

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

BOARD OF EDUCATION OF THE
BOROUGH OF PARAMUS,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-80-38

EDUCATION ASSOCIATION OF PARAMUS,
N.J.E.A.,

Respondent.

SYNOPSIS

The Director of Representation determines that department chairpersons should be excluded from a unit which includes nonsupervisory personnel of the Board. Although the Association maintained that the statutory exception of "established practice" would permit the continued inclusion of supervisors and nonsupervisors in the same unit, the Director concludes that the assumption by chairpersons, in 1979, of the primary responsibility to evaluate personnel resulted in a substantial increase in their supervisory duties and, in fact, actual conflicts of interest had occurred as a result of the performance of these responsibilities.

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EDUCATION ASSOCIATION OF PARAMUS,
N.J.E.A.,

Employee Representative.

Appearances:

For the Public Employer-Petitioner
Winne, Banta, Rizzi & Harrington, attorneys
(Robert M. Jacobs of counsel)

For the Employee Representative
Goldberg & Simon, attorneys
(Theodore M. Simon of counsel)

DECISION

Pursuant to a Petition for Clarification of Unit filed on December 10, 1979 with the Public Employment Relations Commission (the "Commission") by the Board of Education of the Borough of Paramus (the "Board") hearings were conducted before a designated Commission Hearing Officer on the claim raised by the Board that all Department Chairpersons should be removed from the collective negotiations unit represented by the Education Association of Paramus (the "Association"). The Board alleges that Department Chairpersons are supervisors within the meaning of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), and that a potential and actual conflict of interest exists between the supervisory and nonsupervisory employees in the mixed unit. Hearings were held before Commission Hearing Officer Arnold H. Zudick, on June 10 and 17, September 8, and October 7, 1980, in Newark, New Jersey, at which time all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both parties submitted post-hearing briefs; the record closed December 1, 1980. The Hearing Officer thereafter issued his Report and Recommendation on January 5, 1981, a copy of which is attached hereto and made a part hereof.

The Association, by letter dated March 11, 1981, and through resubmission of its post-hearing brief, excepted to certain of the Hearing Officer's findings. On March 17, 1981, the Board in reply to the Association's objections urged adoption of the Hearing Officer's Report and Recommendations and, in support thereof, resubmitted its post-hearing brief.

The undersigned has carefully considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, the exhibits and the post-hearing briefs and finds as follows:

1. The Board of Education of the Borough of Paramus is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this Petition and is subject to the provisions of the Act.

2. The Education Association of Paramus, N.J.E.A., is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the recognized representative of employees in a negotiations unit comprised of Board personnel including department chairpersons and teachers.

4. The Board agrees with the Association that department chairpersons have been supervisors since 1965. Nevertheless, the Board argues that as a result of substantial increases in the scope of the chairpersons' supervisory duties there is a potential for a substantial conflict of interest between the supervisory and nonsupervisory employees in the unit and, in fact, actual conflicts of interest have occurred. Further, the Board argued at hearing that no pre-1968 negotiations relationship existed between it and the Association to justify the continued inclusion of supervisors in the unit.

5. The Association alleges that its collective negotiations history with the Board falls within the statutory "established practice" exception embodied at N.J.S.A. 34:13A-5.3, which permits supervisors to be included in units with nonsupervisors. Further, it argues that there is no actual or potential substantial conflict of interest to prohibit the continuation of the mixed supervisory/nonsupervisory unit. The Association claimed before the Hearing Officer that the chairpersons' supervisory responsibilities had not increased sufficiently to disturb the "historically proper" mixed unit of supervisors and nonsupervisors.

6. The Hearing Officer made the following findings:

a. There was clear and convincing evidence of a pre-1968 negotiations relationship between the Association

and the Board, which meets the standards set out in In re Tp. of West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973) ^{1/} of the statutory "established practice" exception in N.J.S.A. 34:13A-5.3.

b. The Hearing Officer also found that the scope of the chairpersons' supervisory duties had significantly increased since 1979 due to their assumption of responsibilities as primary evaluators of teachers consistent with the requirements of regulations issued by the Commissioner of Education pursuant to "Thorough and Efficient" legislation. The Hearing Officer further found that this increase in responsibility posed a potential for a substantial conflict of interest between chairpersons and teachers.

c. The Hearing Officer found actual instances of conflict when chairpersons failed to include comments on teacher attendance in their evaluations, and failed to attend a particular honor society program.

Based upon the above findings the Hearing Officer recommended that department chairpersons be removed from the Association's negotiations unit.

7. The Association excepts to the Hearing Officer's findings that: (1) there has been an increase in the scope of chairpersons' supervisory duties which has resulted in a

^{1/} West Paterson, in pertinent part, requires: "An organization regularly speaking on behalf of a responsible well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with the intent to reach agreement." at page 10. See also In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973), in which the Commission upon reconsideration reaffirmed its earlier decision and further held that the § 5.3 "established practice" and "prior agreement" exceptions related solely to pre-Act (July 1, 1968) relationships.

substantial change in the nature of the chairpersons' supervisory role; and (2) that actual conflicts have arisen between department chairpersons and teachers. In support of this position the Association resubmitted its post-hearing brief.^{2/}

After review of the entire record the undersigned adopts the Hearing Officer's findings of fact, conclusions of law and recommendation that department chairpersons be removed from the Association's collective negotiations unit.

N.J.S.A. 34:13A-5.3, in relevant part provides:

Nor, except where established practice, prior agreement or special circumstances dictate the contrary shall any supervisor having the power to hire, discharge, discipline or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership

The Commission has held that the finding of a pre-1968 "established practice" does not necessarily mandate the continued existence of a mixed supervisory/nonsupervisory unit. In W. Paterson, P.E.R.C. No. 79, supra, the Commission considered this argument and stated:

The Association's position, on the other hand, seems unduly narrow. It argues that the prohibition against mixed units falls whenever an established practice or prior agreement is found

^{2/} In its exceptions to the Hearing Officer's report, the Association took the position that the consideration of an increase in the supervisory responsibilities of chairpersons would be irrelevant in light of the pre-1968 relationship of the parties. However, the post-hearing brief relied upon by the Association in its exceptions does not support or elaborate upon this contention.

and that upon either finding, the continuation of such unit is mandated. That approach is fairly mechanical and seems to remove from consideration any evaluation of whether the end result -- the allegedly mandated unit -- is within the overall objectives of the statute. We can conceive of situations where the end result would be demonstrably obnoxious to such objective and surely beyond the contemplation of the Legislature when it adopted these exceptions. It also lends itself to a literal application whereby a single, one year, prior agreement would be sufficient to trigger the exceptions with no regard to be given to other substantial considerations. When the Legislature charged the Commission to 'decide in each instance which unit of employees is appropriate', we think it intended a greater degree of discretion and judgment than the Association's approach permits. The statute itself suggests that no unit is mandated because of particular findings. It provides that 'except where dictated by [one of the exceptions], 'the mixed unit is forbidden; it does not say the existence of any of the exceptions dictates a particular unit result. Clearly, the sense of it is that an appraisal and judgment is to be made to determine whether exceptional circumstances warrant, indeed require a deviation from the norm. (Emphasis added)

Applying the above precepts, the Commission concluded that the occurrence of actual substantial conflicts would supercede the existence of an "established practice" and require the removal of supervisors from a unit.

In In re Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., D.R. No. 81-26, 7 NJPER 119 (¶ 12048 1981), the undersigned, also applying the precepts of W. Paterson, concluded that an "established practice" exception would be negated by a substantial increase in supervisory duties.

... Logically, the statutory exceptions which preserve pre-existing relationships are not applicable where the circumstances underlying the pre-existing relationship no longer exist, as in the instant matter where the scope of the Director's supervisory responsibilities have been significantly upgraded, thus creating a potential conflict of

interest between the Director of Guidance and other unit employees. The circumstances relevant to the narrow statutory exception having been removed, the Act's policy prohibiting mixed supervisory/nonsupervisory employee units is preeminent. 3/

In the instant matter, the Hearing Officer correctly determined that the increased scope of supervisory duties delegated to the department chairpersons in its implementation of the Commissioner of Education's 1979 regulations resulted in a substantial change and expansion of the chairpersons' supervisory obligations. At that time the Board delegated to department chairpersons the primary responsibility for preparing summary evaluations of teachers, performance observation reports and for follow-up teacher conferences. Embodied in this responsibility was the requirement for recommending to the administration the continued employment of teachers or the grant or withholding of salary increments. Under current practice the department chairpersons have discretion to validate input from the principal or vice principal in preparing the summary evaluation. The chairpersons alone signs the evaluation. Prior to this change, the department chairpersons prepared summary reports which were submitted to the principal. The principal prepared the summary evaluations of teachers based upon the summary report and the principal's own observations. Compare, In re Waldwick Bd. of Ed., D.R. No. 82-5, 7 NJPER ____ (¶ ____ 1981). Additionally, the Board, in 1979, issued a new job description which gave department chairpersons a

3/ Similarly, in In re Cinnaminson Tp. Bd. of Ed., D.R. No. 81-39, 7 NJPER 274 (¶ 12122 1981), the undersigned determined that the substantial increase in supervisory duties of Department Chairpersons upon implementation of a new job description would "negate any statutory established practice if it had existed."

participating role in recruitment, screening, hiring, training and assignment of department personnel, and has since 1977-1978 required chairpersons to have supervisory certificates.

The Supreme Court envisioned the likelihood that the performance of the evaluative function would give rise to potential substantial conflict of interest in Bd. of Ed. of W. Orange v. Wilton, 57 N.J. 404 (1971). Concerning the duties of a director of elementary education, the Court stated:

While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable any conflict of greater substance may be deemed opposed to the public interest ...

* * *

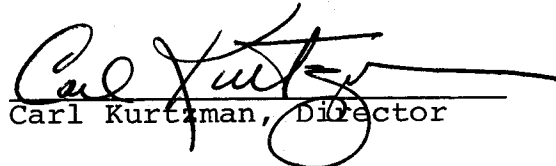
... There is no doubt that it was her duty, among other things, to supervise the work of the principals of the nine elementary schools and to evaluate their performance for the purpose of reporting and making recommendations to the Superintendent of Schools with respect to salary increases and tenure for them. In the performance of such tasks she owed undivided loyalty to the Board of Education. If she were joined in an employees unit which included the principals whose work she was duty bound to appraise in the Board's interest, would she be under pressure, real or psychological, to be less faithful to the Board and more responsive to the wishes of her associates in the negotiating unit? 57 N.J., at 425-426.

In the matter herein, the Hearing Officer correctly concluded that the extent of the chairpersons changed evaluative functions have given rise to a potential for substantial conflict of interest between chairpersons and teachers. Further, his finding that an actual conflict of interest in the preparation of evaluations has arisen is borne out in the record. In March 1980, the Board emphasized to department chairpersons the importance of including in the summary evaluations either positive or negative

comments concerning teacher attendance. Shortly prior to the preparation of the summary evaluations the Association sent to department chairpersons copies of a letter addressed to the superintendent in which the Association expressed "deep concern and displeasure with the new procedure you have instructed primary evaluators to use regarding staff evaluation -- namely, including a written statement about attendance on the summary evaluation form." It is reasonable to conclude from the above that chairpersons were well aware of their responsibilities to management when they prepared the evaluations and were well aware of the Association's opposition to this requirement. It would appear that the dual loyalty of department chairpersons to the Association and to management has been called into question in the manner envisioned by the Court in Wilton, supra.

Accordingly, for the above reasons, the undersigned adopts the Hearing Officer's recommendation that department chairpersons should be removed from the Association's unit. Since the contract covering the employees in the Association's unit expired during the processing of the instant Petition, this decision is effective immediately. 4/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: August 18, 1981
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS,

Public Employer-Petitioner,

- and -

Docket No. CU-80-38

EDUCATION ASSOCIATION OF PARAMUS, N.J.E.A.,

Respondent.

SYNOPSIS

In a Clarification of Unit Petition filed by the Board of Education of the Borough of Paramus, a Hearing Officer of the Public Employment Relations Commission recommends the removal of the supervisory title of Department Chairperson from the remainder of the non-supervisory unit represented by the Education Association of Paramus.

The Hearing Officer found that despite the existence of an established practice with regard to this title, that the duties and responsibilities of the title had changed and increased to the extent that it negated the established practice. The Hearing Officer also found that an actual and potential conflict of interest existed that requires the removal of the above title from the instant unit.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Respondent.

Appearances:

For the Public Employer-Petitioner
Winne, Banta, Rizzi & Harrington, Esqs.
(Robert M. Jacobs of counsel)

For the Respondent
Goldberg & Simon, Esqs.
(Theodore M. Simon of counsel)
(Sheldon H. Pincus on the brief)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on December 10, 1979, by the Board of Education of the Borough of Paramus (the "Board") seeking a clarification of a negotiations unit of its employees represented by the Education Association of Paramus (the "Association"). The Board seeks to have a certain title in the Association's negotiations unit removed therefrom because it is a supervisory title mixed with non-supervisory titles, and because of alleged conflict of interest. The Association argues that no conflict of interest exists among the titles and that its unit is appropriate.

Pursuant to a Notice of Hearing dated April 9, 1980, hearings were held in this matter before the undersigned Hearing Officer on June 10 and 17, 1980,

September 8 and October 7, 1980, in Newark, New Jersey, at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Subsequent to the close of hearing the parties filed timely briefs in this matter, the last of which was received on December 1, 1980.^{1/}

Based upon the entire record in these proceedings, the Hearing Officer finds:

1. The Board of Education of the Borough of Paramus is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of this Petition, and is subject to the provisions of the Act.
2. The Education Association of Paramus is an employee representative within the meaning of the Act and is subject to its provisions.
3. The Board seeks a clarification of the collective negotiations unit of its employees currently represented by the Association, namely the removal of the department chairperson positions from the remainder of the unit. The parties have been unable to agree upon the continued placement of that title in the unit, and therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.
4. The parties have stipulated that the department chairperson title has been a supervisor within the meaning of the Act at least since 1965.

^{1/} During the course of the hearing the Association's attorney presented several documents which were received into evidence as Respondent exhibits. The Respondent, however, never actually provided the undersigned or the Petitioner with copies of those documents. The undersigned advised the Association's attorney on the record (see Transcript ("T") IV pp. 4, 30) that unless copies of the documents were provided to the Petitioner and the Hearing Officer, the documents would not be considered as part of the record. As of the issuance of this decision those documents have not been received by the undersigned. Consequently, those documents cannot be considered in deciding this matter.

The parties have therefore agreed that the issues in this matter are as follows:

a) Was there a negotiations relationship with the Association (or its predecessor) prior to the passage of the Act on July 1, 1968, which would justify the continued inclusion of supervisors with non-supervisors based upon an established practice exception to the Act?

b) Did the duties and responsibilities of the department chairpersons substantially change at any time subsequent to July 1, 1968 which would negate any finding of established practice?

c) Does an actual or potential substantial conflict of interest exist with the inclusion of the department chairpersons with the remainder of the unit?

5. The Board argued that no negotiations relationship existed between the parties prior to the Act; that the duties of chairpersons have significantly changed since 1968; and, that a substantial conflict of interest exists between the disputed title and the remainder of the unit. The Association, however, argued to the contrary on all of these issues.

ANALYSIS

I. The Motion to Dismiss

During the hearing and again in its post-hearing brief the Association moved for the dismissal of the instant Petition alleging that the Board had not authorized the filing of this matter. The Association did not present any evidence of its own with regard to this allegation, but relied upon its cross-examination of two Board witnesses.

The facts show that both Superintendent Shelly and Deputy Superintendent Galinsky testified that the Board supported the petition process.^{2/} In fact, Mr. Galinsky testified that he was directed to accomplish the goal of removing the department chairmen from the Association's unit.^{3/}

The Association contends that because both Shelley and Galinsky acknowledged that no official Board resolution was passed requiring the filing of this Petition that the same was improperly filed. However, the undersigned is convinced that both Mr. Shelley and Mr. Galinsky acted properly, as agents of the Board, in filing the instant matter. The Association has not demonstrated that the Superintendent or Deputy Superintendent acted improperly or without direction from the Board. Their actions were reasonable in view of their perceptions of how the Board wished to handle the department chairmen matter.

If the Board does not support the actions of its agents in this matter it may seek to withdraw the matter through appropriate procedures.

Based upon the foregoing discussion the Association's Motion to Dismiss is denied.

II. The Pre-1968 Negotiations Relationship

Although the Act provides that supervisors shall not be included in units with non-supervisors, it also provides an exception to that rule. At N.J.S.A. 34:13A-5.3 the Act says:

...except where established practice,
prior agreement or special circumstances
dictate to the contrary, shall supervisors
...have the right to be represented in
...negotiations by an employee organization
that admits non-supervisory personnel....

The Association alleges that an established practice exists in this matter, i.e., a pre-1968 negotiations relationship with the Board that included the department chairpersons. Several Commission decisions have issued with regard

^{2/} Transcript ("T") I p. 41, T II p. 10.

^{3/} T II p. 10, 57.

to established practice and it has been determined that to substantiate such a practice there must be clear and convincing evidence that a negotiations relationship timely existed.^{4/} The Commission has held that such a relationship requires:

An organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with the intent to reach agreement.^{5/}

Having examined the evidence with regard to the pre-1968 relationship in this matter, the undersigned is convinced that a negotiations relationship existed between the Association (including the department chairmen) and the Board prior to 1968. The weight of the evidence reveals that throughout the mid-1960's a committee of the Association met with the Superintendent with regard to salary and other benefits, and presented proposals to the Superintendent, and even met with the Board.^{6/}

Ruby Bishar, a department chairperson and member of the Association's Salary Committee during the mid-1960's, testified that proposals were presented to the Superintendent, several meetings were held, and that certain proposals were accepted.^{7/} She also testified that during this time period the committee had several meetings with the Board itself, at which time proposals were presented.^{8/} Another department chairperson, Louis Lanzalotto, supported Ms. Bishar's testimony. Lanzalotto testified that prior to 1967 the Salary Committee presented proposals to

^{4/} In re Teaneck, E.D. No. 23, pp. 7-8 (1971).

^{5/} In re W. Paterson Board of Education, P.E.R.C. No. 77, p. 10 (1973).

^{6/} T 3 pp. 73, 75, 77, 94-96. T 4 p. 60, 81-83.

^{7/} T 3 pp. 75-77.

^{8/} T 3 pp. 94-96

the Superintendent with whom there was a give-and-take relationship.^{9/} He also testified that the committee had several meetings with the Board itself in 1966 or 1967, presented proposals, and reached an agreement.^{10/} Lanzalotto also testified that once an agreement with the Board was reached it was taken back to the Association for a ratification vote.^{11/}

The Board relied upon the testimony of its Secretary-Business Administrator, Wesley VanPelt, to rebutt the Association's position on this issue. VanPelt testified that the pre-1968 meetings were not negotiation sessions.^{12/} However, VanPelt admitted that he was not present during these meetings.^{13/} When asked who prepared the salary guides, VanPelt testified it was the Superintendent. But VanPelt could not rebutt the Association's position that the salary guides were prepared after negotiations with the Salary Committee.

The undersigned is convinced that the evidence supports a finding of established practice as defined in W. Paterson, supra, note 5. The Association (or its predecessor the Paramus Teachers Association) was a well defined group of employees which, through dialogue with the Superintendent and the Board, engaged in the process to reach an agreement. The Board never effectively rebutted the Association's testimony on this issue, and both Bishar and Lanzalotto proved to be credible witnesses. Consequently, the undersigned recommends the finding of a

^{9/} T 4 pp. 60-64

^{10/} T 4 pp. 81-83

^{11/} T 4 pp. 83-84

^{12/} T 2 p. 143

^{13/} T 2 p. 133

pre-1968 negotiations relationship between these parties.^{14/}

III. Changed Circumstances & Conflict of Interest

Despite having found that a pre-1968 established practice existed regarding the department chairpersons, the undersigned believes that the scope of their supervisory function has significantly changed, and that a conflict of interest exists with their inclusion in the unit, both of which negate the effect of the established practice. The changed circumstances and the conflict of interest arise - to some extent - from the same facts.

The significant changes that occurred with respect to the instant title were made in anticipation of or subsequent to the implementation of the new State Board of Education evaluation requirements which were effective in September, 1979.

Paul Shelley, Superintendent of Schools, testified that in anticipation of the new evaluation requirements, the Board, as early as the 1977-78 academic year, began to require the department chairpersons to have supervisory certificates.^{15/} Shelley testified that prior thereto there were individuals who did not have that certificate.^{16/}

^{14/} This matter is distinguished from In re Waldwick Board of Education, H.O. No. 81-8, ___ NJPER ___ (Para. ___ 1980), wherein the undersigned recommended that no pre-1968 negotiations relationship existed. In that matter only one individual provided credible testimony concerning the pre-1968 relationship. In the instant matter the testimony was not only corroborated, it was more comprehensive than the testimony in Waldwick. For example the witnesses in the instant matter provided in depth testimony about the meetings with the Superintendent and the success of certain proposals. The witnesses herein were more sure of themselves than the witnesses in Waldwick. Finally, the witnesses herein testified concerning the Association's ratification procedures, which supported their contention that there was an attempt to reach an agreement. No such testimony was provided in Waldwick.

The testimony in Waldwick did not present clear and convincing evidence of an established practice. However, the undersigned believes that the instant testimony was clear and convincing.

^{15/} T I pp. 20-22

^{16/} T I p. 20

The evidence further shows that in anticipation of the implementation of the new evaluation requirements the Board, in June 1979, created a new job description for department chairpersons, Exhibit P-1. That job description increased the duties and responsibilities of the department chairpersons with regard to evaluations and the hiring process. For example, the old job description, Exhibit P-5, is vague with regard to those duties and states that department chairpersons:

- A. Supervise the work of all teachers in the department through visitations and individual conferences throughout the school year.
- B. Prepares evaluation reports.
- C. Cooperates with administration in selection, dismissal and reassignment of teachers.

The duties set forth therein do not require the making of recommendations and do not require anything more than cooperation in the hiring process. The new job description however states that department chairpersons:

- A. Evaluate and supervise department teacher performance and make recommendations to the principal regarding departmental personnel.
- B. Participate in the process of recruitment, screening, hiring, training, and assigning of department personnel.

Mr. Shelley testified that it was the Board's intent through these job descriptions to increase the role and importance of the department chairperson.^{17/}

Perhaps the most significant change concerning the department chairpersons occurred in 1979. The record shows that prior to that time the department chairpersons evaluated unit personnel but were not the primary evaluators and were not primarily responsible for the preparation of the end of year summary evaluation. Mr. Shelley

testified that up until that time period the principal or vice-principal prepared the summary evaluations. However, he testified that a dramatic shift occurred when department chairpersons were made primary evaluators and given full responsibility for observations and summary evaluations.^{18/}

Deputy Superintendent Galinsky testified with regard to the new evaluation system that now, unlike before, the department chairperson no longer needed to sit down with the principal and vice-principal, but may go directly to doing the evaluation itself.^{19/} He also testified that a meeting between the department chairpersons and the principal or vice-principal over summary evaluations is now optional, but the department chairpersons can decide whether to call such a meeting.^{20/}

The Association acknowledges the department chairperson's new role with regard to summary evaluations but contends that the change is insignificant because the summary evaluation is still a product of the principal and department chairpersons. Department Chairperson Emil Sanzari testified that there is no real difference between the previous summary evaluation procedure and the current procedure.^{21/} The Association also contends that there is no real difference between the overall duties of the department chairpersons now, as compared with prior years. For example, Sanzari testified that he performed essentially the same department chairmen duties prior to 1968 as he does now, including the preparation of documents which are similar to the new PIP's (Professional Improvement Plans).^{22/}

Having reviewed all of the evidence regarding changed circumstances, the undersigned is convinced that the change in primary evaluators was a significant change in the department chairpersons duties which standing alone

^{18/} T I p. 69

^{19/} T II p. 70

^{20/} T II p. 71

^{21/} T IV pp. 37-40

^{22/} T IV pp. 7-24

justifies negating the established practice protection. Although Sanzari testified that he perceived no difference in the new evaluation procedure, he admitted that he now prepares the summary evaluation, that he (and not the principal) has the discretion to validate any input from the principal or vice-principal, and, that he (and not the principal) now signs the summary evaluation report.^{23/} Sanzari also admitted that prior to 1968 the department chairpersons alone prepared the reports similar to the PIP, but that now the teacher participates in that process.^{24/} Based upon the above, the undersigned cannot credit Sanzari's earlier testimony that there is no significant difference between the old and new evaluation procedures.

The significance of the change in evaluation responsibilities becomes more apparent upon examining the facts for a conflict of interest. The guidelines for finding conflict of interest were enunciated by the New Jersey Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971). The Court in that case held that the director of elementary education could not be included in a unit with principals, and it posed a question that can be applied as a test in other cases to determine whether the inclusion of a certain title creates a conflict of interest. The Court said:

If she [the director of elementary education] were joined in an employees unit which included the principals whose work she was duty bound to appraise in the Board's interest, would she be under pressure, real or psychological, to be less faithful to the Board and more responsive to the wishes of her associates in the negotiating unit? 57 N.J. at 426.

When that question is answered in the affirmative, then, pursuant to Wilton, a conflict exists and the title in question must be removed from the unit.

^{23/} T 4 pp. 39,40, 47-48

^{24/} T 4 pp. 45-46

The first element of that test has already been established. The department chairpersons are duty bound to appraise (evaluate) in the Board's interest certain other members of the Association's unit. If it can be demonstrated that the department chairpersons herein would be under pressure, real or psychological, to be less faithful to the Board and more responsive to the unit members, than a conflict of interest exists. The record shows that such pressure, both real and psychological, exists, therefore justifying the exclusion of the title from the instant unit.

The facts show that the Board alleged several incidents of conflict, not all of which the undersigned believes is conflict. Nevertheless, there were two incidents alleged by the Board which the undersigned believes meets the above test of conflict set forth in Wilton. First, Dave Broffman, a principal in the school system, testified that as part of the summary evaluation the department chairpersons were required to provide information concerning staff attendance.^{25/} The evidence shows that the Association was unhappy with that specific requirement, and its president, in a letter to the Superintendent (Exhibit P-24), urged the Superintendent to discontinue the practice immediately. Broffman testified, and P-24 shows, that department chairpersons (primary evaluators) received a copy of that letter.^{26/} Broffman further testified that following the advisory council meeting before which he had been shown P-24, he received the first group of summary evaluations and they made no mention of attendance.^{27/} Broffman later admitted that subsequent summary evaluations did comply with the attendance information, but he still believes that P-24 had an impact on the department chairpersons.^{28/}

^{25/} T 3 p. 9

^{26/} T 3 p. 13

^{27/} T 3 pp. 13-14

^{28/} T 3 p. 43

The undersigned believes that the entire scenario concerning attendance demonstrates actual as well as the potential for substantial conflict of interest. The distribution of P-24 to the department chairpersons was enough to create the real and/or psychological pressure discussed in Wilton. Once those department chairpersons received P-24 they were placed in the conflict situation of divided loyalties. It is not necessary for the Board to prove that the lack of attendance figures in the first summary reports were due to P-24. It is only necessary to show the potential for conflict, and the potential exists once the department chairpersons are placed in a pressure situation and must choose between their responsibilities to the Board, and their loyalty to the Association. P-24 placed them in that conflict position and justifies their removal from the unit.

The Association, in its brief, attempted to dismiss the attendance issue by arguing that no department chairpersons refused to go along with the attendance policy, and that it simply took a few weeks for the department chairpersons to comply with the new policy. That response, however, misses the point. It is unnecessary under Wilton to prove that the department chairpersons actually refused to follow the new policy. It is only necessary to show that the department chairpersons were placed under real or psychological pressure and that a potential for substantial conflict existed. The undersigned believes that P-24 establishes both of those elements.

The second incident of conflict occurred with regard to the honor society program. Broffman testified that in the years prior to the 1979-80 academic year department chairpersons always participated in this program. However, he testified that in June 1980 not a single department chairperson was in attendance, and in fact, he observed one department chairperson picketing in

front of the high school the night of the program presumably with other unit members.^{29/} Broffman admitted that he was not certain what the picket signs said, that attendance by department chairpersons at this program was not mandatory, and that he has no way of knowing whether the Association directed the department chairpersons not to participate.^{30/} Nevertheless, Broffman believes that the department chairpersons failure to attend this program was connected to what he perceived to be an Association job action. Broffman testified that in June 1980 the parties were engaged in collective negotiations and that the job action included the teachers and department chairpersons who were coming to work and leaving work at prescribed times.^{31/}

The Association argues that the picketing of one department chairperson was of a deminimis nature, and totally unconnected to the Association and therefore does not demonstrate a conflict of interest. The undersigned does not agree. The picketing of a department chairperson with other unit members during the course of collective negotiations is an indication that department chairpersons have been placed in a pressure situation. None of the department chairpersons chose to accept the Bard's invitation to attend the awards program. Even if the Association had not directed the picketing, it is clear to the undersigned that department chairpersons during the course of the parties collective negotiations, were placed in a pressure situation to choose whether to follow their normal procedure, i.e., attending the awards program as they had done in the past, and reporting to and leaving work at

^{29/} T III pp. 22-23, 50

^{30/} T III pp. 50-52

^{31/} T III pp. 17-18

other than prescribed times, or support the other unit members. Once placed in that pressure situation there was an actual as well as a potential substantial conflict of interest.^{32/}

Finally, the Association, in its post hearing brief, argued that all of the testimony concerning alleged conflicts of interest herein referred to acts that occurred subsequent to the filing of the instant petition. Therefore, the Association commented that a prima facie case of conflict had not been established at the time the petition was filed. Both parties are aware, however, that in a representation proceeding such as this, the Commission requires that all facts relevant to the issue(s) be gathered in order to reach the proper conclusion. It would be inappropriate for the Commission to exclude facts that concerned the post-filing time period. If such facts were disregarded it could result in a decision that did not reflect the most recent relationship of the relevant title(s) and the remainder of the unit. This would necessitate the filing of a new petition to hear the most recent evidence and thereby contribute to considerable delay, as well as continued disruption of the parties relationship. In order to best effectuate the purposes of the Act, such post-filing evidence is required in representation proceedings.

^{32/} The undersigned believes, contrary to the Association's position, that In re Ramapo-Indian Hills Board of Education, H.O. No. 81-3, 6 NJPER 405 (Para. 11206 1980), is similar to the instant matter. In that case the undersigned held that in order to establish a conflict of interest it is only necessary to establish the conflict, that obligations exist to both parties. The evidence in this matter demonstrates that department chairpersons had obligations to both parties and this conflict is enough to warrant their removal from the unit.

RECOMMENDATIONS

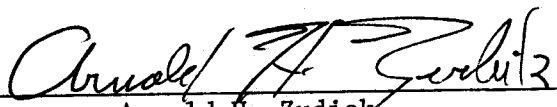
Based upon the foregoing discussion the undersigned Hearing Officer recommends the following:

That the Department Chairpersons employed by the Board be removed from the Association's negotiations unit.

(a) That the existence of an established practice is negated by a change and increase in the overall supervisory duties.

(b) That actual and potential substantial conflict of interest exists that justifies the removal of the instant title from the Association's unit.

Respectfully submitted,


Arnold H. Zudick
Hearing Officer

DATED: January 5, 1981
Trenton, New Jersey