

E.D. NO. 76-28

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIVER DELL BOARD OF EDUCATION,  
Public Employer-Petitioner,

Docket No. CU-87

-and-

RIVER DELL EDUCATION ASSOCIATION,  
Employee Organization.

SYNOPSIS

The Executive Director dismisses a petition for clarification of unit filed by the public employer in which the public employer sought to exclude Department Chairmen from an existing unit composed of Department Chairmen and teachers. In overruling exceptions filed by the public employer to the Hearing Officer's Report and Recommendations, the Executive Director affirms the findings of fact and conclusions of the Hearing Officer that, although Department Chairmen are supervisors within the meaning of the Act, there is an "established practice" pre-dating the enactment of Chapter 303, Laws of 1968, of having Department Chairmen in the negotiating unit with the teachers and there is insufficient evidence of either a potential or actual substantial conflict of interest to nullify the established practice.

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Employee Organization.

Appearances:

For the public employer, Stein & Rosen, Esqs.  
(Mr. Marc Joseph, of Counsel)

For the employee organization, Ruhlman & Butrym, Esqs.  
(Messrs. Joel S. Selikoff and Paul T. Koenig, of Counsel)

DECISION

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission by the River Dell Board of Education (the "Board") seeking a clarification regarding the composition of a negotiating unit represented by the River Dell Education Association (the "Association"). Hearings were held on September 12, 1972, October 19, 1972, November 9, 1972, December 6, 1972 and, pursuant to a request to reopen the hearing prior to the issuance of the Hearing Officer's Report and Recommendations, on November 19, 1974 before Hearing Officer James W. Mastriani at which the parties were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were filed by both parties after the December 6, 1972 hearing. On March 17, 1975, the Hearing Officer issued his Hearing Officer's Report and Recommendations, a copy

of which is attached hereto and made a part hereof. Pursuant to an approved request for an extension of time within which to file exceptions, timely exceptions and a supporting brief were filed by the Board on April 24, 1975. The undersigned has considered the entire record in this proceeding including the Hearing Officer's Report and Recommendations and the exceptions thereto and, on the basis of the facts in this case, finds:

1. The River Dell Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, (the "Act") and is subject to its provisions.

2. The River Dell Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Board is seeking to remove Department Chairmen from the existing negotiating unit represented by the Association, asserting that the continued inclusion of Department Chairmen in the unit is inappropriate. The Association wants the Department Chairmen to remain in the unit, claiming that their inclusion in the unit is appropriate. Therefore, there is a question regarding the composition of a negotiating unit and the matter is appropriately before the undersigned for determination.

4. The Hearing Officer recommended that the Department Chairmen remain in the negotiating unit. He based this recommendation on the conclusion that, although the Department Chairmen

are supervisors within the meaning of the Act, i.e., they have the power to hire, discharge, discipline or to effectively recommend the same, there was an "established practice" of having such supervisors in the negotiating unit prior to the enactment of Chapter 303, Laws of 1968<sup>1/</sup> and the record fails to establish either the actuality or potentiality of a substantial conflict of interest<sup>2/</sup> which would nullify the existence of the established practice of having a mixed unit of supervisors and nonsupervisors. See In re West Paterson Board of Education, P.E.R.C. No. 77 (1973) and In re West Paterson Board of Education, P.E.R.C. No. 79 (1973).

5. The Board excepted to the findings and conclusions of the Hearing Officer in three main areas: (1) his conclusion regarding the existence of an "established practice" prior to the enactment of the Act, (2) his finding that there was no conflict of interest between Department Chairmen and other unit members, and (3) his reliance upon the desires of the employees in determining the composition of the unit.

6. The undersigned is aware of and in agreement with the position of the Commission expressed in the West Paterson

<sup>1/</sup> N.J.S.A. 34:13A-5.3, in pertinent part, provides that "...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor... have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership..." (emphasis added).

<sup>2/</sup> See Bd. of Education of West Orange v. Wilton, 57 N.J. 404 (1971).

cases cited above.<sup>3/</sup> Nevertheless, he hereby adopts the findings of fact and conclusions of law of the Hearing Officer for the reasons stated by the Hearing Officer and overrules the exceptions of the Board.

The record supports the finding of the Hearing Officer that the relationship between the parties prior to the enactment of Chapter 303, Laws of 1968 did constitute "established practice" and that, consistent with previous decisions of the Commission, that relationship embraced a reasonably well defined group including teachers and Department Chairmen.

It is undisputed that the Association included in its membership both teachers and Department Chairmen before the enactment of Chapter 303 and that increased benefits and salaries which were established did accrue to both teachers and Department Chairmen. Furthermore, the first four written contracts between the parties which were negotiated after the passage of the Act specifically included Department Chairmen

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<sup>3/</sup> In P.E.R.C. 79, the Commission said "We view - and we are convinced that the Legislature viewed - mixed units [of supervisors and nonsupervisors] as inherently unworkable and therefore in most cases inappropriate. In order not to disturb those rare relationships involving mixed units which were crystalized prior to Chapter 303, and which managed to succeed despite heavy odds against success, the exceptions of "established practice" and "prior agreement" were formulated... [W/e realize that the continuance of mixed units in future contested cases will necessarily be limited thereby [hereby]. We are not unmindful of this result, but rather view it as desirable and in furtherance of the policy and spirit of the Act and of harmonious labor relations in the public service whose promotion the Act was explicitly designed to accomplish." (footnote omitted)

in the unit and the undersigned finds, as did the Hearing Officer, that this specific inclusion of Department Chairmen in the unit in the written contracts which followed the passage of Chapter 303 merely constituted a continuation of the existing practice.<sup>4/</sup>

Regarding the issue of conflict of interest, the undersigned is satisfied that the Hearing Officer was correct in his analysis and treatment. While agreeing with the Board generally on this issue,<sup>5/</sup> this record - despite the fact that the Board had the experience from 1968 until the end of 1974 to draw upon - simply does not demonstrate that the existing unit is unworkable or has harmed the Board or has been inimical to the public interest. This, evidently, is one of those rare

<sup>4/</sup> Another factor not relied upon herein because the testimony is apparently contradictory relates to the question of whether specific benefits were sought by the Association for Department Chairmen as Department Chairmen before the passage of the Act. The record clearly establishes that before the enactment of Chapter 303, the Association sought to get administrators on an index guide (Tr. 11-19-74: pp. 41-42, 57, 119, 220). A witness for the Association testified that this proposal, which the Board did not accept, would have placed Department Chairmen on a different index from the teachers (Tr. 11-19-74:p. 119). Another Association witness testified that the Association did not demand any benefits specifically for Department Chairmen. It is not clear from this testimony whether Department Chairmen were among the "administrators" who would have benefited from the adoption of an index guide. (Tr. 11-19-74:p. 163). A Board witness testified that the Association, prior to the passage of the Act, never asked for a change in the stipend for Department Chairmen (Tr. 11-10-74:p. 210). Again, this may not be inconsistent with a demand for an index guide for administrators including Department Chairmen.


<sup>5/</sup> See footnote <sup>3/</sup> above.

relationships contemplated by the Legislature in which, experience has shown, supervisors and nonsupervisors can coexist in a negotiating unit.

Finally, it is found that the Hearing Officer did not place an inordinate value upon the desires of the Department Chairmen in determining the appropriate unit. His report indicates that the record reveals that Department Chairmen desire to be included in the unit. But the Hearing Officer cited this fact only to indicate the unavailability in this case of the possible argument that the disputed employees, even if there were an established practice or prior agreement, do not desire to remain in a mixed unit. As noted by the Hearing Officer, if the Department Chairmen desired not to remain in the unit, that fact would suggest the presence of a conflict of interest. This record does not support such a conclusion.

7. Accordingly, based upon the above, it is determined that Department Chairmen should remain in the unit and the petition to remove them from the existing unit is hereby dismissed.

BY ORDER OF THE EXECUTIVE DIRECTOR

  
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Jeffrey B. Tener  
Executive Director

DATED: Trenton, New Jersey  
April 6, 1976

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIVER DELL BOARD OF EDUCATION  
Public Employer-Petitioner

and

Docket No. CU-87

RIVER DELL EDUCATION ASSOCIATION  
Respondent-Employee  
Representative

APPEARANCES:

For the Public Employer  
Stein & Rosen, Esquires  
By Marc Joseph, Esquire

For the Association \*  
Cassel R. Ruhlman, Esquire  
By Joel S. Selikoff, Esquire  
and Paul T. Koenig, Esquire

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A petition was filed with the Public Employment Relations Commission by the River Dell Board of Education requesting clarification of unit on June 21, 1972. Pursuant to Notices of Hearing, hearings were held before James W. Mastriani, Hearing Officer, on September 12, 1972, October 19, 1972, November 9, 1972 and December 6, 1972. <sup>1/</sup> At the hearing the parties were afforded the opportunity to examine and cross-examine witnesses, to present evidence, to argue orally and to file briefs. Briefs were timely filed by both parties. <sup>2/</sup>

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\* Mr. Selikoff appeared on September 12, October 19, November 9 and December 9, 1972. Mr. Koenig appeared on behalf of the Respondent at the hearing held on November 19, 1974.

<sup>1/</sup> Upon receipt of transcript by the Hearing Officer, the hearing was closed on December 26, 1972.

<sup>2/</sup> The hearing in this matter was reopened by the Executive Director of the Commission pursuant to a request made on February 14, 1974 by the Association to reopen the hearing prior to the issuance of the Hearing Officer's Report and Recommendations in order that the issues of established practice and/or prior agreement could be further examined. Pursuant to an Order Scheduling Hearing, dated May 22, 1974 and an Order Scheduling Hearing, dated October 19, 1974, a hearing was held on November 19, 1974 at which time the parties were given full opportunity to present evidence into the pre-1968 relationship between the above parties. Neither party has filed a brief subsequent to the reopened hearing.



The parties have stipulated and the Hearing Officer so finds the River Dell Board of Education, Petitioner, to be a public employer within the meaning of the Act and the Respondent, River Dell Education Association, to be an employee representative within the meaning of the Act and both are, therefore, subject to the provisions of the Act.

Petitioner seeks clarification of negotiating unit to exclude Department Chairmen from existing unit which includes: <sup>3/</sup>

- Teachers
- Librarians
- Nurses
- Guidance Counselors
- Social Workers
- Psychologists
- Department Chairmen
- Supplementary Instruction
- Teachers (hourly employees for salary only)

but excludes:

- Superintendent
- Assistant Superintendents
- Administration Assistants
- School Business Administrators
- Secretaries to the Board
- Assistant Secretaries to the Board
- Principals
- Vice Principals
- Assistant Principals
- Director of Curriculum
- Director of Pupil Personnel Services
- Director of Athletics

The Association disputes Petitioner's attempt to exclude Department Chairmen from the existing negotiating unit. Therefore, a question concerning the composition of the negotiating unit exists and the matter is properly before the Hearing Officer for Report and Recommendation to the Executive Director.

BACKGROUND:

The River Dell Regional School District includes one Junior High School and one Senior High School. In each school there is one principal and one assistant principal. The regional school district employs a faculty of 150 teachers and 13 Department Chairmen.

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<sup>3/</sup> Public Employer Exhibit #4, Agreement between River Dell Board of Education and River Dell Education Association, (1972-73) Pg. 1.

The Department Chairmen are all involved in varying amounts of both teaching and administration. <sup>4/</sup> For example, the Department Chairman of the English Department is assigned one period of teaching while the Department Chairman in Business Education, Music, Art, Home Economics and Humanities are assigned the "average" teaching load of five classes. Administrative functions include participation in hiring and evaluating teachers and serving as management representative at the first level in the grievance procedure. The Department Chairmen may also grieve under the agreement to their immediate superior, the Assistant Principal or Principal. They are paid on a percentage ratio of the teacher guide in direct relation to the number of teachers supervised by each Department Chairman.

An initial written contract negotiated by the parties for the contract year 1969-1970 included Department Chairmen in its unit recognition clause. <sup>5/</sup> Successive agreements were negotiated for the contract years of 1970-1971 and 1971-1972, and a two-year agreement for 1972-1973, 1973-1974, all of which continue the inclusion of Department Chairmen in the unit recognition clause, with the sole exception that the two-year agreement, 1972-1973, 1973-1974, includes the recognition clause as an item to be re-negotiated for the second year of the agreement. <sup>6/</sup> The parties are in dispute over the circumstances surrounding the re-opener of the unit recognition clause.

The Superintendent of Schools testified that during negotiations for the 1972-1973 contract the issue of unit placement of Department Chairmen was negotiated although the final result of the negotiations was the continued voluntary inclusion of the Department Chairmen in the unit although during negotiations the public employer indicated its intention to file a petition seeking their exclusion. Thereafter, the instant petition was filed.

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- <sup>4/</sup> Public Employer Exhibit #15, Time allotments for Department Chairmen (1972-1973).  
<sup>5/</sup> Public Employer Exhibit #1, Agreement between River Dell Board of Education and River Dell Education Association, (1969-1970).  
<sup>6/</sup> Public Employer Exhibits #2, 3, & 4, Agreements between River Dell Board of Education and River Dell Education Association, (1970-1971, 1971-1972, 1972-1974).

In substance, the position of the petitioner-public employer is that the Department Chairmen are supervisors and that their inclusion within the unit which contains non-supervisors has created potential and actual substantial conflicts of interest. In support of the argument, the petitioner relies substantially on standards set forth by the N. J. Supreme Court in Board of Education of the Town of West Orange v. Elizabeth Wilton, et al, 57 of N. J. 404, (1971). These asserted conflicts are alleged to have interfered with the employer's ability to discharge its functions and obligations. Petitioner further alleges that since the initial inclusion of the Department Chairmen in the bargaining unit, their roles have substantially changed to where they more directly supervise the remainder of the unit thereby increasing the inevitability of future conflict. <sup>7/</sup>

Petitioner argues that the standards for application of the statutory exceptions have not been met and that, therefore, there exists neither "established practice" nor "prior agreement." <sup>8/</sup> Petitioner argues that in order for the exceptions to be invoked, they must be in existence prior to the passage of the Act and petitioner asserts that the evidence does not support a finding of this circumstance. However, the petitioner argues that in the event of a Commission finding of established practice or prior agreement, the performance of the unit has led to conflict and, therefore, the experience of the unit should not dictate the invocation of the statutory exceptions. A further contention is that an alleged substantial change in the duties of the Department Chairmen since their

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<sup>7/</sup> A part of this position is that the Department Chairmen, after the alleged substantial functional change, have become supervisors within the meaning of the Act. The record is unclear as to whether it is the position of the employer as to their supervisory status prior to this change.

<sup>8/</sup> N.J.S.A. 34:13A-6(d): "(The Commission) shall decide in each instance which unit of employees is appropriate for collective negotiations provided 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..."

inclusion constitutes a change of circumstances which should nullify the existence of the exceptions if they are found to apply.

The respondent employee representative maintains that Department Chairmen are not supervisors within the meaning of the Act and that their duties are removed from actual authority so as to dictate that their recommendations in the areas of hiring and evaluations cannot be found to be effective. However, it sets forth the argument that even if the Commission were to find that the Department Chairmen are supervisors, that the four negotiated agreements in evidence before the Hearing Officer, all of which include the Department Chairmen in the existing negotiating unit without reservation, and alleged salary negotiations, which pre-date the written agreements constitute both established practice and prior agreement which dictate that the Department Chairmen remain within the existing unit which contains non-supervisors. The Association argues that there has been no substantial change in the function or responsibilities of the Department Chairmen since their initial inclusion in the unit and that whatever changes have been made during their inclusion in the unit have been minimal. Such change is asserted by the Association only to amount to an increased degree of control in which the administration exercises over the Department Chairmen rather than a greater degree of responsibility of the Department Chairmen over the remainder of the employees in the unit.

#### FACTS AND FINDINGS

In order to determine whether the Department Chairmen are supervisors within the meaning of the Act, a finding must be made as to whether they hire, discipline, discharge, or effectively recommend the same.<sup>2/</sup>

The record reveals that the Department Chairmen are directly involved in the hiring process. Formally, the Board of Education hires teaching personnel at public board meetings upon a formal recommendation by the Superintendent of Schools.

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<sup>2/</sup> C. 34:13A-5, 3 (7) N.J.S.A.

While the Superintendent renders this recommendation to the board, the record clearly indicates that prior to this formal recommendation, the Department Chairman and the Principal, rather than the Superintendent, directly participate in the recruitment and interviewing process from which the effective recommendation for hiring is submitted to the Superintendent. <sup>10/</sup>

The record indicates that when an opening occurs it is the Department Chairman in the first instance who investigates prospective applicants. The Department Chairman in a specific subject matter area, scans application files of prospective candidates which are kept in the office of the Superintendent. The Department Chairman, however, is not limited in his search for a new hire from the application forms and may proceed independently to seek out prospective candidates.

From the total number of prospective teachers, the Chairman conducts interviews and thereafter separates individuals whom he judges to be unacceptable from those who require additional consideration. If the Department Chairman rejects an applicant, the applicant receives no further consideration for potential employment.

Thereafter, the Department Chairman, based on interviews and/or observations makes a specific recommendation to the principal that a specific individual be recommended for employment. The principal, subsequent to the departmental interview and positive recommendation of the Department Chairman conducts an additional interview with the applicant. Subsequent to this interview, if the principal concurs in the recommendation of the Department Chairman, he will recommend to the Superintendent that the individual be hired. The record indicates that while the recommendation to the Superintendent is received directly from the principal,

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<sup>10/</sup> See Tr-1, p. 24, 25, 26, 97, 98, 99, 100  
Tr-2, p. 28, 31, 34, 35, 37, 38, 39, 43, 44, 90, 106, 117, 119, 120  
Tr-3, p. 114, 116-120  
Tr-4, p. 23

the recommendation incorporates the positive recommendation of the Department Chairman. Without the positive recommendation of both the Department Chairman and the principal, the applicant is not recommended for employment.

In the three previous years all individuals hired received positive recommendations from Department Chairmen. The Superintendent testified that a teacher will not be hired without the positive recommendation from the Department Chairman. Principal O'Connell testified that in the one instance he could recall where a disagreement existed between he and the Department Chairman over the hiring of a teacher, a re-examination by himself resulted in his concurring with the positive recommendation of the Department Chairman and the subsequent hiring of the applicant. In the absence of either the Department Chairman or the principal, the Superintendent has recommended to the Board that certain teachers be hired based solely on the recommendation of the Department Chairman or the principal.

In evaluations, as in hiring, the Department Chairman and principal both directly participate. Each observes, evaluates and makes recommendations based on a prescribed number of evaluations. The Department Chairmen are required to conduct at least four evaluations of non-tenure teachers and two for teachers on tenure. The principal conducts two and one respectively.

In 1971-1972 an evaluation form was introduced by the Board. Evaluations and ratings are made in specific topical areas. The teacher who has been evaluated and the Department Chairman sign the form. The form is then filed with the principal. A direct recommendation is made by the Department Chairman on a separate form by initialing after a teacher's name whether or not to issue an employment contract for the next year or to advance an increment on the salary guide.

Several specific examples exist where non-tenure teachers have failed to receive renewal of employment contracts. These individuals all received a

negative recommendation from the Department Chairman. <sup>11/</sup> The evaluations of the Department Chairman and principal were consistent in recommending non-renewal. The Superintendent testified that he would place greater weight in the evaluation by the Department Chairman. There is no evidence to indicate the input of Department Chairmen carries greater weight nor is there evidence which indicates that their evaluations are less significant than that of the principal. The two principals and the superintendent appear before the Board of Education at a meeting held for the purpose of making recommendations concerning the employment status of all teachers which precedes the issuance of employment contracts for the ensuing year. While the Department Chairmen do not appear at this meeting, the principals are in possession of the evaluations, ratings and recommendations of the Department Chairmen. The lack of presence by the Department Chairmen at this meeting cannot be found to minimize the effectiveness of their evaluations which, in tandem with those of the principal, form the basis of the Board's formal, legal action. The testimony of Principal O'Connell confirms the effectiveness of the input of the Department Chairman in the evaluation process.

At issue during the hearing was whether or not a change occurred in the role of the Department Chairman after 1970 and if so, its significance.

The Superintendent testified that the role of the Department Chairman changed in September 1970. Contemporaneous with this alleged change was the appointment of Mr. Richard Viet to the office of Superintendent. He was previously a principal since 1966. Prior to 1970, the Department Chairman reported to a curriculum coordinator and post-1970 to the principal. Petitioner alleges that this change placed the line function of the Department Chairman directly beneath the principal which resulted in more direct supervision of teachers than

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11/ Public Employer Exhibit #11

had occurred previously when they reported to the curriculum coordinator.<sup>12/</sup>  
Specifically, the Department Chairmen are alleged after 1970 to have first level direct line responsibility in areas of hiring and evaluation on a consistent and effective bases. Prior to the school and contract year of 1971-1972, the Superintendent testified that no consistent evaluation form was authorized and that a specific evaluation form was adopted in that year and used by the Department Chairmen after each teacher evaluation.<sup>13/</sup>

The Superintendent concedes that prior to 1970, the Department Chairman did evaluate teaching personnel and did make recommendations to the principal but that no uniform document was used nor a specific number of evaluations required. He also testified that subsequent to the implementation of the new evaluation form and job description form which the petitioner now alleges substantial change, negotiations for future contracts resulted in the continued inclusion of the Department Chairmen in the recognition clause.

The Superintendent testified that prior to September 1970, the Superintendent of Schools played a greater and direct role in hiring, and that the Department Chairman's role was inconsistent in that in some cases they actively hired and in other cases they were only consulted after a decision to hire was made by the Superintendent or principal.

Prior to 1970, the Superintendent would occasionally interview an applicant and present him to the Department Chairman whereas after 1970, the Department Chairman became responsible for recruiting, interviewing and recommending to the principal. The Superintendent does concede that prior to 1970, an active Department Chairman could actively recruit and recommend an individual for employment.

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<sup>12/</sup> The Curriculum Coordinator was also a Department Chairman with additional responsibilities.

<sup>13/</sup> Public Employer Exhibit #10.



Department Chairman Robert McGluckie testified that his involvement in the hiring process prior to September 1970 was not consistent. His testimony does indicate, however, that during 1969-1970 on at least one occasion he interviewed an applicant and recommended him for employment and that this recommendation apparently was effective.

Mr. McGluckie testified that prior to 1970 he, as a Department Chairman, evaluated non-tenure teachers three times each year and tenured teachers once. No specific evaluation form was used at this time. The evaluations were recorded as general statements in summaries. He also testified that at the end of the school year 1969-1970 he was asked to render recommendations on tenured and non-tenured teachers and that except in one instance, they were uniformly followed. He further testified that the number of evaluations for all teachers increased after September 1970 and that a specific evaluation form was instituted. Despite <sup>14/</sup> the change he did not use the evaluation form but rather his own in narrative. On this form he would issue a "rating" as part of the evaluation such as "outstanding," etc. He concedes, however, that the ratings issued pursuant to his evaluation could result in a denial of an increment or the refusal of the administration to retain a non-tenure teacher.

The Superintendent testified that a new board policy was developed to effectuate the 1970 change, <sup>15/</sup> and that pursuant to the new policy increased supervisory demands were made on the Department Chairmen. The association submitted into evidence the previous board policy <sup>16/</sup> established in 1964 and asserts that no significant change occurred. A comparison of the two reveals that except for reporting requirements, pre-1970 to the curriculum coordinator and post-1970 to the principal, there is no apparent change in board policy after 1970. The

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<sup>14/</sup> Respondent Exhibits 3a, 3b, 4a, 4b, 4c

<sup>15/</sup> Public Employer Exhibit #5, September 8, 1970.

<sup>16/</sup> Respondent Exhibit #1, 1964.

Superintendent concedes that except for the change in line responsibility outlined above, that the actual requirements in the policies have not changed but rather have intensified and become more consistent.

It is found that the basic functional role of the Department Chairmen did not substantially change during their inclusion in the unit. What has changed is the individual occupying the role of Superintendent and the institution of his philosophy that Department Chairmen perform pursuant to board policy on a more effective and consistent basis.

Based upon the above, the Hearing Officer finds that the Department Chairmen are supervisors within the meaning of the Act. This finding is based on the evidence that these employees effectively recommend the hiring of teaching personnel, <sup>17/</sup> and effectively recommend, through the evaluation procedure, the renewal and non-renewal of teaching personnel which in the judgement of the undersigned in public education is tantamount to the supervisory criteria of discipline and discharge.

The Department Chairmen intimately participate in the hiring of teaching personnel. They have an effective veto power over applicants whom they may reject in the screening process. They have an effective voice in the recommendation that specific applicants be hired for specific openings in their respective subject matter area. The record is clear that an applicant must possess a positive recommendation for hiring from the Department Chairman in order to be hired by the employer. While the principal also evaluates the applicant for hiring, and it is the Superintendent who makes the formal recommendations to the Board of Education these facts do not render any less effective the direct, effective role of the Department Chairmen in the hiring process.

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17/ E.D. No. 45 Board of Trustees of Essex County College, July 27, 1973.

The Department Chairmen are also supervisors due to their participation in the evaluation process from which effective recommendations are made relating to the renewal or non-renewal of teacher employment contract.

The Department Chairmen evaluate all teaching personnel on a consistent basis. Ratings are made on each teacher subsequent to an evaluation and specific recommendations, either positive or negative, are made for every teacher prior to the issuance of contracts for the next year. In each instance in which a negative evaluation has been rendered by a Department Chairman for a non-tenure teacher, that teacher has not been rehired. In two specific examples, <sup>18/</sup> Hartman and Glosser, two non-tenured teachers, each "grieved" to the board the negative evaluation by their respective Department Chairmen pursuant to a contract provision that a hearing be conducted if an "uncertainty" exists with regard to their potential for rehire. <sup>19/</sup> The "uncertainty" in these matters resulted from evaluations of Department Chairmen. The Department Chairmen involved were compelled to appear before the administration to support their negative evaluations. Neither teacher was rehired.

Having found the Department Chairmen to be supervisors within the meaning of the Act, the undersigned must look to whether or not statutory exceptions exist to dictate the continued inclusion of Department Chairmen in the unit. As referred to above, except where established practice, prior agreement or special circumstances dictate the contrary, no unit shall be appropriate which includes both supervisors and non-supervisors. Therefore, the undersigned must look to whether or not established practice, prior agreement or special circumstances exist. If any exceptions are found to exist, then the undersigned must examine the history of the parties' relationship from inception to the present in order to determine whether a conflict of interest

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<sup>18/</sup> See Public Employer Exhibit #7 & #8.

<sup>19/</sup> Public Employer Exhibit #4, Sec. 7.2, p. 19.

exists which would either permit the exceptions to be invoked or to nullify the exceptions.<sup>20/</sup>

In P.E.R.C. No. 79, in reconsideration of P.E.R.C. No. 77, the Commission found that the terms established practice and prior agreement were intended to apply to circumstances which pre-date the passage of Chapter 303. The undersigned can, therefore, assign no weight to the parties' relationship which post-dates the passage of the Act unless such circumstances were to constitute a continuation of a negotiating relationship prior to 1968.

In applying the principles of established practice and/or prior agreement the undersigned must look to previous Commission interpretation of these terms. In P.E.R.C. No. 29, Middlesex County College Board of Trustees, the Commission found "established practice" to denote "the give and take of negotiations including a bilateral relationship rather than a unilateral establishment of terms and conditions of employment..." Also noted is the factor of the parties' intention to reach an "agreement." In P.E.R.C. No. 52, City of Camden, the Commission similarly found that an established practice would require a finding of "two sides coming to the table intent upon resolving differences and reaching agreement (even oral agreement) by compromise or otherwise." In P.E.R.C. No. 77, established practice was found to include "a mutual undertaking for the resolution of differences or an intent to achieve common agreement" and the determination of significant employee conditions through the method of the negotiations process.

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P.E.R.C. No. 79, West Paterson Board of Education  
20/ It was the rendering of P.E.R.C. No. 79 on which the Association based its request to reopen the hearing. In this decision the Commission indicated that established practice and prior agreement cannot be found to exist based solely on circumstances in evidence after the passage of Chapter 303 and that either established practice and/or prior agreement must be shown to exist prior to 1968. The Association argued that a change in standards was created through P.E.R.C. No. 79 and that an opportunity should be given through the reopening of the hearing to present evidence consistent with the standards created in that decision.

Also in P.E.R.C. No. 77, the Commission found the exceptions to require at least "an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement." In quantitative terms, also in P.E.R.C. No. 77, the Commission found established practice despite a "limited" scope of negotiations.

In the instant matter the parties negotiated four successive agreements which included the Department Chairman in the unit recognition clause, commencing with the agreement for the 1969-1970 school year. These facts are insufficient to meet the standard of "established practice" or "prior agreement" previously set forth by the Commission in that the statutory exceptions in order to be invoked must be shown to have been in existence "prior to the arrival of Chapter 303." <sup>21/</sup>

Prior to the first written agreement which post-dates 1968, there is little dispute that a relationship existed between the parties herein and that at least for 1966-1967, and 1967-1968 discussions were held on certain employment conditions for implementation the following school years. What is in dispute is whether or not the substance of the discussions constitute an "established practice" prior to 1968 which in conjunction with post-1968 experience would dictate the continued inclusion of Department Chairmen, above found to be supervisors within the existing unit.

The Association seeks to establish a negotiating relationship commencing with 1962-1963. Robert McGluckie, Chairman of the Association's Salary Committee in 1966-1967, testified that he was aware of "negotiations" during 1962-1963 through a series of memoranda he received from a Salary Committee which met with the Board of Education. The record is devoid of

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<sup>21/</sup> P.E.R.C. No. 79, Supra.

any evidence which would support a finding of a bilateral negotiating relationship and accordingly no "established practice" is found for the time period 1962-1963.

The bulk of the testimony regarding "established practice" relates to 1966-1967 and 1967-1968. The record establishes that during 1966-1967 a series of approximately 12 meetings took place and during 1967-1968 approximately 15 meetings took place between the Association and the Board of Education regarding certain employment conditions. The meetings were held between October and January of those years. The objective of the parties was to at least establish a salary guide for the ensuing school year prior to the submission of the budget to the public for referendum. The record indicates that the meetings were concluded prior to the budget submission and that no meetings were held thereafter. For the 1966-1967 negotiations, a list of items was submitted to the public employer including improvements in Blue Cross-Blue Shield benefits, additional salary guides to reflect credit for certain graduate levels, a request for an index guide, a nurses salary guide, an administrators index guide, a salary guide for coaches, monetary improvements for "bedside" instructors and driver education instructors and a longevity payment beyond the regular salary guide. These items appear on notes <sup>22/</sup> Mr. McGluckie testified he made during the negotiations.

During the approximately 12 sessions in 1966-1967, the Association emphasized salary and failed to achieve concessions in the remaining areas and dropped pursuit of the other items. The Association contends an agreement was reached on a salary guide while the Petitioner asserts that the "agreement" was nothing more than what the Board would submit to the public for adoption. The Department Chairmen at the time were compensated on the teachers' salary guide and in addition received a stipend. No specific items were included of the

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22/ The Board of Education objects to this document's admissability. The document was received into evidence over petitioner's objection. Mr. McGluckie testified first-hand knowledge of the document and his testimony concerning the items is corroborated by Mr. Sneidiker's testimony, a Petitioner witness. Tr. 220.  
Respondent Exhibit No. 6

discussions which related solely to a term and condition of employment for Department Chairmen, although any benefit received by a teacher would apply to the Department Chairmen. There were no issues raised which could be defined as non-monetary.

At the conclusion of the series of meetings in 1966-1967, the Association contends an agreement was reached on a salary guide. No documents of proposals, counter-proposals, memoranda of agreement, or initialing of tentative agreements were offered into evidence relating to discussions or negotiations held prior to the first written agreement for 1969-1970. The President of the Association in 1966-1967 and member of its salary committee testified that an agreement itself was finalized. Upon the conclusion of the series of meetings the committees of both parties would return to their respective bodies for approval of a salary guide. Upon the approval of the Association and Board, the Board would incorporate the funds necessary to implement the proposed salary guide in their budget request which would be submitted to the public for voting approval. The Board would present the salary guide at a public meeting prior to the budget referendum support it, and indicate it was the result of bilateral discussions.

The Chairman of the Association's Salary Committee for 1967-1968, Gerome Rainieri, testified that Association membership and individuals with teaching responsibilities constituted the scope of the negotiating unit. He testified that approximately 15 meetings took place and the issues of salary, nurses guide, Blue Cross/Blue Shield were discussed. He testified that the Committee achieved an increase in Blue Cross/Blue Shield payments and a salary index. He testified that a written agreement was made and that it was signed by the President of the Association and Board of Education. He produced no documentation relating to the series of meetings which took place. No benefits were negotiated specifically for the Department Chairmen although they received the benefits of increases in salary and medical payments received by the teachers. He testified that Department Chairmen were negotiated for by

the Association based on the fact that they were also classroom teachers.

A Petitioner witness, Assistant Principal Chester Snediker, who in 1966 was a mathematics teacher and a member of the Association's salary committee, testified that he attended a majority of the meetings held between the parties. His testimony corroborates that of Mr. McGluckie in the area of the number of meetings and issues discussed. He disputes that the series of meetings were negotiations and represents that the Board adopted the posture of meeting for informational purposes prior to its adopting of a guide. He testified that the Board transmitted a position that it felt no obligation to alter the guide from the prior year. The testimony conflicts from other testimony wherein he concedes that the Board would make higher proposals in response to Association rejection of lower proposals.

The Hearing Officer finds that in 1966-1967 and 1967-1968 the parties did meet on a consistent basis prior to the Board's submission of the budget, and that a series of meetings were held in 1966-1967 and 1967-1968 in an attempt to reach an agreement on certain conditions of employment and to incorporate such costs within the proposed budget for implementation for the next school year. The Department Chairmen, as teachers and members of the Association, were represented at the meetings and although no formal recognition of this fact was documented, there was at minimum a tacit understanding that their interests were present at the table. This finding is supported by record evidence that the first four written agreements between the parties clearly included the Department Chairmen within the recognition clause and that the parties in their first written agreement did not dispute the unit structure as it related to Department Chairmen. This contract for 1969-1970, the undersigned hereby finds to be evidence of a continuation of the parties' existing practice to include Department Chairmen with the remainder of the unit. Indeed, it was not until the second written



agreement that the petitioner sought to negotiate the exclusion of Department Chairmen from the unit and failed. It was not until after the fourth successive written agreement that the instant petition was filed and record indicates that the subject of Department Chairmen was discussed in each of the negotiations for the second, third and fourth agreement.

The Petitioner asserts that the "negotiations" took place with a tacit understanding that they would terminate by budget submission and thus alleges that they were not negotiations but an informational process through which the Board would have knowledge of its fiscal implication. While this may have been the source of the employer's motivation, it does not negate its participation in a negotiating process. Accordingly, this argument is rejected. The parties apparently had a history of negotiating between October and January prior to budget and the record indicates that during the negotiations for the first written agreement, post-Chapter 303, that the time framework for negotiations was between October and January, a continuation of the past.

A further argument offered by the Board is that the final "agreement" was substantially what the Board had intended to arrive at notwithstanding the meetings which took place. The evidence does not support this claim although again, if found to be accurate does not negate its participation in a negotiating process. Indeed, the negotiation of a salary index during the 1967-1968 meetings cannot be attributed to what the Board intended to give unilaterally but was a subject initiated by the Association and implemented for the 1968-1969 school year.

The Petitioner seeks the Hearing Officer to place great weight on the lack of documentation offered by the Association in minimizing the oral testimony of Association witnesses. The undersigned is keenly aware of the Association's lack of documentation. The Commission has, however, found oral agreement as a result of the negotiations process to meet the standard of established practice. The Hearing Officer finds the Association's witnesses to have offered credible testimony. Mr. Snediker, Petitioner's witness, concedes that a salary guide would have been adopted at less of a figure which was eventually adopted if the Salary Committee had accepted a lower proposal than what was finally

achieved. His testimony that the Association's position was akin to being "hat in hand," relates to the relative negotiating strength of the parties. The principle of established practice relates to the process of negotiation rather than who possessed the greater negotiating power.

The Petitioner argues that the scope of the discussions were narrow, involving salary alone and that the impact of Chapter 303 was felt after the first contract and thus sought to exclude Department Chairmen from the unit. The record supports the argument that items such as grievance procedures were not included in pre-Chapter 303 discussions and that the Department Chairmen are placed in a potential conflict of interest by virtue of being the employer's representative in the first step of the procedure where they have been since the first written agreement. It is also true that the first written agreement placed the Department Chairmen in the unit recognition clause and, therefore, both items were the result of voluntary agreement of the parties. The Department Chairmen continue to exercise teaching responsibilities which from the beginning formed the basis for Association representation.

The undersigned, therefore, finds that the negotiations process in evidence for 1966-1967 and 1967-1968 and its continuation for four successive contracts post-1968 constitutes an established practice. As no documentation was presented which embodies terms and conditions of employment prior to 1968, no "prior agreement" is found to exist; nor is there any evidence which would compel a finding of "special circumstances."

The finding of established practice compels an analysis into the experience of the unit in order to determine whether or not the existence and extent of conflict would vitiate or nullify the existence of the exceptions pursuant to the Commission standards created in P.E.R.C. No. 79, wherein the Commission held that such examination is essential despite a finding of the exceptions.

The employer has raised one incident which it argues depicts a relationship of conflict. Mrs. Elizabeth Glosser, a non-tenured mathematics teacher,

received a negative evaluation of her teaching performance from her Department Chairman. Mrs. Glosser appealed the validity of the evaluation through a contractual provision which permits the non-tenured teacher to confer with the Administration if an "uncertainty" exists with respect to her employment for the ensuing year. A meeting was held at the principal's level and pursuant to the contract clause, Association representation was requested and received. In attendance at the meeting were Mrs. Glosser, the principal, the superintendent, the Department Chairman, and Association representative.

Some time after the meeting the leadership of the Association met with Department Chairmen involved and requested that his evaluation of Mrs. Glosser be changed from negative to positive. The Department Chairman involved did not change his evaluation and continued not to render a positive recommendation of the teacher.<sup>23/</sup> The Department Chairman, apparently apprehensive over the incident, communicated to the Superintendent concerning this request to alter his evaluation, at which time a meeting was held and the Superintendent informed the Association representatives that their activities were improper and that in the future they should conduct themselves accordingly.

In the judgement of the undersigned this incident should not be accorded such weight so as to nullify the above found established practice between the parties. The activities of the Association representative did present an incident of conflict of interest which the Association so acknowledged during the hearing. However, the incident must be placed in the perspective of a long-term relationship and is not indicative of the parties' relationship but rather an exception within the historical existence. The Department Chairman involved negatively evaluated a non-tenured teacher. He did not change his recommendation and in fact, supported his recommendation to the administration. There is no evidence that the actions of the Department Chairman or the Association compromised

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<sup>23/</sup> This incident further demonstrates the effectiveness of a recommendation by a Department Chairman pursuant to an evaluation.

the employer's position in any way. In fact, the incident was communicated to the Superintendent who held a meeting to dispose of the issue. During the history of the relationship of the parties there has been no evidence that the inclusion of the Department Chairmen in the unit has in any way compromised the loyalty of the Department Chairmen in the discharge of their duties to the administration nor has their inclusion resulted in the Department Chairmen indicating any feeling of discrimination or lack of fair representation by the Association during negotiations on their behalf. In fact, the Department Chairmen voice a desire to continue in the unit and to continue to discharge their responsibilities to the Board of Education.<sup>24/</sup> In fact, after the incident the employer negotiated an additional agreement and included the Department Chairmen in the unit.

In finding that the existing unit should continue unaltered it should be emphasized that the Hearing Officer is neither creating the instant unit nor endorsing the inclusion of supervisors in negotiating units with non-supervisors as the most desirable labor relations concept. To permit the continuation of mixed units under certain circumstances is a matter of legislative expression which cannot be ignored. Notice is taken of recent amendments to the Statute, P.L. of 1974, c. 123, effective January 20, 1975 which do not alter previous legislative expression to permit mixed units upon findings of statutory exceptions.

RECOMMENDATION

Based upon all of the foregoing and the entire record of this proceeding, the undersigned recommends that the instant petition be dismissed.

  
James W. Mastriani  
Hearing Officer

JWM:l  
DATED: Trenton, New Jersey  
March 17, 1975

<sup>24/</sup> The employer cites Wilton, Supra to argue that desires of employees cannot dictate or control unit placement. In a de novo situation I would concur. However, in examining a situation of established practice, it should be accorded weight when examining questions of fair representation and conflict of interest.