E.D. NO. 12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HENRY HUDSON REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION

Public Employer - Petitioner

and

Docket No. CU-11

HENRY HUDSON REGIONAL EDUCATION
ASSOCIATION, INC.

Employee Representative

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the status of Department Chairmen, hearings were held before ad hoc Hearing Officer Jonas Silver at which all parties were given an opportunity to present evidence, examine and cross-examine witnesses and to argue orally. Thereafter, the Hearing Officer issued his Report and Recommendations, attached hereto. Exceptions to that Report were filed by both Petitioner and the Association. The Executive Director has considered the record, the Hearing Officer's Report and Recommendations and the Exceptions, and on the facts in this case finds:

1. The Petitioner, Henry Hudson Regional School District Board of Education is a public employer within the meaning of the Act and is subject to its provisions.
2. Henry Hudson Regional Education Association, Inc. is an employee representative within the meaning of the Act.

3. The Employer seeks to exclude department chairmen from the unit currently represented by the Association. Since the Association opposes this effort, there is a question concerning the composition of the negotiating unit and the matter is properly before the Executive Director for determination.

4. The Hearing Officer found that department chairmen are supervisors within the meaning of the Act. He further found that established practice, namely, a five year history of collective negotiations covering department chairmen and teachers jointly, dictated the inclusion of the former in the unit with teachers.

The Employer excepts to this latter conclusion on the ground that the five year process was not collective negotiations but simply compliance with the State constitutional guarantee of the right to organize and grieve collectively; secondly, on the ground that there was in fact a legal impediment to the act of engaging in collective bargaining prior to the passage of Chapter 303. The undersigned concludes that the record fully supports the Hearing Officer's characterization of the process as collective negotiations, as that term is generally understood in the field of labor relations. It may be that, subjectively, the Employer intended to do no more than comply with the constitutional provision. However, the Employer's conduct, rather than the reason for that conduct, is the proper area of inquiry. The record demonstrates that the essential elements for negotiations existed: 1/ the give and take of a bilateral

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1/ Board Member Brown's testimony indicates that meetings with the Association were limited to an exchange of information, i.e., the Association stated what it wanted and the Board, upon consideration stated what it would give. The Hearing Officer did not credit this testimony. Rather, he relied upon the testimony of Board President Higgins and two Association witnesses. The record amply supports the Hearing Officer's credibility findings which we adopt.

relationship, through proposal and counterproposal, directed towards consummation of a mutually acceptable agreement. 2/ Whether this process goes beyond the right to organize and grieve need not be answered.

The Employer's second basis for exception places the same facts in a different perspective: no established practice can be found because the "bargaining" process which is used to support that finding was beyond the legal capacity of the parties. The Employer relies on several court cases 3/ for the proposition that prior to Chapter 303 public employees had no right to engage in collective bargaining. In the Employer's view this amounts to a prohibition which cannot be avoided simply by designating the process as "negotiations" rather than "bargaining". We question that the absence of the right to bargain or negotiate should be read as a prohibition against doing so. But that question need not be answered here because, once again, the issue is essentially a factual one, not legal. We are concerned with what transpired between the parties during the five-year period in question. We have found in essence that they were engaged in a process whereby differences were harmonized or adjusted in order to reach mutual agreement on certain terms and conditions of employment for teachers and department chairmen. However this process is described is considerably less important than the fact that it occurred. Even if it is now termed "bargaining", the history of the situation is

2/ cf. Middlesex County College Board of Trustees, Perc. No. 29.

3/ Delaware River and Bay Authority v International et al, 45, N.J. 138 (1965): Woodbridge Township Education Association v Board of Education of the Township of Woodbridge, 91 N.J. Super 54 (chan. 1966).

changed not at all by observing that bargaining was prohibited. The semantics problem should not divert attention from the central issue of this case: whether the history of dealings between these parties, as described above, for a unit of teachers and department chairmen demonstrates the desirability and propriety, in terms of the Act's objectives, of continuing that same relationship; or, in the words of the Act, whether established practice dictates the inclusion of supervisors with non-supervisors. The Hearing Officer found that there was an established practice and that such dictated the continued inclusion of the disputed group. The undersigned agrees. 4/

5. The Association takes exception to the Hearing Officer's finding that department chairmen are supervisors. This exception does not take issue with any particular fact found by the Hearing Officer, it does not cite any particular portion of the record relied upon to support the exception, and it offers no explanation of why or where the Association feels the Hearing Officer erred. The undersigned finds that the exception fails to comply with the Commission's Rules and Regulations concerning the filing of exceptions, Section 19:14-16, and therefore refuses to consider it. The Hearing Officer's finding that department chairmen are supervisors within the meaning of the Act is supported by the record and is accordingly adopted.

4/ Willingboro Board of Education, E.D. No. 3 is distinguishable because in that case the parties had intermittently included department chairmen with teachers and department chairmen exercised a control over their inclusion with the teachers.

6. In view of the above dispositions, the undersigned concludes that department chairmen shall continue to be included in the existing unit. Since there is no question of what organization represents the existing unit, but only a question of the composition of that unit, no election will be directed.

Louis Aronin
Executive Director

DATED: August 14,1970
Trenton, New Jersey

STATE OF NEW JERSEY

PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of HENRY HUDSON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION Public Employer-Petitioner -and- HENRY HUDSON REGIONAL EDUCATION ASSOCIATION, INC. Employee Representative	Docket Number CU-11

APPEARANCES:

For the Board of Education
Peter Kalac, Esq.

For the Education Association
Casel Ruhlman, Esq.

BEFORE: Jonas Silver, Hearing Officer

REPORT AND RECOMMENDATION OF
HEARING OFFICER

Upon a petition duly filed under the Act by the Henry Hudson Regional School District, Board of Education, hearing in this proceeding was held at Newark, New Jersey, on April 1, and April 13, 1970, before the undersigned ad hoc Hearing Officer. At the hearing, the parties were given full opportunity to present testimony, evidence and argument, and to examine and cross-examine witnesses. By May 19, briefs were received from both parties and have been carefully considered.

Upon the entire record in this proceeding, the Hearing Officer finds:

1. Petitioner, Henry Hudson Regional School District, Board of Education, is a Public Employer within the meaning of the Act and is subject to its provisions.

2. Henry Hudson Regional Education Association, Inc., is an employee representative within the meaning of the Act.

3, Inasmuch as the employee representative is currently recognized by the Public Employer, but the Public Employer seeks clarification of the negotiating unit, a question conerning representation exists.

4. The clarification sought: The negotiating unit for which the employee representative is voluntarily recognized includes teachers, guidance personnel, librarian, psychologist, nurse and department chairmen. During the 1968-69 negotiations which preceded the initial agreement for 1969-70, the Public Employer questioned the inclusion of department chairmen on the ground of alleged supervisory duties but agreed to their inclusion subject to challenge as in the instant proceeding. The employee representative denies that the department chairmen exercise supervisory duties and would continue such employees in the negotiating unit.

The Henry Hudson Regional School District came into existence in 1961 and in 1962 began a six year, K-7 to K-12 school serving Atlantic Highlands and Highlands. The professional staff numbers 55 including the 11 department chairmen involved herein, and a principal (appointed effective January 15, 1970), with a superintendent at the head. The department chairmen are: seventh and eighth grade; science; mathematics; English; business education; industrial arts; foreign languages; physical education and health; guidance; special education; and art. The Public Employer does not seek to exclude librarian and music.

5. The duties in question may be grouped in major categories as follows: hiring of new teachers; teacher evaluation relative to: retention

or release of untenured and tenured teachers; teacher evaluation relative to: granting of increments.

(a) Hiring of new teachers: The duty list of department chairmen drawn up cooperatively by the chairmen and the superintendent, states: "The Department Chairman will: 1. interview prospective teachers and make his recommendation to the superintendent." In practice, applicants for teaching positions are referred to the department chairman for initial interview in order to ascertain whether or not the applicant possesses the fitness and ability to teach in that department. If the department chairman, following questioning as to experience and educational attainments, finds the applicant satisfactory, he or she is then referred to the superintendent for further interview. Meanwhile the department chairman verbally informs the superintendent of the results of the interview, indicating his or her judgment as to the suitability of the applicant for hire. Applicants who have not gained the approval of the department chairman, though they may gain an interview with the superintendent on their own initiative, are not in fact reconsidered over the department chairman's rejection.1/

At the interview with the prospective teacher found satisfactory by the department chairman, the superintendent reviews prior experience and educational attainment and inquires as to whether the individual has been offered a contract in the district of present hire. His primary concern

1/ The exception being emergency hiring. Summer hiring for the new term may not involve chairmen.

is with determining the salary step on the district schedule at which the applicant would be hired. Upon setting the amount which the individual will receive, the superintendent together with the department chairman submit written recommendations to the Public Employer. Though the superintendent's recommendation is required, that of the department chairman carries weight as well. The Public Employer has the authority to hire; however, it has not rejected the recommendations in the past.

(b) Retention or release of untenured teachers; granting of tenure: The aforementioned duties of department chairmen states: "recommend the hiring or not re-hiring of non-tenure teachers." In practice, written evaluations of teacher performance are made by the department chairmen in December and March. The guidelines used are: physical condition of the classroom; teaching preparation; personality traits: professional responsibility; additional comments; and recommendation. The December evaluations as to new personnel become a part of the superintendent's verbal report to the Public Employer; the March evaluations are submitted in summary form as a written report on new personnel by the superintendent to the Public Employer. The report is predicated upon the results of the evaluations and makes reference from time to time to the judgments of the department heads as well as the superintendent with regard to teacher performance and the desirability or not of retaining the untenured teacher or of granting tenure to those up for tenure. In practice, the Public Employer exercises its authority to act on the recommendations of the superintendent by approving the recommendations contained in the report with rare modifications.

The teacher evaluation of the department chairman may contain, at the headings of "additional comments" and "recommendation", a summary of the positive and negative aspects of the observations without more. On the other hand, the "recommendations" may also indicate a specific personnel action. However the report may be terminally written, the superintendent discusses unfavorable evaluations with the department chairman and may himself, in such cases, observe classroom performance. In the case of a favorable evaluation, the superintendent transmits the results of the report with a concomitant recommendation for renewal of contract or grant of tenure directly to the Public Employer. In the case of an unsatisfactory rating, though the superintendent confers with the department chairman, he does not alter the written or verbal recommendation as to retention or release made by the department chairman. The record contains examples of such recommendations including the case of a teacher released in mid-year.

(c) Granting of increments: The duty list of the department chairman makes no provision for a role in the granting of increments. And, though the agreement between the employee representative and the Public Employer provides that the superintendent recommend and the Public Employer approve increments based upon satisfactory performance, in practice, the department chairmen do recommend through teacher evaluation the granting or withholding of increments as a means of inducing teachers to "shape up" in their job responsibilities. The record contains examples of such recommendations as well as a recommendation for the granting of an increment previously denied. Final Public Employer approval of the granting of increments is obtained by the superintendent upon submission of a list of recommended grants of increments;

withholding of increments is separately reported to the Public Employer by the superintendent and reflects the recommendations of the department chairmen. The Public Employer has concurred in the action presented for its consideration except that in a particular case it modified the proposed withholding to a partial withholding.

6. Of ten chairmen, only one has two teaching periods while others teach from four to seven periods a day. The department chairmen engage in the duties of non-supervisory teachers for an accumulated daily total of 48 periods while engaging in supervision for only 9 periods. For their status as department chairmen, they are paid $300 plus $25 for each teacher in the department in addition to their salary step on the teachers' guide. All fringe benefits and conditions of employment are the same as those of teachers except that department chairmen are the first step superiors in the adjustment of teacher grievances. And while chairmen receive their appointments as teachers for the coming year in March, it is not until August that they are notified as to appointment as department chairmen.

7. Conclusory findings as to supervisor: Section 7 of the Act,[2/] insofar as pertinent herein, in effect defines supervisor as:

> ". . .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,. . ."

There being no authority in the department chairmen to "hire, discharge, discipline", do they have "the power. . . to effectively recommend. . ." as to

2/ Cherry Hill Township, Department of Public Works, P.E.R.C. No.30.

one or more of these personnel actions? If so, they are to be excluded from the unit unless one or more of the exceptions of Section 6 (d) apply.

The prior findings establish that the department chairman passes upon the qualifications of an applicant for a teaching position and makes a recommendation to the superintendent to hire the applicant if found satisfactory by the chairman. No other applicants are interviewed by the superintendent except in a courtesy sense. What remains for the superintendent in substance is to fit the prospective teacher to the salary guide, hardly a routine matter. Conceivably, there would be a falling out at this stage. The recommendation of the department chairman does not ipso facto become the final recommendation of the superintendent.

However, the function of the department chairman in this connection is not merely to screen applicants for interview.[3] Indeed, it is not to be doubted that without a favorable report from the chairman, the applicant does not reach the stage of salary interview with the superintendent. And should the salary talk with the superintendent fail of consummation, it may be inferred that there would take place a subsequent recommendation and the process repeated. Clearly, therefore, the final recommendation of the superintendent must bear the inescapable earmark of the department chairman for, ultimately, none may be hired who do not have the chairman's approval.[4] This factor, then, makes the department chairman's recommendation effective as to hire. Furthermore, as heretofore found, the Public Employer gives substantial weight to the

[3] Cf. East Patterson Board of Education, P.E.R.C. No. 18.

[4] Except for emergency and summertime hiring.

recommendation of the department chairman, in effect treating the two recommendations before it almost as if they had been merged into one.

Related to the initial hiring, is the department chairman's role in re-hiring for a second or third year and in the granting of tenure. In these circumstances, as the findings above demonstrate, the evaluation made by the department chairman plays a significant and effective part in the superintendent's recommendation to the Public Employer which the latter submits without further investigation on his part.

The Public Employer treats the department chairman's views in this context as having an important bearing on its decision.

The withholding of increments constitutes a form of "discipline" for it is a way of inducing satisfactory job performance by imposing monetary penalty for less than satisfactory work. Clearly, the concept of "discipline" connotes not merely sanctions for objectionable personal conduct but, more importantly, in the employment context, sanctions for the state of falling below the norm of productivity. It is appropriate, therefore, under the Act, to consider "discipline" as including such measures as the denial of the yearly increment of the salary guide following an unsatisfactory rating by a department chairman. As heretofore found, the Public Employer attaches considerable weight to the adverse evaluation of the department chairman, concurred in by the superintendent, in making a final decision to "discipline."

But, argues the employee representative, the department chairmen cannot be regarded as supervisors under the Act because they are not distinguishable from teachers in that their compensation is little higher, they work as

teachers most of the time, they receive the same benefits, and they do not receive notice of reappointment as chairmen until August. The short answer is of course that the statute prescribes the exclusive tests of supervisory status in terms of the existence of specified power. If the power exists in one or more function so that it inheres in the position and is exercised by the individual occupant as the occasion arises, that is sufficient to satisfy the statute. It matters not therefore for the purposes of this investigation as to representation whether the perquisites and emoluments of the office rise to the level which, in the opinion of the employee representative, ought to grace the position.

"Of even greater significance," the employee representative contends, "is the fact that these Department Chairmen are not required to hold Supervisor's Certificates." It appears that such a certificate is required by education law and the rules of the State Board of Education to be held by any school officer, "who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." These responsibilities, it is maintained, must include the authority to effectively recommend in the manner prescribed in the Act in order for such responsibilities to be carried out. Without a state certificate, the argument concludes, the department chairman cannot supervise and cannot perform those functions which the Act requires to constitute a supervisor.

The difficulty with the employee representative's argument is that it assumes the education law and regulations as to supervisor to be in pari materia with the provisions of the Act. There is no support for such an assumption. Each law has its own distinctive reason for being and each pursues distinctive objectives. The Commission is no more bound to follow the state certifying

requirements as to supervisor than the State Board of Education is bound to follow the criteria of Section 7 of the Act. Moreover, the duties of the department chairmen in question would still remain to be determined on the record in this proceeding even assuming an analogy to certification requirements. The contention is without merit.

Upon all the foregoing findings, I conclude that the department chairmen involved herein have the power to effectively recommend with regard to each of the following attributes: hire, discharge, discipline of teachers in the district. I therefore find the department chairmen to be supervisors within the meaning of Section 7 of the Act.[5/]

8. The exceptions to the exclusion of supervisors in a unit of non-supervisors : On January 15, 1969, the Public Employer voluntarily recognized the Association as the employee representative in a unit of teachers and related professional staff under the Act including department chairmen. At some point in time during the 1968-69 negotiations, however, the Public Employer made clear to the employee representative that it regarded the department chairmen as middle management supervisors not within the unit but that because budget submission time was near, it would not undo the work done on salaries

5/ In so finding, I have considered the change in administrative succession presented by the employment of a principal in the school for the first time as of January 15, 1970. According to the superintendent, the principal will conduct teacher evaluations and interview applicants for positions but, it is asserted, this will not change the significance of the duties of the department chairmen in these areas. Whether in fact a three tier hierarchy in place of the existing two tiers to the Board, will so dilute the authority of the department chairmen as to call for a different conclusion than that reached herein cannot be known at this time. It appears that the principal has not been integrated into the exercise of the authorities examined on the record in this proceeding to the point of time covered in the current school year.

by insisting on exclusion in the 1969-70 contract. At the same time the Public Employer informed the employee representative that it would make the matter of exclusion of the department chairmen an issue in the 1969-70 negotiations for the 1970-71 contract. The current agreement, therefore, effective July 1, 1969, includes department chairmen in the recognition clause and substantively refers to chairmen in the teachers' salary guide provisions. On December 12, 1969, the Public Employer filed the instant petition seeking clarification of the unit with respect to the department chairmen.

Prior to the enactment of the statute, according to the testimony of Samuel P. Brown, a member of the Board since its inception, the meetings with the employee representative were "discussions" of salary items including fringes with the employee representative "informing" as to a fair and reasonable salary and the Public Employer "indicating. . . how far we thought we might be able to go." After the Act, the procedure changed "in the sense that . . . it was negotiation and we were talking far more than salaries. Of course we were talking the total gambit of agreement between the Board and the Association." Brown acknowledged that the "discussions" with the employee representative before the Act included the pay of department chairmen.

Paul Higgins, President of the Board, and formerly in charge of negotiations over a period of four years, testified that with the Act "negotiations" have become formal and detailed. Before the Act, the employee representative presented requests for payment on behalf of department chairmen and they were part of the "give and take". Higgins testified as follows:

> "Q. Prior to the enactment of Chapter 303 was there any give and take negotiations with the teachers?
>
> A. Well, as far as negotiating salaries, yes.

Q. What occurred really with regard to salaries?

A. Well, we would, I guess, go through the normal labor negotiations in a sense. We would be presented a packet as to the, let's say, request or demands of the teacher's association regarding salary, benefits, etc.-right down the line, plus policy, grievance committees and things of this nature. We would discuss this at this meeting and we would go to our Board and discuss it. We would have committee meetings, work shop meetings and the go back again to the teachers and have another meeting and this would go back and forth until ultimately we came up with an agreement between the two bodies."

On behalf of the employee representative, Vincent S. Gorman, chairman of the negotiations committee for the past three years, testified that after the Act in 1968, the employee representative submitted proposals on working conditions, salaries and fringes including a payment proposal for department chairmen. Several meeting with the Board committee followed; "there would be a give and take . . . and we would discuss things." Around budget time in Decmeber agreement was reached on money items with non-money matters taken up between March and June. In 1967, before the Act, the employee representative proposed increases in the salary guide and other money items (insurance, sabbatical, substitutes, pay for unused sick leave) including department chairman pay increase to $500 and $25 for each teacher in place of $300 and $25. There followed several meetings with a later "counterproposal" from the Board and ultimate understanding at less than what the employee representative sought and without change in the pay of the department chairmen. In

December of that year, the Board adopted "teachers' salary guide provisions" incorporating the results of the "negotiations." There was no written agreement with the employee representative.

On cross-examination, Gorman was asked with regard to the 1967 pre-Act "negotiations":

> "Q. Isn't it a fact, Mr. Gorman, that you didn't negotiate, you merely met and had discussions with the Board of Education concerning those items?
>
> A. To my knowledge we negotiated.
>
> Q. Well, can you tell me, please, what you understand by "negotiating"?
>
> A. Negotiating to me would mean that we put a proposal on the table, talked about it and eventually the other side would come back with their proposal and we would talk about that.
>
> Q. Merely talk about that; is that correct?
>
> A. Well, "talk about" I would say would mean negotiating in the sense that both parties have the idea firmly fixed in their minds that they are going to come to some sort of an agreement, not just talk and forget."

Before the Act, according to Gorman, "the only thing that we we would discuss really would be salaries and so called fringe benefits." Following the Act, he testified, "we continued the same type of discussion, but in addition, we included more articles for discussion or negotiation."

Aaron Breslow, a department chairman, and a member of the negotiating committee of the employee representative, testified on cross examination with regard to the pre-Act, negotiations

for the school year '68-69:

> "Q. Mr. Breslaw, isn't it a fact that after you presented this proposal (on salary and fringes including $500 and $25 for chairman) for the year '68-'69 the Board considered it and after considering it they came back and said this was what we can afford and gave you a new salary guide and told you what your fringe benefits would be and that was the end of all discussions?
>
> A. That did not happen until the final meeting at which we agreed on a proposal that didn't work out just that way. There was a lot of haggling over some of these things that we requested. I will grant you they may have -- we may have settled for what the Board finally could afford but there was a lot of discussions on this before it came to a settlement."

In answer to questions put by the Hearing Officer as to the same negotiations, Brelaw testified:

> "MR. SILVER: Prior to the last Board proposal did the Board make any intervening proposals different from the last proposal?
>
> THE WITNESS: Prior to the last one all the way through the meetings?
>
> MR. SILVER: Yes.
>
> THE WITNESS: Yes, verbally they did. They suggested that maybe they could do this or maybe they could that but they wouldn't do anything until the final meeting where it was made concrete.
>
> MR. SILVER: And did the Association change its proposal?
>
> THE WITNESS: Yes, we did.
>
> MR. SILVER: In the course of these talks?
>
> THE WITNESS: Yes, we did."

From the beginning of negotiations with the employee representative in 1963, department chairmen were in the unit of teachers and no objection was raised by the Public Employer to their inclusion until the negotiations of 1968-69. Before the 1964 school year, department chairmen received

no payment in addition to their salary; sometime thereafter the payment went to $150 and then to $300 plus $25 where it has remained for the past two or three years.

(a) Concluding findings: It is found that from 1963 department chairmen have been in the unit with teachers and represented by the employee representative; that the Public Employer challenged this inclusion in 1968 with the advent of the Act; that the department chairmen continued in the unit for the school year 1969-70 and were covered by that contract subject, however, to the outcome of this proceeding.

Further the record shows that the nature of the representation of the teachers and the department chairmen involved, in the words of a Board negotiator, "give and take", "back and forth", as well as joint and separate meetings, until ultimate understanding was achieved. While the outcome as to teachers and chairmen was conditioned on what the Public Employer considered that it could afford, nevertheless between the Association proposals, the Board's initial reply and the "haggling" that ensued thereafter, there took place considerable discussion and change of positions on both sides. The testimony of Higgins, Breslaw and Gorman makes this quite clear. So that the final concurrence was not the perfunctory, informational exchange, kind of discussion alluded to by Board Member Brown, in the which the Public Employer is represented as having proposed and disposed but rather a thorough airing of views with an objective to reach a resolution of differences.

I find that what transpired from 1963 through 1968 was collective negotiation on behalf of teachers and chairmen, not as extensive in range of subject matter as under the Act, but substantively significant for the salary

and money items covered.[6/] Furthermore, in the light of the testimony of Higgins and the Association negotiators, I find that in fact this was not really different from the later negotiation under the Act--the indispensable process of "give and take" remained the same, only formality and detail took hold.

I shall next consider the exceptions of Section 6 (d), for having concluded that the department chairmen are supervisors, they may not remain in the unit "except where dictated by established practice, prior agreement, or special circumstances. . ." Does the foregoing finding that collective negotiations embracing department chairmen did in fact take place in the years 1963-68, bring the department chairmen inclusion in the unit of teachers within any of these exceptions?

The Board maintains that "since public employees had no right to engage in collective bargaining prior to Chapter 303, there could have been no established practice as such, neither could there have been any such agreement prior to Chapter 303's adoption." Without doubt the exception as to "prior agreement" has no application herein. This is so because the 1969-70 agreement manifestly was concluded without prejudice to the right of the Board to raise the question of the propriety of the inclusion of department chairmen in the unit under the Act. Moreover, the pre-Act negotiations were not formalized in a collective agreement because, in the

6/ The extent to which the Association was successful in realizing its initial salary and fringe proposals in the final outcome, is not a true measure of whether negotiations took place. There is evidence that some upward adjustment was achieved in the pay of department chairmen between 1963 and 1969 in response to the proposals of the Association.

state of the law as it then existed, the Board was not required to recognize the Association as the exclusive representative or to negotiate concerning terms and conditions of employment or to enter into a contractually binding agreement.

This is not to say, however, that conduct short of imposed or enforcible representation in a unit of teachers and department chairmen for collective negotiations could not and did not characterize the relationship of the parties during the pre-Act years of 1963-68 involved herein.

In the recent Fireman's Mutual Benevolent Association v. International Association of Fire Fighters, Local 1066, et al., A-48 September Term 1969, the Supreme Court of New Jersey placed in perspective the guarantee of Article I, paragraph 19 of the Constitution to public employees to "present to and make known to the State. . . their grievances and proposals through representatives of their own choosing." The Court stated:

> "This Court declared in Board of Ed., Borough of Union Beach v. N.J.E.A., 53 N.J. 29, 44-45 (1968) that the purpose of Article I, paragraph 19 was to secure the specified rights of employees in private and public employment against legislative erosion or denial. It reveals no intention to deprive the Legislature of the power to grant to public employees a further right designed to implement or effectuate those rights secured by Article 1, paragraph 19, or to grant more expansive relevant rights which do not conflict with that article. Id, at 45."

The Court went on to hold that--

> "no unconstitutional repugnancy exists between the portion of Article I paragraph 19. . . and the provision of Section 7, Chapter 303, conferring the exclusive right and duty on the majority-chosen representative to represent all employees in the unit in negotiating collective agreements."

Though the Court did not expressly rule on the "specifics of 'collective negotiations'", it may be fairly inferred from the tenor of the opinion that the constitutional guarantee embraces the right to engage in good faith

"collective negotiations" in the sense of give and take, proposal and counter proposal procedures such as, in this respect, characterize the "collective bargaining" of private industry. Clearly, therefore, while it could be said that Article I, paragraph 19, did not mandate good faith "collective bargaining", the right to public employee good faith "collective negotiations" in the aspects material herein certainly lodged within the constitutional guarantee in the period before the Act. And while such right was effectuated with Chapter 303 in 1968, there was no legal impediment to the recognition of this right by implementation in practice such as voluntarily occurred on the part of this Public Employer in the period 1963-68.

By treating the department chairmen as within the unit, by give and take, proposal and counter proposal, type of extended discussions of economic issues eventuating in understandings as to monetary outcome without at any time prior to the enactment of Chapter 303 raising any question as to the presence of department chairmen in the unit,[7/] the Board and the Association evolved a pattern of collective negotiation that in substance is equatable in practice to that prescribed in the state of the law as it now exists.

7/ In November 1969, the superintendent sought to persuade the chairmen to remove themselves from the teacher unit. However, the chairmen, all but one signing, rejected the suggestion, stating:

". . . The position in which we find ourselves is not an enviable one, nor is it an easy one. We must walk the middle ground of being co-administrator or advisor, on the one hand, while we are first and foremost teachers, on the other. All of us have been members of the local Association for years. Those of us who have worked in other school districts were active members in those districts' associations. All of us wish to continue this long tradition of active association membership, and we wish that membership to be without restrictions. We feel that we must be entitled to the same prerogatives of membership that are extended to other teachers in the Association. And we feel that the right to negotiate within the Association is one of those prerogatives.

To the argument that we should form a separate group, we must reply that to do so would, in our judgment, destroy the Association. This none of us wishes to do. This we do not have a right to do."

As Board President Higgins put the matter, the difference then and now is one of detail and formality. He testified:

> ". . . Unfortunately I think we have gotten into a period where we have lost the informality and the ability to hold meetings as we use to. We didn't have to go through a lot of rigmarole and we could do things without the tremendous amount of detail and come up with a happy solution. Now things have become more detailed, consequently we just have to dig deeper and bring up things which, as far as I am concerned, are a waste of time."

I must therefore reject the Board's assertion that no "established practice" could exist because there was no legal right to "collective bargaining." In fact a practice of collective negotiations did exist and its existence was not incompatible with the then law precisely because, in deference to the law, it never assumed the status of a formal, enforcible relationship but remained a practice to await implementation and fleshing out at the hands of the legislature which became Chapter 303.

In my opinion the legislature intended by the use of "established practice" as an exception to the unit exclusion of supervisors, to signify that the normal unit standard of "community of interest" could be discounted where, as here, the actual experience over a period of time evidences the feasibility of commingling for purposes of collective negotiations. "Established practice" is synonymous with the collective bargaining term "past practice" and connotes that course of conduct which has existed for sometime by mutual acceptance thereby furnishing an unwritten understanding apart from the formal contract. And the legislature left no room for doubt that it sought to cover that which is conduct as well as that which is agreement by further reference to "prior agreement" as a separate and distinct category of exception. Manifestly, to give force and effect to "established practice" during the infancy of the Act

requires that resort be had to the years preceding the effective date of the Act in 1968, there being no separate effective date or stay for implementation of the exceptions. It follows as a matter of the internallogic of the proviso that pre-Act negotiations may be employed as background evidence to test the occurrence of the commingling of supervisors and nonsupervisors in the same unit and the manner in which such negotiations were conducted albeit the Public Employer was not obligated, as a matter of law, to conduct itself in the fashion later mandated by the Act.

Further, I am convinced and find that five years is a sufficient period of time to warrant the description of "established." I further find, in view of the unchallenged, repetitive consistency of the "established practice" of collective negotiations on the basis of inclusion of department heads in the unit of teachers, that continued inclusion is "dictated" within the meaning of Section 6 (d) of the Act. Accordingly, I shall so recommend.

RECOMMENDATION

Upon the entire record and the findings and conclusions predicated thereon and set forth heretofore, the Hearing Officer recommends that the negotiating unit in which the Public Employee Representative is currently recognized by the Public Employer and in which no representation election is sought, shall be, and hereby is, clarified as follows:

> The negotiating unit of the Henry Hudson Regional School District shall continue to include department chairmen.

DATED: June 11, 1970
North Merrick, N.Y.

JONAS SILVER, HEARING OFFICER