

When Clarification is Confusing

By: *Christopher B. Reich*

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Recently PERB has rendered two decisions on unit placement of Teaching Assistants (TAs).

In the Matter of Newburgh Teachers' Association, PERB Case No. CP-866 ("Newburgh") and in the Matter of CSEA and Southern Cayuga CSD, PERB Case No. CP-905 ("Southern Cayuga"), the PERB decided the initial placement of TAs is in teacher bargaining units. The rationale for this placement derives from a series of previous PERB decisions that TAs and teachers share a compelling, unique community of interest, distinguishable from other non-instructional employees. In the Southern Cayuga case, the ALJ, citing Ichabod Crane 33 PERB 3042 (2000) confirmed by the Appellate Court, 3rd Dept., 35 PERB 7020 (2002), decided that TAs are professional employees, and may never be included in a bargaining unit with non-professional employees in an initial placement.

In the Southern Cayuga decision, the PERB, while upholding the ALJ's placement decision, stated that the ALJ misinterpreted and misapplied the Ichabod Crane decision by stating, "Nothing in that decision compels a finding that, as a matter of law, professionals may never be included in a unit with non-professionals. Community of interest is still the cornerstone of our uniting decisions."

What Does Ichabod Crane Decision Mean?

In 2002, the New York State Supreme Court, Appellate Division, Third Department confirmed the PERB Decision that held: the "[c]ommunity of interest as opposed to compelling need standard governed requested fragmentation, where nurses shared occupational identity and professional interests based upon their education, training and professional responsibilities." The court in Ichabod Crane found "no basis to disturb PERB's efforts to consider the Taylor Law's community of interest standard as a factor in both initial uniting and fragmentation cases," and that "following its own precedent of denying fragmentation in instances where the petitioning party fails

to show actual conflict of interest or inadequate representation, did not warrant annulling PERB's determination that fragmentation of nurses from non-instructional unit was appropriate." Id. The Ichabod Crane court apparently embraced PERB's argument that applying the "community of interest" standard in a fragmentation matter for nurses "is a rational extension of its elimination of an inconsistency in its handling of fragmentation cases involving law enforcement personnel." Id. (citations omitted). In "off the record" discussions with certain PERB Office of Public Employment and Representation personnel, the Ichabod Crane case should be narrowly construed as applying to nurses only.

We know then, that in the initial placement context TAs share a unique community of interest with teachers and will likely be placed with a teacher bargaining group rather than a non-instructional group. We know also, that the Board will apply the initial placement standard of community of interest, in fragmentation cases regarding nurses, regardless of an absence of a conflict or inadequate representation.

Will the Board make a 'rational extension' and analyze TA fragmentation cases in the same manner as nurses?

In Ichabod Crane the Board stated "petitioner's concern that PERB's determination will lead to an undue proliferation of bargaining units, we note that PERB has not abandoned its long-standing policy of requiring compelling evidence of the need to fragment existing bargaining units (Matter of County of Steuben [CSEA], 34 PERB ¶ 3023 [2001]). Also, as the exception to the general fragmentation standard is extended here only to another situation where PERB had no occasion to consider upon initial uniting whether a job title would be more appropriately placed in a separate bargaining unit and where there is a clear basis in the employees' responsibilities to fragment their job title from other unit personnel, undue proliferation should not result." Ichabod Crane.

Based on PERB's reasoning in Ichabod Crane, has PERB opened the door for NYSUT to make a "money" grab for new dues-paying members through fragmentation of teaching assistants from long-standing non-teacher units that have adequately represented their interests, and where there are no conflicts of interests?

PERB's early standards applicable to unit fragmentation issues show that the Board usually declined fragmentation of a long-standing unit, even if it would not have initially placed those positions sought to be removed, in that long-standing bargaining unit. Town of Smithtown, 8 PERB 3015 (1975); conf'd sub nom Long Island Public Service Employees, United Maritime Div. Nat'l Maritime Union v. Helsby, 53 A.D. 2d 805, 385 N.Y.S. 2d 161, 9 PERB 7014 (3d Dept. 1976), see also County of Clinton, 13 PERB 3021 (1980). The PERB has relied on the meaningful negotiations and proper representation standards to support a community of interest existed which coincided with the employer's interest of maintaining a larger bargaining unit for negotiation purposes. The PERB had set a standard that it will not fragment units of existence for some years, where an employer objects, unless compelling reasons exist.

In County of Sullivan, 7 PERB ¶3069 (1974), conf'd sub nom. Bivins v. Helsby, 55 A.D. 2d 230, 389 N.Y.S. 2d 917, 9 PERB ¶7029 (3d Dep't 1976), *motion for leave to appeal denied*, 41 N.Y. 2d 805 (1977), the employer's argument that the separation of public works employees from an overall unit would serve its administrative convenience was sufficient, in view of the special interests of those employees, to overcome the weight to be accorded a favorable negotiating history; *see also County of Rockland*, 10 PERB ¶3014 (1977). *Compare City Sch. Dist. of City of Glen Cove*, 19 PERB ¶3017 (1986) (board refused a fragmentation request supported by the employer).

Is being a TA, RN, or an LPN in a non-teaching bargaining unit sufficient for a fragmentation petition to succeed? That is the key question that PERB will probably address in a future decision.

PERB's earlier decisions and the Ichabod Crane, Newburgh, and Southern Cayuga decisions do not provide enough clarity to guide public employers and their representatives, when and if a petition is filed to separate TAs, RNs, or other professional titles from existing bargaining units which include non-professionals.
