COMMONWEALTH OF MASSACHUSETTS/CHIEF ADMINISTRATIVE JUSTICE AND MASSACHUSETTS SUPERIOR COURT REPORTERS ASSOCIATION AND LOCAL 6, OPEIU, SCR-2170 (8/30/83). NOTICE OF DISMISSAL.

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NOTICE OF DISMISSAL

On January 19, 1983, the Massachusetts Superior Court Reporters Association (Association) filed with the Labor Relations Commission (Commission) a petition seeking to sever from the judiciary staff and clerical bargaining unit (unit) fifty-six individuals employed as reporters in the Commonwealth's Superior Courts. Local 6, O.P.E.I.U. (local 6) is the certified collective bargaining representative of the unit.

At various dates prior to January 30, 1983, the Commissin notified the Association that its showing of interest was defective and that the time necessary to correct the defect would not expand the open period for the filing of petitions. The Association submitted a sufficient showing of interest on February 3, 1983.

Commission hearing officer Amy Davidson conducted an initial investigation of the Association's petition. On April 6, 1983, Commissioner Joan G. Dolan held a further lengthy investigation. The Association originally took the position that the reporters' employer is not the Chief Administrative Justice but the Justices of the Superior Court. Additionally, the Association contends that the reporters are professionals who whould not be in the non-professional unit. At the April 6 investigation, Local 6 filed a motion to clarify the petition. The Association assented to the motion without waiving its claims. Local 6 moved to be substituted for the Association as the petitioner. Local 6 stated that it seeks a separate bargaining unit for the Superior Court reporters with the public employer designated as the Justices of the Superior Court. Should the Commission reject that alternative, Local 6 seeks a separate nonprofessional unit of Superior Court reporters to be represented by Local 6; it does not seek to have the reporters declared to be professionals.

All parties provided the Commission with position papers and evidence in support of their points of view. All also sought to have the fundamental questions involved in this dispute resolved by the Commission. There is currently pending in the Superior Court (Suffolk County Civil Action No. 47837) litigation raising the same issues as are before us in this case.

On the basis of the evidence and arguments presented during the investigatory process, we dismiss the petition for the following reasons.

Background

Superior Court reporters are charged with providing a complete and accurate record of court proceedings. They record and read back testimony, maintain exhibit,

trial, and transcript files, and prepare official court transcripts for judges and attorneys on request. They are not permitted to edit or correct transcripts but must prepare a verbatim record. Reporters receive their training in any of several 2-year colleges in the Commonwealth. They are hired to work a 40-hour week by the courts, although they may work other hours preparing transcripts for the bar. Such activities are discretionary and not within the working hours set by their employer. Reporters are appointed after successful completion of a dictation examination taken in the courtroom. They are appointed and supervised by the justices or administrative officials of the Superior Court. Reporters must furnish at their own expense the majority of the equipment and supplies they use in court. Although they do not supervise any other court personnel, they may employ other individuals to assist them in preparing transcripts for the court or the bar.

General Laws, Chapter 221, Sections 82-91 states, among other things, that reporters are appointed, and their salaries set, by the Justices of the Superior Court. Traditionally, a committee composed of Superior court judges and reporters has met to discuss wages and working conditions. This committee jointly arrived at a booklet of regulations governing the reporters in 1973. The committee continues to meet.

In 1976, the Supreme Judicial Court held that judicial employees were not covered by General Laws, Chapter 150E (the Law). Massachusetts Probation Association v. Commissioner of Administration, 370 Mass. 651, 352 N.E.2d 684. Chapter 278 of the Acts of 1977 amended Section 1 of the Law to bring within its coverage any person employed within the judicial branch of government. This same enactment amended the definition of "public employer" by providing that "in the case of judicial employees, the employer shall be the Chief Justice of the Supreme Judicial Court... ."

In 1978, the Court Reorganization Act (Chapter 478 of the Acts of 1978), effected a massive alteration in the operation of the Commonwealth's court system. For purposes of this dispute, the changes most relevant were the creation of a trial court consisting of several departments, among them the Superior Court (Chapter 211B, Section 1); the creation of the position of Chief Administrative Justice for the trial court (Chapter 211B, Section 1); the granting of powers over budget and personnel to the Chief Administrative Justice (Chapter 211B, Sections 8, 9, 10); and the amending of Chapter 150E by changing the employer of judicial employees from the Chief Justice of the Supreme Judicial Court to the Chief Administrative Justice of the Trial Court (Chapter 478, Section 74 of the Acts of 1978). Additionally, the Court Reorganization Act amended Chapter 150E, Section 3 by redefining statutory units for judicial employees. The language reads:

> "The appropriate bargaining units for judicial employees...shall be a professional unit composed of all probation officers and court officers, and a unit composed of all non-managerial or non-confidential staff and clerical personnel employed by the judiciary; provided that court officers in the superior court department for Suffolk and Middlesex counties shall be represented by such other bargaining units as they may elect." (Chapter 478, Section 76 of the Acts of 1978).

None of the legislation described above specifically repealed Chapter 221, Sections 82-91 insofar as those sections pertained to the power of the Justices of the Superior Court to appoint court reporters and determine their wage rates. Certain other provisions of Chapter 221 not material to this case were specifically repealed by the Court Reorganization Act.

On January 4, 1980, Local 6 filed a petition with the Commission seeking to represent the judicial non-professional unit. Parties to the election agreed upon a list of the employee job titles to be included in the non-professional unit. No hearings were held by the Commission. Among the agreed-upon titles was that of court reporter. The reporters' names were included on the Excelsior List supplied by the Chief Administrative Justice. No challenge to their inclusion in the unit was raised at the time of either the original election or a subsequent run-off. On July 24, 1980, the Commission certified Local 6 as the exclusive representative of "all non-managerial and non-confidential staff and clerical personnel employed by the judiciary."

After the certification, the Chief Administrative Justice and Local 6 began negotiations for a collective bargaining agreement. Superior Court reporters participated in the negotiations process, along with unit employees holding other job titles. On March 18, 1981, the Association filed a petition with the Commission seeking to sever the reporters from the unit (Case No. SCR-2157). The petition was dismissed on the grounds that the reporter position was within Local 6's bargaining unit. On April 6, 1981, the Chief Administrative Justice and Local 6 signed a collective bargaining agreement covering the period July 1, 1980 through June 30, 1983. Court reporters receive all of the benefits of the agreement, as well as statutory benefits such as insurance and retirement which apply to other employees of the judiciary.

There are currently 56 court reporters in a unit of approximately 2700 employees holding roughly 61 job titles. Many other groups of employees have had different traditions of appointment and working conditions within the courts or departments of the judiciary where they are employed. The Chief Administrative Justice has been bargaining in an effort to deal with these individual differences unique to different groups of employees within the courts.

Procedural Questions

First is the timeliness of the petition. The open period for filing in this unit was the month of January, 1983. On January 19, the reporters submitted a showing of interest in petition form. The petition stated:

> We, the undersigned, wish to be represented in a separate bargaining unit consisting of all official court reporters of the Superior Court Department of the trial court.

Although the petition contained an adequate number of signatures, it nowhere designated the organization seeking to represent the reporters. Orally and by letter, Commission staff informed the Association that the showing was defective, that the Association could re-file the showing, but that the open period would not be extended in light of Commission Rule 402 CMR 14.05 so stating.

On February 3, several days after the end of the open period, an adequate showing of interest was received by the Commission. Again, the Association's showing was in the form of a petition signed by a sufficient number of employees. The petition's heading read:

> We, the undersigned, wish to be represented in a separate bargaining unit by the Massachusetts Superior Court Reporters Association, consisting of all official court reporters of the Superior Court department of the trial court for the Commonwealth of Massachusetts for the purpose of collective bargaining over hours, wages, and other terms and conditions of employment with the justices of the Superior Court department of the trial court.

Petitions must be filed during the open period (402 CMR 14.06(1)), and no petition may be entertained unless it is accompanied by a legally adequate showing of interest (G.L. c.150E, Section 4; 402 CMR 14.05). Here, the petition could not be entertained until February 3 when the showing of interest was adequate. Since February 3 was several days after the expiration of the open period, the petition was not timely filed. The Association argued pursuant to 402 CMR 14.06(1) that the necessity for it to obtain new signatures from reporters all over the Commonwealth constituted good cause to relieve the Association from the requirement that its petition be filed during the open period. The Association's argument cannot prevail since the mechanical difficulties involved in correcting a legally deficient showing cannot constitute good cause or the open period requirement would become meaningless. Therefore, the petition must be dismissed. In light of the necessity for resolving the issues raised by this case, however, we will discuss below the substantive reasons which also compel dismissal.

The second procedural question is Local 6's motion to substitute itself for the Association as the petitioner in this case. The motion is denied. To grant it would lead to several problems. Local 6 is already the certified representative of the reporters, a legally sufficient number of whom signed the showing of interest seeking representation by the Association, and not by Local 6. To allow Local 6 to substitute would undo the showing of interest and call into question the entire petition. Additionally, it would be anamalous to permit a certified representative to file a petition seeking to sever from itself a small group of employees it agreed to represent in a large unit but now seeks to represent in a separate unit. This is particularly true in light of the merits of this case. Thus, we deal with this matter with the Association in the posture of the petitioner.

Substantive Issues

The Association's case boils down to two positions: 1) the employer of the reporters is not the Chief Administrative Justice but the Justices of the Superior Court; and 2) the reporters are professionals who do not belong in the statutory non-professional unit. In light of our conclusions below, we need not deal with the Chief Administrative Justice's argument that the reporters are estopped from raising these arguments in this proceeding.

The Employer

As is virtually universally the case where new collective bargaining relationships come into existence, there is a history in this workplace of pre-collective bargaining rules, regulations, working conditions, and employer/employee relationships. Equally universal in the public sector is a web of pre-collective bargaining statutes giving appointing and budgetary authority to public officials at every level of government. When collective bargaining becomes a reality by law, rights and obligations must be meshed with pre-existing authority and conditions in a way that makes labor relations sense and harmonizes statutes which at times appear to conflict. See, e.g., City of Malden, 9 MLC 1073 (1982) (City of Malden, not Malden Retirement Board, the employer of employees working in the Board's offices.) When a public entity undergoes a massive reorganization, the situation can become particularly difficult.

Here, we must begin with the fact that reporters are clearly employed in the judicial branch of government. Turning to Chapter 150E, we find unequivocal language stating that "In the case of judicial employees, the employer shall be the Chief Administrative Justice of the Trial Court... ." We are without power to alter the statutory language. The Association argues, however, that General Laws, Chapter 221, Sections 82-91 make the Justices of the Superior Court the employer of the reporters, and not the Chief Administrative Justice. In general, these sections enable the Justices of the Superior Court to appoint reporters and set their salaries. Some of the specified sections were passed well over a hundred years ago. A meshing of Chapter 221 with Chapters 150E and 211B, the Court Reorganization Act, does not alter our conclusion that it is the Chief Administrative Justice who is the employer of the reporters.

The Supreme Judicial Court has had several occasions to deal with the relationship between the court reorganization statute and pre-existing laws giving rights and authority apparently in conflict with the powers of the Chief Administrative Justice. Bruno v. Chief Administrative Justice of the Trial Court, 380 Mass. 128, 401 N.E. 2d 849 (1980) dealt with the reconciliation of the Chief Administrative Justice's power under G.L. c.211B, Section 9 with court officers' rights under G.L. c.221, Section 70. Clerk of the Superior Court for the County of Middlesex and others v. Treasurer and Receiver General, 386 Mass. 517, 386 Mass. 517, 437 N.E. 2d 158 (1982) examined an alleged conflict between the powers of the Chief Administrative Justice under G.L. c.211B, Section 9 and those of Superior Court clerks under G.L. c.35. In both cases, the Court upheld the powers of the Chief Administrative Justice as they were both explicit and implied in Chapter 211B. As the Court noted:

> A major feature of G.L. c.211B...is the consolidation of resources into a unified trial court under the management of the Chief Administrative Justice. (Citation omitted.) The express legislative purpose of the enactment was 'to promote the orderly and effective administration of the judicial system of the commonwealth. To that end, the provisions of this act provide for an administrative consolidation of the several courts of trial jurisdiction... .' The thrust of the statute is toward consolidation, not separation; toward conformity, not diversity. Clerk of the Superior Court, 386 Mass. at 522.

It is true that the Court Reorganization Act did not repeal the provisions of Chapter 221 giving the Justices of the Superior Court authority to appoint and set wages for the reporters. On the basis of the two cases cited above and the need to harmonize different statutes, however, we must find that the only sensible construction of both Chapter 150E and Chapter 211B is that the Chief Administrative Justice is the employer of the reporters. To do otherwise would contravene the clear wording of both statutes. It would also make for fragmented rather than stable labor relations since the Superior Court Justices would negotiate wages while the Chief Administrative Justice had responsibility to negotiate all other terms and conditions of employment.

We note that boards and commissions at both the state and municipal levels of government, as well as court officials other than judges, exercise appointing authority without conflict with the statutory definitions of "employer" under Chapter 150E. Although the parties did not discuss the point in detail, it would appear that the provisions of G.L. c.211B, Sections 8, 9, and 10 provide a mechanism whereby the Chief Administrative Justice and the Justices of the Superior Court would reconcile their approaches to appropriate appointments and salary levels for reporters.

The Bargaining Unit

The Association contends that the reporters are professional employees who should not be included in the non-professional unit established by G.L. c.150E, Section 3. We note first that that section specifically states that Suffolk and Middlesex Superior Court officers may choose bargaining units other than those created by statute. There is no such provision for the reporters or any other group of employees. Only if we find the reporters to be professionals need we discuss unit possibilities other than the statutory non-professional unit.

Before turning to our reasons for finding reporters to be non-professionals, we note that the terms "professional" or "non-professional" are terms of art for labor law purposes and carry none of the layman's ordinary negative or positive connotations. The term "non-professional" arises in labor law from the statutory definitions with which both we and the National Labor Relations Board must work.

Chapter 150E defines "professional employee" as:

> ...any employee negaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

It should be noted that the definition requires that all four criteria be met. We need not examine the type of work performed by the reporters since the facts adduced at investigation clearly establish that they do not meet the fourth criteria for professional status.

Court reporter training is obtained in a two-year junior college program. This is a fact not disputed by the Association. Giving to the court reporting function all of the respect it justly deserves, we are unable to find that it requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning... ." As established at investigation, reporter training involves stenographic and transcription skills communicated under the aegis of a business department. While the reporters indisputably exercise these skills professionally in the layman's sense, they cannot be found to be "professional" for purposes of Chapter 150E. We note that the National Labor Relations Board has applied identical language in holding that a newspaper's reporters, staff writers, columnists, copy editors, editorial writers, and a cartoonist were not "professionals" under the National Labor Relations Act since they had only a general college education and lacked the type of specialized, advanced knowledge contemplated by the statutory definition. Express-News Corporation, 223 NLRB 627, 91 LRRM 1489 (1976). We have found the following not to be professional employees: licensed practical nurses, Plymouth County Hospital, 1 MLC 1255 (1975); emergency medical technicians, City of New Bedford, 3 MLC 1159 (1976); respiratory therapists, City of Worcester, 6 MLC 1104 (1979); home care case managers, Old Colony Elderly Services, Inc., 6 MLC 1893 (1980).

CONCLUSION

We conclude that the procedural infirmities discussed above require dismissal of this matter. Further, we find that the Superior Court reporters are non-professional employees whose employer is the Chief Administrative Justice of the Trial Court. The reporters are properly placed in the statutory non-professional unit represented by Local 6. Since there is no reasonable cause to believe that a substantial question of representation exists in this case, the petition must be, and hereby is, dismissed.

JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

CHAIRMAN PAUL T. EDGAR did not participate in this matter.