

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

In the Matter of

RAMAPO-INDIAN HILLS REGIONAL
HIGH SCHOOL DISTRICT BOARD
OF EDUCATION,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-79-29

RAMAPO-INDIAN HILLS EDUCATION
ASSOCIATION, INC.,

Employee Representative.

SYNOPSIS

The Director of Representation, adopting the findings and recommendations of a hearing officer, determines that certain Board supervisory personnel should be excluded from a negotiations unit which contains nonsupervisory personnel. Since the supervisory responsibilities of the Director of Guidance were significantly upgraded since his initial inclusion in the unit, the "established practice" exception of the Act, which permits the continuance of certain supervisory/nonsupervisory units, is not applicable. Regarding department chairmen, the Director finds an absence of an established practice which would permit their continued unit inclusion.

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ASSOCIATION, INC.,

Employee Representative.

Appearances:

For the Public Employer-Petitioner
Green & Dzwilewski, attorneys
(Jacob Green & Ellen Harrison of counsel)

For the Employee Representative
Goldberg & Simon, attorneys
(Sheldon Pincus of counsel)

DECISION

Pursuant to a Petition for Clarification of Unit filed with the Public Employment Relations Commission (the "Commission") by the Ramapo-Indian Hills Regional High School District Board of Education (the "Board"), hearings were conducted before a designated Commission Hearing Officer with respect to the claim raised by the Board that Department Chairmen and the Director of Guidance should be removed from a negotiations unit of employees represented

by the Ramapo-Indian Hills Education Association, Inc., (the "Association"), due to their alleged supervisory status.

Hearings were held before Commission Hearing Officer Arnold H. Zudick on December 4 and 5, 1979, January 29 and 31, 1980 and April 30, 1980, 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 briefs with the Hearing Officer. The Hearing Officer thereafter issued his report and recommendation on July 25, 1980. Neither party has excepted to the Hearing Officer's Report and Recommendation.

The undersigned has carefully considered the record in this proceeding, including the Hearing Officer's Report and Recommendations and finds and determines as follows:

1. The Ramapo-Indian Hills Regional High School District 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. (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 Ramapo-Indian Hills Education Association, Inc., is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the recognized representative of a unit comprised of the Board's professional teaching personnel. Included in the unit are the positions of Department Chairmen and the Director of Guidance.

4. The Board argues that the individuals in the above positions are supervisory employees pursuant to N.J.S.A. 34:13A-5.3 and may not be included in a unit with nonsupervisory employees. The Board argued before the Hearing Officer that the employees became supervisors subsequent to July 1, 1968, and therefore, the narrow statutory exceptions preserving pre-1968 negotiations relationships involving employee units which included supervisory and nonsupervisory personnel are not applicable herein. In the alternative, the Board argued that if there was a pre-1968 relationship, the supervisory functions of each position had so increased in scope that the statutory exceptions should be rendered inapplicable.

5. The Association argued before the Hearing Officer that the employees in the above titles were supervisors prior to 1968 and that a past practice existed to justify their continued inclusion in the unit. Additionally, the Association asserted that no conflict of interest exists between the employees in these titles and other unit employees, and therefore, the unit composition should not be altered.

6. The relevant statutory provision concerning the appropriateness of including supervisory and nonsupervisory employees in the same negotiations unit is contained in N.J.S.A. 34:13A-5.3, as follows in relevant 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
...

Additionally, N.J.S.A. 34:13A-6(d) provides in part:

The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors

The Commission has determined that the terms "established practice" and "prior agreement" refer to negotiations relationships which pre-exist the passage of the Act in 1968. In In re West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973) and P.E.R.C. No. 79 (1973) (decision on reconsideration). In the absence of the existence of circumstances falling within the enumerated statutory exceptions, the Act prohibits the inclusion of supervisory with nonsupervisory employees in the same unit.

7. The Hearing Officer found that the negotiations relationship between the Association and the Board predated the passage of the Act. However, the Hearing Officer found that the Department Chairmen were not supervisors prior to the passage of the Act, but were now functioning in a supervisory capacity. He, therefore, recommended that the Department Chairmen should be removed from the Association's negotiations unit. The undersigned, having reviewed the record and noting the absence of exceptions to the Hearing Officer's factual findings, adopts those findings and determines that Department Chairmen shall be removed from the Association's unit.

The Hearing Officer found that that the Director of Guidance was represented by the Association prior to the passage of the Act and that the Director of Guidance was a supervisor

prior to 1968. The Hearing Officer, further found that the supervisory responsibilities of the Director of Guidance substantially and dramatically increased after 1968. In light of this finding, the Hearing Officer concluded that the "established practice" exception was negated by the substantial increase in supervisory duties.

Having fully reviewed the record, the undersigned adopts the Hearing Officer's factual findings and the above reasons for removal of the Director of Guidance from the Association's negotiations unit. The Commission has concluded that the mere finding of an established practice or prior agreement does not mandate the continuation of a mixed supervisory/nonsupervisory unit. The Commission addressed this argument in the West Paterson matter supra, P.E.R.C. No. 77, wherein it stated, at p. 14:

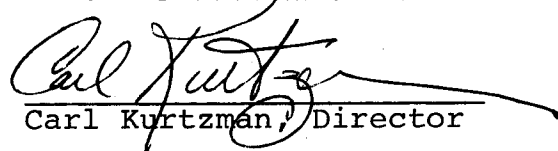
The Association's position, on the other hand, seems unduly narrow. It argues that the prohibition against mixed units falls whenever established practice or prior agreement is found and that upon either finding, the continuation of such unit is mandated. That approach is fairly mechanical and seems 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.

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.

Accordingly, for the above reasons, the undersigned adopts the recommendations of the Hearing Officer and determines that Department Chairmen and the Director of Guidance shall be removed from the Association's negotiations unit. The record reveals that the collective negotiations agreement between the parties, which was operative at the time the Petition was filed, has since expired. Accordingly, the instant determination is effective immediately. 1/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: January 30, 1981
Trenton, New Jersey

H.O. NO. 81-3

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

In the Matter of

RAMAPO-INDIAN HILLS REGIONAL
HIGH SCHOOL DISTRICT BOARD OF
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-and-

DOCKET NO. CU-79-29

RAMAPO-INDIAN HILLS EDUCATION
ASSOCIATION, INC.,

Employee Representative.

SYNOPSIS

In a Clarification of Unit Petition filed by the Ramapo-Indian Hills Board of Education, a Hearing Officer of the Public Employment Relations Commission, recommends the removal of the supervisory titles of Department Chairmen and the Director(s) of Guidance and Pupil Personnel Services from the remainder of the nonsupervisory unit represented by the Ramapo-Indian Hills Education, Inc.

The Hearing Officer found that the Department Chairmen were not supervisors within the meaning of the Act prior to July 1, 1968, and were, therefore, not protected by a past practice defense. The Hearing Officer concluded, however, that the Director of Guidance position was supervisory at that time, and that a negotiations relationship and established practice existed between the parties covering the Director title prior to July 1, 1968. Nevertheless, the Hearing Officer found that the scope and responsibilities of both the Department Chairmen and the Director(s) of Guidance had increased and, therefore, negated any established practice that may have existed to justify the inclusion of supervisors in the Association's unit. Finally, the Hearing Officer found, in part, because of the increase of the supervisory functions necessitated by the new State Board of Education evaluation requirements, and in part, because of pressures that exist because of the present inclusion of Department Chairmen and Director(s) of Guidance in the Association's unit, that a potential substantial

conflict of interest exists that mandates the removal of the above titles 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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HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on December 27, 1978, by the Ramapo-Indian Hills Regional High School District Board of Education (the "Board") seeking a clarification of a negotiations unit of its employees represented by the Ramapo-Indian Hills Education Association, Inc. (the "Association"). The Board seeks to have certain titles

currently in the Association's collective negotiations unit removed therefrom allegedly because they are supervisors, lack a community of interest with the remainder of the titles in the unit, and because of a potential conflict of interest. The Association argues that the titles in question most appropriately belong in their unit.

Pursuant to a Notice of Hearing dated July 9, 1979, a hearing was originally scheduled in this matter for late August and early September 1979. However, hearings in this matter were postponed several times by agreement of the parties. ^{1/} Finally, by agreement of the parties, hearings were held before the undersigned Hearing Officer on December 4 and 5, 1979, January 29 and 31, 1980 and April 30, 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 June 30, 1980. The Board filed a reply brief by July 8, 1980.

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

1. The Ramapo-Indian Hills Regional High School District 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.

^{1/} This matter was rescheduled for hearing on October 30 and 31, 1979. The parties subsequently requested a postponement which resulted in the hearings commencing on December 4 and 5, 1979.

(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 Ramapo-Indian Hills Education Association, Inc., 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. The parties have been unable to agree upon the continued placement of the titles in question 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 agree that the issues in this matter are as follows:

(a) Were the positions of Department Chairmen and Director of Guidance and Pupil Personnel Services supervisory before July 1, 1968, within the meaning of the relevant provisions of the Act.

(b) If such position were supervisory, are there established practices, prior agreement, or special circumstances dictating to the contrary of the rule that supervisors as defined in the Act shall not otherwise be represented in collective negotiations by the Association which is an employee organization that admits non-supervisory personnel to membership.

(c) Under the circumstances of this case, was there an actual conflict within the meaning of the Act prior to July 1, 1968.

(d) Have actual conflicts occurred or manifested themselves subsequent to June 30, 1968.

(e) Have the positions increased in scope of supervisory function so as to render inapplicable any alleged established practice, prior agreement, or special circumstances.

(f) Have substantial potential conflicts of interest arisen since June 30, 1968, due to a change in the overall role and functions of the positions.

The parties also agreed to stipulate into the record numerous Joint Exhibits concerning the issues as set forth above. ^{2/}

5. The Board argued that the titles in question were supervisors within the meaning of the Act and only obtained that responsibility subsequent to July 1, 1968 and, that a conflict of interest existed with the inclusion of these titles in the Association's unit and, therefore, these titles were inappropriate for membership in that unit. The Association, however, argued that the titles in question were supervisors within the meaning of the Act prior to July 1, 1968 and, therefore, a past practice existed justifying their continued inclusion in the unit. Moreover, the Association maintains that no conflict of interest exists between employees in these titles and the remainder of the unit and, therefore, the titles should remain in the unit.

^{2/} The Joint Exhibits are marked as J-1 through J-54 and are contained in the record.

AnalysisI. Were the Titles in Question Supervisors
Prior to the Act?

The Board, relying primarily upon the testimony of Superintendent Salt and Principal Kernan argued that the relevant titles were not supervisors prior to the passage of the Act (July 1, 1968). The Association, however, relying primarily upon the testimony of the Board witnesses, argued that the instant titles were supervisors prior to July 1, 1968. Since the testimony of the witnesses on this point is to some degree conflicting and contradictory, the undersigned has reached a conclusion based upon the credibility of the witnesses as well as the total review of each witnesses' testimony rather than relying upon a given phrase or sentence taken out of context.

Regarding the Director of Guidance position, the undersigned agrees with the Association's assertion that said position was a supervisor within the meaning of the Act prior to July 1, 1968. That finding is supported by Mr. Kernan's testimony that the Director of Guidance is third in command of the High School and has always had a supervisory certificate, ^{3/} and, that he believed that said position was a supervisor prior to 1968. ^{4/} Since there was no contradictory testimony regarding this title the undersigned finds that it was a supervisory title prior to 1968.

3/ T II pp. 87-88

4/ T II p. 89

Although the testimony and evidence regarding the Department Head position was not as clear as that concerning the Director of Guidance, the undersigned believes that the weight of the evidence supports the Board's assertion that Department Heads were not supervisors prior to the passage of the Act. In arguing to the contrary, the Association relied upon its own interpretation of Mr. Kernan's testimony, as well as the testimony of its own witness, Audrey Besaw. In its brief the Association cited numerous passages from Mr. Kernan's testimony to support its position regarding this title. The undersigned has reviewed those cited passages and finds that as a whole those passages were being read out of context with the bulk of Mr. Kernan's testimony which clearly supports the Board's position. For example, Mr. Kernan did testify concerning the 1967-68 school year that after he interviewed job applicants they were forwarded to the Department Chairmen for review, ^{5/} but he also testified that he actually screened the applications and chose those people to be interviewed. ^{6/} Mr. Kernan, further testified that during the 1968-69 school year he began to let Department Chairmen make the initial selection process ^{7/} which did not occur prior to the passage of the Act.

^{5/} T II p. 13

^{6/} T II pp. 13, 15, 17

^{7/} T II pp. 17-18

Regarding evaluation and observations, Mr. Kernan did testify that Department Chairmen had some role in evaluations in the 1967-68 school year, 8/ but he very clearly testified that during that time period the Department Chairman role was advisory only, 9/ and that the final evaluation was the principal's responsibility. 10/ Finally, Mr. Kernan testified that prior to 1970, a Department Chairman could make a written or verbal recommendation but was not accountable for that recommendation, and that he, the principal, could adopt or reject those recommendations, 11/ whereas after 1970 the Department Chairmen became accountable for their evaluations and they became part of the evaluation system. 12/

Superintendent Salt's testimony on this point was similar to Mr. Kernan's. Dr. Salt testified with regard to the hiring process prior to July 1, 1968 and said:

... [T]he Department Head was advisory to the Principal, and the Principal, according to his own judgement, would bolster his recommendation with reflection on conversation with the Department Head. T. V p.76

Dr. Salt also testified with regard to Exhibit J-27 which was the Principal's job description prior to July 1, 1968, and indicated

8/ T II p. 20

9/ T II p. 46

10/ T III p. 48

11/ T III pp. 23-24

12/ T III p. 25

that the Principal, and not Department Heads, were responsible for evaluations at that time. 13/

The Association in support of their position regarding this issue also relied upon its interpretation of Principal Riley's testimony. However, the record clearly shows that Mr. Riley was not employed by the Board prior to January 1, 1970. 14/ Therefore, his testimony cannot be relied upon to show what occurred prior to July 1, 1968. Mr. Riley did testify, however, that when he first arrived in the district the Department Chairmen thought of themselves as being "Head Teachers," 15/ and that the accountability of the Department Chairman has increased since his arrival in the district. 16/

The Association also relied upon the testimony of its own witnesses to support its position regarding this issue. Two Department Chairmen, Audrey Besaw and Tom McKenzi, testified that they screened applicants and made recommendations on hiring, 17/ and further testified that they conducted observations and evaluations and made recommendations therefrom. 18/ Both individuals believed that their recommendations were effective. However, when questioned further on this issue Ms. Besaw actually testified

13/ T IV p. 23

14/ T III p. 56

15/ T III p. 102

16/ T III p. 103

17/ T V pp. 3, 50

18/ T V pp. 3, 51-52

that with regard to hiring, she recommended that applicants be "interviewed" again ^{19/} (which is not the same as a recommendation to hire), but subsequently, when being questioned by the undersigned, Ms. Besaw changed her testimony and stated that she was actually recommending that the applicant be hired. ^{20/} Ms. Besaw also testified that she made her recommendations to the building principal and that she wasn't certain whether they were written or not. ^{21/}

Ms. Besaw's testimony concerning recommendations was consistent with Mr. Kernan's testimony to the extent that recommendations were made to the Principal and may have been written or oral. Although Ms. Besaw and Mr. McKenzi testified that their recommendations carried weight, they had no other evidence to support that contention, and the undersigned credits the testimony of Mr. Kernan and Dr. Salt that Department Chairmen at that time could only make advisory rather than effective recommendations. Mr. Kernan's testimony was more consistent than Ms. Besaw's and more objective.

In In re Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976), the Director of Representation found that a branch office supervisor functioned as an expediter "to help work flow more evenly and efficiently" rather than as a supervisor within the meaning of the Act. In the instant matter the

^{19/} T V p.4

^{20/} T V p.14

^{21/} T V p.16

record supports a finding that Department Chairmen acted in a similar fashion prior to the passage of the Act.

Based upon the foregoing discussion the undersigned recommends that the Department Chairmen were not supervisors within the meaning of the Act prior to July 1, 1968, but that the Director of Guidance did possess the required supervisory authority prior to the same time period.

II. Exceptions to the Supervisory Rule Versus the Scope of Supervisory Functions

Two other issues stipulated by the parties were:

(1) whether an exception existed, i.e., established practice, prior agreement or special circumstances, to the rule that supervisors should not be in units with nonsupervisors; and (2) whether the scope of supervisory function has increased so as to render any exception to the supervisory role inapplicable.

Since the undersigned has found with regard to the first issue, that the Director of Guidance and Pupil Personnel Services was a supervisor within the meaning of the Act prior to July 1, 1968, it is necessary to determine whether the statutory exceptions set forth in N.J.S.A. 34:13A-5.3 justify that titles' continued inclusion in the instant unit. ^{22/} The undersigned believes that the record supports a finding that a negotiations

^{22/} Since Department Chairmen were not found to be supervisors prior to the passage of the Act, then it makes no difference whether an established practice or prior agreement existed with regard to that title.

relationship existed between the parties prior to July 1, 1968. Exhibits J-1 (pp. 30A-30B) and J-2, whether they are evidence of a collective agreement or of proposals for a collective agreement, demonstrate the existence of a "negotiations" relationship between the parties prior to July 1, 1968 to negotiate over certain terms and conditions of employment. The Commission in In re West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), found that the minimum requisite ingredient of a pre-1968 established practice was:

... 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 any employer who engaged in the process with an intent to reach agreement. (slip op. p.10)

The undersigned believes that the parties' pre-1968 relationship, at least in 1967, fits the above definition. Although the parties' relationship prior to 1967 did not appear to be a "negotiations" relationship, it cannot be disputed that Exhibits J-1 and J-2 demonstrate an intent by the parties to reach agreement over certain terms and conditions of employment.

Whether the Director of Guidance position was included in the above negotiations, however, is another matter. Exhibit J-3 which is a collective agreement between the parties dated September 24, 1968, lists the Director of Guidance position as included in

the unit. The evidence of the pre-1968 (prior to July 1, 1968) negotiations does not indicate whether the instant position was included or not. However, the undersigned finds it hard to believe that the negotiations which culminated in the September 24, 1968 agreement did not include the Director of Guidance. The September agreement was reached only three months after the passage of the Act, and the evidence clearly shows that the parties were negotiating as early as the Fall of 1967. Therefore, the undersigned, albeit based upon circumstantial evidence, finds that the Director of Guidance was included in the pre-1968 negotiations.

Despite having found that a pre-1968 established practice existed with regard to the Director of Guidance, and even assuming that Department Chairmen were supervisors and that a similar established practice existed regarding them, the undersigned believes that the scope of their supervisory function has substantially increased thereby negating the effect of the pre-1968 established practice.

The undersigned credits the testimony of Mr. Kernan when he testified that beginning in 1970 Department Chairmen first began making written evaluation reports, 23/ and Mr. Riley when he testified that as of June 30, 1977, Department Chairmen had to possess supervisory certificates. 24/ Mr. Riley also testified that with the implementation of the new State Board of Education evaluation

23/ T V p.60

24/ T III pp. 166

and improvement requirements N.J.A.C. 6:3-1.21, that it was necessary to create a professional improvement plan based upon evaluation results and it was the job of the Department Chairmen to do that job. ^{25/} Even assuming that Department Chairmen were supervisors prior to the passage of the Act, this testimony shows that there was a considerable change in the scope and responsibility of the Department Chairmen duties that negated any established practice that may have existed to justify their inclusion with non-supervisory employees.

The same result is true for the Director of Guidance position. Although they were supervisors prior to the passage of the Act, Mr. Riley testified that the increase in supervisory functions that affected Department Chairman also included the Director of Guidance. ^{26/} This demonstrates that when the role of Department Chairmen increased because of the new State regulations, the role of the Director of Guidance also increased.

Many parties have argued in the past that once it has been established that supervisors who are included in a unit with non-supervisors are protected by established practice or prior agreement, that no change in the scope of the supervisory duties can negate the established practice. That belief, however, is not supported by the law or equitable considerations. The purpose of the exceptions to the supervisory rule is to leave undisturbed bargaining units that existed prior to July 1, 1968, which have

^{25/} T III pp. 68-69.

^{26/} T III pp. 86-87.

not shown evidence of conflict, and in which the scope of supervision has not substantially changed. But where, as here, evidence of conflict does exist, and the supervisory duties have dramatically increased in part because of the new State evaluation and improvement requirements, the Commission cannot ignore those changes and must explore anew the viability of the mixed unit. See In re Hillside Board of Education, E.D. No. 2 (1970). Having explored the change in the Department Chairmen and Director of Guidance responsibilities, and cognizant of the increase in the potential for conflict, the undersigned finds that any established practice or prior agreement that may have existed in this case no longer justifies the inclusion of these titles with the remainder of the Association's unit.

III. Conflict of Interest

The parties in the instant matter stipulated three different issues all related to conflict of interest. The first issue involved whether there was any evidence of actual conflict prior to July 1, 1968, because of the inclusion of supervisors with non-supervisors. Both of the remaining issues involved evidence of conflict that occurred subsequent to July 1, 1968. Although a review of the first issue may be interesting, the undersigned does not believe that it is relevant in view of the existence of conflict after the passage of the Act.

With regard to the remaining issues the record supports a finding that the potential for conflict involving the instant titles is great enough to justify their removal from the Association's unit.

The evidence showed that a strike by the instant bargaining unit occurred in this district in 1969. Mr. Kernan testified that all but one Department Head supported the strike at the Indian Hills school, but that none of the Department Heads at Ramapo supported the strike. ^{27/} Assuming that Department Chairmen were supervisors within the meaning of the Act at that time, their support of the strike at Indian Hills demonstrated an actual conflict of interest. The fact that the Ramapo Department Chairmen did not support the strike demonstrated their acknowledgement of a certain responsibility that they had to the Board as supervisors. This split of opinion among Department Chairmen - half supporting the strike and half opposed - goes to the heart of the meaning of conflict. Certain pressures existed at each location to result in the split among Department Chairmen. Some Department Chairmen felt a greater obligation to the Board, others felt that obligation to the Association. If the Department Chairmen and Guidance Directors were not part of the unit, a significant degree of pressure would be eliminated.

The same result would occur even if the Department Chairmen were not supervisors within the meaning of the Act in 1969. Audrey Besaw and Thomas McKenzie testified on behalf of the Association and their own testimony demonstrates the potential for substantial conflict in this district. Ms. Besaw admitted that if placed in a strike situation again (she supported the 1969 strike) she would consider information from both sides and then make her decision

whether to support the Board or the Association. ^{28/} She also testified that if there were pressure from either side she would ignore the pressure and make up her own mind. ^{29/} Finally, Ms. Besaw testified that in a job action or strike she would not feel bound or obligated to support the Association, but she also testified that she would not feel obligated as a supervisor to remain at her post. ^{30/} The undersigned cannot credit portions of Ms. Besaw's testimony. It is unrealistic to believe that someone who admits that pressure may exist and that she would consider information from both sides would be unaffected by the same. Nevertheless, in order to establish a conflict of interest, it is not necessary to determine whether a supervisor has a greater obligation to the Board or the Association. It is only necessary to establish the conflict, that obligations exist to both parties, and the conflict herein is established by Besaw's recognition that pressures exist that may force her to choose between the Board or the Association.

Mr. McKenzie also testified that in a strike situation he would use independent judgment in making a decision whether to support the strike. ^{31/} This merely accentuates the conflict that Department Chairmen in this district must feel. By remaining

^{28/} T V p. 43

^{29/} T V p. 44

^{30/} T V p. 44

^{31/} T V p. 74

in the instant unit they will still be subject to pressure from nonsupervisory employees which could, in turn, diminish their ability to adequately perform their supervisory responsibilities. By being removed from the unit -- and even if they formed their own unit -- they would not be placed in conflict with or be subject to the same pressures by nonsupervisory employees.

The New Jersey Supreme Court in Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404, 425-426 (1971), held that:

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 or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest.

The undersigned believes that the potential for conflict in this matter is far greater than a mere de minimis or peripheral conflict. Rather, the obligations delegated by the Board to the Department Chairmen and the Directors of Guidance by increasing their evaluation responsibilities and requiring them to create professional improvement plans for other unit members, as well as the pressures that can and have been placed upon the Department Chairmen in previous Association job actions has created the potential for

substantial conflict. The Board need not wait until incidents of actual conflict have occurred to justify the removal of the instant titles from the Association's unit.

The record contains other evidence of conflict. Mr. Kernan testified that the Department Chairmen's membership in the Association placed a constraint on his cabinet level discussions,^{32/} and Mr. Reily testified that he withholds certain information from Department Chairmen to prevent placing an undue burden on them.^{33/} In conjunction with the evidence of conflict previously discussed the instant Petition could be sustained on the conflict evidence alone, notwithstanding the other findings herein.

Recommendations

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

That the Department Chairmen and the Director(s) of Guidance and Pupil Personnel Services employed by the Board be removed from the Association's negotiations unit:

(a) That Department Chairmen were not supervisors within the meaning of the Act prior to July 1, 1968, but that Directors of Guidance were supervisors during that period of time.

(b) That an established practice (prior to July 1, 1968) existed with regard to Directors of Guidance, but that said practice


32/ T III p. 21

33/ T III p. 110

was negated by an increase in the overall supervisory duties subsequent to July 1, 1968.

(c) That a potential substantial conflict of interest exists that justifies the removal of the instant titles from the Association's unit.

Respectfully Submitted


Arnold H. Zudick
Hearing Officer

DATED: July 25, 1980
Trenton, New Jersey