195 provides that he shall be removed from his role in the collective bargaining process, Section 1801(b). It does not authorize dismissing the employe or requiring him to resign from the organization.

Accordingly, we make the following:

ORDER

AND NOW, to wit, this 4th day of January 1973, it is ordered and decreed that the Appeal of George R. Reese from the decision of dismissal by the Board of School Directors of the Ellwood City Area School District is hereby sustained and the Board of School Directors of the Ellwood City Area School District is directed to reinstate George R. Reese forthwith without loss of pay.

* * * *

Appeal of Beulah L. Burns, a Professional
Employe, from a decision of the Board of
School Directors of the Chester Upland
School District, Delaware County,
Pennsylvania

In the Office of the Secretary of Education,
Commonwealth of Pennsylvania, at
Harrisburg, Pennsylvania

No. 216

OPINION

John C. Pittenger
Secretary of Education

Beulah L. Burns, Appellant herein, has appealed from a decision of the Board of School Directors of the Chester Upland School District, Delaware County, Pennsylvania, terminating her contract and dismissing her as a professional employe.

FINDINGS OF FACT

1. The Appellant served as a temporary professional employe in the Chester Upland School District from February, 1969 until February, 1971.
2. On February 1, 1971, the Appellant was issued a professional employe's contract by the Board of School Directors of the Chester Upland School District.
3. During the course of her employment with the School District, the Appellant taught seventh grade social studies and ninth grade civics at Showalter Junior High School.