In the matter of

EAST HARTFORD BOARD OF EDUCATION

-and-

LOCAL 1933, COUNCIL #4,
AFSCME, AFL-CIO

Case No. MPP-10,240

STATE OF CONNECTICUT
LABOR DEPARTMENT

CONNECTICUT STATE BOARD OF LABOR RELATIONS

Decision No. 2686
October 28, 1988

APPEARANCES:

Shipman and Goodwin
By: Lisa B. Bingham, Esq., and
    Richard A. Mills, Jr., Esq.
for the Board of Education

Law Office of J. William Gagne, Jr.
By: J. William Gagne, Jr., Esq., and
    Barbara J. Collins, Esq.

DECISION

and

DISMISSAL OF COMPLAINT

On October 27, 1986, Local 1933, Council #4, AFSCME, AFL-CIO (the
Union) filed with the Connecticut State Board of Labor Relations (Labor
Board) a complaint alleging that the East Hartford Board of Education (Board
of Education) had engaged and was engaging in prohibited practices within
the meaning of Section-7-470(a) of the Municipal Employee Relations Act (the
Act) in that:

The Board has removed bargaining unit work without negotiations
with the Union.

The Board has bargained in bad faith by implementing unilateral
changes in terms and conditions of employment during the pendency
of negotiations for a contract.

After the requisite preliminary administrative steps had been taken,
the parties appeared before the Labor Board for a hearing on January 25,
1988. Both parties were represented and were provided a full opportunity to
adduce evidence, examine and cross-examine witnesses and make argument. By
April 22, 1988, both parties had filed written briefs.
On the basis of the record before us, we make the following findings of fact, conclusions of law, and dismissal of the complaint.

Findings of Fact

1. The Board of Education is a municipal employer within the meaning of the Act.

2. The Union is an employee organization within the meaning of the Act and has been the exclusive bargaining representative for non-supervisory custodial, maintenance and tradesman workers of the Board of Education at all times relevant to this case.

3. There existed at East Hartford High School a position known as Head Custodian III (High School Head Custodian III). This position was included within the non-supervisory bargaining unit.

4. In June of 1986, the incumbent in that position, Frank Carberry, retired.

5. Other than the High School Principal, to whom Carberry reported on certain matters, Carberry had no supervisor above him who was based at the High School.

6. In terms of physical area, number of staff and number of students, the High School is the largest school under the jurisdiction of the Board of Education.

7. The Board of Education decided not to fill the High School Head Custodian III position after Carberry retired.

8. Instead, the Board of Education created a new position entitled Plant Manager at East Hartford High School.

9. The elimination of the High School Head Custodian III position and the creation of the Plant Manager position were done without bargaining with the Union.

10. The Head Custodian III position had involved inter alia certain first line supervisory responsibilities for approximately twenty (20) custodial and maintenance employees both on the day shift and at the beginning of the evening shift at the High School.

11. When the Head Custodian III position was initially established at the High School and Carberry was appointed to that position, it was intended that Carberry spend half of his work time performing supervisory duties and the other half performing the same type of hands-on custodial work performed by other custodians.

12. In fact, it appears from the testimony of the Union's witnesses that, except when there was a staff shortage and sometimes during lunch time in the cafeteria, Carberry performed little or no hands-on custodial work. Other than in those limited instances, Carberry spent virtually all of his time performing supervisory duties.
13. Carberry was in effect the on-site eyes and ears of management.

14. Carberry’s supervisory responsibility and authority was monitored to varying degrees by the non-bargaining unit positions of Supervisor of plant Operations (a system-wide position), Custodial Foreman for the evening shift (a system-wide position), the Coordinator of Plant Operations (a system-wide position) and the High School Principal.

15. The new Plant Manager position has greater independent supervisory authority over custodians and maintenance employees at the High School than did Carberry.

16. However, the Plant Manager finds that it requires a relatively small percentage of his time to effectively handle those responsibilities.

17. The major share of the Plant Manager’s working time is spent dealing with private contractors who are doing a considerable amount of work at the High School building and its grounds.

18. Carberry had spent some time dealing with private contractors, but it was limited mainly to contacting the central maintenance office to identify the need for such work, escorting contractors to the worksites where their work was to be done and reporting that such work had not been completed or had not resolved the problem it was performed to correct.

19. The Plant Manager has substantial independent authority for initial ordering, directing, reviewing and approving payment for the work done by private contractors.

Conclusions of Law

1. The transfer of duties that, under Section 7-471(2) of the Act, would qualify a position in a non-supervisory unit to be a supervisor, is a decision reserved to the employer’s discretion by the Act.

2. The direct impact upon an incumbent non-supervisory bargaining unit member whose position is divested of such supervisory duties must be bargained with the union representing the non-supervisory bargaining unit, if the union requests such bargaining.

3. In the present case, there was no incumbent in the High School Head Custodian III position and therefore there was no impact to bargain.

Discussion

The gravamen of the Union’s complaint is that the High School Head Custodian III was the “first line of supervision for the custodians” at the High School and that the removal of that level of supervisory duties from the High School Head Custodian III to the Plant Manager position constituted a unilateral removal of work from the bargaining unit. The Union argues that the High School Head Custodian III had responsibility for scheduling overtime, assigning, overseeing and reviewing the work of custodians at the High School. The Union further argues that such work constituted the great
majority of the High School Head custodian III's work and that he performed very little of the hands-on type of work of the other custodians.

The Union's position in this case is peculiar when considered against the typical position taken by municipal unions in representation cases involving non-supervisory bargaining unit employees. In such cases, municipal unions historically have sought to de-emphasize and argue against the conclusion that an employee's work is characterized by the types of supervisory duties which the Union contrariwise emphasizes in the present case. See, e.g. Town of Plymouth, Decision No. 1830 (1979); Madison Board of Education, Decision No. 1802 (1979); Brooklyn Board of Education, Decision No. 1738 (1979); Town of Groton, Decision No. 1200 (1974); Ridgefield Board of Education, Decision No. 1169 (1973); Simsbury Board of Education, Decision No. 1132 (1973); Town of Weston, Decision No. 902 (1969); AFSCME Local 1042, Council 4 (Norwalk Board of Education), Decision No. 822 (1968).

There is a very good reason why municipal unions historically argued as they have. Until 1979, individuals who qualified as supervisors within the meaning of the Act were not only excluded from inclusion within a non-supervisory bargaining unit, but were excluded from the definition of employee by the Act and therefore enjoyed none of the protections of the Act. See generally, Board of Trustees, State Technical Colleges, Decision No. 1940 (1980). In 1979, the Act was amended and supervisors were made employees within the meaning of the Act, but they could be included only in bargaining units comprised exclusively of supervisors. In other words, supervisors may not be included in a bargaining unit that also includes non-supervisory employees. Thus, both before the 1979 amendment and since, it has been in the interests of municipal unions representing non-supervisory bargaining units to argue that a given position does not rise to the level of a supervisor within the meaning of the Act, because a contrary determination will result in exclusion of the position from the non-supervisory bargaining unit.

Moreover, the definition of supervisor contained in the Act has remained the same both before and since the 1979 amendment. That definition states in relevant part as follows:

In determining whether a position is supervisory the board shall consider, among other criteria, whether the principal functions of the position are characterized by not fewer than two of the following: (A) Performing such management control duties as scheduling, assigning, overseeing and reviewing the work of subordinate employees; (B) performing such duties as are distinct and dissimilar from those performed by the employees supervised; (C) exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing


** Section 7-471(3) of the Act states "...no unit shall include both supervisory and non-supervisory employees."
the provisions of a collective bargaining agreement; and (d) establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards. (emphasis added) (C.G.S. Section 7-471(2))

The Union’s evidence and argument in the present case proves that the actual duties of the Head Custodian III position at the High School qualify that position as a supervisor because those duties meet at least the first two criteria of Section 7-471(2)’s definition of a supervisor. We therefore must conclude that the Head Custodian III position at the High School is ineligible for inclusion in the non-supervisory custodian bargaining unit. What the Union asks us to do in the present case is order the Hoard of Education to bargain over the removal of duties which the Act itself clearly makes inappropriate to a non-supervisory unit. Moreover, the Union would have us order the reestablishment and inclusion in the bargaining unit of a position which the Act expressly prohibits from being included within the non-supervisory unit. It is clear that such an order would conflict with the policies and language of the Act. We therefore believe that the good faith removal, from a non-supervisory unit position, of duties that would qualify the position as a supervisor within the meaning of the Act, is not subject to mandatory bargaining with the union representing the non-supervisory unit.

In reaching this conclusion, we must make two observations as a caution for future cases. First, the present case involves the removal of supervisory duties from a non-supervisory bargaining unit position and not-the removal of a position from bargaining unit status to non-bargaining unit status. The Plant Manager position is not merely the High School Head Custodian III position retitled. There are substantial differences between the two positions which demonstrate that they are entirely different positions. Thus, the present case gives no permission to employers to unilaterally remove supervisory positions from a non-supervisory unit and place such positions in a non-bargaining unit status. In the present case, the position of High School Head Custodian III was simply eliminated; it was not moved to a new status. If the High School Head Custodian III position had continued in existence and merely been retitled, the Hoard of Education would have been required to act in accordance with our past decisions (see, e.g. East Hartford Hoard of Education, Decision No. 1980 (1981); City of New Haven, Decision No. 2034 (1981)) before it could have changed the bargaining unit status of the position.

Our second cautionary observation is that, although we rule that there is no duty to bargain the removal of supervisory duties from a non-supervisory unit, such a removal could impact incumbent employees (in the position in question) and such impacts would require bargaining. Here, however, there was no incumbent in the High School Head Custodian III position when the supervisory responsibilities of that position were transferred to the non-bargaining unit Plant Manager position. The impact of such a change obviously would be significant if the change had been made while the position was filled. In such circumstances, there would be a duty to bargain the impact upon the incumbent unless the employer proved a defense recognized in our case law.
Dismissal of Complaint

By virtue of and pursuant to the powers vested in the Connecticut state Board of Labor Relations by the Municipal Employee Relations Act, it is

ORDERED, that the complaint filed herein be, and the same hereby is, dismissed.

CONNECCTICUT STATE BOARD OF LABOR RELATIONS

BY /s/ Patricia V. Low
Patricia V. Low

/s/ Craig Shea
Craig Shea

CONCURRING OPINION

I agree with the result reached by the majority -- i.e., the School Board did not breach any duty to bargain when it eliminated the position of head custodian at the high school and transferred some of those duties to a newly created non-unit supervisory position. However, I do not rely on the majority's rationale concerning the absence of a duty to bargain over the transfer of duties which would qualify a position in a non-supervisory unit to be supervisory. Rather, I conclude that the case should be decided on the basis of our well-established "shared work" doctrine.

Under the "shared work" doctrine if work in question has a history of being performed by both bargaining and non-bargaining unit members, an employer may unilaterally remove it from the bargaining unit, at least so long as there is no adverse effect on an individual or on the bargaining unit. Hartford Board of Education, Decision No. 1938 (1980); Norwich Board of Education, Decision No. 2579 (1987); City of Milford, Decision No. 2235 (1983). This doctrine has been applied in cases involving shared work removed from a non-supervisory unit to supervisory personnel. Vernon Board of Education, Decision No. 2620 (1988). In the instant case the Union argues that this work was not shared, and advances a theory that it is an unacceptable distortion of the doctrine to call work "shared" simply because a unit employee's work or action required a supervisor's concurrence, approval, or because the action was overseen by a supervisor.

I do not reject the Union's theory out of hand. Although I do not reach my own conclusions on this theory at this time, it is at least arguable that certain actions of a sort of "working foreman" who falls short of supervisory status should not be deemed shared work simply because they are the first link in a chain leading to final action by a non-unit supervisor. But for reasons detailed below, I do not find that the facts here comport with the Union's theory. Rather, the head custodian 3's activities which were either supervisory or quasi-supervisory in nature were
clearly also actually performed by non-unit supervisors and were not simply activities overseen by a supervisor. Moreover, those non-supervisory duties originally performed by the head custodian 3 and now performed by the plant manager or others were also duties formerly shared by non-unit supervisors.

Specifically, among the supervisory or quasi-supervisory duties, the head custodian 3 at the high school prepared employee evaluations. But the custodial foreman, a non-unit supervisor, did not simply place a signature on the written evaluation as a routine matter—he actually had input into the evaluation, sitting down and discussing it. (Tr. I at 63-64; Tr. II at 56.) Thus this entailed shared work. The high school head custodian 3 gave out work assignments to day and night shift personnel in the high school. Yet assignments were also given out by the non-unit custodial foreman. Even if most of the foreman’s assignments were at locations other than the high school, this still constitutes shared work. See Portland Board of Education, Decision No. 1670 (1978) and Hartford Board of Education, Decision No. 2573 (1987) (rejected argument that unit work would be determined school by school). Similarly, review of time cards was performed not only by the high school head custodian 3 but by the custodial foreman. Lastly, among the head custodian’s supervisory or quasi-supervisory duties was notifying his supervisor of an infraction by a custodian which might warrant discipline. The testimony on this point is limited to the above and the simple statement that a formal reprimand or discipline could only be issued by the head custodian’s supervisors. We do not even know if the head custodian made recommendations about discipline. I conclude that, assuming that this “notification” rises to the level of a distinct duty, it is so intertwined with the disciplinary process which rested outside the bargaining unit that it must be characterized as shared work. (The setting here is not one of a basic low level supervisor’s decision which, under the Union’s theory, becomes shared work simply by virtue of approval by higher echelons following cursory review. Here the higher echelons are the principal source of decision making.)

I turn now to duties that do not strike me as truly supervisory but which now are performed by the Plant Manager. The head custodian’s responsibility concerning overtime was limited to identifying a possible need for overtime. (If it was approved he assigned it according to a set formula that does not seem to have entailed much discretion.) I do not see a true supervisory role here as the matter was then brought to non-unit supervisors for discussion, evaluation and independent decision. The gist of the testimony about the extensive involvement in operations of the supervisor of Plant Operations and the custodial foreman lead me to believe that sometimes they made the initial identification of a need for overtime work. In any case, I do not see the communication of a possible need for overtime as a sufficiently distinct duty to raise a question of removal of unit work. The overtime matter was principally within the province of the head custodian’s supervisors.

The head custodian 3 also spent some time checking on malfunctioning systems to see if an outside contractor should be brought in. However, the testimony made clear that there were many occasions when his supervisors made this “first stage” assessment. And certainly, even if he made an initial check, often his supervisors did an indepth check and decided if a
contractor was needed. This was clearly an area of shared work. When outside contractors or vendors were brought in, the head custodian did usher them to their areas and advise them of the nature of the work needed. When seen in light of the much more extensive involvement of supervisors, who actually drew up specifications for work, wrote purchase orders and checked detailed lists of required functions at the conclusion of work, it is clear that at most the head custodian was participating in the shared work of dealing with outside contractors.

In sum, in this case there is no violation of the duty to bargain, largely because the job duties involved shared work. I believe it is preferable to decide the case on this basis than to embark on a newly enunciated doctrine about unilateral removal of supervisory duties. I do not believe the Board has had an opportunity to adequately consider all aspects of that doctrine, particularly in the absence of any briefs on this theory. I am left with doubts about the doctrine, particularly as it seeks to distinguish between removal of supervisory duties and removal of a supervisory position. I am not confident that there has been full exploration of the doctrine, particularly as its rationale may bear on an employer's duty to bargain where the supervisory duties in a position are insufficient in quantity to render the position supervisory. I reserve my conclusions on these points.*

s/ Margaret A. Lareau
Margaret A. Lareau

*My approach does not require a determination of the supervisory status of the former head custodian at the high school. However, I do note my disagreement with Finding of Fact 12 as I believe the testimony of the high school principal supports a finding that Carberry did more hands-on work in the cafeteria than this finding would indicate. Moreover, I believe Carberry's supervisory activities fell quite a bit short of being the "on-site eyes and ears of management", as reflected in Finding 13. Carberry's principal supervisory function was the daily assignment of work to keep the school clean and in good repair.