

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

In the Matter of

EMERSON BOARD OF EDUCATION,

Public Employer,

-and-

EMERSON SUPERVISORS ASSOCIATION,

Petitioner,

Docket No. RO-81-98

-and-

EMERSON EDUCATION ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation determines that a proposed unit consisting of the Board's Supervisors of Instruction is an appropriate collective negotiations unit and directs that a secret ballot election be conducted in order to provide the Supervisors with an opportunity to select or reject the Emerson Supervisors Association as their exclusive representative. Although the Supervisors of Instruction have been represented within a unit that includes classroom teachers, a separate unit is appropriate since the Supervisors of Instruction are supervisors within the meaning of the Employer-Employee Relations Act.

D.R. NO. 82-13

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

In the Matter of

EMERSON BOARD OF EDUCATION,

Public Employer,

-and-

EMERSON SUPERVISORS ASSOCIATION,

Petitioner,

Docket No. RO-81-98

-and-

EMERSON EDUCATION ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer, Serge Aniel, E.E.D.,
Superintendent

For the Petitioner, N.J.A.S.S.P.S.
Robert M. Schwartz, Esq.

For the Intervenor, Bucceri & Pincus, Esqs.
(Sheldon Pincus, of Counsel)

DECISION AND DIRECTION OF ELECTION

On October 15, 1980, the Emerson Supervisors Association ("ESA") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission") seeking to represent a unit of "Supervisors of Instruction" (formerly, Coordinators) employed by the Emerson Board of Education (the "Board"). The Emerson Education Association ("EEA"), the current representative of the employees in question, was granted intervenor status in the proceedings.

Pursuant to a Notice of Hearing, hearings were held before Hearing Officer Robert Anderson, Jr., on March 17, 18, 1981. At the hearing, all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Thereafter, on June 16, 1981, the Hearing Officer issued his Report and Recommendations, a copy of which is attached hereto and made a part hereof. On June 29, 1981, EEA filed exceptions to the Hearing Officer's Report and Recommendations. Specifically, EEA excepts to the Hearing Officer's finding of supervisory status and potential for substantial conflict of interest. The undersigned has considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcripts and the exhibits, and on the basis thereof finds and determines as follows:

1. The Emerson Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., is the employer of the employees who are the subject of this proceeding and is subject to the provisions of the Act.

2. The Emerson Supervisors Association and the Emerson Education Association are employee representatives within the meaning of the Act, and are subject to its provisions.

3. ESA seeks to represent a unit to be comprised of Supervisors of Instruction in the areas of Mathematics, Physical Education, Art and Home Economics, Foreign Languages, Business Education, Industrial Art, Music, Social Studies, Language Arts,

and Science. ESA is neither a recognized or certified employee representative at the present time. EEA currently represents the employees in question within a negotiations unit which includes teaching staff employees.

4. ESA asserts that the Supervisors of Instruction are supervisors within the meaning of the Act since they have the power to effectively recommend the hiring, discharge and discipline of the teachers in their departments. Moreover, ESA contends there is a substantial conflict of interest between Supervisors of Instruction and the teachers they evaluate, which conflict necessitates the removal of these supervisors from EEA's unit.

EEA argued before the Hearing Officer that the employees in the disputed titles are not supervisors within the meaning of the Act since Supervisors of Instruction do not have the power to hire, discharge or discipline teachers in their departments or to effectively recommend these personnel actions and since no conflict of interest exists necessitating the removal of Supervisors of Instruction from EEA's unit. Accordingly, the EEA asserted that in the absence of a finding of supervisory status or a conflict of interest, the employees should not be "severed" from its unit. EEA further asserted that the ESA's petition should be dismissed because it was not timely filed under the Commission's contract bar rule. Finally, EEA claimed that even if the employees were found to be supervisors under the Act, the appropriate unit for the representation of Supervisors would be other than that proposed by the ESA.

The Board did not take a position with respect to any of the disputed issues. It affirmatively stated that it does not object to ESA's proposed negotiations unit and does not object to the existing unit structure.

5. The Hearing Officer found that Supervisors of Instruction have the power to effectively recommend the hiring of teachers in their departments, and based upon their formal and regular role in the evaluation process and the frequency of the adoption of their recommendations, they also have the power to recommend discharge and discipline. Thus, the Hearing Officer concluded that Supervisors of Instruction are supervisors within the meaning of the Act. The Hearing Officer further found that a potential substantial conflict of interest would arise between Supervisors of Instruction and the teachers under their supervision based upon the evaluation responsibilities of the former group and the likelihood that these responsibilities have and will significantly continue to affect the careers of the latter group. The Hearing Officer rejected the additional issues raised by EEA.

6. EEA's exceptions are limited to the Hearing Officer's findings concerning supervisory status and conflict of interest. The EEA argues that Supervisors of Instruction exercise merely an advisory role in the hiring, firing and disciplinary processes, and that absolutely no instances of conflict have arisen from the inclusion of Supervisors of Instruction and teachers within the same negotiations unit. In support of its exceptions EEA exclusively relies upon its post-hearing brief, which the Hearing Officer considered in rendering his report and recommendations.

7. The undersigned has carefully reviewed the entire record herein including the transcript and exhibits, the Hearing Officer's report and recommendations, and EEA's exceptions.

N.J.S.A. 34:13A-5.4 defines a supervisor as an employee "having the power to hire, discharge, discipline or effectively recommend the same...." In several recent decisions involving factual records similar to that involved herein, the undersigned has found the existence of "supervisory" status where department chairpersons exercise the primary responsibility for evaluating teachers, and where the evaluations are instrumental in determinations to withhold increments, renew contracts, or terminate employment. See In re Board of Education of the Borough of Paramus, D.R. No. 82-7, 7 NJPER ____ (¶ ____ 1981); In re Waldwick Board of Education, D.R. No. 82-5, 7 NJPER ____ (¶ ____ 1981); In re Cinnaminson Board of Education, D.R. No. 81-39, 7 NJPER 274 (¶ 12122 1981). The facts herein, which are well documented by the Hearing Officer, lead the undersigned to the same conclusion reached in the above cited cases, that the employees in question are supervisors within the meaning of the Act. The Supervisors of Instruction hold State certification as supervisors. The Supervisors conduct classroom observations of teachers, prepare a professional growth plan, and prepare a formal mid-year (March) contract evaluation. As part of the latter evaluation, the Supervisors of Instruction are required to make recommendations to the principal and superintendent concerning contract renewal, the grant of tenure, and award of increment. The Supervisors' recommendations to grant tenure

have always been accepted by the principal. The supervisors' recommendations to renew or not renew non-tenured teacher contracts (not affecting tenure) are mostly accepted, although there have been instances where the principal has disagreed with a recommendation not to renew a contract. Quite often, a formal recommendation not to renew a contract is unnecessary, since the teacher is offered an opportunity to resign. The supervisor's suggestion of this option to the principal is virtually always accepted.

Based upon the totality of the record the undersigned concludes that the Supervisors' recommendations as to contract renewal, non-renewal, and increment determinations are effective. While these recommendations are subject to review, the measure of "effectiveness" is the extent to which the recommendation is instrumental in effectuating the end result -- i.e. an adverse or positive personnel action. Thus, while the Supervisors' recommendations are not always followed, there is substantial certainty that the Supervisors' recommendation will result in the proposed personnel action.

Based upon the above analysis, and considering the substantial degree to which the evaluative functions of supervisors establish supervisory status, the undersigned need not further address the Supervisors' additional duties relating to the hiring process. Further, in finding the Supervisors of Instruction to be supervisors within the meaning of the Act, there is no need to examine the conflict of interest issue.

Accordingly, the undersigned determines that the Supervisors of Instruction may constitute a separate, appropriate

negotiations unit. Therefore, the undersigned finds that the appropriate unit for collective negotiations is: All Supervisors of Instruction employed by the Emerson Board of Education, including Supervisor of Mathematics, Supervisor of Physical Education, Supervisor of Art and Home Economics, Supervisor of Foreign Languages, Supervisor of Business Education, Supervisor of Industrial Art, Supervisor of Music, Supervisor of Social Studies, Supervisor of Language Arts and Supervisor of Science, excluding all non-supervisory teaching personnel.

Pursuant to N.J.A.C. 19:11-2.6(b)(3), the undersigned directs that an election be conducted among the employees described above. The election shall be conducted no later than thirty (30) days from the date set forth above.

Those eligible to vote are the employees set forth above who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

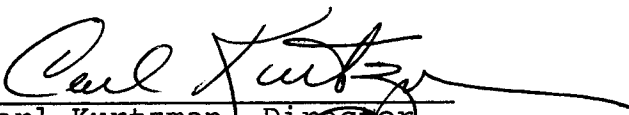
Pursuant to N.J.A.C. 19:11-9.6, the Public Employer is directed to file with the undersigned and with the ESA an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the

eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with the ESA with a statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective negotiations by the Emerson Supervisors Association.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in the election. The election directed herein shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: September 16, 1981
Trenton, New Jersey

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

In the Matter of

EMERSON BOARD OF EDUCATION,

Public Employer,

-and-

EMERSON SUPERVISORS ASSOCIATION,

Docket No. R0-81-98

Petitioner,

-and-

EMERSON EDUCATION ASSOCIATION,

Intervenor.

SYNOPSIS

A Hearing Officer for the Public Employment Relations Commission recommends that Supervisors of Instruction employed by the Emerson Board of Education be excluded from a teacher-based collective negotiations represented by the Emerson Education Association.

The Hearing Officer concludes that Supervisors of Instruction are supervisors within the meaning of the New Jersey Employer-Employee Relations Act and that a potential substantial conflict of interest exists between Supervisors of Instruction and the teachers they evaluate.

A Hearing Officer's Report and Recommendation 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, and 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.

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

In the Matter of
EMERSON BOARD OF EDUCATION,
Public Employer,

-and-

EMERSON SUPERVISORS ASSOCIATION,
Petitioner,

Docket No. R0-81-98

-and-

EMERSON EDUCATION ASSOCIATION,
Intervenor.

ERRATA

The transcript in the above titled matter is hereby corrected as follows:

<u>Page</u>	<u>Line</u>	<u>Incorrect Word(s)</u>	<u>Correct Word(s)</u>
<u>Transcript I</u>			
7	20	after Association	add is
8	6	ART	Art
10	3-4	the Board of Education case of	Board of Education of West Orange v. Wilton
11	5	petition of	petition's own
25	25	A	I
51	5	after used	add with the
78	2	Affected	effected
79	11	agressive	aggressive
92	9	formerly	formally
100	22	file	filing
101	2	produced	provided
101	8	grievance	grievances
105	24	of	or
106	2	represent	present
111	2	ad	item
111	4-5	completed	deleted
111	4-5	completed	deleted
111	20	about	item
114	17	in power	empowered
117	7	in	an
126	9	besides	bedside

<u>Page</u>	<u>Line</u>	<u>Incorrect Word(s)</u>	<u>Correct Word(s)</u>
131	5	recommended	represented
155	20	spike	pike
185	2	is	are
222	7	delineate	eliminate
222	18	J-3	J-13
222	24	foremanship	formsmanship
227	6	relationship	membership

Transcript II

13	5	save	serve
37	23	courses	course
41	4	have	had
46	25	after line	add of
55	6	after made	start new
			¶ w/:"Q
62	5	to	in
63	9	supervisor instruc- tion	supervison of instruc- tion
72	11	impetus from	impetus for
93	14	that particular	delete
102	13	or	on
104	13	advise	advice
119	14	path	part
123	17	aren't	are
123	19	in	delete
129	24	add at	before any
130	3	demon on his	demonstrable
142	13	by view of	by either
152	15,18,22	Chicoli	Trocolar
153	4/13	Chicoli	Trocolar

Robert E. Anderson, Jr.
Robert E. Anderson, Jr.
Hearing Officer

DATED: June 16, 1981
Trenton, New Jersey

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

In the Matter of

EMERSON BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-81-98

EMERSON SUPERVISORS ASSOCIATION,

Petitioner,

-and-

EMERSON EDUCATION ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer
Serge Angiel, E.E.D., Superintendent

For the Petitioner, N.J.A.S.S.P.S.
Robert M. Schwartz, Esq.

For the Intervenor, Goldberg & Simon, Esqs.
(Sheldon Pincus, Esq.)

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On October 15, 1980, the Emerson Supervisors Association ("ESA") filed a Petition for Certification of Public Employee Representative (A-1A). ^{1/} ESA sought to represent "[a]ny certificated (where required) and duly appointed position which involves the supervision and/or direction of professional staff" ^{2/} employed

^{1/} Commission exhibits will be designated by the letter A; Joint exhibits by the letter J; Petitioner exhibits by the letter P.

^{2/} At the hearing, the parties agreed that the positions in dispute were Supervisors of Instruction in ten different departments at the Emerson Junior-Senior High School.

by the Emerson Board of Education ("Board"). The petition named the Emerson Education Association ("EEA") as the current representative of the employees in question and stated that the last contract between the Board and EEA had expired in June, 1980.

On November 25, 1980, the Director of Representation issued a Notice of Hearing for December 22 and 23, 1980 (A-1B). EEA requested a postponement because the hearing dates fell on the last two days before the holiday recess and because its attorney had a conflicting court engagement (A-2A); the undersigned rescheduled the matter for February 2, 3, and 4, 1981 (A-2B).

On January 26, 1981, EEA filed a Motion to Dismiss the petition (A-3A) and an accompanying brief (A-3B). EEA asserted that (1) the petition was untimely pursuant to the contract bar rule, and (2) the unit requested by ESA was inappropriate because even if the employees involved should be removed from the EEA unit, they belong in a unit of administrators represented by the Administrators' Association of Emerson ("AAE") rather than a separate unit.

On January 27, 1981, the undersigned informed the parties that the Director of Representation had referred the Motion to Dismiss to him for consideration and directed the parties to file briefs, if they so desired, on or before January 30, 1981. On January 28, 1981, the undersigned informed AAE's president that EEA had raised the possibility that Supervisors of Instruction should be placed in the AAE unit and invited a response (A-5A). On February 2, 1981, AAE's president responded by letter. He stated

that AAE did not wish to intervene in this proceeding and that it would not "react further" until a determination had been made concerning whether EEA should continue to represent Supervisors of Instruction (A-7A).

On February 2, 1981, before the hearing commenced, ESA requested a continuance in order to secure legal representation. The undersigned, with the consent of all parties, postponed the hearing until March 13, 17, and 18, 1981 (A-8A; A-8B). On February 17, 1981, the undersigned, because of a scheduling conflict created by representation elections involving State employees, postponed the first day of hearing until March 17, 1981 (A-9A).

On February 17, 1981, EEA filed a supplemental brief in support of its Motion to Dismiss (A-3D). In this brief, EEA argued that ESA could not meet Commission standards governing the severance of a group of employees from an existing unit and further that EEA had standing to argue the appropriate unit question.

On March 4, 1981, ESA's recently obtained legal counsel filed a responding brief to EEA's Motion to Dismiss (A-11B). ESA asserted that the contract bar rule did not apply because the Board had not ratified a successor contract until five days after the filing of ESA's representation petition. Further, ESA challenged EEA's standing to raise the appropriate unit question to the extent that EEA argued that Supervisors of Instruction belonged in the AAE unit. Finally, ESA argued that its proposed unit was appropriate and that it could meet the standards for severance.

On March 6, 1981, the undersigned informed the parties that he had decided to take EEA's Motion to Dismiss under consid-

eration pending the completion of the hearing and the issuance of his Report and Recommendations (A-12A).

On March 17 and 18, 1981, the undersigned conducted a hearing. At the outset, EEA formally moved to intervene on the basis of its representation of the employees in question. Because the Director of Representation had informed the undersigned that EEA had satisfied the requirements of N.J.A.C. 19:11-2.7, the undersigned granted the motion (Tr. I, p. 3). ^{3/} ESA then amended the unit description in its petition to include only Supervisors of Instruction (also referred to as department supervisors) (Tr. I, p. 11). The undersigned then received stipulations and exhibits concerning certain issues and facts and afforded all parties an opportunity to examine witnesses, present evidence, and argue orally.

Briefs were due on or before May 1, 1981. Both EEA and ESA have submitted briefs; the Board has not.

FINDINGS OF FACT

Based on the entire record in this proceeding, the Hearing Officer makes the following findings of fact:

1. The Emerson Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. (the "Act"), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding (Tr. I, p. 7).

2. The Emerson Education Association is an employee representative within the meaning of the Act, is subject to its pro-

^{3/} Transcript references to the hearing sessions held on March 17 and 18, 1981, will be designated, respectively, Tr. I, p. and Tr. II, p. .

visions (Tr. I, p. 7), and currently represents the employees who are the subject of this proceeding pursuant to the recognition clause of a collective agreement which expires on June 30, 1983 (Exhibit A to A-11B). Prior to 1975 or 1976, EEA did not represent these employees to the extent their interests were different from the interests of teachers; instead, they negotiated on their own behalf (Tr. I, pp. 52-58, 241-242).

3. The Emerson Supervisors Association is not currently recognized or certified at this time, but is seeking to become the employee representative of the Supervisors of Instruction in the following departments: Mathematics, Physical Education, ^{4/} Art and Home Economics, Foreign Languages, Business Education, Industrial Art, Music, Social Studies, Language Arts, ^{5/} and Science (Tr. I, p.8).

4. The Administrators' Association of Emerson represents a unit composed of the positions of Junior-Senior High School Principal, Junior-Senior High School Guidance Director, and Elementary School Principals, but excluding the Superintendent of Schools and the School Business Administrator, pursuant to a collective agreement with the Board (Exhibit D to A-3B). The agreement expires on June 30, 1981.

5. The parties stipulated that the following issues are in dispute:

(a) Was ESA's petition untimely because of the contract bar rule;

(b) Is the requested unit inappropriate because AAE already represents an established administrative unit;

(c) Should the petition be dismissed because ESA

^{4/} The position of Supervisor of Physical Education Instruction is presently vacant (Tr. I, p. 190).

^{5/} The Supervisor of Language Arts is also the Administrative Assistant to the Principal (Tr. I, p. 209).

allegedly cannot meet Commission standards for severance of one group of employees from a pre-existing unit;

(d) Are the titles in dispute supervisory within the meaning of the Act; and

(e) Is there a conflict of interest within the meaning of Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971) ("Wilton") necessitating the removal of these employees from the unit which EEA currently represents (Tr. I, pp. 9-10).

6. ESA takes the following positions with respect to the issues identified in Finding of Fact No. 5:

(a)-(c) See pp. 3-4, supra;

(d) The titles in dispute are supervisory within the meaning of the Act since Supervisors of Instruction have the power to effectively recommend the hiring, discharge, and discipline of teachers in their departments; and

(e) There is a conflict of interest between Supervisors of Instructions and the teachers they evaluate severe enough to necessitate the removal of these supervisors from EEA's unit (A-11B; Post-Hearing Brief).

7. EEA takes the following positions with respect to the issues identified in Finding of Fact No. 5:

(a)-(c) See pp. 2-3, supra;

(d) The titles in dispute are not supervisory within the meaning of the Act since Supervisors of Instruction do not have the power to hire, discharge or discipline teachers in their departments or effectively recommend these personnel actions; and

(e) There is no conflict of interest necessitating the removal of Supervisors of Instructions from EEA's unit (Tr. I, p. 12; A-3B; A-3D; Post-Hearing Brief).

8. The Board has taken no formal position on any of the issues identified in Finding of Fact No. 5. The Board, represented by the Emerson Superintendent of Schools at the hearing, has no objection to ESA forming into a separate bargaining unit (Tr. I, p. 11) and no objection to Supervisors of Instruction remaining in EEA's unit (Tr. I, p. 211).

9. Under a contract effective from September 18, 1978, to June 30, 1980, EEA represented "Classroom Teachers," a designation which expressly included Coordinators (J-1, Articles I and XXV). ^{6/} On September 9, 1980, the Board and EEA entered a Memorandum of Understanding "subject to ratification by both sides and reduction to contractual language." (Exhibit B to A-3B) On October 15, 1980, ESA filed the instant representation petition. On October 20, 1980, the Board ratified a successor agreement based on the Memorandum of Understanding covering Classroom Teachers and specifically including Supervisors of Instruction (J-2). The agreement was retroactively effective July 1, 1980 (Exhibit A to A-11B, Article XVIII).

10. Approximately 61 teachers instruct about 730 students in the Emerson Junior-Senior High School (Tr. II, p. 87). Enrollment has declined in the past few years from a high of about 1000 students and will continue to decline over the next several years to a low of about 500 students (Tr. II, p. 24). Reductions in staff and recertification of teachers in other disciplines will accompany reductions in enrollment (Tr. I, pp. 180-184; Tr. II, p. 24).

11. Three documents, read together, constitute the closest approximation to a formal job description for Coordinator, the predecessor job title to Supervisor of Instruction (J-3A; J-3B; J-5).

^{6/} Subsequent to the execution of this contract, the title of Coordinator was changed to the title of Supervisor of Instruction (Tr. I, p. 218).

The first two documents are included in the faculty manual (Tr. I, p. 216). The third one is Board Policy No. 314, adopted in 1972 and revised in 1974. Board Policy No. 314 is essentially identical to one of the faculty manual descriptions (J-3B). According to one document, Coordinators visiting classrooms and making out reports were not to create the feeling in teachers that Coordinators were responsible for evaluating them (J-3A, n.4(e) and 18). According to the two other documents, Coordinators supervised instruction including class visitation, committee meetings, and individual conferences (J-3B, n.B.6; J-5, n.B4).

12. Since January, 1979, the Board has required state certification as a supervisor for all Supervisors of Instruction (Tr. I, p. 51).

13. The present Superintendent (since August 1, 1980) described the role of Supervisors of Instruction as follows:

...Department Supervisors are the people who are competent in the subject matter areas that they supervise and have the prime responsibility in a number of areas and working with their staff in developing curriculum, ordering the necessary supplies, textbooks, equipment and everything else that is needed to implement the program. When I say they do this, they do this through their building principal to me. They don't work directly with me. They work with staff members in terms of staff improvement, working with staff in terms of evaluation and supervision and dealing with parents when there are problems that come along within that subject area. (Tr. I, p. 175; see also Tr. I, p. 103).

Questioned about their evaluative responsibilities, the Superintendent responded that they were "primary evaluators" in charge of coming up with personnel recommendations stemming from their evaluations, in particular a recommendation concerning the continued employment of teachers (Tr. I, p. 176) (Exhibit B to A-11B).

The current Emerson Junior-Senior High School Principal (since 1962) described the role of the Supervisor of Instruction in the evaluation process:

They're very much involved in the evaluation of teachers and make classroom observations and have the after conference, make suggestions, very much involved in writing the PIP on every staff member and very much -- they initiate and write those too as well as the contractual evaluation which makes recommendations for tenure, increment, or dismissal. (Tr. II, pp. 2-3).

14. Supervisors of Instruction also teach. The Supervisor of Instruction for the Foreign Language Department teaches five classes a day, the same number as all other teachers in her department except one who teaches six classes (Tr. I, p. 102). The Social Studies Department supervisor teaches three courses; other teachers in his Department five classes a day (Tr. I, p. 168). The Science department supervisor teaches three or four class periods a day; others average five class periods a day (Tr. I, p. 254). Of the approximately eight periods a day, three or four periods are available for Supervisors of Instruction to perform supervisory or evaluative duties (Tr. I, pp. 103, 168, 254).

15. An organizational chart, adopted in 1974 and still current with some minor variations, shows the following progression upwards from the then Coordinators: Vice-Principals/Director of Guidance, Principals, Superintendent, Board (J-4; Tr. I, p. 228). Only the Board can hire or fire employees or withhold increments (Tr. I, p. 176). The chain of command for a personnel decision concerning the hiring, discharging, or disciplining of an employee starts with the recommendation of a Supervisor of Instruction; this

recommendation is in turn reviewed by the Principal, Superintendent and Board (Tr. I, pp. 117-118, 174-176).

16. The Superintendent described the process employed to hire teachers (Tr. I, pp. 189-190). The Supervisor of Instruction for the department with a vacancy does all the preliminary screening -- including reviewing applications and resumes and conducting initial interviews -- and then recommends a candidate to the Principal. The Principal then interviews that person; the Supervisor of Instruction may or may not attend this interview. If the Principal endorses the recommendation, the Superintendent interviews the candidate and, if he accepts the recommendation, informs the candidate he will be recommended to the Board for hiring. The Superintendent then marshalls the necessary supporting documentation and makes his recommendation to the Board; if the Board accepts this recommendation, a contract is issued. ^{7/}

The Superintendent testified that he made the only "effective" recommendation in the hiring process (Tr. I, p. 220). However, he used the phrase "effective recommendation" to mean that pursuant to statute, only the Superintendent can make a hiring recommendation to the Board, not to signify whose recommendation was the one which the Board or Superintendent actually relied upon in making a hiring decision (Tr. I, pp. 219-220).

The Principal confirmed the Superintendent's description of the hiring process (Tr. II, pp. 14-18). He added that if he does

^{7/} Since the Superintendent assumed his position in August, 1980, only one teacher -- a member of the Physical Education Department -- has been hired. There is currently no Supervisor of Instruction in this department so the process described above commenced with the Principal's participation (Tr. I, p. 190). The Superintendent intends to interview any person who is hired in any department (Tr. I, p. 227).

disagree with the supervisor's recommendation, he will send both his and the supervisor's recommendation to the Superintendent (Tr. II, pp. 15, 69-71). Further, he meets with the Superintendent before the latter interviews the candidate and discusses the applicant; after the interview, he either meets with or calls the Superintendent to discuss the candidate further (Tr. II, p. 18). The department supervisor normally does not meet with the Superintendent separately to discuss his recommendations (Tr. I, p. 82).

According to the Principal, supervisors are occasionally not available during the summer to conduct the initial interview. In such a case, the Principal conducts the interview and then calls the supervisor concerned to see if the supervisor can meet the candidate or, in the alternative, if the supervisor will agree to rely on the Principal's judgment to make the recommendation to the Superintendent (Tr. II, p. 15). Similarly, if the Principal is unavailable during the summer, he expects the supervisor to direct a candidate to the Superintendent so that all positions will be staffed come September (Tr. II, p. 66) ^{8/} Very little hiring is done during the summer. According to the Principal, of the 20 people hired in the last five years, only two have been hired during the summer; of these two candidates, a supervisor interviewed one of them prior to hiring (Tr. II, pp. 89-90).

In the last five years, the Superintendent has always accepted the Principal's recommendation to hire a particular person,

^{8/} The Supervisor of Instruction in the Foreign Languages Department illustrated this testimony. During the 1980 summer, before the current Superintendent arrived and when the Principal was unavailable to interview a candidate, the Principal empowered her to offer that candidate a position directly; she did so (Tr. I, pp. 30, 114). However, she told the offeree that the Principal and Superintendent would have to "finalize the salary increment"; this is the normal practice (Tr. I, pp. 84-85). The Principal did not meet with the candidate until just before the school year started (Tr. I, p. 85).

and the Board has always accepted the Superintendent's recommendation (Tr. II, p. 90). The Principal relies very heavily on the supervisor's assessment of a candidate's knowledge of subject matter, but reserves the right to question teaching style and poise (Tr. II, pp. 95-96). Further, the Principal, provided the quality of teaching is not compromised, desires candidates who have coaching ability or other extracurricular experience (Tr. I, p. 146; Tr. II, pp. 67-68). Generally, but not automatically, the Principal follows the supervisor's recommendation to hire a particular individual (Tr. II, pp. 16-17); the Principal recollected one instance in the last two years in which he disagreed with the supervisor's recommendation (Tr. II, p. 16).

Various Supervisors of Instruction described their experience in making hiring recommendations. The Foreign Language Department supervisor has interviewed some six to 50 applicants for each vacancy before selecting the one person she has recommended to the Principal (Tr. I, p. 27). In the last five years, she has participated in five hiring decisions; on four occasions, her recommendation was adopted and on the fifth occasion, the Principal empowered her to offer a contract directly to the candidate of her choice (Tr. I, pp. 29-31). She has done all screening, including interviews, during the summer months (Tr. I, p. 83).

The Social Studies Department supervisor has a much different track record. Of the four persons hired during his tenure as supervisor, he has formally recommended only one; the other three have been hired in the summer (Tr. I, p. 125). He did some preliminary screening, interviewed one of these three candidates, and discussed

the others with the Principal over the telephone before the decision to hire was made (Tr. I, pp. 133-134, 149-150).

The Science Department supervisor has recommended hiring approximately 40 persons since 1966; in only one instance has the Principal not followed his recommendation (Tr. I, pp. 238-239). On that one occasion, involving a dual position in the Science and Mathematics Departments, the Principal expressed a preference to look for another candidate and, after discussion, the supervisor agreed (Tr. I, pp. 235-236). Of the six persons in his department, he has conducted the initial interview and made recommendations to hire five teachers. The other person was hired during the summer when the supervisor was not available for the initial interview. He did, however, subsequently interview the candidate and reach a mutual agreement with the Principal before the position was offered (Tr. I, p. 236). ^{9/}

Finally, a former Social Studies Department Coordinator testified that when he occupied that position from approximately 1968 to 1977 (Tr. II, pp. 106-107), he made hiring recommendations to the Principal (Tr. II, p. 113, 122). On one occasion involving a part-time position, the Principal and Superintendent disagreed with him (Tr. II, pp. 113-114).

17. Supervisors of Instruction, after consulting with staff members, make recommendations concerning the assignment of

^{9/} This supervisor also testified that on occasion the Principal, considering the size of the school and the need for some teachers to play dual roles, has asked him to look for candidates with coaching experience. The supervisor nevertheless recommended the persons best for the Science Department. In particular, one time when the Principal expressed a preference for candidates with coaching experience, he recommended two candidates without such experience. Both were hired (Tr. I, pp. 245-246).

teachers to teach particular classes (Tr. I, pp. 48-49, 95, 138-139). The Principal makes the final decision on assignments (Tr. I, pp. 157-158; Tr. II, pp. 32-33; J-10). The Principal accepts the supervisor's recommendations unless a conflict in scheduling makes the recommended assignment impossible (Tr. I, pp. 95-96, 107, 138-139, 255; Tr. II, pp. 91-92).

18. Department supervisors generally determine what programs are to be offered within a specific department (Tr. I, p. 187, Tr. II, pp. 23-24). Further, they have met with the Principal, the Administrative Assistant, the Dean of Students, the Director of Guidance, and the media specialist to review the curriculum in light of declining enrollment and to consider combination of disciplines and recertification of teachers (Tr. II, p. 23-24). However, when enrollment in a particular offering falls below ten students, the Principal must determine whether to recommend the continuance of the course (Tr. I, pp. 185-187). On one occasion, the Science Department supervisor recommended that applied chemistry no longer be offered; the Principal disagreed, and the Board approved its continuation (Tr. I, pp. 252-253).

19. Department supervisors are also responsible for submitting department budgets; they are free to solicit staff input. The Principal then makes up a budget for the Junior-Senior High School and submits it to the Superintendent. The Superintendent then reviews the proposed budget, makes any necessary changes, and submits it to the Board for final approval (Tr. II, pp. 22-23, 62-63).

20. Under Article XI of the current collective agreement (Exhibit A to A-11B), the first step of the grievance procedure is for the employee to take his grievance to his "immediate superior." If the immediate superior is below the rank of Principal, the Principal shall have the right to participate in a first-step hearing. The predecessor agreement contained an identical provision (Exhibit A to A-3B). Under this language, it appears that some grievances might be referred initially to Supervisors of Instruction (for example, a dispute over an assignment) (Tr. I, pp. 201-202) while other grievances might go directly to the Principal (Tr. I, pp.91, 94; P-1).

A few years ago, a Social Studies teacher filed a grievance challenging his assignment to provide bedside instruction (Tr. I, p.126). The present Social Studies Department supervisor made the assignment, based on his policy decision that the teacher of an absent student should provide the instruction, but it is unclear whether he did so in the capacity of supervisor or administrative assistant (compare Tr. II, pp.35-36 with pp. 38-40). The undersigned believed that he probably acted as a supervisor (Tr. I, p. 126; Tr. II, pp. 41-43). The supervisor and the Principal heard the grievance together and rejected it (Tr. I, pp. 127-129, 153-156). The Superintendent agreed. The Board formulated a policy of assigning bedside instruction to the teacher whose student is absent, provided no one else volunteered (Tr. I, pp. 127-128).

21. The evaluation process has a number of different components including observations, conferences, observation reports,

contract evaluation forms and conferences, and professional growth plans. This process plays a critical role in making personnel decisions involving the renewal or non-renewal of contracts, the granting or denial of tenure, and the granting or withholding of a salary increment.

Supervisors of Instruction must observe non-tenured teachers at least four times a year (three times before the mid-year evaluation) and tenured teachers at least once (Tr. I, pp. 16, 144, 205). The supervisor observes a teacher conduct one or more classes. The supervisor then fills out a Professional Observation report (J-6); this report lists several criteria (e.g. discipline, student-teacher rapport) upon which the evaluator will mark the teacher either satisfactory or unsatisfactory. A conference is then held between supervisor and teacher; they discuss the observation report, add any comments they desire, and then sign it. The staff member the evaluator, the Principal, and the Superintendent all receive a copy of the report (Tr. I, pp. 17-18, 63-64).

The Principal also conducts occasional observations and fills out Professional Observation reports. He tries to observe new teachers during the first few months of employment (Tr. I, pp. 112, 169, 258) and teachers who are being considered for tenure (Tr. II, p. 85). ^{10/} In addition, he observes teachers when their supervisors have alerted him to a problem or even a success or requested another opinion (Tr. I, pp. 121, 164, 256). Finally, he

^{10/} The Principal observes, roughly, less than half of the teachers during their tenure decision year (Tr. II, p.85); however, since evaluation for tenure purposes is an ongoing process, he attempts not to wait until the last year to make his observation (Tr. II, p. 86).

observes supervisors (Tr. II, pp. 6, 83-86). The Principal reads all observations reports and generally relies very heavily on these "first line" forms (Tr. II, pp. 7, 85-87). ^{11/} The Principal ordinarily does not offer input concerning the content of the Professional Observation report (Tr. I, pp. 66, 165-166).

The Superintendent reads all observations reports forwarded to him, but ordinarily does not offer input concerning the content of these reports (Tr. I, p. 66). He will observe each teacher who is being considered for tenure and likewise expects his Principal to do so; he hopes his Supervisors of Instruction will do more than the minimum number of observations during the tenure decision year (Tr. I, pp. 224-225). He considers the supervisors the "prime evaluators" in the observation process (Tr. I, p. 205).

In March of each year, the Supervisor of Instruction fills out a mid-year contract evaluation (J-7A) form for each teacher, tenured or non-tenured, in his department (Tr. I, p. 21). The Contract Evaluation Form lists several evaluative criteria and provides a space for the evaluator to mark satisfactory or unsatisfactory next to each criteria as well as a space for comments. The Supervisor of Instruction must also make recommendations concerning contract renewal, regular increment, and tenure status on this form. After the supervisor completes the form, he reviews it with

^{11/} Up until about five or six years ago, the Principal considered himself the "first line" of teacher observation. With the advent of "T&E and state mandates and student rights, parents rights, affirmative action and all the others," he has become proportionately less and supervisors proportionately more involved in the observation process (Tr. II, pp. 25-26). Today, the department supervisors, not the Principal, constitute the "first line" of teacher observation.

the Principal, ^{12/} and then has a conference with the staff member. The staff member and the supervisor both sign the form and retain a copy. Other copies go to the Principal and Superintendent for their review (Tr. I, pp. 21-23, 134-135, 203-204). If, as happened on two occasions more than five years ago, the Principal and Supervisor of Instruction disagree about comments or recommendations on a contract evaluation form, the Principal and Supervisor of Instruction each write a separate contract evaluation form and forward it to the Superintendent (Tr. I, pp. 23-25; Tr. II, p. 87). The Principal sometimes adds positive comments on the Contract Evaluation form (Tr. I, pp. 76, 134-135), but does not change the rating portions of the document or add adverse comments (Tr. I, p. 76; Tr. II, pp. 81-82, 86-87).

After the mid-year process is completed, the staff member and department supervisor begin to formulate a Professional Growth Plan ("PGP") (J-8). This plan provides a basis for focusing the evaluation and assistance efforts of the supervisor in the ensuing year. The plan seeks to identify weaknesses and to recommend specific remedies; if no weaknesses exist, the plan provides general guidance for voluntary professional development (Tr. I, pp. 203-204). During a series of conferences, the staff member and supervisor seek to reach mutual agreement on the content of the form (Tr. I, pp. 36-38). After the form has been completed and signed, the staff member and supervisor each retain a copy, and copies are forwarded to the Principal and Superintendent for their review (Tr. I, pp. 38, 88,

^{12/} At this point, the Principal may discuss with the supervisor any complaints which the Director of Guidance has passed on to the Principal from students concerning teacher performance (Tr. II, pp. 10-11).

203-204). To date, there have been no instances of a teacher refusing to sign a PGP (Tr. I, p. 106) or the Principal submitting a separate PGP to the Superintendent (Tr. II, pp. 13-14). The department supervisors use PGPs to monitor the performance and progress of teachers (Tr. I, pp. 39-40, 44, 47-48).

22. The present Superintendent has not changed any contract evaluation recommendations since becoming Superintendent in August, 1980 (Tr. I, p. 202). He considers the department supervisor the first line or prime evaluator in making the decision whether to renew a non-tenured teacher's contract (Tr. I, pp. 191-192).

The Principal has never disagreed with a supervisor's recommendation to grant tenure (Tr. II, pp. 10, 78-79). Further, he has never disagreed with a supervisor's recommendation to grant or deny a salary increment (Tr. II, p. 81). Generally, the Principal agrees with the supervisor's recommendations to renew or not renew a non-tenured teacher's contract (Tr. II, p. 9). On two occasions, however, within the last three years, he has disagreed with the supervisor's bottom line recommendation to not renew a contract (Tr. II, pp. 9-10, 79-81). ^{13/} The Principal also testified that he and the supervisor sometimes decide to give a teacher the option of resigning before they make a recommendation not to renew a contract (Tr. II, p. 19). With one exception, the Principal has never overruled a supervisor's suggestion that the supervisor offer a teacher the opportunity to resign (Tr. II, p. 91; Tr. I, pp. 104-105).

^{13/} Also, the Principal, on one occasion while accepting the supervisor's recommendation to offer another contract, wrote a separate contract evaluation making the narrative portion less harsh (Tr. I, pp. 74-75).

The Foreign Language Department supervisor testified that when she becomes dissatisfied with a teacher's performance, her normal practice is to confer with the Principal and then offer the teacher the opportunity to resign (Tr. I, pp. 32, 85-86, 104-105). On only one occasion has the Principal disagreed with her recommendation that a teacher be given the opportunity to resign (Tr. I, pp. 24-25, 72-74, 104-105). Because of this practice, she has never formally recommended the non-renewal of a contract (Tr. I, p. 86). Similarly, while she has threatened, with the Principal's knowledge, to recommend withholding an increment, she has never actually made such a recommendation (Tr. I, p. 105). Her recommendations to grant salary increments have always been followed (Tr. I, p. 34).

The Social Studies Department supervisor testified that the Superintendent and Principal, with one exception, always followed his contract evaluation recommendations (Tr. I, pp. 135, 166). In the one incident, which the Principal also described, the Principal agreed with his assessment of the teacher's classroom performance, but overruled his recommendation to renew the contract because he needed a teacher who could coach (Tr. I, pp. 169-170). The Principal and Superintendent have always followed his recommendations to grant salary increments; he has never recommended the denial of an increment (Tr. I, pp. 164-165).

The Science Department supervisor testified that he also has a practice of offering an unsatisfactory teacher the opportunity to resign before he makes a formal recommendation not to renew a contract (Tr. I, pp. 239-240). Prior to making this offer, he discusses the matter with the Principal and secures his approval (Tr. I,

p. 240). Four times he has recommended that a teacher be given an opportunity to resign; in each instance, his recommendation was approved, and the teacher resigned (Tr. I, pp. 238-240). The Board has always followed his tenure recommendations (Tr. I, p. 247). ^{14/} The Board has always followed his recommendations to grant salary increases; he has never recommended that a salary increment be withheld (Tr. I, pp. 237, 246).

A former Coordinator in the Social Sciences Department testified that the Principal always agreed with his contract evaluations and recommendations (Tr. II, pp. 109-110). On three occasions, prior to filling out the contract evaluation forms, he told the Principal that a teacher's contract should not be renewed; each time, the Principal directed him to offer the teacher an opportunity to resign, and the teacher did so (Tr. II, pp. 110-112, 141). His recommendations concerning tenure were always accepted (Tr. II, p. 111).

23. The Board has not represented that it perceives any actual or potential conflict of interest between Supervisors of Instruction and teachers stemming from their inclusion in the same unit (Tr. I, pp. 211-212).

The Superintendent perceives a potential conflict arising from the inclusion of department supervisors and teachers they evaluate in the same unit. In particular, a potential for conflict exists in the areas of processing grievances and implementing ad-

^{14/} On one occasion, he recommended that a teacher should receive tenure in the Physical Education Department, not the Science Department; the individual received tenure in the former department (Tr. I, pp. 248-250).

ministrative directives (Tr. I, pp. 179-180). Also, the Superintendent perceives a possibility that membership in the same unit or union might make a supervisor's evaluation of a teacher less reliable (Tr. I, p. 227).

The Superintendent has not encountered any actual conflict between department supervisors and the teachers they evaluate (Tr. I, p. 180). He is not "inordinately troubled" about the reliability of evaluations received from department supervisors (Tr. I, p. 227). He knows of no instances in which the Board's negotiating team has shared confidential information with department supervisors (Tr. I, p. 215). The Superintendent has also worked in districts where Principals and assistant principals under their supervision have belonged in the same unit, yet no actual conflicts have compromised the ability of the mixed unit to function well (Tr. I, p. 213).

The Principal definitely perceives a conflict of interest between department supervisors and teachers stemming from their shared negotiations unit. First, he believes that department supervisors may have shared confidential information concerning contract negotiations with unit members (Tr. II, p. 27). Second, he questions the ability of department supervisors to retain objectivity in evaluating teachers when confronted with the peer pressure of fellow EEA members (Tr. II, p. 27). The Principal could not identify any specific occasions on which he believed an evaluation had been distorted or biased as a result of common unit membership (Tr. II, p. 93). Further, he supervises a fellow AAE member, the Director of Guidance, but does not believe that his objectivity has been

diminished (Tr. II, p. 55). The Principal differentiates the relationship of department supervisor-teacher from that of Principal-Director of Guidance because in the former relationship, but not the latter, unit members receive information concerning budgets, finances, and structural changes which is pertinent to negotiations concerning other members' terms and conditions of employment (Tr. II, pp. 57-58).

No present or former department supervisors who testified identified any instances of conflict stemming from the observation, evaluation, or PGP process (see, e.g. Tr. I, pp. 165, 257-258; Tr. II, p. 120). One concrete example of a conflict concerned the previously discussed assignment bedside instruction.

In the fall of 1979, EEA filed a class action grievance which challenged as premature the Principal's directive implementing a PGP process. This directive and ensuing grievance caused confusion among some department supervisors concerning whether they should obey the directive and hold meetings with department members (Tr. II, pp. 150-151). The Superintendent resolved the problem when he directed all personnel charged with supervisory responsibilities at the Junior-Senior High School to use evaluation forms developed by the Professional Advisory Council and approved by the Board, pending implementation of a formal PGP program the following spring (P-1).

24. The president of EEA asserted that prior to the filing of the petition, no department supervisor expressed dissatisfaction with EEA's handling of negotiations or grievances or with any other aspects of its representation (Tr. II, pp. 144-145; Tr. I, pp. 101-102). A March 18, 1980 letter from the department supervisors to

the president announcing their intention to withdraw from EEA confirms that the department supervisors were not dissatisfied with EEA's representation, but instead believed that the changing role of Supervisor of Instruction might engender conflicts of interest if membership in the same unit continued (A-3D).

ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

1. In its Motion to Dismiss, EEA maintains that the contract bar rule makes the instant petition untimely. The undersigned disagrees.

N.J.A.C. 19:11-2.8 governs questions concerning the timeliness of petitions. No election or certification bar has been raised in the instant case. N.J.A.C. 19:11-2.8(a), (b). Instead, the issue is whether a contract bar exists under the following language of N.J.A.C. 19:11-2.8(c) (3): ***

(c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless: ...

3. In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

In County of Middlesex and Middlesex Council #7, N.J.C.S.A., P.E.R.C. No. 81-29, 6 NJPER 439 (¶11224, 1980), our Commission, borrowing from private sector labor law, see e.g., Appalachian Shale Products Co., 121 NLRB No. 149, 42 LRRM 1506 (1958), held that a

memorandum of agreement will not bar the filing of a petition when the terms of the memorandum require ratification until ratification has actually been secured. In the instant case, a collective agreement between EEA and the Board expired on June 30, 1980. On September 9, 1980, EEA and Board negotiators signed a memorandum of understanding which they expressly conditioned upon ratification by the Association and the Board. Board ratification was not forthcoming until October 20, 1980, five days after the filing of the instant petition. Consequently, under County of Middlesex, supra, no existing contract precluded ESA's petition.

2. In its Motion to Dismiss, EEA maintains that even if Supervisors of Instruction should be excluded from EEA's teacher-based unit, they should not be allowed to form a separate unit, but rather should be included in the existing AAE unit. EEA asserts that it has standing to raise this issue since "...a representative organization [has] an interest in restricting the number of organizations it must compete with for a 'piece of the Board's ear.'" (A-3D, p. 6). The undersigned concludes that this argument is not a basis to dismiss outright the instant petition.

Analytically, one does not reach the question of whether Supervisors of Instruction belong in the AAE unit until one determines that they do not belong in the present EEA unit. Thus, the petition has been properly processed for purposes of determining whether department supervisors should remain in the same unit as the teachers they evaluate. Once a determination is made that EEA can no longer represent department supervisors, then EEA's legal standing -- as opposed to its purely practical concerns -- to litigate the

appropriate unit question dissipates. The undersigned specifically rejects EEA's overly expansive notion of standing requirements; acceptance of the "piece of the Board's ear" theory would threaten to turn each representation proceeding into a morass of multi-party litigation, even when the parties immediately concerned with the final appropriate unit question -- here the Board and AAE -- agreed. County of Middlesex and Middlesex County Health Inspectors Supervisors Assoc., D.R. No. 80-14, 5 NJPER 517 (¶10267, 1979).

3. EEA also argues that the instant petition should be dismissed because ESA cannot meet Commission standards governing the severance of a group of employees from an existing unit. Given the Board's neutral position concerning ESA's claims of conflict of interest and supervisory status, EEA questions ESA's standing to raise unilaterally either of these issues. If ESA lacks such standing, then it must meet the standards for severance set forth in numerous Commission decisions. See e.g., In re Jefferson Township Board of Education, P.E.R.C. No. 61 (1971). EEA maintains that since ESA has not established that EEA failed to provide effective and fair representation to all employees in the unit, its petition must be dismissed. The undersigned rejects this argument because Commission severance standards are inapplicable to this case. ^{15/}

N.J.A.C. 13A-5.3 and 6(d) proscribe, with certain narrow exceptions not pertinent hereto, the inclusion of supervisors and non-supervisors in the same negotiations unit. ESA has standing to raise the issue of supervisory status, despite the Board's neutral

^{15/} If severance standards were applicable, the undersigned would conclude that ESA did not establish that EEA failed to provide effective and fair representation to all employees in the unit (See Finding of Fact No. 24, supra).

position concerning proper unit placement, because it seeks, through a timely filed petition, to represent a group of employees who allegedly perform supervisory functions. These employees are directly concerned with their unit designation and community of interest as well as with their ability to interact with teachers without the tensions caused by the conflicting loyalties supervisory personnel experience when placed in the same unit as employees they evaluate. Because the undersigned concludes the ESA has standing to litigate the issues of supervisory status and conflict of interest raised by its representation petition, he determines that EEA's reliance on Commission severance standards is misplaced. 16/

4. The next issue is whether Supervisors of Instruction are "supervisors" within the meaning of N.J.S.A. 34:13A5.3. This section provides, in pertinent part:

...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
... 17/

Since the Board indisputably retains the ultimate power to hire, discharge and discipline, the crucial question here is whether

16/ Even if the Board actively opposed the formation of a separate unit for Supervisors of Instruction, this opposition would not foreclose ESA's opportunity to litigate issues related to its perception of a unique community of interest among department supervisors and of pressures eroding the cohesiveness of the present EEA unit. Such opposition might, however, be relevant to determining the extent of reliance the Board placed on department supervisors' recommendations.

17/ Consider also N.J.S.A. 34:13A-6(d) which states that "...except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors.

Supervisors of Instruction have the power to "effectively recommend" such personnel actions.

Cases decided by the Commission, the Director of Representation, and Commission Hearing Officers have uniformly and repeatedly found certificated Department Chairpersons to be supervisors within the meaning of the Act. See River Dell Board of Board of Education, E. D. No. 76-28, 2 NJPER 89 (1976); Sterling Board of Education, P.E.R.C. No. 80 (1974); Cinnaminson Township Board of Education, D. R. No. 81-39, ___ NJPER ___ (May 7, 1981), affirming H. O. No. 81-2, 6 NJPER 396 (§11205, 1980); Ramapo-Indian Hills Regional High School District Board of Education, D. R. No. 81-26, 7 NJPER 119 (§12048, 1981), affirming H. O. No. 81-3, 6 NJPER 405 (§11206, 1980); ^{18/} Ridgewood Board of Education, D.R. No. 80-33, 6 NJPER 209 (§11102, 1980), affirming H.O. No. 81-9, 7 NJPER 349 (§10183, 1979); Delaware Valley Regional High School Board of Education, H.O. No. 81-12, 7 NJPER ___ (§_____, May 6, 1981); Paramus Board of Education, H.O. No. 81-9, 7 NJPER 52 (§12022, 1981); Edison Township Board of Education, H.O. No. 81-7, 6 NJPER 582 (§11292, 1980); Waldwick Board of Education, H.O. No. 81-8, 6 NJPER 593 (§11295, 1980); but cf. In re Board of Education of East Orange, E.D. No. 34 (1971). ^{19/} The instant case falls within this

^{18/} In Ramapo-Indian Hills, the Hearing Officer found that Department Chairpersons became "supervisors" after the passage of the Act; before the Act, Department Chairpersons played no role in the initial hiring process and no formal role in the evaluation process for which they were accountable.

^{19/} In East Orange, the parties stipulated that the positions in dispute -- including Department Chairpersons -- were supervisory within the meaning of our Act. The Hearing Officer found, however, that an established pre-Act bargaining relationship justified the continued inclusion of supervisors in the same unit as non-supervisors and that a Wilton conflict of interest analysis did not require taking Department Chairpersons out of this stable relationship since in that school district as of 1971 they were lower echelon administrators not substantially involved in making personnel recommendations.

pattern of precedent.

Supervisors of Instruction have power to effectively recommend the hiring of teachers in their departments. Supervisors of Instruction play a formalized and regular role in the hiring process which requires them to recommend particular candidates. Generally, no candidate whom the department supervisor has not initially screened, interviewed, and recommended can be hired. ^{20/} In considering the candidate whom the department supervisor recommends, the Principal relies heavily on the supervisor's assessment of the candidate's knowledge of subject matter. Almost always, he converts the department supervisor's recommendation into his own. In every instance in the last five years, the Superintendent and then the Board have adopted the Principal's recommendation. In short, the ability of Supervisors of Instruction to exclude all other applicants but the ones they recommend and the almost unvarying adoption of their formal recommendations manifest a power to make effective hiring recommendations. ^{21/}

Supervisors of Instruction have the power to effectively recommend adverse personnel actions, including contract nonrenewal,

^{20/} Exceptions to this rule have occasionally occurred when a particular department supervisor was on a vacation during the summer. The undersigned does not find these exceptions significant in light of the Principal's testimony that summer hirings are rare. Further, the Principal himself is occasionally absent during the summer and during his absence, he expects and authorizes department supervisors to make hiring recommendations.

^{21/} EEA relies upon In re Brookdale Community College, D.R. No. 78-10, 4 NJPER 32 (14018, 1977), in arguing that Supervisors of Instruction do not have power to make effective hiring, discharge, or discipline recommendations. In Brookdale, the Director of Representation held that the role of the Director of Student Life and Activities in personnel processes was too remote to make his recommendations effective. The Director of Representation doubted that a recommendation that required three additional levels of approval could be considered effective. However, when the record establishes, as here but not in Brookdale, that an

denial of tenure, withholding of salary increments, and discipline, against department members. Again, department supervisors play a formal and regular role in the evaluation process leading to such decisions. In order to ensure that department supervisors will be able to play this evaluative role, the Board has required that they obtain state certification as supervisors. Their signature on observation reports, contract evaluation forms, and professional growth plans makes them formally accountable to the administration for their recommendations and becomes a lightning rod for any staff member's discontent with an evaluation. As the evaluation system has become more structured during the past few years,^{22/} the Principal has come to rely more and more upon the observations and recommendations of department supervisors. Today, both the Principal and Superintendent agree that the Supervisors of Instruction are the first-

21/ (continued) employee's personnel recommendations have been regularly, even though not always, followed, then mere reliance on the number of steps in a personnel process is too wooden an approach and is inconsistent with the long line of cases according Department Chairpersons supervisory status. The same reasoning refutes EEA's reliance on In re Middlesex County Welfare Board, P.E.R.C. No. 10 (1969); In re Township of Hanover, E.D. No. 41 (1971); In re Township of Teaneck, E.D. No. 23 (1971); In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976). In all these cases, none of which involved Department Chairpersons, the bare assertion of supervisory authority was not supported by a track record showing the actual and frequent adoption of personnel recommendations.

The undersigned also notes that under Teaneck, supra, an employee is a statutory supervisor if he has the power to make effective recommendations concerning hiring or discharge or discipline. Private sector precedent accords. See R. Gorman, Basic Text on Labor Law, pp. 36-37 (1976).

22/ The development of the more structured evaluation system parallels the passage and implementation of legislation and regulations seeking to ensure a "thorough and efficient education" through firmer supervisory controls. See N.J.S.A. 18A-27:3.1; N.J.A.C. 6:3-1.19; N.J.A.C. 6:3-1.21.

line, primary evaluators. The track record with respect to their recommendations confirms this conviction. Usually, although not invariably, formal recommendations of Supervisors of Instructions to renew or not to renew a non-tenured teacher's contract have been adopted. Further, the Principal and various department supervisors have collectively and frequently decided to offer unsatisfactory teachers an opportunity to resign without pursuing a formal recommendation process leading through the Superintendent to discharge by the Board. Usually, but again not invariably, the department supervisors' tenure recommendations have been followed. Finally, the department supervisors' recommendations to grant salary increments have always been approved, and the Principal has supported department supervisors who have threatened the withholding of salary increments. Based on their formal and regular role in the evaluation process and the frequency of the adoption of their recommendations, the undersigned concludes that Supervisors of Instruction have the power to make effective discharge and discipline recommendations.

Accordingly, based on his Findings of Fact and the above discussion, the undersigned concludes that Supervisors of Instruction are "supervisors" within the meaning of N.J.S.A. 34:13A-5.3 and 6(d) and recommends their removal from the unit of non-supervisory personnel which EEA currently represents. ^{23/}

5. The parties have also identified a conflict of interest issue within the meaning of Board of Education of West Orange v. Wilton, supra. In Wilton, the Court stated:

^{23/} The only statutory exception to the prohibition of mixed supervisory and non-supervisory units is inapplicable since EEA concedes that there is no pre-Act established practice, agreement, or special circumstances justifying the continuation of a mixed unit (Post-Hearing Brief, p. 5, n. 4).

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees the community of interest required for inclusion of such supervisor is not present. While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. Supra, at 57 N.J. 425-426.

Ordinarily, the Wilton analysis arises in Department Chairperson cases when a party contends that the existence of a conflict of interest has disrupted the stability and effectiveness of a pre-Act negotiations relationship involving a mixed unit of supervisory and non-supervisory personnel. See, e.g. River Dell Board of Education, supra; Ridgewood Board of Education, supra. Given the conclusion that Supervisors of Instruction are supervisors within the meaning of the Act and EEA's concession that no pre-Act negotiations relationship existed, the undersigned need not reach the merits of the conflict of interest issue. Instead, the undersigned merely notes a potential substantial conflict between Supervisors of Instruction and their staff members because the evaluation responsibilities of the former group significantly affect the careers of the latter. The potential for conflict is heightened by the first-step role of Supervisors of Instruction in the grievance process when staff members challenge their decisions and by the effective ability of Supervisors of Instruction to control classroom assignments in the absence of a scheduling conflict. While the record does not establish that the potential for conflict has erupted into significant and recurrent actual conflicts testing the loyalty and com-

promising the ability of Supervisors of Instruction to perform their duties, ^{24/} the existence of a potential substantial conflict supports the undersigned's conclusion that Supervisors of Instruction and the teachers they supervise should not be included in the same unit. Cf. Cinnaminson Township Board of Education, supra, ^{25/} Ridgewood Board of Education, supra.

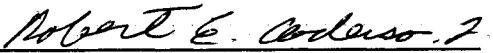
^{24/} The de minimis level of actual instances of conflict would be much more significant if EEA had been able to demonstrate an established pre-Act negotiations relationship which should not be disrupted unless unworkable or harmful. See River Dell Board of Education, supra.

^{25/} In Cinnaminson, the Director of Representation stated in words equally appropriate to the instant case:

Under the new job description, chairpersons will clearly be supervisors within the meaning of the Act. They will be responsible for evaluation of non-tenured and marginal tenured teachers, for recommendations on increments and renewals, for screening and rating teacher applicants, for teacher discipline and for grievance administration on behalf of the Board. Supervisory certification will be required for preparation of evaluations. Consequently, chairpersons will be in a position where their good faith performance as supervisors would often put them at odds with other employees in the unit, thus raising a potential substantial conflict between the chairpersons and teachers. [Footnote quoting the language from Wilton in the text above omitted.] The Hearing Officer, in the instant case, correctly determined that the performance of the obligations and powers delegated to department chairpersons under the new job description would create more than a de minimis conflict of interest, destroying the prior community of interest between the department chairperson and teachers in the existing collective negotiations unit. As supervisors, the department chairpersons may not be in the same unit with non-supervisors (Slip Opin. at pp. 7-8).

CONCLUSIONS AND RECOMMENDATIONS

Upon consideration of the entire record and the foregoing discussion, the Hearing Officer concludes that Supervisors of Instruction are supervisors within the meaning of the Act and that a potential substantial conflict of interest exists between Supervisors of Instruction and the teachers they evaluate. Accordingly, the Hearing Officer recommends the removal of Supervisors of Instruction from the negotiations unit represented by the Emerson Education Association.



Robert E. Anderson, Jr.
Hearing Officer

Dated: June 16, 1981
Trenton, New Jersey