

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

In the Matter of

DELAWARE VALLEY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Public Employer,

-and-

DELAWARE VALLEY REGIONAL
SUPERVISORS' ASSOCIATION,

DOCKET NO. RO-81-58

Petitioner,

-and-

DELAWARE VALLEY REGIONAL
TEACHERS' ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation adopts the recommendations of a Hearing Officer that department chairpersons constitute an appropriate collective negotiations unit and directs an election among these employees to ascertain their representational desires. The department chairpersons are supervisors within the meaning of the Act. The Hearing Officer found that although the department chairpersons have been included in a unit with nonsupervisory personnel, the statutory exceptions which might be the basis of continuing the inclusion of department chairpersons in a teachers' unit were not present in this matter. The Director observes that even if a pre-Act negotiations relationship existed between the Board and the Teachers' Association, the substantial increase of supervisory responsibility assigned to department chairpersons since 1968 would vitiate the applicability of any statutory exception which permits, limited circumstances, units which include supervisors and nonsupervisors.

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

In the Matter of

DELAWARE VALLEY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,

Public Employer,

-and-

DELAWARE VALLEY REGIONAL
SUPERVISORS' ASSOCIATION,

DOCKET NO. RO-81-58

Petitioner,

-and-

DELAWARE VALLEY REGIONAL
TEACHERS' ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer
Cassetta, Brandon Associates
(Raymond Cassetta, Consultant)

For the Petitioner
Robert M. Schwartz, attorney

For the Intervenor
Delaware Valley Regional Teachers' Association
(John A. Thornton, UniServ Rep.)

DECISION AND DIRECTION OF ELECTION

On September 24, 1980, the Delaware Valley Regional Supervisors' Association ("Supervisors' Association") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission").

The Supervisors' Association seeks to represent a unit of "Supervisors of Educational Departments" employed by the Delaware Valley Regional High Board of Education (the "Board").

Pursuant to a notice of hearing, hearings were held before Hearing Officer Robert E. Anderson, Jr., on January 5, 6 and February 6, 1981. At the hearing the Delaware Valley Regional Teachers' Association ("Teachers' Association") moved, pursuant to the recognition clause of the collective agreement between it and the Board, to intervene on the basis of its current representation of the positions in question. All parties stipulated that the Teachers' Association was the current representative of the positions in question. Accordingly, the Teachers' Association was granted intervenor status in this matter.

At the hearing, all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Thereafter, on March 16, 1981, the Supervisors' Association filed a post-hearing brief. No other party filed a post-hearing brief. On May 6, 1981, the Hearing Officer issued his Report and Recommendations, a copy of which is attached hereto and made a part hereof. No party has excepted to the Hearing Officer's Report and Recommendations. The undersigned has considered the entire record herein including the Hearing Officer's Report and Recommendations, the transcripts and the exhibits and on the basis thereof finds and determines as follows:

1. The Delaware Valley Regional High School 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 proceeding and is subject to the provisions of the Act.

2. The Delaware Valley Regional Supervisors' Association and the Delaware Valley Regional Teachers' Association are employee representatives within the meaning of the Act and are subject to its provisions.

3. The Supervisors' Association seeks to represent a unit to be comprised of department chairpersons. Currently the school district employs department chairpersons in the areas of English, Science, Industrial Arts, Business Education, Physical Education, and Math. The Teachers' Association currently represents the department chairpersons within a negotiations unit which includes teaching staff employees.

4. The Supervisors' Association asserts that department chairpersons are supervisors, that the department chairpersons were not supervisors prior to July 1, 1968, and that the scope of supervisory functions performed by department chairpersons has dramatically increased since 1968. Finally, the Supervisors' Association asserts that there is a conflict of interest between department chairpersons and the teachers, whom they supervise, flowing from their inclusion within the same unit.

The Teachers' Association disputes the proposed unit which, if found appropriate, would entail the removal of department chairpersons from its unit. The Teachers' Association argues that department chairpersons are not supervisors, that there is no

conflict of interest between teachers and department chairpersons, and that the requested unit is, therefore, inappropriate.

The Board neither disputes nor supports the claim that the proposed unit is appropriate. The Board is willing to recognize a unit of chairpersons if such unit is deemed appropriate by the Commission. If a department chairpersons unit is not found appropriate, the Board intends to continue to negotiate with the Teachers' Association with respect to the department chairpersons within the present unit structure.

5. The Hearing Officer found that department chairpersons are supervisors within the meaning of the Act, that their supervisory functions had substantially increased since 1968 and that the exercise of their responsibilities would present a substantial conflict of interest vis-a-vis their inclusion in the negotiations unit with teaching staff members whom they supervise. The Hearing Officer found that none of the statutory exceptions, which might permit the continued inclusion of supervisors and nonsupervisors in the same negotiations unit, were applicable because chairpersons were not supervisory personnel prior to July 1, 1968, and because there was no pre-Act negotiations relationship between the Teachers' Association and the Board affecting the distinct interests of department chairpersons.

6. N.J.S.A. 34:13A-5.3 defines a supervisor as an employee "having the power to hire, discharge, discipline or effectively recommend the same" The record herein reveals that department chairpersons are empowered to make recommendations

with respect to the hiring of teachers within their own departments. Additionally, department chairpersons have, and exercise, the authority to recommend adverse personnel actions including, but not limited to, discharge and formal discipline against department members. Thus, notwithstanding the principal's independent performance of his own observation and investigation into any particular problem and his resulting action with respect to such problem, the instant record establishes that department chairpersons play an active and effective role in the administrative decision making process. The department chairpersons, in assuming the role as principal evaluators of teachers, make recommendations concerning teacher performance which are instrumental in determining contract renewal and contract nonrenewal, and the grant or denial of tenure.

The undersigned finds that there is substantial evidence in the record with respect to the manner in which the department chairpersons function to support the Hearing Officer's conclusion that department chairpersons are supervisors within the meaning of the Act.

The Act permits the existence of units comprised of supervisors and nonsupervisors only under exceptional circumstances. These circumstances are set forth in the Act at N.J.S.A. 34:13A-6(d):

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

See also N.J.S.A. 34:13A-5.3.

Accordingly, the unit solely comprised of supervisors proposed by the Supervisors' Association would normally constitute the appropriate unit, unless it is argued and demonstrated that a statutory exception may be invoked as a basis for retaining the present unit structure.

After a complete review of the record, the undersigned adopts the Hearing Officer's finding that the conditions permitting a continuation of a mixed unit of supervisors and nonsupervisors in accordance with the statutory exceptions embodied in N.J.S.A. 34:13A-5.3 and 6 (d) are not present herein. To the extent that the record reveals some department chairpersons have performed supervisory or evaluative functions prior to July 1, 1968, the testimony indicates that these functions have, since that time, substantially increased in scope, formality and import. Thus, assuming arguendo that department chairpersons functioned in supervisory capacities prior to July 1, 1968, and were included in a collective negotiations relationship between the Teachers' Association and the Board prior to 1968, the substantial increase in their duties would vitiate the legal significance of that status and operate as a bar against invoking the statutory exception herein. In re Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER ____ (¶ ____ 1981); In re Cinnaminson Tp. Bd. of Ed., 81-39, 7 NJPER 274 (¶ 12122 1981); In re Ramapo-Indian Hills Bd. of Ed., D.R. No. 81-26, 7 NJPER 119 (¶ 12048 1981). 1/

1/ In Ramapo-Indian Hills Bd. of Ed., the undersigned stated:

Logically, the statutory exceptions which preserve pre-existing relationships are not applicable where the circumstances underlying the pre-existing relationship no longer exist, as in the instant matter where the scope of the

(Continued)

Accordingly, the undersigned finds that a question concerning representation exists in an appropriate unit and that an election should be conducted to ascertain the free choice of employees. Therefore, the undersigned finds that the appropriate unit for collective negotiations is: All Department Chairpersons employed by the Delaware Valley Regional High School Board of Education, but excluding teachers, managerial executives, confidential and craft employees, professionals, police and supervisors within the meaning of the Act. The undersigned hereby directs that a secret ballot election shall be conducted among employees in the unit no later than thirty (30) days following the commencement of the school year in September, 1981.

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

1/ (Continued)

Director's supervisory responsibilities have been significantly upgraded, thus creating a potential conflict of interest between the Director of Guidance and other unit employees. The circumstances relevant to the narrow statutory exception having been removed, the Act's policy prohibiting mixed supervisory/nonsupervisory employee units is preeminent.

Pursuant to N.J.A.C. 19:11-9.6, the Board is directed to file with the undersigned and the Supervisors' Association an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses. 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 Supervisors' Association with statements of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether they wish to be represented for purposes of collective negotiations by the Delaware Valley Regional 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 shall be directed in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: August 27, 1981
Trenton, New Jersey

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

In the Matter of

DELAWARE VALLEY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION

Public Employer,

-and-

DELAWARE VALLEY REGIONAL
SUPERVISORS' ASSOCIATION,

DOCKET NO. R0-81-58

Petitioner,

-and-

DELAWARE VALLEY REGIONAL
TEACHERS' ASSOCIATION,

Intervenor.

SYNOPSIS

A Hearing Officer recommends that Department Chairpersons be removed from a unit of teachers currently represented by the Delaware Valley Regional Teachers' Association. The Delaware Valley Regional Supervisors' Association filed a representation petition seeking a separate unit for Department Chairpersons; the Teachers' Association opposed the petition, and the Delaware Valley Regional Board of Education took a neutral position. The Hearing Officer finds that Department Chairpersons are "supervisors" within the meaning of the New Jersey Public Employer-Employee Relations Act, that no statutory exception warrants continued inclusion of supervisors and nonsupervisors in the same unit, and that a conflict of interest between supervisors and the teachers they evaluate also supports exclusion of Department Chairpersons.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, and exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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

In the Matter of

DELAWARE VALLEY REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Public Employer,

-and-

DELAWARE VALLEY REGIONAL SUPERVISORS'
ASSOCIATION,

DOCKET NO. R0-81-58

Petitioner,

DELAWARE VALLEY REGIONAL TEACHERS'
ASSOCIATION,

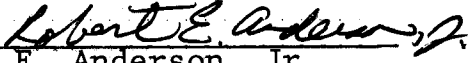
Intervenor.

ERRATA

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

<u>Page</u>	<u>Line</u>	<u>Incorrect Word(s)</u>	<u>Correct Word(s)</u>
<u>Transcript I (1/5/81)</u>			
17	13	district	Director
18	22	third	fourth
19	10	it	in -
20	5	Supervisors'	Teachers'
29	18	than	then
33	17	and	delete
35	9	personal	personnel
35	11	personal	personnel
109	22	separable	sizable
150	6	make	link
156	25	quid is omitted	place before pro
173	13	release	released

<u>Page</u>	<u>Line</u>	<u>Incorrect Word(s)</u>	<u>Correct Word(s)</u>
<u>Transcript II (1/6/81)</u>			
59	3	Merkle's	Mangold's
90	17	piece	peace
116	19	copies	copied
135	2	assume	as soon
175	24	narrative	perjorative
180	17	attends	tends
189	21	resolved	involved
191	5	associate	Association
193	15	out	at
197	20	after to	add ask
239	7-8	tri-party type	tripatite
239	10-11	tri-party type	tripatite
253	15	first	fired
260	16	triumphant	triumvirate
261	25	triumphant	triumvirate
<u>Volume III (2/6/81)</u>			
6	2	bargain	bargaining
8	20	refuse	reduce
12	14	insured	assured
35	10	loss	law
40	22	want	went
69	7	processed	process and
70	1	relevant	irrelevant
87	4	word	reward
90	8	File	Final


 Robert E. Anderson, Jr.
 Hearing Officer

DATED: May 6, 1981
 Trenton, New Jersey

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

In the Matter of

DELAWARE VALLEY REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,
Public Employer,

-and-

DELAWARE VALLEY REGIONAL
SUPERVISORS' ASSOCIATION,
Petitioner,

DOCKET NO. R0-81-58

-and-

DELAWARE VALLEY REGIONAL
TEACHERS' ASSOCIATION,
Intervenor.

Appearances:

For the Public Employer
Cassetta, Brandon Associates
(Raymond Cassetta, Consultant)

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

For the Intervenor
New Jersey Education Association
(John A. Thornton, UniServ Rep.)

HEARING OFFICER'S
REPORT AND RECOMMENDATIONS

On September 24, 1980, the Delaware Valley Regional Supervisors' Association filed a Petition for Certification of Public Employee Representative. The Supervisors' Association sought to represent a unit composed of "Supervisors of Educational Departments" employed by the Delaware Valley Regional High School District.

Pursuant to a Notice of Hearing, the undersigned conducted a hearing on January 5, 6, and February 6, 1981. At the outset of the hearing, the Delaware Valley Regional Teachers' Association moved to intervene on the basis of its representation of the positions in question pursuant to the recognition clause of a collective agreement

between it and the Board (J-6;TR.1/5/81, p.7). ^{1/}

All parties stipulated that the Teachers' Association currently represents the positions in question (TR.1/5/81, p.15). Because the Director of Representation had informed the undersigned that the Teachers' Association had satisfied the requirements of N.J.A.C. 19:11-2.7, the undersigned granted the motion to intervene (TR.1/5/81, p.7).

The Teachers' Association then moved to dismiss the proceedings because the Supervisors' Association had failed to comply with certain alleged procedural prerequisites to Commission jurisdiction; the undersigned reserved his ruling on this motion until the completion of the hearing (TR.1/5/81, p.7). Next, the undersigned granted a motion to amend the petition and other formal papers to state the correct name of the public employer, the Delaware Valley Regional High School Board of Education (TR.1/5/81, p.7-8).

After considering these preliminary matters, the undersigned received stipulations concerning certain issues and facts and then afforded all parties an opportunity to examine witnesses, present evidence, and argue orally. At the close of the hearing, the Teachers' Association renewed its jurisdictional objection (TR.2/6/81, pp.82-83). It also moved to dismiss because it believed that the Board or some of its members may have encouraged certain supervisors to file the instant Petition (TR.2/6/81, pp.85-86). The Supervisors' Association then moved for a ruling granting its Petition (TR.2/6/81, pp.83-84).

^{1/} Joint exhibits will be designated by the letter "J"; Petitioner exhibits by the letter "P"; Intervenor exhibits by the letter "R"; and Commission exhibits by the letter "A". Transcript references will be designated by "TR" and the date of hearing session.

The undersigned reserved his ruling on all these motions until the issuance of his Report and Recommendations (TR.2/6/81, pp. 84-85, 89).

Briefs were due on or before March 17, 1981. Only the Supervisors' Association has filed a brief.

FINDINGS OF FACT

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

1. The Delaware Valley Regional High School Board of Education ("Board") is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et. seq. (the "Act"), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding (TR.1/5/81, p.13).

2. The Delaware Valley Regional Teachers' Association ("Teachers' Association") is an employee representative within the meaning of the Act, is subject to its provisions (TR.1/5/81, pp.13-14), 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, 1981 (J-6).

3. The Delaware Valley Regional Supervisors' Association ("Supervisors' Association") is seeking to become the employee representative of the Department Chairpersons of English, Science, Industrial Arts, Business Education, Physical Education, and Math (TR.1/5/81, pp.14-15) through the instant representation petition. ^{2/}

^{2/} The parties initially stipulated that the position of the Director of Athletics was in dispute (TR.1/5/81, p.15), but subsequent testimony made clear that the Director of Athletics was not a
(Continued)

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

(a) Did the Supervisors' Association comply with the procedures necessary to give the Public Employment Relations Commission ("Commission") jurisdiction over its petition;

(b) Are Department Chairpersons "supervisors" within the meaning of the Act;

(c) If Department Chairpersons are supervisors, does an established practice, prior agreement, or special circumstance distate to the contrary of the rule that supervisors shall not be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership;

(d) Were Department Chairpersons "supervisors" before July 1, 1968;

(e) Has the scope of supervisory functions performed by Department Chairpersons increased since July 1, 1968 to such an extent as to render inapplicable any established past practice, prior agreement, or special circumstance permitting a unit comprising both supervisory and nonsupervisory personnel; and

(f) Is there a conflict of interest necessitating the removal of Department Chairpersons from the unit presently represented by the Teachers' Association (TR.1/5/81, pp.17-20).

2/ (Continued)...Department Chairperson whom the Supervisors' Association sought to represent (P-3;TR.1/5/81, p.49).

In addition, the Teachers' Association has moved to dismiss the instant Petition because the Board or some of its members allegedly encouraged some supervisors to file this Petition (TR.2/6/81, pp.85-86).

5. The Board has no position on the appropriateness of the requested unit. It is prepared either to grant recognition if the Commission determines that the proposed unit is appropriate or to continue recognition of the currently existing unit containing these employees (TR.1/5/81, p.21).

6. The Supervisors' Association takes the following positions with respect to the issues identified in Finding of Fact No. 4:

- (a) It complied with all jurisdictional requirements;
- (b) Department Chairpersons are supervisors;
- (c) There is no such established practice, prior agreement, or special circumstance;
- (d) Department Chairpersons were not supervisors before July 1, 1968.
- (e) The scope of supervisory functions performed by Department Chairpersons has dramatically increased since 1968; and
- (f) There is a conflict of interest between Department Chairpersons and Teachers whom they supervise stemming from their inclusion in the same unit (TR.2/6/81, pp.83-84).

With respect to the Board's alleged encouragement of the representation petition, the Supervisors' Association contends that such encouragement did not occur and that such a claim can only be raised by an unfair practice charge (TR.2/6/81, pp.86-87; Post-Hearing Brief).

7. The Teachers' Association takes the following positions with respect to the issues identified in Finding of Fact No. 4:

(a) The Commission lacks jurisdiction because the Supervisors' Association did not formally request recognition from the Board;

(b) Department Chairpersons are not supervisors, and the requested unit is inappropriate (TR.1/5/81, p.22;2/6/81, p.82); and

(c) Granting the Supervisors' Association's Petition means condoning the commission of unfair practices (TR.2/6/81, p.86).

8. In or about March or April, 1980, some Department Chairpersons discussed the possibility of recognition of a supervisors' unit with some members of the Board; these members stated that such recognition of a subgroup of employees represented by the Teachers' Association might constitute an unfair practice (TR.1/5/81, p.80). On April 21, 1980, six Department Chairpersons wrote a letter to the Board stating their intent to petition the Teachers' Association for release from membership and, upon such release, to organize a supervisors' negotiating unit for recognition by the Board (P-8). The Department Chairpersons then requested release from the Teachers' Association (TR.1/5/81, p.146). On May 23, 1980, the president of the Teachers' Association wrote a letter to the six Department Chairpersons informing them that the Teachers' Association had denied the motion to accept the resignation of the chairpersons (P-9). The Department Chairpersons did not formally request the Board to recognize a supervisors' unit at this point (TR.1/5/81, p.146). Instead, on September 24, 1980, the Supervisors' Association filed the instant petition (A-1A). At all times, however, the Board has

refused and, continues to refuse, to recognize the Supervisors' Association until either the Teachers' Association allows the Supervisors' Association to negotiate separately or the Commission certifies the Supervisors' Association as an appropriate independent unit (TR.1/5/81, p.77;pp.174-175). The Board does not maintain that the Supervisors' Association had to make a formal demand to negotiate with the Board after the Teachers' Association declined to permit withdrawal (TR.1/5/81, pp.174-175).

9. Department Chairpersons in the Delaware Valley Regional High School perform a host of duties. According to the current job description (J-1), they perform the following duties directly relevant to the question of whether they are "supervisors" within the meaning of the Act:

"(7) observe and hold conference with teachers in the department as well as make recommendations to members of the department on instructional procedures...

"(9) work cooperatively with department members in drawing up tentative class list and tentative teacher assignments...

"(10) assign and work with department members to prepare, evaluate and maintain an up-to-date course of study in subject matter and grade level...

"(15) make periodic reports on teacher effectiveness to the teacher and to the administration.

(a) Formal observations and conference including written reports much be done anytime between September and December for tenured and non-tenured teachers.

(b) Formal observations and conference including written report must be done anytime between January and March 1 for tenured and non-tenured teachers.

(c) All non-tenured teachers in a department must be observed three times by the Department Chairperson. This must be done between September 1 and March 1 of each year...

"(25) collect, observe and comment on each teacher's plan book first Monday of every month."

The current English Department Chairperson summarized his duties: "I am responsible for the entire English Department, that is, getting the materials together, getting the curriculum together, evaluating the staff, evaluating pupil performance, making recommendations as to who teaches what, and also, in some cases, who is hired and who is fired, dismissed." (TR.1/6/81, pp.25-26; compare TR.1/6/81, pp.3-4). Department Chairpersons also prepare department budgets for the Principal's approval (TR.1/6/81, pp.68, 238).

10. Since October 1977, the Board has required Department Chairpersons performing evaluations to be certified because state law requires certification of personnel supervising teachers (TR.1/5/81, p.24;1/6/81, pp.138-39). See also N.J.A.C. 6:3-1.19 and 6:3-1.21; N.J.S.A. 18A:27-3.1. For performance of their duties over and above teaching, Department Chairpersons receive additional compensation of \$150 for each teacher they supervise (TR.1/5/81, p.67). Department Chairpersons, unlike teachers, are also required to work one day a week during the summer (TR.1/5/81, pp.127-28). ^{3/}

^{3/} A few departments do not have Chairpersons, but instead have Curriculum Co-ordinators (TR.1/5/81, p.168). The Co-ordinators take inventory and work on curriculum content, but cannot perform evaluative and supervisory functions requiring certification (TR.1/5/81, pp.175-76). The Principal and Assistant Principal supervise teachers in these departments (TR.1/5/81, p.109).

11. Department Chairpersons also teach. Most Department Chairpersons teach four periods (TR.1/5/81, p.162). The normal teaching load is five periods per day (TR.1/5/81, p.125). The Principal observes and evaluates each Department Chairperson as a teacher in essentially the same fashion Department Chairpersons observe and evaluate teachers in their department (TR.1/5/81, p.126-27) and also observes and evaluates each Department Chairperson as a Department Chairperson rather than as a teacher (P-7).

12. The current Organizational Chart shows that Department Chairpersons report to the Principal who reports to the Superintendent (this position is presently vacant) who reports to the Board (P-3;TR.1/5/81, pp.38-39). Only the Board can hire or fire employees or withhold an increment (TR.1/6/81, pp.225-26). The Superintendent, the Principal, and the Department Chairpersons are located in the same building (TR.1/6/81, p.14).

13. Department Chairpersons constitute part of an administrative team that recommends to the Board which teachers it should hire. The Principal and Superintendent are also on this team. The Chairperson of a Department with a vacancy will participate in all interviews. The Principal, in his words, "...lean(s) heavily toward (the Department Chairperson's) evaluation of personnel and new personnel, so that, what they do in terms of hiring is very important." (TR.1/6/81, p.137). After the joint interview, the team members rate each candidate and decide whom to recommend. The Department Chairperson on the team has never disagreed with the recommendation made and adopted; on occasion, the Principal has disagreed, but has been out-voted (TR.1/6/81, pp.204-07). Three Department Chairpersons

also described this team interview process and testified that their recommendations had always been accepted (TR.1/5/81, pp.96-97; 1/6/81, pp.4-5, 18-19, 252-53, 260-262).

14. The Principal makes the final determination concerning teacher assignments (TR.1/5/81, p.64). Department Chairpersons recommend which teachers should teach what courses with how many students. The Principal accepts at least 85% of these recommendations (TR.1/6/81, pp.126-27).

15. The evaluation process has a number of different formal components including observations, conferences, reports, professional improvement plans, annual summaries, and pupil progress reports (P-2;P-6).

Department Chairpersons observe non-tenured teachers in their department at least three times a year (TR.1/5/81, p.113) and tenured teachers twice a year (TR.1/5/81, p.101). They follow formal descriptive criteria for evaluation of teachers (P-4;TR.1/5/81, p.44) and detail their findings in a Teacher Observation Report (P-5; TR.1/5/81, p.44). The Principal reviews a copy of this report (TR.1/5/81, p.101). After each observation, the Department Chairperson conducts a conference with the teacher and discusses the content of the observation report. Department Chairpersons also review teacher plan books once a month and fill out a Plan Book Observation Report (P-18). According to one teacher, the Principal and Superintendent (when this position is occupied) observe non-tenured teachers (TR.2/6/81, p.79); according to one Department Chairperson, the Superintendent has ceased being an active participant in the observation process (TR.1/5/81, p.117).

At the end of each year, starting in 1980, the Department Chairpersons fill out an Annual Performance Report for each teacher pursuant to certain guidelines (P-2). The form has two sections:

- (1) Summary Remarks of Evaluator, and
- (2) Additional Data by Staff Members.

Before filing the report with the Principal, the Department Chairperson has a conference with the teacher (TR.1/5/81, pp.53-54).

At the end of each year, starting in 1980, a staff member and his Department Chairperson meet and mutually develop an Individual Professional Improvement Plan Report (PIP) pursuant to certain guidelines (P-2). The PIP attempts "...to correct deficiencies and/or to continue professional growth." (P-2). It tracks the teacher's responsibilities outlined in his job description, states whether there are deficiencies in the performance of these responsibilities, and sets forth a suggested remedy, schedule, and implementation responsibility for each deficiency. The form concludes with spaces for Recommendations For Professional Growth and Comments. One Department Chairperson described the meeting between staff member and chairperson to fill out the PIP as "...a negotiations process." (TR.1/5/81, p.114). The Principal does not observe or confer with teachers with respect to the completion of a PIP, but he does review PIPs (TR.2/6/81, pp.43-44).

The Department Chairperson and staff member also complete a Pupil Progress Review Summary Form pursuant to certain guidelines (P-2). This form involves the SRA Testing Program and attempts to insure that the teacher's pupils are learning (TR.1/5/81, p.54). A copy goes to the Principal (TR.1/16/81, p.181).

16. The present evaluation system, particularly because of the addition of the PIP, the Annual Performance Report, and the Pupil Progress Review Summary last year, is much more formalized and stressful than in past years. Greater emphasis has been placed on teacher accountability and effectiveness (TR.1/6/81, p.9). The English Department Chairperson testified that the PIP was a negative document which caused resentment among teachers and that teachers had become much more concerned with the content and wording of the more detailed Teacher Observation Report (TR.1/5/81, pp.29-30, 61-64, 119). The Business Education Department Chairperson testified that there were "small conflicts" over the content of one-half of the observation reports she submitted (TR.1/6/81, p.4). The Principal confirmed that several teachers had complained about reports written by Department Chairpersons (TR.1/6/81, pp.129, 187).

17. The Principal considers Department Chairpersons his "right arm" (TR.1/6/81, p.134). He and his assistant can not "... go into classrooms and observe and confer and then write up an annual report, summary report, it is just too much" (TR.1/6/81, p.136). The Principal depends upon receiving evaluations and recommendations from the Department Chairpersons identifying specific problems and teacher weaknesses in order to make his own investigation of these particular problems (TR.1/6/81, pp.238, 242). He analogizes the Department Chairperson - teacher relationship during the evaluation process to the relationship between a State Trooper and a car driver he has stopped (TR.1/6/81, p.158).

The Principal has noticed "...a tremendous amount of apprehension...at the present time under the new law regarding supervisors and supervising teachers and writing it down than there has ever been" (TR.1/6/81, p.160). He has also observed that "...with the enactment of the law for the professional improvement plan,...I feel, I sense and I know in certain instances, that there is reluctance to be completely honest, because it may jeopardize one of those people from getting a raise, or getting tenure." (TR.1/6/81, pp.160-61). In particular, the Principal testified, and the Department Chairperson involved confirmed, that the Home Economics Department Chairperson prepared some very negative PIPs, but at the conferences on these documents, the teachers refused to sign. The Chairperson subsequently submitted PIPs with no deficiencies listed because it was "...not worth the grief...." (TR.1/6/81, pp.131-32;167-170;176-78;263-69; R-4c,f,j) ^{4/}.

The Principal also believes that the Department Chairpersons have been reluctant to place critical remarks in the Pupil Progress Review Summaries because these comments might reflect adversely on the teacher (TR.1/6/81, p.163).

^{4/} One Home Economics teacher testified that she did not sign her PIP because it was not xeroxed and thus she would not have a copy (TR.2/6/81, p.55). Further, she testified that she did not complain about the content of her PIP, but only about the timing of the conference (TR.2/6/81, p.55). The Hearing Officer credits the testimony of the Department Chairperson and the Principal concerning the filling out and submission of the PIP in question.

The Principal concluded:

"...a supervisor who wears two hats to begin with has got two strikes against him. They belong to the teachers' group, they pay their dues, they eat lunch with them, maybe they go out with them... [b]ut, when it comes to the day of reckoning where you have to write something down that may mean the difference between an increment--between the principal seeing something about a teacher that maybe best that he did not know about the teacher [,there] is a reluctance on the part of our present supervisors, who belong to the Association, to be mellow in the performance of their activities as Department Chairmen." (TR.1/6/81, p.188).

18. Department Chairpersons make recommendations to the Principal concerning the renewal or non-renewal of non-tenured teacher contracts, the granting or denial of tenure, and the performance of tenured teachers (TR.1/5/81, p.95;1/6/81, p.194). When the Department Chairperson alerts the Principal that a teacher is not performing satisfactorily, the Principal will confer with and observe that teacher himself (TR.1/6/81, p.137). If a teacher is to be dismissed or his contract not renewed, the Department Chairperson and the Principal will normally agree to recommend this course of action after making a "collective decision" (TR.1/6/81, p.194). The Principal, however, testified that he must make an independent judgment based on his observations and available information (TR.1/6/81, p.195). There have been some exceptions to the collective decision rule. On two occasions, the Principal thought that teachers should be dismissed while the Department Chairperson favored retention. One of these teachers did not receive a new contract; the other received a one year reprieve (TR.1/6/81, p.196). The Superintendent formally notifies a teacher of a decision to dismiss or not to renew a contract (TR.1/6/81, p.196).

The English Department Chairperson testified that the Principal has always followed his tenure recommendations (TR.1/5/81, p.96). In 1973, he recommended dismissal of a teacher; she was asked to resign and did (TR.1/5/81, p.94). In 1974 or 1975, he recommended that a teacher receive a third year contract, but then be dismissed; the Principal decided to release this person after the second, rather than the third, year (TR.1/5/81, p.94).

The Business Education Department Chairperson testified that she once recommended dismissal and that the Administration accepted her recommendation based in part on her written reports and observations and in part on the Principal's own knowledge and observations. On the day the Board was to consider this recommendation, the teacher in question resigned (TR.1/6/81, pp.5-7, 55-57).

The Science Department Chairperson described his role in a dismissal action brought against a science teacher. He evaluated the teacher repeatedly and testified in support of the Board's decision to dismiss him (TR.1/6/81, pp.247-251, 153-260).

In the last ten years, there have been no recommendations that a teacher's salary increment be withheld (TR.1/6/81, p.208). One Department Chairperson testified that the Department Chairpersons have never been asked to make recommendations about increments for teachers they evaluate (TR.1/5/81, p.36). There have been one or two formal letters of reprimand issued; the Principal could not recall if Department Chairpersons were involved in these recommendations (TR.1/6/81, pp.209-10). The Business Education Department Chairperson testified that on one or two occasions, she recommended

written warnings, and the Principal issued the warnings (TR.1/6/81, pp.59-60).

20. From 1962 until present, the High School has grown in population from 475 students and 25 teachers to 855 students and about 71 teachers. During this period, the High School has become gradually more structured and responsibility less centralized (TR.1/6/81, pp.77, 106, 125, 185). Prior to 1969, there were at most three of four Department Chairpersons and perhaps only one (Compare TR.1/5/81, p.91 with TR.1/6/81, p.122). Consequently, the Principal and Vice Principal were primarily responsible for teacher evaluations between 1962 and 1970 (TR.1/5/81, pp.92-93; 1/6/81, p.123;P-17). Not until 1969, and possibly not until 1972, did Department Chairpersons start to perform observations and evaluations on an organized basis (TR.1/6/81, pp.108-109, 121). The period 1968-1974 also saw a shift in the functions of a Department Chairperson from basically clerical tasks to more and more supervisory and evaluative roles (TR.1/5/81, p.91;1/6/81, pp.77, 106-08) as well as the emergence of the Department Chairperson's role in the hiring process (TR.1/6/81, p.137).

21. Before 1968, a very loose association of teachers discussed teachers' salaries with the Board at one or two meetings per year (TR.1/5/81, p.90, 129-30). No formal contract was executed until 1972-1973 (TR.1/5/81, p.91). This loose association did not discuss or negotiate the question of compensation for Department Chairpersons (TR.1/5/81, pp.129-30) or any matters specifically pertaining to Department Chairperson as opposed to teachers (TR.1/5/81, p.178).

22. Contrary to the belief of one of the Department Chairpersons (TR.1/5/81, p.179), the Constitution of the Teachers' Association (R-1) does not prohibit Department Chairpersons from becoming president. On one occasion, however, some teachers objected to the nomination of a Department Chairperson for president because of a perceived conflict of interest stemming from his supervisory duties (TR.1/6/81, p.43). Department Chairpersons must evaluate the persons who negotiate their salaries (TR.1/5/81, pp.180-82). The Association placed a Department Chairperson on its negotiating team for the existing contract because it wanted to represent all "special interest groups" (TR.2/6/81, pp.7-8) and because the president believes that "...a Department Chairman who was involved in the evaluation process would know more as to why he needed more money" (TR.2/6/81, pp.45-46).

ANALYSIS OF ISSUES AND
CONCLUSION OF LAW

1. The Teachers' Association has made a Motion to Dismiss because the Supervisors' Association failed formally to ask the Board for recognition before filing the instant representation petition.^{5/} The undersigned dismisses this motion and finds that a question concerning the composition of the negotiations unit exists. Thus, the matter is properly before him.

5/ There is no dispute that the instant petition was timely filed pursuant to N.J.A.C.19:11-2.8.

Nowhere in the Act or in the Commission's Rules on Representation Procedures, N.J.A.C. 19:11-1.1 et. seq., does the alleged jurisdictional requirement of a formal request for recognition appear. Members of the Board correctly informed inquiring Department Chairpersons that recognition of a group already represented by the Teachers' Association might constitute an unfair practice in the absence of the incumbent representative's approval. The Department Chairperson tried, unsuccessfully, to secure the necessary approval. In light of the Board's undeviating refusal to recognize the Supervisors' Association short of certification or the Teachers' Association's permission to withdraw from the unit, requiring Department Chairpersons to go back to the Board at this point and formally request recognition would be the height of futility. Finally, the undersigned questions the standing of the Teachers' Association to raise this issue since the only party directly affected by a failure to request recognition -- the Board -- has no objection to the procedure followed in this case.

2. The Teachers' Association has also moved to dismiss because it believes that some members of the Board may have committed an unfair practice by encouraging certain supervisors to file the instant petition. The undersigned dismisses this motion.

There is no evidence that the Board officially encouraged the filing of the instant Petition. Some members of the Board did state their belief that the Board could not recognize a separate unit of Department Chairpersons without prior certification or approval of the Teachers' Association, but there is no credible evidence that Board members affirmatively encouraged the filing of

the instant Petition in order to undermine the Teachers' Association. Even assuming the truth of the allegations raised in the Motion to Dismiss, such facts would not constitute a defense to a representation petition; instead, the Teachers' Association would have to file an unfair practice charge.

3. The next issue is whether Department Chairpersons are "supervisors" within the meaning of N.J.S.A. 34:13A-5.3. This section provides, in pertinent part:

"...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership... ^{6/}

All parties agreed that the Board retains the ultimate power to hire, discharge and discipline; thus, this case turns upon whether Department Chairpersons have the power to effectively recommend such personnel actions.

Cases decided by the Commission, the Director of Representation, and Commission Hearing Officers have uniformly and repeatedly found Department Chairpersons to be supervisors within the meaning of the Act. See River Dell Board of Education, E.D. No. 76-28, 2 NJPER 89 (1976); Sterling Board of Education, P.E.R.C. No. 80 (1974); Ramapo-Indian Hills Regional High School District Board of Education, D.R. No. 81-26, 7 NJPER 119 (¶ 12048 1981), affirming H.O. No. 81-3, 6 NJPER 405 (¶ 11206 1980); Ridgewood Board of Education, D.R. No. 80-33,

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

6 NJPER 209 (¶ 11102, 1980), affirming H.O. No. 80-4, 5 NJPER 349 (¶ 10183 1979); Paramus Board of Education, H.O. No. 81-9, 7 NJPER 52 (¶ 12022, 1981); Edison Township Board of Education, H.O. No. 81-7, 6 NJPER 58, 82 (¶ 11292, 1980); Cinnaminson Township Board of Education, H.O. No. 81-2, 6 NJPER 396 (¶ 11205, 1980); Waldwick Board of Education, H.O. No. 81-8, 6 NJPER 593 (¶ 11295, 1980). The instant case fits squarely within this pattern of precedent.

Department Chairpersons have power to effectively recommend the hiring of department teachers. Since the institution of the administrative team hiring structure, the recommendation of the participating Department Chairperson has always been followed. By contrast, the Principal has occasionally been out-voted by the Department Chairperson and the Superintendent.

Department Chairpersons have power to effectively recommend adverse personnel actions including discharge and formal discipline against department members. The Principal uses the Department Chairpersons as his "right arm" for evaluation purposes. It is not feasible for the Principal and his assistant to perform the required number of observations and to complete the necessary evaluation reports and PIPs for all approximately 71 teachers while at the same time running a school with 855 students. The Department Chairpersons are at the hub of the structured evaluation system instituted during the past few years and based on their observations and their completion of written documentation such as Teacher Observations Reports, PIPs, Annual Performance Reports and Pupil Progress Review Summaries. If the Department Chairperson does not

observe and document a problem with a particular teacher, that problem may go unremedied and the teacher may escape any adverse effect on his career. While the Principal, once alerted, will independently perform his own observations and investigation into a problem, ^{7/} he will continue to consult with the concerned Department Chairperson, and they will normally come to a "collective decision" concerning the appropriate action to take. The exceptions to the "collective decision" rule are too insubstantial and infrequent to negate the importance of the Department Chairpersons' input into adverse personnel decisions.

Accordingly, based on his findings of fact and the above discussion, the undersigned concludes that Department Chairpersons are "supervisors" within the meaning of N.J.S.A. 34:13A-5.3 and 6(d).

4. Pursuant to N.J.S.A. 34:13A-6(d), supervisors may not be included in a unit containing nonsupervisors except "...where dictated by established practice, prior agreement or special circumstances." The Hearing Officer now considers whether Department Chairpersons even though statutory supervisors, may still remain in the Teachers' Association's unit pursuant to this exception.

^{7/} In Sterling Board of Education, supra, the Commission observed that when Department Chairpersons made negative recommendations, the administration independently verified them. This finding did not undercut the supervisory status accorded Department Chairpersons.

Again, numerous cases involving the proper unit placement of Department Chairpersons have considered this issue. See River Dell Board of Education, supra; Sterling Board of Education, supra; Ramapo-Indian Hills Regional High School District Board of Education, supra; Ridgewood Board of Education, supra; Paramus Board of Education, supra; Cinnaminson Board of Education, supra, Waldwick Board of Education, supra. These cases teach that the statutory exception will not apply unless clear and convincing evidence shows a negotiations relationship which existed before the effective date --July 1, 1968 -- of the Act. The relationship must be between

"an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) [and] an employer... engaged in the process with an intent to reach agreement."

In re West Paterson Board of Education, PERC No. 77, at p.10 (1973).

Also the group of employees for whom the organization purports to speak must include employees acting as supervisors before July 1, 1968, and not just employees who subsequently became supervisors after the Act's effective date. The give-and-take of a bilateral negotiations relationship must be distinguished from mere consultations after which the employer unilaterally sets terms and conditions.

In the instant case, the statutory exception is inapplicable for two reasons:

(1) Department Chairpersons were not "supervisors" within the meaning of the Act prior to July 1, 1968; and

(2) There was no pre-Act negotiations relationship between the Teachers' Association and the Board affecting the interests of Department Chairpersons as Department Chairpersons rather than as teachers.

Prior to July 1, 1968, there were at most three or four Department Chairpersons who did some informal evaluations, but performed essentially clerical functions and played no role in the hiring process. During the pre-Act period, the Principal and Assistant Principal were primarily responsible for teacher evaluations. Accordingly, before the July 1, 1968, the few Department Chairpersons were not "supervisors". To the small extent that some Department Chairpersons performed supervisory or evaluative functions prior to July, 1968, these functions have substantially increased in scope, formality and importance since that time. Thus, even assuming that Department Chairpersons first became supervisors before July, 1968, this substantial change would vitiate the legal significance of that status. See, e.g., Ramapo-Indian Hills Regional High School District Board of Education, supra. A mixed unit of nonsupervisory teachers and supervisory Department Chairpersons cannot be sanctioned when Department Chairpersons obtained their supervisory responsibilities and status only after the passage of the Act.

In fact, a negotiations relationship within the compass of the above cases never existed. Rather than participating in give-and-take sessions designed to hammer out a mutual and binding agreement, the Board and a loose association of teachers engaged in at most sporadic discussions which did not culminate in the

execution of any formal contracts prior to July, 1968. Most significantly, these discussions did not touch upon the interests of Department Chairpersons as a group with interests different from teachers as a group. Accordingly, the undersigned concludes that a negotiations relationship sufficient to invoke the exception to the Act's prohibition of mixed supervisory - nonsupervisory units did not exist.

5. Board of Education of West Orange V. Wilton, 57 N.J. 404 (1971), also supports the exclusion of Department Chairpersons from the unit represented by the Teachers' Association. In Wilton, the Commission included the Director of Elementary Education in a unit with other supervisors. The Supreme Court questioned the appropriateness of inclusion since the Director supervised elementary school principals in the unit and evaluated their performance for the purpose of making recommendations to the Superintendent of Schools with respect to salary increases and tenure. The Court queried:

"In the performance of such tasks she owed undivided loyalty to the Board of Education. If she were joined in an employees unit which included the principals whose work she was duty bound to appraise in the Board's interest, would she be under pressure, real or psychological, to be less faithful to the Board and more responsive to the wishes of her associates in the negotiating unit? Supra, at p.426."

The Court then held:

Where a substantial actual or potential conflict of interest exists among supervisors with respect to their duties and obligations to the employer in relation to each other, the requisite community of interest among them is lacking and... a unit which undertakes to include all of them is not an appropriate negotiating unit within the intentment of the statute. Supra, at p.427.


Accordingly, the Court remanded the case to the Commission for reconsideration utilizing the above standards for gauging a conflict of interest.

Numerous cases have applied the Wilton standards to support the exclusion of Department Chairperson from a unit including the teachers they evaluate. Sterling Board of Education, supra; Paramus Board of Education, supra; Cinnaminson Board of Education, supra, Ramapo-Indian Hills Regional High School District Board of Education, H.O. No. 81-3 supra; Waldwick Board of Education, supra; But see River Dell Board of Education, supra. Application of these standards and precedent here yields the same support.

Department Chairpersons have substantial power over the careers of teachers. The exercise of this power has apparently made neither department members nor the Principal happy. On the one hand, the completion of Teacher Observation Reports, PIPs Annual Performance Reports, and Pupil Progress Review Summaries, has led to repeated disagreements between Department Chairpersons and teachers, specifically including confrontations which caused a Department Chairperson to delete critical remarks from three PIPs. On the other hand, the Principal believes that the conflict between the Department Chairperson's membership in the Teachers' Association and his supervisory responsibilities has occasionally resulted in a reluctance to be completely honest in preparing these documents. Continued inclusion of Department Chairpersons in the unit will only tighten the grip of this vise. Accordingly, Department Chairpersons should be excluded from the Teachers' Association's unit pursuant to the Wilton conflict of interest analysis.

CONCLUSIONS
AND RECOMMENDATIONS

Upon consideration of the entire record and the foregoing discussion, the Hearing Officer concludes that Department Chairpersons are supervisors within the meaning of the Act, that no "established practice, prior agreement, or special circumstances" warrant the continuation of a mixed supervisory -- nonsupervisory unit, and that a conflict of interest would in any event render continued unit inclusion of Department Chairperson inappropriate. Accordingly, the Hearing Officer recommends the removal of Department Chairpersons from the Teachers' Association's negotiations unit.


Robert E. Anderson, Jr.
Hearing Officer

DATED: May 6, 1981
Trenton, New Jersey