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A Management Perspective

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Unit Status of Supervisors in Public Education: A Management Perspective

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Issues revolving around employees who perform supervisory functions in education, such as who should be classified as a supervisor, who should have collective bargaining rights and whether if such employees are granted collective bargaining rights they should bargain jointly with other employees or in units of their own, have, in my experience been much more likely to be settled on pragmatic grounds relating to the immediate situation, rather than becoming the source of carefully thought out policies. I am not sure that there is such a thing as a "management position" on these issues, other than a strategic decision which fits the need of the moment. Too often I have found that management has not faced the consequences of these decisions and has been left to repent at leisure. This piece will examine some of the factors which management should consider in formulating a strategy towards these issues, and take a brief look at some of the relationships between them.

I. The Election Issues. All managements which undertake to oppose unionization of employees face a dilemma regarding marginal employees, the resolution of which depends on their calculation of the likely outcome of an organizational election (assuming that management is not willing to voluntarily recognize the Union). If management believes that there is a likelihood that the election could be won, then there is a tendency to strive to include supervisory or quasi-supervisory employees in the bargaining unit, on the theory that such employees are less susceptible to unionization. On the other hand, if the management views its chances of winning the election as remote, then the tendency is to attempt to *exclude* the self same employees, on the grounds that they will remain "loyal" to management rather than to the union.

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A further consideration is how the individual employee will react to being placed in the bargaining unit. Sometimes such employees will feel "abandoned" and believe that the mere fact that management has so categorized them means that they are not really viewed as a valuable part of the management team. On the other hand, they may also become intensely resentful of the union for "dragging down" their hard won status. (Naturally both unions and managements respectively will attempt to induce these opinions.)

Another refinement of the calculation relates to whether or not the marginally supervisory employee is viewed by management as an opinion leader who is likely to sway others in voting. For example, I have been involved in at least one case in which the administration of a four year university voluntarily conceded to the placement of department chairmen in the bargaining unit, because of the strong level of credibility they felt the chairmen had with the rest of the unit. Much to the management's chagrin, a number of the chairmen became highly active and influential in the union, which illustrates how chancy such decisions can be.

Generally, it would seem that managers are more likely to attempt to "load" a bargaining unit with quasi-supervisors in four year colleges than they are in K-12 public educations systems. The case law abounds with examples (all pre-*Yeshiva*[1] in the NLRB's jurisdiction) in which managements and unions have squared off over quasi-managers and supervisors with the union attempting to exclude them and management attempting to include them. (see generally *Fairleigh Dickenson University*,[2] *University of Miami*,[3] *University of Detroit*[4]) This same kind of tactical skirmish extends to professional schools as well, it being the belief that medical doctors and dentists particularly are less likely to align themselves with their less affluent academic brethren than they are with the administration.

K-12 school system managers seem to be less prone to this kind of calcuation, perhaps because of the much greater propensity of K-12 teachers (at least in states with firmly established traditions of collective bargaining) to favor union representation in elections. Similarly it is the union which tends to seek the more expansive unit, desiring to include department chairmen, community school directors, consultants and the like. If there is electoral infighting in the K-12 setting it is much more likely to occur in circumstances in which there is a

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[1] NLRB v. Yeshiva University, 444 U.S. 672 (1980).

[2] Levine v. Fairleigh Dickenson University, 646 F.2d 825 (3rd Cir. 1981).

[3] Unreported case.

[4] Unreported case.

contest between two unions for the right to represent the employees, when one or the other organization feels it is at a disadvantage with more senior people. This is not to suggest that higher education units may not count noses and formulate positions in the same manner. Under these circumstances the well-advised management will withdraw to a position of benevolent neutrality and let the two unions slug it out.

II. The Negotiation Issue. Assuming that union representation is already established, or is a foregone conclusion, management may well determine its position on these issues based on negotiation dynamics. Obviously, management's first choice under these circumstances is to have no supervisory employees in a bargaining unit at all. The lessening of the number of supervisors will simply, by reducing potential dues payers, at least marginally reduce the strength of the union. More importantly, it will raise whatever chances may exist that the institution could function even if the bargaining unit chooses to go on strike. This appears to be universally the choice of management; perhaps there are some who might feel that the presence of quasi-supervisors, who may be faculty members of some seniority, may tend to exert a stabilizing influence on a bargaining unit and thereby lessen the likelihood of strike action, but in my experience unit members supporting management tend to be viewed as traitors in the midst of the union, or they become the leaders of the union movement, rather than any countermovement.

Idealistic union leaders and supporters tend to react with horror (or at least feigned horror) to the notion that public management would assert a right to fashion units so they could engage in something as heinous as "strikebreaking." Yet the position is not nearly as intellectually illegitimate as the unionists would suggest. The past ten years have seen a growing public acceptance (in some parts of the country perhaps from sheer familiarity) of the public employee strike. If our system is to adjust to the concept of economic warfare between public managers and public employees, it does not seem terribly unreasonable to suggest that such warfare be of the limited variety, so that the particular public service affected is not brought to a complete halt. Indeed the presence of sufficient supervisors outside of the bargaining unit may prevent the injunction of the strike by preventing the imperilment of the public health, safety and welfare through the efforts of supervisors providing minimal services, at least in those jurisdictions which legally tolerate strikes but with limitations.

In order for a mature labor relations system which contemplates the possibility of strikes to function in a reasonable fashion, there has to be present the possibility that in some circumstances the union might lose more than it would gain by striking. If the system creates the risk-free strike, the responsible union leader has no basis on which to convince his membership that they should not strike in virtually any case; there is always the possibility that a strike will produce a better deal. If, on the other hand, the union faces the reality that management may decide that it is in the public interest to accept the inconvenience and disruption of public service, rather than acquiescing to the union's demands, that position could well result in the union employees losing more pay through striking than they would gain through the possible new contract, and then an atmosphere for settlement is enhanced on both sides.

Absent actual exclusion from the collective bargaining process, management's next best bet is a separate bargaining unit for supervisors. In my experience, it is only in the very large metropolitan school districts that a supervisory unit has sufficient negotiating capacity to even negotiate a comprehensive contract that deals with specificity with all the aspects of wages, hours, and terms and conditions of employment that are usually found in such a document, much less to extract substantive concessions from management. Unions of principals and assistant principals in school districts of less than 100,000 students tend to be very weak for two obvious reasons. The first is that they have no credible strike threat; not only could the school system operate if they chose to strike, but the public pressure generated by such an action would be virtually negligible. There is simply not enough day to day contact between the consumers of public school services and building principals for it to make any short term difference to parents and students whether they struck or not.

Secondly, and perhaps most important in an operative sense, many school supervisors aspire to becoming school managers. While leadership in a teacher's union may result in the administration identifying leadership potential and promoting the teacher to an administrative position, it is not equally likely that a building principal who becomes aggressive in his leadership of a principal's union is particularly likely to endear himself to the higher echelons of the school administration. This tends to lead to a "who will bell the cat" phenomenon which can be easily perceived in the review of administrator union contracts.

K-12 teacher unions have generally not sought to include building administrators *per se* in their membership. Indeed the constitutions

of some of the state affiliates of the National Education Association exclude persons holding such positions from active membership. However, skirmishing over the strike threat issue does occur in relation to ancillary positions, such as athletic directors, community school directors, educational specialists and consultants. Persons who by training are regularly called upon to handle large groups of children (such as athletic and recreation directors) who could provide at least custodial care during a K-12 strike are especially sensitive in a strike prone school district.

III. The "Sensitive Employees" Issue. I have used the term "sensitive employee" rather than the common labor relations term "confidential employee" for a particular reason. In my experience most public managers find it extremely difficult to distinguish between an employee who shares their confidences as to general business issues, and one who is in fact "confidential" in the sense used by many public employment relations statutes, in that they in fact are privy to information which is significant to the collective bargaining process.

Public managers, particularly in environments which have not experienced a great deal of unionization, are particularly sensitive to a fear that information which is confidential in a business sense, but not in a collective bargaining sense, will leak out to the union. The fact that the information does not have any direct bearing on collective bargaining, but may relate to items as indirectly related as issues of the policy direction of the institution of school district, does not seem to provide the public manager any particular comfort.

Upon reflection, this is not surprising. I feel that the confidentiality definition, which has been lifted in many jurisdictions almost directly from the private sector, is one area in which labor relations policy really fails to take into account the difference between the public and private sector.

The reason for this is that the labor relations process in the public sector is inherently politicized. Unions really have two separate sources of pressure upon their negotiating adversaries: they may use the traditonal labor relations pressure point, but they add to them the political pressure of both the votes of their membership, if they live in the electoral district served by a public institution, and the general availability of public pressure which they may generate on a particular issue.

Obviously, the possession by the union of sensitive information, even though unrelated to collective bargaining, certainly aids in this political attack. If, for example, a union was to obtain negative evalu-

ations of building administrators, and to use them either to foment their membership or the public at large, this could cause severe political damage to the school administration, even though it might have nothing whatsoever to do with the negotiating process.

One has only to look at current national political events to recognize the potency of the "leak" as a political weapon influencing policy or raising or lowering the relevant level of political prestige and power of a given public figure. Used in the hands of a skillful union leader, the "leak" can be just as effective in the more mundane world of a K-12 school district, a community college or a state university.

Even in a private institution, certain information can have a severe effect on the institution so as to reinforce the notion "knowledge is power." I once had occasion in dealing with a private sector university to find that the university's primary motivation in a given dispute was to avoid the release of certain salaries in a given professional school, for fear of a firestorm of protest that would be set off in other schools and in the liberal arts college. The union's ability to obtain partial access to that information had a good deal to do with the resolution of some unrelated disputes between the parties. Similarly, the possession of certain information in a four year university can cause major internal controversy, particularly if the university maintains a full faculty governance system in addition to a collective bargaining relationship with the union.

This crossover between political issues and collective bargaining issues tends to make the traditional distinction between the confidential employee with access to labor relations information and the nonconfidential employee in the possession of sensitive information largely irrelevant, at least in the minds of the public managers. A college president who finds himself being whipsawed between a faculty union and a faculty senate, with a flow of sensitive information between both based on critical positions held by bargaining unit members, will have difficulty seeing the distinction traditionally held out by the labor relations process.

Often the confidential employee is supervisory or quasi-supervisory, such as a department chairman in a university. The issues of supervision, policy making, and confidentiality in this setting really become indistinguishable, and since confidentiality is so often an unproductive argument for management to make, may lead management to desire to exclude employees on the grounds they are supervisory, when management's real concern is that the employee has sensitive information that cannot be labeled confidential in a labor relations sense.

IV. The Quality of Supervision Issue. There is a particular concern among public managers, especially where lower level supervisors have their own union, that unionized personnel while supervising other union personnel will reduce the quality of supervision, and even more dangerously destroy the effectiveness of the organizational structure through which policy is implemented. Managers fear that a "family circle" will be created between the lower level union supervisor who is supervising, and also often processing, grievances filed by unionized employees and the union representative of the supervised employees. The risk is that the similarities between the positions in terms of their unionized status will outweigh the differences between supervisor and the supervised.

Many public managers have complained to me, for example, that they have been saddled by grievance procedures in which the first level of the grievance process is handled by supervisors who are themselves members of supervisory unions. Given a situation in which there is not the opportunity or the inclination for thorough review of the lower level supervisors' performance as grievance officers, the unionized supervisor may be in a position to settle many grievances effectively in his own discretion. (This is particularly true in very large and complex units.) Often, and far too often in the light of the managers, they then come to a grievance which cannot be settled, and find themselves confronted by a series of past practices which may well be contrary to the policy expectations of management, and may indeed have been established by unionized supervisors in informal settlements or first level grievances of which higher level management had only a vague awareness at best.

Such managers assert that they find themselves in a position in which their lower level supervisors will effectively compromise the working conditions for the benefit of the employee, because in so doing they are setting a precedent which the supervisors themselves can then utilize through their own union. Whatever positions are secured by management through the formal collective bargaining process may in fact be bargained away in friendly grievances with a unionized employee dealing with a unionized representative of the employer.

How often this really happens is problematic. What is not problematic is that the fear and concern of public managers about it is very real. This adds a note of instability and tension to the collective bargaining process, and tends to diminish the likelihood of settlement of grievances at the first level. Some public managers simply will not allow unionized supervisors to participate in the grievance process, thereby making the process more cumbersome and expensive

than it is usually conceived to be intended.

In higher education a converse situation occurs in institutions that have traditional tenure systems involving faculty members in the reappointment and tenure process. The classic dilemma was posed a number of years ago in a large public university when a number of unionized department chairmen simply refused to follow the procedures prescribed for tenure review in their own collective bargaining agreement. The university administration thus found itself facing a grievance by the union in which the principal actor on behalf of management was a member of the bargaining unit. While this type of situation is not directly related to the issue of supervision, as no one was really claiming that the senior faculty was generically supervisory, it nonetheless points out the kind of anomalous risk that can be created not only when the lines between the supervisory and nonsupervisory process are blurred, but also when supervisors are grouped into a separate unit, which then tries to supervise other unionized employees.

One product of this pattern can be exotic multi-union grievances. Consider, if you will, the hypothetical example of a unionized building principal filing a grievance protesting a negative evaluation which arose from an arbitration award on behalf of a probationary teacher who had received an unfavorable performance evaluation from the principal. Assume that the teacher claimed the principal's evaluation of him was not in conformity with the procedures in the teacher's collective bargaining agreement. Under such circumstance should the principal have the right to appear in his own behalf and argue in the *teacher's* grievance arbitration? Does the arbitrator considering the principal's own discipline have the right to re-examine the issue of whether or not the teacher's evaluation was improper? Does the award of the arbitrator who arbitrated the teacher's negative evaluation have any precedential value with regard to the arbitration on behalf of the principal with regard to his own negative evaluation? Or does the arbitrator deciding the principal's case have a right if not an obligation to relitigate the decision with regard to the teacher's evaluation in order to determine if the principal was improperly disciplined? If the arbitrator in the principal's case is going to relitigate the issue of the teacher's evaluation, may the teacher be obligated to appear to state his complaint? If not, the managers of the school district can be put in the extraordinary position of having to advocate in one forum that which they defended in another. Most public managers confronted with such a situation are easily convinced that this way is madness.

V. Reductions In Force, Promotions & Transfers. This is probably, at least in the section of the country in which I practice, the most vital concern surrounding supervisory unionization. Obviously, many school administrators will have seniority in a school system dating from a time in which they were school teachers. Most public school teacher unions have taken the position that a school administrator who is subject to layoff due to a reduction in the administrative force may only exercise in the teacher's bargaining unit that seniority which he compiled as a teacher. Thus, a school principal who had taught school, for example, for five years, but had been a principal for twenty years would have fewer seniority rights than a school principal who had taught for six years but only been a principal for two or three years.

Obviously, such a result appears grossly inequitable to school administrators, especially those who run the risk of being unemployed altogether as a result of a position such as this taken by a teachers union. More objectively, however, this can result in perhaps the best school administrators, who may well be those who are identified for administrative talent early in their careers being forced out of the district altogether, while others remain based on their longer service in their teaching positions. This is not a happy result from a public policy standpoint, at least in the eyes of the school managers.

A different issue is presented by the fact that such positions if commonly held will have a serious effect on the mobility of school administrators from one district to another. A school district that runs the risk of reduction in force, even if only in the remote future, will have difficulty attracting administrative talent from outside its own borders if those administrators fear that they will not be able to exercise their administrative seniority in the event of an administrative cutback. For example, I recently encountered the case of a school administrator who transferred into a school district some twelve years ago as an assistant principal and has served successfully therein ever since. He is now confronted by a teacher's union which asserts he has no rights whatsoever to bump into the bargaining unit because he never taught as a teacher in the district. Under their interpretation, which has been accepted by a number of arbitrators, in the absence of clear contractual language to the contrary, this administrator, employed for twelve years, has no employment rights whatsoever if the school district feels it necessary to fold his position.

Of course this will be a difficult and delicate issue regardless of whether the supervisors are organized into unions. However, it becomes an even thicker procedural fog if there is a supervisory union.

Consider the case, a real one within my experience, of a school district which had historic language regarding layoff which never contemplated the rollback of supervisors into the teacher's bargaining unit, but which when the supervisors organized, pledged to the supervisor's union that it would vigorously seek the interpretation that their system-wide seniority was applicable for a teaching position if there was a reduction in force. Subsequent to the signing of the contract, a number of Michigan arbitrators decided cases suggesting that absent specific language, seniority in a teacher's contract referred to seniority within the bargaining unit only.

The result is a most unusual circumstance in which the school district had some duty to defend an employee in an arbitral forum other than that of the bargaining unit of which that employee is a member. Could a supervisor in this circumstance grieve the quality of advocacy of the Board of Education in a grievance filed under the teacher's collective bargaining agreement? If an arbitrator found that the Board of Education had "taken a dive" in the arbitration under the teacher's contract, attempting to establish the right of the supervisor to enter the teacher's unit, what remedy would he fashion? If the supervisor prevailed could the arbitrator order the supervisor to be employed in the teacher's bargaining unit in spite of the teachers' rights? Would he have the right to order his continuation in a supervisory capacity?

The possibilities, and in some cases realities, of multiple forum arbitrations between various levels of employee, supervisor and supervised, pose a new and exotic threshold for American labor law. The vast body of precedent available from over forty years of private sector arbitration simply has no answers to questions such as these. The path is uncertain, complex and unlikely to be very satisfying even when the end is reached.

Conclusion:

There really isn't a coherent employer position on the unionization of supervisors. Under most circumstances, most public managers would probably rather see supervisory unionization eliminated, and supervisors broadly defined, simply for the basic reason that this will limit the power of the union. However, as we've seen above, particularly in areas in which the election of the union may be in doubt, not even this generalization is universally true.

The only conclusion that can really be safely drawn is that a purely tactical decision, predicated upon whatever advantage may or may not be immediately perceived, is not likely to serve public manage-

ment well. The same school superintendant who insists that supervisory personnel be in a separate unit from general employees so that he is more comfortable about sharing sensitive information with them may five years later find that he has terribly intractible problems relating to a reduction in force. The same college president who congratulated himself greatly on excluding supervisory employees from a potential faculty bargaining unit, may several years later rue the day when he finds that those faculty members are processing grievances with members of a supervisory group, including the same people he tried to eliminate. Management would be well advised to consider the factors discussed above, and undoubtedly many more, in a long range fashion together with any tactical considerations in selecting bargaining units. While I am not sure there is any basic evidence for finding that public service in this country has been overwhelmingly damaged by the trend toward unionization of supervisory employees, it certainly is apparent that the trend has made the process significantly more complex and confusing. On the other hand, the only coherent reason I've ever heard advanced for the unionization of supervisory employees in the public sector is essentially a defensive tactical one: namely, absent the ability to unionize supervisors, management will so underdefine bargaining units as to prevent effective unionization. Public sector management would be well advised to provide the union movement some comfort on this issue, whether statutorily, or less formally, if in fact such comfort could lead to the lessening of the zest of public sector supervisors to unionize at all.