

D.R. NO. 83-10

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

In the Matter of

CLIFFSIDE PARK BOARD OF EDUCATION,

Public Employer,

-and-

CLIFFSIDE PARK SUPERVISORS
ASSOCIATION,

Petitioner,

DOCKET NO. RO-82-56

-and-

CLIFFSIDE PARK EDUCATION
ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation, adopting the recommendations of a Hearing Examiner, determines that Department Heads are supervisors, may be removed from a unit with teaching personnel, and may vote in an election to select or reject a negotiations representative for a unit of department heads. The Director's decision is consistent with numerous recent decisions finding that department heads exercise supervisory powers, particularly in the observation and evaluation of teachers. The Director also rejects the contention of the teachers association that department heads remain in the unit to the extent that they are teachers. Such a conclusion would promote conflicts of interest.

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Intervenor.

Appearances:

For the Public Employer
Winne, Banta & Rizzi, Esqs.
(Robert N. Jacobs of counsel)

For the Petitioner
Robert M. Schwartz, Esq.

For the Intervenor
Bucceri & Pincus, Esq.
(Sheldon H. Pincus of counsel)

DECISION AND DIRECTION OF ELECTION

On October 1, 1981, a Petition for Certification of Public Employee Representative, supported by an adequate showing of interest, was timely filed with the Public Employment Relations Commission ("Commission") by the Cliffside Park Supervisors Association ("Petitioner"), seeking to represent, "All personnel who have been appointed department supervisors having supervisory responsibilities within the meaning of N.J.S.A. 31:13A-5 et seq." who are employed by the

Cliffside Park Board of Education ("Board"). The department supervisors are currently represented by the Cliffside Park Education Association ("Association") and are included in a unit which includes teachers and other professional staff. Pursuant to N.J.A.C. 19:11-2.7, the Association requested and was granted intervenor status.

Hearings were held before Commission Hearing Officer, Robert E. Anderson, Jr., on February 10 and 11 and also April 12, 1982, in Newark, New Jersey, at which time all parties were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Post-hearing briefs were submitted by the parties, the last of which was received by June 7, 1982. The Hearing Officer thereafter issued his Report and Recommendations on June 21, 1982., a copy of which is attached hereto and made a part hereof. The Association filed exceptions to the Hearing Officer's Report and Recommendations on July 1, 1982.

The undersigned has considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, the exhibits and the Association's exceptions and finds and determines as follows:

1. The Cliffside Park 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 Cliffside Park Supervisors Association and the Cliffside Park Education Association are employee representatives within the meaning of the Act and are subject to its provisions.

3. The Association is the exclusive representative of a unit of professional employees which include teachers, department heads and other professional titles.

4. The Petitioner seeks a separate negotiations unit of department heads/supervisors of instruction ("department heads"). It argues that department heads are supervisors and therefore may not be included in a unit which includes nonsupervisors. The Board agrees that department heads are supervisors and does not oppose a separate unit. The Association argues that the department heads are not supervisors, and that their inclusion in the negotiations unit with teachers does not present a conflict of interest. It further argues that even if department heads are excluded from the unit because of their supervisory status, they should remain in the unit to the extent that their duties are the same as any other teacher in the unit. ^{1/}

5. The Hearing Officer found that the department heads are supervisors within the meaning of the Act, that through their roles in the observation/evaluation process and in making recommendations with respect thereto they have substantial power to affect the careers of teachers, and that the exercise of their supervisory responsibilities would present a conflict of interest vis-a-vis their inclusion in the negotiations unit with teaching staff members whom they supervise. He also found that the teaching duties of department heads as could not be separated from their duties as supervisors and thus

^{1/} N.J.S.A. 34:13A-5.3 provides that under certain conditions a mixed unit of supervisory and non-supervisory employees is permitted. However, the Association does not contend that any of the statutory exceptions apply to the instant matter.

they could not be included in the unit to the extent that they are teachers. Finally, the Hearing Officer recommended that the department heads be removed from the existing collective negotiations unit and be provided with the opportunity to choose separate representation.

The Association excepts to the Hearing Officer's findings, arguing that the department heads are not supervisors within the meaning of the Act and that there is no actual or potential conflict of interest between the department heads and other unit members. The Association further submits that even if the department heads are supervisors, to the extent that they are teachers, they should be included in the existing unit.

After a review of the entire record, the undersigned adopts the Hearing Officer's findings of fact, conclusions of law, and recommendation that an election be provided to resolve the question concerning representation in the unit of department heads.

N.J.S.A. 34:13A-5.3 defines a supervisor as one having the power to hire, discharge or discipline employees, or to effectively recommend the same. In numerous recent decisions, which have reviewed school district situations subsequent to the promulgation by the Commissioner of Education of regulations concerning the observation/evaluation of teachers in accordance with the "thorough and efficient" education mandate, the undersigned has consistently found department

chairpersons to have supervisory status. ^{2/} The record herein reveals that department heads, all of whom hold supervisory certificates, play a substantial role in a teacher's evaluation and submit these written evaluations to the principals with recommendations. The evaluation process plays a significant role in decisions involving the reappointment or non-reappointment of teachers as well as the granting or denial of tenure. The record also reveals that the department heads, together with the building principal and vice-principal, conduct the hiring interviews for prospective teachers in the department head's area of expertise. Each member of the interviewing team prepares an appraisal record and makes a recommendation. The high school principal stated that no person has ever been hired over the objection of a department head. Department heads also help prepare class schedules and assignments and develop a budget for their own department. The high school principal described the department heads as being part of the management team.

After a review of the record the undersigned is satisfied that, based on the functions they perform, particularly in the observation/evaluation/recommendation process, the department heads in this instance are statutory supervisors and that, for collective negotiations

2/ In re Delaware Valley Regional High School Board of Education, D.R. No. 82-11, 7 NJPER 530 (¶ 12234 1981); In re Emerson Board of Education, D.R. No. 82-13, 7 NJPER 571 (¶ 12255 1981); In re Edison Twp. Bd. of Ed., D.R. No. 82-8, 7 NJPER 560 (¶ 12249 1981); In re Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (# 12247 1981); In re Waldwick Bd. of Ed., D.R. No. 82-5, 7 NJPER 498 (¶ 12221 1981); In re Ramsey Bd. of Education, D.R. No. 82-37, 8 NJPER 141 (¶ 13062 1982), aff'g H.O. No. 82-8, 7 NJPER 688 (¶ 12309 1981); In re Bloomfield Bd. of Ed., D.R. No. 82-56, 8 NJPER 383 (¶ 13175 1982), aff'g H.O. No. 82-13, 8 NJPER 262 (¶ 13113 1982); In re Parsippany-Troy Hills Bd. of Ed., D.R. No. 82-51, 8 NJPER 282 (¶ 13128 1982), aff'g H.O. No. 82-12, 8 NJPER 178 (¶ 13077 1982); In re Paterson Bd. of Ed., D.R. No. 82-46, 8 NJPER 250 (¶ 13110 1982).

purposes, they must be separate from the teachers they supervise.

The undersigned is further satisfied that this is not a situation where the department heads should remain in the existing unit to the extent that they are teachers. In In re Ocean Twp. Bd. of Ed., P.E.R.C. No. 82-9, 7 NJPER 446 (¶ 12198 1981) the Commission held that the Board could appoint non-unit supervisory employees, specifically, department chairpersons, to co- and extracurricular positions which were represented in the teachers unit. The Commission held that the department chairpersons would be unit members for the limited purpose of determining the terms and conditions of employment associated with the extra-curricular position.

In footnote 11 of Ocean Twp., the Commission stated: "No tension will exist between the limited inclusion of department chairpersons and teachers in the same unit because department chairpersons will have no supervisory responsibilities over other unit members stemming from their extracurricular activities." In Ocean Twp. there existed minimal potential for conflict as the result of the limited scope of negotiations involving extra-curricular employment conditions, predominantly stipend. Department heads perform teaching and other non-supervisory functions activities as part of their overall job function. As a result of the far more expansive area of negotiations relating to these activities, the degree of tension is more significant in the instant context. Negotiable issues, such as hours, workload, pupil contact time as opposed to time devoted to evaluation and other administrative functions, are matters which may concern both teachers

and department heads and therefore may inevitably lead to the conflict which unit separation would avoid.

Accordingly, for the above reasons, the undersigned adopts the Hearing Officer's Recommendation that department heads are supervisors within the meaning of the Act and should be removed from the Cliffside Park Education Association. The petitioned-for unit is prima facie appropriate. Therefore, the undersigned finds that the appropriate unit for collective negotiations is: all department heads/supervisors of instruction, but excluding managerial executives, confidential employees, police and craft employees, and all other professional employees of the Cliffside Park Board of Education. ^{3/}

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

Those eligible to vote are the department heads who are employed during the first payroll period of September 1982, including employees who did not work during that period because they were out ill, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligiblt to vote. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

^{3/} The department heads include the heads of the following high school departments: Social Studies, Business, English, Language, Science, Mathematics, Industrial and Fine Arts, Physical Education, and Guidance and the heads of the following middle school departments: English/Social Studies, Math/Science, Special Subjects, and Reading, and the head of the Child Study Team.

Pursuant to N.J.A.C. 19:11-9.6, the Public Employer shall file with the undersigned and with the Petitioner an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with the Petitioner with statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

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

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

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director

DATED: September 3, 1982
Trenton, New Jersey

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Intervenor.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that a representation election be held among department heads employed by the Cliffside Board of Education. He concludes that department heads are supervisors within the meaning of the New Jersey Employer-Employee Relations Act and thus cannot remain in the same negotiations unit as the teachers they supervise. He also rejects an argument that department heads should remain in the unit to the extent they teach.

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Appearances:

For the Public Employer, Winne, Banta & Rizzi, Esqs.
(Robert N. Jacobs, of Counsel)

For the Petitioner, Robert M. Schwartz, Esq.

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

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On October 1, 1981, the Cliffside Park Supervisors Association ("CPSA") filed a Petition for Certification of Public Employee Representative (A-1A).^{1/} CPSA sought to represent a unit of: "All personnel who have been appointed department supervisors having supervisory responsibilities within the meaning

^{1/} Commission exhibits will be designated by the letter A, Joint Exhibits by the letter J, Petitioner Exhibits by the letter P, Intervenor Exhibits by the letter I, and Employer Exhibits by the letter E.

of...N.J.S.A. 34:13A-5 et seq." by the Cliffside Park Board of Education ("Board"). The petition acknowledged that the Cliffside Park Education Association ("CPEA") claimed to represent these employees and that a contract between the Board and CPEA would expire on June 30, 1982. CPEA subsequently requested and received intervenor status.

On December 2, 1981, the Director of Representation issued a Notice of Hearing (A-1B) for January 4, 5, and 6, 1982. At the request of the CPEA, and with the consent of all parties, the hearings were rescheduled for February 10, 11 and 12, 1982 (A-2A-2C). On February 10 and 11, hearings were held. The parties requested and received postponement of the third day of hearing (A-4; A-5a-5d) which was held on April 12, 1982. At all three hearings, the parties had the opportunity to present stipulations and joint exhibits, examine witnesses, present documents, and argue orally.

Briefs were due on or before May 17, 1982 and reply briefs on or before May 25, 1982. CPEA requested a ten day extension to which all parties consented. The Board, CPEA, and CPSA filed timely briefs, and CPSA a reply brief on June 7, 1982.

Findings of Fact

1. The Cliffside Park 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 subject

to its provisions, and is the employer of the employees who are the subject of this proceeding (Tr. I, p. 6).^{2/}

2. CPEA is an employee representative within the meaning of the Act, is subject to its provisions (Tr. I, pp. 6-7), and currently represents the employees who are the subject of this proceeding pursuant to the recognition clause of a collective agreement which expires on June 30, 1982 (J-1).^{3/}

3. CPSA is not currently recognized or certified, but is seeking to become the employee representative of department heads/supervisors of instruction ("department heads") (Tr. I, p. 7).

4. There are fourteen department heads. In the high school, there are nine departments: Social Studies, Business, English, Language, Science, Mathematics, Industrial and Fine Arts, Physical Education, and Guidance. In the middle school, there are four departments: English/Social Studies, Math/Science, Special Subjects, and Reading. There is also a Child Study Team servicing both schools (J-3; Tr. I, pp. 11-12).

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

(1) are the department heads employed by the Board "supervisors" within the meaning of the Act;

^{2/} Transcript references to the hearings held on February 10, 11, and April 12, 1982 will be designated, respectively, Tr. I ____, Tr. II ____, and Tr. III ____.

^{3/} The recognition clause specifies that CPEA represents teachers, guidance counselors, the coordinator of cooperative industrial education, school psychologists, librarians, nurses, special subject teachers, special class teachers, social workers, and department heads.

(2) does a conflict of interest within the meaning of Wilton v. Board of Education of West Orange 57 N.J. 404 (1971) exist, thus necessitating removal of department heads from the unit currently represented by CPEA; and

(3) even if department heads are "supervisors," should they remain in the CPEA unit to the extent they perform teaching duties as opposed to supervisory duties (Tr. I, pp. 8-9).^{4/}

6. CPSA takes the following positions with respect to the stipulated issues:

- (a) department heads are supervisors within the meaning of the Act;
- (b) a conflict of interest exists; and
- (c) the duties of department heads as teachers cannot be separated from their duties as supervisors for purposes of determining a representative (Tr. I, pp. 12-13).

7. The Board agrees with the CPSA with respect to the

^{4/} CPEA did not contend, or present any evidence suggesting, that a pre-Act established practice or prior agreement warranted the continued inclusion of department heads in its unit. (Post-hearing brief, p. 3, n. 1) Further, although a unit of administrators exists (Tr. II, p. 36), there is no contention that a separate unit of department heads is not appropriate if the CPEA's arguments are rejected (Tr. II, p. 45).

stipulated issues (Tr. I, pp. 13-14).^{5/}

8. CPEA takes the following positions with respect to the stipulated issues:

(a) department heads are not supervisors, but are merely advisors;

(b) there have been no actual or potential instances of conflict; and

(c) in the alternative, department heads should remain in the unit to the extent they teach rather than supervise (Tr. I, pp. 14-15).

8. There are about 22,000 residents of Cliffside Park. There are about 55 teachers and 1160 students in the high school, 30 teachers and 310 students in the middle school (Tr. II, pp. 11, 81). There is an elementary school with about 10 teachers and 190 students, but no department heads (Tr. II, p. 81).

10. P-1 is the current job description for department heads (Tr. III, pp. 3-4).^{6/} This job description was promulgated

^{5/} When initially presented with CPSA's desire to represent department heads in a separate unit, the Board demurred. The superintendent testified that the Board took this position because of a single unit tradition. After the superintendent met with the department heads, came to believe a conflict of interest existed, and reported his findings to the Board, the Board adopted its present position (Tr. II, pp. 140-145).

^{6/} There was great confusion at the hearing concerning the identity of the current job description. Initially, the parties stipulated that it was J-2 (Tr. I, pp. 10-11) and every witness so testified until the superintendent uncovered this error (Tr. II, pp. 149-152). J-2 and P-1 have identical first pages except J-2 refers to "supervisors of instruction" while P-1 refers to "department head." P-1 has a second page -- covering department meetings, textbooks and supplies, co-curricular activities, and other duties -- which is apparently missing from J-2.

pursuant to a Board resolution (E-2), adopted July 10, 1980. That resolution implements N.J.A.C. 6:3-1.19 and 6:3-1.21 providing for the observation and evaluation of non-tenured and tenured teaching staff members by appropriately certified supervisory staff. It created the position of supervisor of instruction, to be known as department head. The job description requires each department head to have a standard New Jersey supervisor's certificate or equivalent, e.g., administrator's certificate. It makes department heads responsible, inter alia, for observing and evaluating teachers within their department, implementing administrative policies, assisting in interviewing candidates for positions, assisting in development of curriculum, holding department meetings, preparing a department budget, recommending class assignments, and working with the administration in carrying out all duties relating to the tenure and education laws.

11. There is no organization chart. The department heads report to their building principal who reports to the superintendent who reports to the Board (Tr. I, p. 36).

12. The superintendent testified that department heads initiate the observation and evaluation process and that their recommendations carry a weight equal to the principal's recommendations. While the principal is the overall administrator of the building, the department head is an expert in his field. The superintendent stressed his reliance on this expertise and its

importance in the educational philosophy of Cliffside Park (Tr. II, pp. 119, 129-132).

The high school principal testified that he considers department heads part of the management team in observing and evaluating teachers (Tr. II, p. 19). They are primarily responsible for observations and evaluations, and he gives their recommendations "a lot of weight" (Tr. II, pp. 39-40). When a department head identifies a problem, the principal and department head work together, in "...a collective management type of approach..." to resolve it (Tr. II, pp. 42-43, 63-64).

The middle school principal testified that he relies very heavily on department chairmen for the entire school operation (Tr. II, p. 68). They are part of the administrative organization in the middle school (Tr. II, p. 80).

They are the people who do the actual footwork for me. They are the people who keep me apprised of any situation going on in the building. Anything, not only teachers, but any situation. Fire hazards, health hazards, what have you. It would be horrendous to imagine operating without them. I would place them almost as important to me as my vice principal.
(Tr. II, p. 80)

13. The superintendent and both principals testified that the 1979-1980 school year demonstrated the indispensability of the department heads in the observation and evaluation process. During that year, the department heads were "in limbo" (Tr. II, p. 20). Not all had received the necessary supervisory certification first required by the Board in September, 1979 (Tr. II,

pp. 107-108); the administration gave them additional time (Tr. II, pp. 20-21). Further, there was a conflict over salary negotiations following the Board's decision to upgrade the responsibilities of department heads (Tr. II, pp. 112-115, Tr. III, pp. 71-75). As a result, in January or February, 1980, the Board suspended the participation of department heads in the observation-evaluation process and entrusted all these duties to the principals. The Board, temporarily it turned out, also voted to abolish the position of supervisor of instruction/department head (Id; Tr. II, p. 164; I-9). The superintendent stated that this experience proved that the principals had neither the time nor the subject matter expertise to do all the observation-evaluation functions (Tr. II, p. 119). The high school principal confirmed this assessment (Tr. II, p. 21-22) as did the middle school principal (Tr. II, pp. 83-84).

14. The superintendent and both principles described the hiring process (Tr. II, pp. 123-125; 22-28; 76-78). Resumes on file are sent to the principals and department heads for their review (Tr. II, pp. 22-25, 77). The department heads together with the building principal and vice-principal then conduct interviews.^{7/} The department head is expected to probe the subject matter proficiency of the candidate (Tr. II, p. 26). Each committee member completes an appraisal record for teaching candidates (E-1) and makes a recommendation on that form.

^{7/} In the summer, however, some department heads may not be available to participate (Tr. I, p. 131; Tr. II, p. 178).

Ordinarily, the committee recommends three persons for the superintendent to interview (Tr. II, p. 172). He does so and then makes his recommendation to the Board. No person has ever been hired over the objection of the high school principal or his department heads (Tr. II, pp. 27-28). Similarly, the middle school principal has never disagreed with a hiring recommendation of his department heads.^{8/}

15. The superintendent and both principals described the role the department heads play in preparing a budget (Tr. II, pp. 126, 173-174, 29, 78). The department heads develop, after consultation with staff members, a budget for their own department. The department head submits his budget to the principal who reviews it, discusses it with the department head, and then integrates it into one budget for his school. This budget is submitted to the superintendent who, after consulting with the principals and perhaps department heads, forms a districtwide budget (Tr. II, p. 176).^{9/}

16. Department heads help prepare class schedules and assignments (Tr. I, pp. 92-94, 119-120, 167-170; Tr. II, p. 30, 123). The department head consults with department members about their preferences and then makes recommendations to the vice-principal who actually arranges the schedules. The middle school

^{8/} Several current and former department heads also described the hiring process. See, Tr. I, pp. 37-44, 85-86, 117-118, 131-134, 157-163, 186-190; Tr. III, pp. 8-11, 22-23.

^{9/} For supporting testimony from department heads on the budgetary process, see Tr. I, pp. 44-47, 119, 166-167).

differs from the high school in that in the former the department head may also assign non-classroom duties while in the latter the vice-principal assigns such duties (Tr. I, p. 167; Tr. II, p. 30).

17. Department heads meet weekly with the building principal and vice-principal (and occasionally the superintendent) to discuss building concerns including budgets and personnel policies (Tr. I, pp. 71, 205-206; Tr. II, pp. 79, 123).

18. Department heads, in accordance with the job description, have some responsibility for developing and administering the curriculum (Tr. II, p. 123; Tr. I, pp. 168).

19. Department heads spend much of their time teaching, but not as much as other department members. For example, in the high school social studies department, the department head teaches four classes a day, members five. In addition, members have 1 1/2 duty periods which the head instead uses to perform departmental tasks (Tr. I, pp. 54-57; I-2). The head of the high school industrial and fine arts department testified similarly (Tr. I, pp. 123-124) as did the head of the middle school reading department (Tr. I, pp. 175-176).

20. The evaluation process has a number of different components including observations, conferences, observation reports, annual summary evaluations and conferences, and professional improvement plans. This process plays a critical role in decisions involving the reappointment or non-reappointment of

teachers, the granting or denial of tenure, and the granting or withholding of a salary increment.^{10/}

21. Pursuant to Board policy, non-tenured teachers must be formally observed at least three times per year, tenured teachers at least once. A conference between the observer and the observee must follow within 15 days and must include a discussion of the Teacher Evaluation/Observation Report (P-2) ("observation report") the observer fills out.^{11/} Each party to the conference must sign the observation report. A space is provided for the teacher's comments, and his signature merely signifies having read the report. The observer, teacher, building principal, and superintendent all receive a copy of the observation report (Tr I, p. 147).

^{10/} P-4, entitled Evaluation of Professional Personnel, sets forth the Board's policies and procedures for making evaluations. It was adopted on September 18, 1979, at the outset of the year the position of department head was in limbo and thus prior to the crystallization of that position's responsibilities. It assigns the Principal the ultimate responsibility for evaluation in his building (§ 12), but charges the superintendent to assign any appropriately certified personnel to perform duties of supervision within the meaning of N.J.A.C. 6:3-1.21. The high school principal questioned whether this document remains in full force and effect (Tr. II, pp. 41-42), but the superintendent confirmed that it did (Tr. II, pp. 111-112). Since its promulgation, and after the "in limbo" year passed, as will be seen, the role of the department heads in the observation and evaluation process considerably expanded and they became the appropriately certified personnel performing duties of supervision within the meaning of N.J.A.C. 6:3-1.21 and P-4.

^{11/} This form has been in use since 1979 or 1980 (Tr. I, pp. 107-108, 143; Tr. II, pp. 7-9).

In the high school, department heads perform two of the three yearly formal observations of non-tenured teachers; the principal or vice-principal performs the other. The department head performs the yearly formal observation of tenured teachers (Tr. I, pp. 21, 35, 108, 113-114), although the principal will observe a tenured teacher if the department head reports something amiss or if he wants to pick up some methodological tips for non-tenured teachers (Tr. II, pp. 4-5). In the middle school, department heads usually perform all three yearly formal observations of non-tenured teachers and the yearly formal observation of non-tenured teachers (Tr. I, pp. 141-142); the principal observes less than half the non-tenured teachers each year (Tr. II, p. 69). The principal or vice-principal will observe a particular teacher if the department head identifies a problem or so requests (Tr. I, pp. 142-143; Tr. II, pp. 101-102).

The principal reviews and signs his copy (Tr. II, pp. 69-70, 117). The superintendent also reviews this report (Tr. II, p. 117). The principal will also discuss observation reports with the department heads (Tr. I, p. 109).

There is no suggestion that either of the principals has ever disagreed with a department head's observation report or has significantly modified such a report (Tr. I, pp. 33-34, 114; Tr. II, p. 75). If a department head reports that a teacher has problems, the department head, as well as the principal, vice-

principal, or perhaps even the superintendent, will make follow-up observations (Tr. II, pp. 42-43, 181-182)^{12/}

22. Pursuant to Board policy (P-4), an annual summary report must be filed each year with the superintendent. The evaluator and evaluatee must have a conference before the form is completed. The form (P-3) contains spaces for the following information: performance areas of strength, areas needing improvement, summary of pupil progress and growth, professional improvement plan, and comments by staff member. The teacher may also request a conference with the superintendent. The form also contains a space for yes or no recommendations concerning re-appointment and salary increment.

The teacher, department head, and the building principal sign the form. The teacher, department head, principal and superintendent all receive copies of the form (Tr. I, p. 134).

P-3 was created in 1979 or 1980 (Tr. I, pp. 156-157). At that time, the principal still completed the annual evaluation (Tr. I, pp. 74-75, 110-111; Tr. II, p. 14). Hence, the form calls for the principal's signature and recommendations. In fact, now that the limbo year has passed and the position of department heads has solidified, the department head fills out and signs the report and is supposed to make recommendations on the form (Tr. I, p. 96, 126, 154, 163; Tr. II, pp. 11, 15-16, 47, 50, 68, 71, 119-120). The principal affirmatively seeks their

^{12/} Prior to the decision to require department heads to obtain certification, the principal would take over the evaluation process once a department head made a negative observation. Now, the principal and department head work cooperatively to remedy the problem (Tr. II, pp. 42-43).

recommendations, whether checked off or not (Tr. II, p. 16).^{13/}
The principal also signs the report and makes recommendations (P-4; Tr. I, pp. 75-76, 126). In addition, pursuant to Article XV of the collective agreement, the principal confers with the staff member under review (Tr. I, p. 81). The principal will also hold a meeting with the department head to review the performance of all department members, identify any problems, and discuss recommendations (Tr. II, pp. 36-37, 84).

Two department heads testified that their principal did not disagree with or modify the annual summary reports they prepared (for the first time) last year (Tr. I, pp. 33, 115). Another department head testified that the building principal withdrew and then rewrote one of her annual summary reports in the Spring of 1981 (Tr. I, pp. 148-149, 179-180). The department head had recommended that a teacher not receive tenure (Tr. I, pp. 150-151). The principal did not agree with this recommendation because two other teachers were already going to be dismissed and because a dismissal would be difficult to substantiate (Tr. I, pp. 151-153, 183; Tr. II, pp. 71-72). The principal apparently did not disagree with the negative content of the evaluation report, only the feasibility of dismissal (Tr. I, p. 199; Tr. II, pp. 71-72). The department head withdrew from the evaluation

^{13/} Some department heads have failed to check off a recommendation on salary increments on P-3, perhaps because of the misleading nature of the form (Tr. I, p. 31, 131; Tr. II, p. 16). The forms were not changed because of the expense; the next batch will make clear the responsibility of the department heads (Tr. II, p. 120).

process concerning the protesting teacher (Tr. I, p. 179), and the principal is now monitoring that teacher's professional improvement plan (Tr. I, p. 181; Tr. II, p. 85).

23. The professional improvement plan (PIP) is a subpart of the annual summary report (P-3; P-4). PIPs were introduced a little more than two years ago (Tr. P-4; Tr. I, p. 25). The department head meets with the faculty member and discusses areas of possible improvement. The teacher then writes up his plan, which is in turn discussed and incorporated into the annual summary report. The department head monitors the teacher's progress under the plan (Tr. I, pp. 25-28; Tr. II, pp. 17-18).^{14/}

24. Department heads make recommendations concerning the granting or denial of tenure (Tr. I, pp. 34, 121-122).^{15/} With the exception of the incident previously discussed in finding of fact #22, it appears that the principals, superintendents, and Board have uniformly followed the recommendations of department heads on tenure (Tr. I, pp. 34, 122; Tr. II, pp. 37-38, 74, 127-128, 174). About 12 high school teachers have received tenure in the last three years (Tr. II, p. 37).

^{14/} On one occasion since the beginning of the 1980-1981 school year, a principal has drafted a PIP. The principal and department chairperson did not agree with the teacher's proposed plan, and agreed it should be changed in accordance with the principal's draft.

^{15/} One department head testified that he did not make "formal" recommendations on tenure and that tenure automatically resulted from adequate performance (Tr. I, pp. 120-121, 131). In fact, however, the principal discussed with him whether tenure should be granted and his observations and evaluations as well as his response certainly played a role in answering this question (Tr. I, p. 121-122, 135). Another former department head testified similarly (Tr. III, p. 12), but her testimony is discounted since she resigned her position as department head before the present system was fully in place (Tr. II, pp. 7, 19).

25. Department heads make recommendations, written and/or oral, concerning the reappointment or non-reappointment of teachers (Tr. I, pp. 32-33, 155-156). Putting aside the instance in which tenure was denied over a department head's objection, the principals and superintendents generally follow the recommendations of department heads in this regard (Tr. I, pp. 32-33, 123, 125, 152-153, 174, 182; Tr. II, pp. 28, 61, 73-74, 127-128, 174, 183; Tr. III, pp. 14, 23-24, 33-35).

26. The high school principal recalled one incident in 1973 or 1974 in which a department head recommended, and he concurred, that a salary increment be withheld (Tr. II, pp. 60-61). With that exception, no witness could remember any incidents of either recommended or actual salary withholding (Tr. I, pp. 116, 156; Tr. II, pp. 39, 93-95, 127-128, 174; Tr. III, p. 11). As mentioned above, the superintendent and principals expect department heads to make formal recommendations concerning salary increments, although some heads have not done so.

27. The testimony concerning suspensions or written reprimands was sparse. The high school principal did not recall any written reprimand within the last three years (Tr. II, p. 40). He did, however, suspend one teacher for one day in May, 1980 because she disobeyed a duty assignment order from him. Because the matter involved duty, and not academic performance, and because the incident occurred during the "limbo" year, the

department head was not involved (I-4; Tr. II, pp. 38, 52-53, 64; Tr. III, pp. 16-18). Although the middle school principal did not recall any recent written reprimands (Tr. II, p. 75), a department head testified credibly that two years ago the principal placed a sealed letter of reprimand in a personnel file (Tr. I, pp. 172-173). The principal wrote the letter based on his, the department head's, and the vice-principal's observations. The department head in part brought the matter to the principal's attention (Tr. II, pp. 172-173). He could not recall any suspensions in his school (Tr. II, p. 75). No other witness remembered any other incidents of suspension or written reprimand (Tr. I, pp. 120, 173, 204).

28. There was a one or two day strike in the school district about 1975 or 1976 (Tr. I, pp. 194-195, 207-210, 34-35; Tr. III, pp. 52-53). Department heads participated (Tr. I, pp. 195, 207; Tr. II, pp. 34-35; Tr. III, pp. 52-53).

29. A department head testified that at a CPEA executive board meeting in October 1981, she was told that if a teacher grieved her poor evaluation, CPEA would support the teacher against the department head because the Board would support the latter (Tr. I, pp. 196-198, 200-201). The meeting concerned the recommendation not to grant tenure previously described in finding of fact #22. Because the recommendation was withdrawn, a grievance was not filed (Tr. I, pp. 148-149).

No grievances have been filed against department heads as a result of their role in the observation-evaluation process

(Tr. I, pp. 71-72, 117; Tr. II, p. 31. Nor have department heads requested the filing of any grievances on their own behalf (Tr. III, pp. 100-101).

The first step of the grievance procedure in the collective agreement is discussion with the principal (J-1, Art. III).

29. The superintendent believed that common membership in the same unit and employee organization made it more likely that a department head's evaluation of a teacher would be less candid (Tr. II, pp. 132-133). He cited no specific examples of less than candid evaluations (Tr. II, pp. 136-137). The high school principal did not share this concern in the absence of an actual conflict (Tr. II, p. 34). The principal had no fear that common unit or organization membership would impair a principal's candid evaluation of a vice-principal (Tr. II, p. 137).

Discussion

The first issue is whether the department heads in the Cliffside Park school system are "supervisors" within the meaning of N.J.S.A. 34:13A-5.3 and 5.6. Section 5.3 provides, in 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.

Section 5.6 provides, in part:

...except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors.

In the public sector, the board of education retains the ultimate power to hire, discharge or discipline. Thus, the critical question is whether the department heads in a school district have the power to "effectively recommend" such personnel actions.

In In re Emerson Board of Education, H.O. No. 81-14, 7 NJPER 374, 381 (¶12171 1981), I catalogued Commission, Director of Representation and Hearing Officer cases concerning department chairpersons or equivalent positions. In each case, department chairpersons were in fact found to be supervisors within the meaning of the Act.

Since Emerson, several more decisions have issued. In re Delaware Valley Regional High School Board of Education, D.R. No. 82-11, 7 NJPER 530 (¶12234 1981); In re Emerson Board of Education, D.R. No. 82-13, 7 NJPER 571 (¶12255 1981); In re Edison Twp. Bd. of Ed., D.R. No. 82-8, 7 NJPER 560 (¶12249 1981); In re Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981); In re Waldwick Bd. of Ed., D.R. No. 82-5, 7 NJPER 498 (¶12221 1981); In re Ramsey Bd. of Education, D.R. No. 82-37, 8 NJPER 141 (¶13062 1982), aff'g H.O. No. 82-8, 7 NJPER 688 (¶12309 1981); In re Bloomfield Bd. of Ed., D.R. No. 82-56, 8 NJPER ____ (¶____ 1982), aff'g H.O. No. 82-13, 8 NJPER 262 (¶13113 1982); In re Parsippany-Troy Hills Bd. of Ed., D.R. No. 82-51, 8 NJPER ____ (¶____ 1982), aff'g H.O. No. 82-12, 8 NJPER 178 (¶13077 1982);

In re Paterson Bd. of Ed., D.R. No. 82-46, 8 NJPER 250 (¶13110 1982). Each of these cases concludes that department chairpersons are supervisors.

Laws and regulations in the past few years have sought to strengthen supervisory controls over the teaching process in order to guarantee the students' state constitutional right to a "thorough and efficient education." See, N.J. Const., Art. 8 §4, ¶1; N.J.S.A. 18A:27-3.1; N.J.A.C. 6:3-1.19; N.J.A.C. 6:3-1.21. In response to these legal requirements, school boards throughout the state have developed more structured observation and evaluation systems, have required department chairpersons to obtain certification as supervisors, and have delegated more responsibility in the observation and evaluation process to department chairpersons. Our cases reflect these developments.

This case is not an exception. In 1979, the Board articulated a new, more structured policy on the observation and evaluation process. It required department heads to obtain the necessary supervisory certification to perform the observations and evaluations which the applicable laws and regulations and the new Board policy contemplated. After the 1979-1980 school year passed and all department heads were certified, the role and authority of the department heads in the observation process solidified. The superintendent and the principals place great reliance on the personnel recommendations of the department heads and especially defer to their subject matter expertise. While

not necessarily determinative, these recommendations are almost always followed. Further, the principals and superintendent depend upon department heads to identify and report teaching deficiencies and to help resolve these problems. In essence, the superintendent, principals, and department heads now work as a supervisory team. Both the role of the department heads in the observation/evaluation process and their successful track record in making recommendations establish their substantial power to affect, adversely or positively, the careers of teachers and thus their supervisory status within the meaning of our Act.^{16/}

The CPEA argues, in the alternative, that even if department heads as department heads should be removed from its unit, they should remain in the unit to the extent (more than one-half their time) they teach. It relies upon In re Fair Lawn Bd. of Ed., P.E.R.C. No. 79-45, 5 NJPER 50 (¶10033 1979). There, the Commission restrained arbitration over the appointment of a non-unit employee to be head football coach, a unit position. The Commission held that the board has a prerogative to appoint whomever it wanted to that position. The Commission recognized, however, that "the effect on an employee's terms and conditions of employment associated with the person's selection as head football coach is mandatorily negotiable." Supra at p. 50.

^{16/} Because of this conclusion, it is not necessary to decide whether a conflict of interest exists which would preclude common unit membership even if department heads were not "supervisors" within the meaning of the Act.

In In re Ocean Twp. Bd. of Ed., P.E.R.C. No. 82-9, 7 NJPER 446 (¶12198 1981), the Commission asked and answered the question CPEA now poses. Applying Fair Lawn, the Commission held non-negotiable a proposed contract clause that would have prevented the Board from appointing non-unit employees, specifically department chairpersons, to perform coaching and other co- and extra-curricular work historically performed by unit employees. The Commission reiterated that while a Board could unilaterally appoint department chairpersons to extracurricular positions, it would have to negotiate with the exclusive representative over the terms and conditions of employment of that position. In a footnote, n. 11 at p. 448, the Commission implicitly distinguished the situation presented here:

Department Chairpersons who come to occupy co- and extracurricular positions within the unit will thus be unit members in their co- or extracurricular capacities rather than in their supervisory capacities. No tension will exist between this limited inclusion of department chairpersons and teachers in the same unit because department chairpersons will have no supervisory responsibilities over other unit members stemming from their extracurricular activities.

(Emphasis supplied) ^{17/}

Although the footnote is dictum, I find it persuasive. The tension between supervisors and non-supervisors our Act seeks to ease will persist if CPEA represents department heads to the

^{17/} Some department heads in Cliffside Park have co- or extra-curricular unit posts. Under Fair Lawn and Ocean Twp., these positions remain in the unit, regardless of who holds them.

extent they teach. Such representation would give teachers too much power over the terms and conditions of employment of their supervisors and might correspondingly inhibit the inclination and ability of department heads to criticize teachers in their observations and evaluations. Further, while there is a clear division between the positions of department head, and, say, football coach, it would be artificial to sever what is one position -- department head -- into two separate components. Accordingly, I reject CPEA's alternative argument.

Conclusions of Law

1. The Cliffside Park department heads are supervisors within the meaning of the Act.
2. Department heads may not remain in the CPEA unit to the extent they teach.

Recommendations

1. Department heads in the Cliffside Park school system should be removed from the unit of employees which the CPEA represents.
2. In the absence of recognition pursuant to N.J.A.C. 19:11-3.1, a representation election should be promptly conducted in the following separate and appropriate negotiations unit: All department heads employed by the Cliffside Park Board of Education, including the heads of the following high school departments: Social Studies, Business, English, Language, Science, Mathematics, Industrial and Fine Arts, Physical

Education, and Guidance and the heads of the following middle school departments: English/Social Studies, Math/Science, Special Subjects, and Reading, and the head of the Child Study Team.



ROBERT E. ANDERSON, JR.
Hearing Officer

DATED: Trenton, New Jersey
June 21, 1982