

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

In the Matter of

CINNAMINSON TOWNSHIP BOARD
OF EDUCATION,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-78-52

CINNAMINSON TOWNSHIP TEACHERS
ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation, in agreement with the recommendations of a Hearing Officer, determines that department chairpersons must be excluded from a teachers' negotiations unit when the Board adopts a new job description which will place them in a supervisory capacity over teachers. The Director adopts the Hearing Officer's conclusion that a statutory exception of "established practice," which would permit the continued inclusion of supervisory personnel in the unit, is not applicable. He further notes that even if department chairperson were previously supervisors, their new supervisory responsibilities would substantially be increased, thus rendering the "established practice" exception inapplicable.

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Employee Representative.

Appearances:

For the Public Employer-Petitioner,
Murray, Granello & Kenney
(James P. Granello, of Counsel)

For the Employee Representative,
Selikoff & Cohen, P.A.
(Joel S. Selikoff, of Counsel)

DECISION

Pursuant to a Petition for Clarification of Unit filed on June 1, 1978, with the Public Employment Relations Commission (the "Commission") by the Cinnaminson Township Board of Education (the "Board"), hearings were conducted before a designated Commission Hearing Officer on the claim raised by the Board that all department chairpersons should be removed from the collective negotiations unit represented by the Cinnaminson Township Teachers Association (the "Association") because the department chairpersons, upon implementation of a newly revised job description, will be supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").

Hearings were held before Commission Hearing Officer, Charles A. Tadduni on June 19, 20, 21 and 27, 1979 in Trenton, at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Post-hearing briefs were submitted by the parties and the record closed September 6, 1979. The Hearing Officer thereafter issued his Report and Recommendations on July 18, 1980.

The Association filed exceptions to the Hearing Officer's Report and Recommendations on August 29, 1980. The Board filed a reply to these exceptions on September 15, 1980.

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

1. The Cinnaminson Township 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., is the employer of the employees who are the subject of this petition and is subject to its provisions.

2. The Cinnaminson Township Teachers Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is the recognized representative of a unit comprised of Board personnel including department chairpersons and teachers.

4. The Board argues that the chairpersons will become supervisors upon implementation of a proposed new job description and therefore must be excluded from the collective negotiations unit pursuant to N.J.S.A. 34:13A-5.3 and 6(d). Further, they contend that there is a substantial actual or potential conflict of interest between department chairpersons and teachers if chairpersons remain in the same unit while functioning in a supervisory capacity vis a vis teachers. Furthermore, the Board asserts that there has been no clear and convincing showing of any statutory exception that would mandate the continued inclusion of chairpersons in the existing collective negotiations unit.

5. The Association argues that prior to July 1, 1968, 1/ the department chairpersons were supervisors within the meaning of the Act and that they have continued to be supervisors. They also argue that the Association's collective negotiations history with the Board falls within the statutory "established practice" exception and therefore permits the continuation of this mixed unit of supervisors and non-supervisors. The Association contends that the employer has failed to demonstrate that the continued inclusion of supervisors in the unit gives rise to any actual conflict of interest which would require their removal. In the alternative, the Association argues that even if a potential for conflict was an appropriate standard for exclusion of supervisors, it is premature to apply

1/ The 1968 date assumes significance since the Commission, in In re W. Paterson Board of Education, PERC No. 79 (1973), held that the statutory exception of "established practice" relates solely to pre-act (1968) relationships.

that standard to the circumstances in the instant case because chairpersons do not now perform the supervisory duties listed in the proposed job description.

6. The Hearing Officer found the following: a) Department chairpersons were not supervisors within the meaning of the Act prior to 1968 because their role in the procedures for hiring, teacher evaluation and staff discipline was inconsistent, inconclusive and not sufficiently substantial to rise to the level of supervisory; b) The statutory established practice exception allowing the continued mixing of supervisors and non-supervisors was intended to preserve only those collective negotiation relationships which existed before passage of the Act, and does not protect this mixed unit of supervisory and non-supervisory employees. The Hearing Officer found that there was no showing that prior to 1968 the parties negotiated the terms and conditions of employment which specifically related to department chairpersons and that any discussions which occurred were applicable only to the position of teacher; c) There was insufficient evidence to substantiate the claim of a pre-1968 collective negotiations relationship between the Board of Education and the Association; d) Chairpersons would be functioning as supervisors with a substantial expansion of their role in the evaluation and observation of non-tenured and marginal tenured teachers. Chairpersons would be assigned duties and responsibilities concerning recommendations in the areas of hiring, annual salary increments and renewal of non-tenured teachers. Chairpersons would have more authority in disciplinary matters and

would be involved as management's representative in the initial steps of the grievance procedure. In addition, these employees would be required to secure supervisory certification in accordance with newly promulgated regulations.

The Hearing Officer recommended that department chairpersons be removed from the collective negotiations unit immediately because the substantial increase in their supervisory duties presents potential or actual conflicts of interest between the chairpersons and the teachers whom they would supervise.

The Association excepts to the Hearing Officer's findings arguing that 1) department chairpersons were supervisors within the meaning of the Act prior to 1968 and they made effective recommendations concerning the employment of teachers. The Association argues that, to avoid conflict of interest, the administrators did not allow chairpersons to observe non-tenured teachers or marginal teachers. 2) Further, the position of department chairperson was included in the Cinnaminson Teachers Association collective negotiation unit prior to 1968, as stipulated by the parties. 3) A pre-1968 collective negotiations relationship between the Board and the Association was demonstrated and supports the application of the statutory established practice exception to permit continuation of the present mixed unit. 4) The Board's clarification of unit petition is untimely because the alleged conflict of interest claim is based on a proposed job description which has not yet been adopted nor implemented. The Association distinguishes In re Sterling Board of Education, PERC No. 80 (1974), where the parties

jointly urged an adjudication while in the instant case the Association does not seek an adjudication prior to the actual implementation of the proposed job description for chairpersons.

5) Exclusion of department chairpersons from a collective negotiations unit, where an established practice exists, requires a showing of actual conflict of interest.

The Board submitted a brief in support of the Hearing Officer's findings of fact and conclusions of law.

After review of the entire record, the undersigned adopts the Hearing Officer's findings of fact, conclusions of law and recommendation that department chairpersons be removed from the Association's collective negotiations unit.

The statutory provisions concerning the appropriateness of including supervisory and non-supervisory employees in the same negotiations unit are contained in N.J.S.A. 34:13A-5.3 and 6(d) which provide in relevant part as follows:

5.3...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 non-supervisory personnel to membership...

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

There is ample evidence in the record to support the Hearing Officer's finding that department chairpersons were not supervisors prior to 1968. Likewise the record supports his conclusion that a pre-1968 collective negotiations relationship did not exist between the Board and the Association, as it related to the role of department chairpersons.

The record further reveals that, beginning in 1974, with the hiring of Superintendent Holtzman and High School Principal Byrne, substantial changes occurred in the administrative and supervisory organization of the school district. The role of chairpersons in the teacher evaluation process has increased significantly due to new requirements for both formative and summative evaluations of non-marginal tenured teachers. These requirements have been imposed on school districts by the State Department of Education in implementation of the "thorough and efficient" education standards established by legislation in 1975 and 1979. It appears that the Board has withheld from chairpersons the requirement that they prepare evaluations for non-tenured teachers because preparation of the evaluations would create a conflict of interest between the chairpersons and other employees in the unit.

In order to implement the new requirements, the Board has created new duties and authorities for the chairpersons, which it has embodied in a new job description.

Under the new job description, chairpersons will clearly be supervisors within the meaning of the Act. They will be

responsible for evaluation of non-tenured and marginal tenured teachers, for recommendations on increments and renewals, for screening and rating teacher applicants, for teacher discipline and for grievance administration on behalf of the Board. Supervisory certification will be required for preparation of evaluations. Consequently, chairpersons will be in a position where their good faith performance as supervisors would often put them at odds with other employees in the unit, thus raising a potential substantial conflict between the chairpersons and teachers. 2/ The Hearing Officer, in the instant case, correctly determined that the performance of the obligations and powers delegated to department chairpersons under the new job description would create more than a de minimis conflict of interest, destroying the prior community of interest between the department chairperson and teachers in the existing collective negotiations unit. As supervisors, the department chairpersons may not be in the same unit with non-supervisors.

The Association, however, strongly argues that a pre-1968 "established practice" existed which would mandate the continued

2/ Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), at page 425:

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees the community of interest required for inclusion of such supervisor is not present. While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest.

inclusion of the department chairpersons in the unit. In addition, the Commission has been presented with several clarification of unit petitions which seek the removal of department chairpersons because of the implementation of the "thorough and efficient" regulations. Although the undersigned has concluded that the record herein does not support a finding that department chairpersons were supervisors prior to 1968, thus mooting the "established practice" argument, the other petitions may pose the question in the context of a proven established practice situation. Therefore, to provide guidance, the undersigned has evaluated this petition in light of principles recently outlined in In re Ramapo-Indian Hills Regional High School District Board of Education, D.R. No. 81-26, 6 NJPER _____ (¶ _____ 1981).

In Ramapo, the undersigned reviewed a Hearing Officer's recommendation concerning the unit placement of a Director of Guidance. The Hearing Officer found that the Director of Guidance was represented by the Association prior to the passage of the Act and that the Director of Guidance was a supervisor prior to 1968. He also found that the negotiations relationship between the Association and the Board predated the passage of the Act. The Hearing Officer further found that the supervisory responsibilities of the Director of Guidance substantially and dramatically increased after 1968. In light of this finding, the Hearing Officer concluded that the "established practice" exception was negated by the substantial increase in supervisory duties. The undersigned, in affirming the Hearing Officer, pointed out that

the mere finding of an established practice does not mandate the continuation of a mixed supervisory/non-supervisory unit. 3/

In conclusion, 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 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/non-supervisory employee units is preeminent.

In the instant case, upon implementation of a new job description for department chairpersons there will be substantial

3/ In In re West Paterson Board of Education, PERC No. 77 (1973), the Commission stated:

The Association's position, on the other hand, seems unduly narrow. It argues that the prohibition against mixed units falls whenever established practice or prior agreement is found and that upon either finding, the continuation of such unit is mandated. That approach is fairly mechanical and seems to remove from consideration any evaluation of whether the end result -- the allegedly mandated unit -- is within the overall objectives of the statute. We can conceive of situations where the end result would be demonstrably obnoxious to such objective and surely beyond the contemplation of the Legislature when it adopted these exceptions. It also lends itself to a literal application whereby a single, one-year, prior agreement would be sufficient to trigger the exceptions with no regard to be given to other substantial considerations. When the Legislature charged the Commission to 'decide in each instance which unit of employees is appropriate', we think it intended a greater degree of discretion and judgment than the Association's approach permits. The statute itself suggests that no unit is mandated because of particular findings. It provides that 'except where dictated by (one of the exceptions),' the mixed unit is forbidden; it does not say the existence of any of the exceptions dictates a particular unit result. Clearly, the sense of it is that an appraisal and judgment is to be made to determine whether exceptional circumstances warrant, indeed require a deviation from the norm.

and significant change in the relationship between the supervisory and non-supervisory employees in the existing unit which would negate any statutory established practice, if it had existed.

The Association raises a timeliness issue and argues that the application of the potential conflict standard is premature in the instant case because the Board has neither adopted nor implemented the chairperson job description. It distinguished Sterling, supra wherein the parties jointly urged a determination on the merits.

In Sterling, the Board of Education converted department chairpersons into department coordinators with expanded supervisory authority and duties. The Commission therein concluded that the coordinators' new hiring authority and other supervisory duties established an "incompatibility of interest" with teachers and therefore coordinators were excluded from the teacher collective negotiation unit. Similarly, in the instant case, the chairpersons, under the revised job description, have greater decision-making authority for hiring, renewals, termination and grievances on behalf of the Board as well as an expanded supervisory responsibility for teacher evaluation. The undersigned concludes that the potential substantial conflict of interest which would result from inclusion of chairpersons performing duties under the new job description raises the kind of situation which the Court in Wilton wished to avoid. This conflict requires exclusion from the existing unit.

Notwithstanding the Association's assertion that the instant matter is not ripe for adjudication, the Commission has not adopted a rigid approach relating to its consideration of Clarifi-

cation of Unit petitions. In Sterling, supra, the Commission proceeded to issue a determination as to unit identification, although it advised that the record therein did not reflect the normal demonstration of "sufficient past conduct from which a pattern or routine could be established with reasonable conviction." The Commission noted that both parties in Sterling urged a determination, but this consideration does not appear to be the sole reason for the Commission's consideration of the issues. The record in Sterling revealed a substantially developed supervisory job description, adopted by the Board in June, implemented in December, and the subject of a Commission hearing in December. Previously, in West Paterson, supra, n.3, the Commission had stated:

"future contingencies are an acceptable and, in fact, generally controlling consideration in most determinations concerning supervisors because, in the absence of a history, there is only expectation and probability that the interests of supervisors and those supervised will clash, to the detriment of some right entitled to protection. But where past experience exists, such can obviously be a more accurate gauge of probabilities than mere speculation not benefited by hindsight."

In contrast, in In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976), the undersigned declined to consider an employer's claim that a possible future expansion of a program would produce a "conflict of interest" since the "string of contingencies on which such a conflict is predicated is too far removed from the present situation to support the exclusion of the Coordinator of Consultation and Education from the petitioned-for unit."

In the present matter, the Board has confirmed its

intent to adopt and implement the new job description for department chairperson, and apparently will do so upon the exclusion of department chairpersons from the Association's unit. 4/ Thus, this matter does not involve speculation or conjecture as to job function nor does it involve a remote possibility that implementation of the changes would ever occur, as in the Somerset matter. Clarification of the Association's unit is therefore appropriate at this time. 5/

Accordingly, for the above reasons, the undersigned adopts the findings of fact and conclusions of law of the Hearing Officer and determines that department chairpersons shall be removed from the existing collective negotiations unit. The effectiveness of the instant clarification, and therefore, the exclusion of department chairpersons from the Association's collective negotiation unit shall be simultaneous with the Board's adoption of the new job description. The undersigned further determines that if the program as conceived has not materialized within a reasonable time from the date of the adoption of the

4/ The Board has stipulated: "To date, the Board has not formally adopted, and therefore has not formally implemented, the new job description. Further, the Board stipulates that it is ready to adopt and/or implement the new job description immediately but that it would not adopt and/or implement said job description prior to receipt of a Commission decision addressing the unit status of department chairpersons." Exhibit J-2.

5/ Compare In re Passaic County Regional High School Board of Education, PERC No. 77-19, 3 NJPER 34 (1975) involving an employer's refusal to negotiate with respect to a purportedly "confidential" employee. The Commission encouraged the utilization of the Clarification of Unit procedure to avoid potential unfair practice litigation, which might result from such unilateral action by an employer.

job description either party may request a reexamination of this matter. See Sterling, supra.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: May 7, 1981
Trenton, New Jersey

STATE OF NEW JERSEY
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ASSOCIATION,

Employee Representative.

SYNOPSIS

A Commission Hearing Officer finds that department chairpersons operating under a new job description and in the context of a revised administrative-supervisory structure, will be supervisors within the meaning of the Act; the Hearing Officer further concludes that the inclusion of department chairpersons (operating under said new job description) in the Cinnaminson Teachers Association's negotiating unit will precipitate such actual or potential substantial conflicts of interest as would warrant the exclusion of department chairpersons from said unit. Finally, the Hearing Officer finds that no established practice has been shown to exist herein that would dictate the inclusion of department chairpersons in the Association unit. Accordingly, the Hearing Officer recommends removal of department chairpersons from the Association's negotiating unit.

Further, the Hearing Officer recommends that after an appropriate time, either party (or both) may request a reexamination of this matter, upon a prima facie showing that the program as conceived has not materialized.

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 Proceedings who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

For the Public Employer-Petitioner
Murray, Granello & Kenney
(James P. Granello, of Counsel)

For the Employee Representative
Selikoff & Cohen, P.A.
(Joel S. Selikoff, of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") (Docket No. CU-78-52) on June 1, 1978, by the Cinnaminson Township Board of Education (the "Board") seeking a clarification regarding the composition of a unit of employees represented by the Cinnaminson Teachers' Association (the "Association"). The Board seeks a determination which would exclude from the negotiations unit represented by the Association all department chairpersons employed by the Board. Pursuant to a Notice of Hearing, hearings were held before the undersigned Hearing Officer on June 19, 20, 21 and 27, 1979, in Trenton, at which all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs were submitted by the parties by

September 6, 1979. Upon the entire record in this proceeding, the Hearing Officer finds:

1. The Cinnaminson Township Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act" N.J.S.A. 34:13A-1.1 et seq.), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding.

2. The Cinnaminson Teachers' Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Board has filed a Petition for Clarification of Unit seeking the exclusion of department chairpersons from the unit represented by the Association. ^{1/} The Association opposes the exclusion of department chairpersons from its unit. Accordingly, there is a question concerning the composition of the negotiations unit and the matter is properly before the Hearing Officer for a report and recommendations.

I. Positions of the Parties

The Board contends that upon implementation of the newly revised job description for the department chairperson position, department chairpersons will be supervisors within the meaning of the Act and accordingly must be excluded from the current Association negotiations unit. Further, the Board contends that the implementation of the new department chairperson position will create substantial

^{1/} Exhibit A7 (Art. II, Sec. B), an expired agreement between the Board and the Association covering school years 1976-78, sets forth the following recognition clause:

Pursuant to the New Jersey Employer-Employee Relations Act, the Board hereby recognizes the Association during the life-time of this Agreement as the exclusive representative for purposes of collective negotiations concerning the terms and conditions of employment for the following groups: contracted teaching staff members (excluding full time administrators), psychologists, nurses, librarian aides, secretaries, clerks, teacher aides and media assistants, but excluding all employees statutorily excluded by the Act.

Schedule E2 of said agreement sets forth salary stipends for department heads.

actual and potential conflicts of interest between department chairpersons and teachers if the department chairpersons remain in the Association unit, which would require the exclusion of department chairpersons from the Association unit.

The Association asserts that the department chairpersons are already supervisors within the meaning of the Act, and that the new job description, if implemented, rather than making them supervisors would merely add to the current level of supervisory authority already possessed by the department chairpersons. The Association further asserts that an "established practice" exception exists herein which mandates the continued inclusion of department chairpersons in the Association negotiating unit. Finally, the Association argues that there has been no showing of actual or potential conflicts of interest which would require exclusion of department chairpersons from the unit.

Responding, the Board contends that there has been no clear and convincing showing of any statutory exception that would mandate the inclusion of supervisors in the negotiating unit.

II. Issues

1. Whether the department chairpersons, operating under the new job description, will be supervisors within the meaning of the Act?
2. Whether such actual or potential substantial conflicts of interest are generated by the inclusion of the department chairpersons (operating under the new job description) in the Association's negotiations unit that it becomes necessary to exclude the department chairpersons from said unit?
3. Whether an established practice exists that would dictate the continued existence of either a mixed unit of supervisors and non-supervisors or a negotiations unit whose composition gives rise to conflicts of interest?

III. Discussion and Analysis of Law and Facts

The undersigned will examine the nature of the role of department chairpersons in Cinnaminson, broken down temporally, as follows: (a) pre 68 (b) pre 74 (c) post 74 (d) upon implementation of the new job description.

Upon having reviewed the role of department chairpersons prior to 1968, the undersigned will consider the established practice issue.

(A) Status as Supervisors and Conflicts of Interest

N.J.S.A. 34:13A-5.3 provides in part that "...nor except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership."

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

The Commission has determined that the Act, in effect, defines supervisor as one having the authority to hire, discharge, discipline, or to effectively recommend any of the foregoing.

In Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), the Supreme Court examined at length the factors attendant upon the structuring of negotiations units consistent with the purposes of the Act, i.e., to foster fair and harmonious public employer-employee relations.

Specifically, the Wilton court considered:

To what extent does the reasonable and good faith performance of the obligations a supervisor owes to his employer have capacity, actual or potential, to create a conflict of interest with other supervisors whose work he is obliged to oversee and evaluate for his employer.

The court concluded that where performance of the obligations or the powers delegated by an employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for the inclusion of such supervisor is not present.

(1) Pre '68 and Pre '74 Role of
Department Chairpersons

No job descriptions are in evidence for this period. No supervisory certification was required for department chairpersons during this time.

The department chairperson position was then less clearly defined than it is today. The responsibilities and authorities of the position varied from department to department and from time to time. There were wide variations in hiring and evaluation practices, with different departments using a variety of formats and paper work.

Department chairpersons had a role in the hiring process in years prior to 1968, although no specific participation was required of department chairpersons -- that is, they were not essential participants in the process.^{2/} Department chairpersons had an advisory role in the hiring process. (T2/34)

Usually, the principal did the pre-interview screening^{3/} or selection of applicants (T3/65) or the department chairperson cleared his selection of applicants for interview with the principal (T3/118). The interview process varied from two steps (department chairperson and principal) to three steps (department chairperson, principal and central administration). Sometimes the department chair-

^{2/} In re River Dell Bd. of Educ., E.D. No. 76-28(1976), without a direct hiring recommendation from the department chairperson who interviewed a candidate, the superintendent testified that such a candidate would not be hired.

^{3/} While Department Chairperson Shultz indicated that she interviewed separately from the principal and that she selected her interviewees, she further indicated that she was uncertain whether the principal interviewed all candidates or only those whom she positively recommended. (T4/57)

person and principal interviewed a candidate together; sometimes they interviewed separately, but on the same day. The constant factor herein was that the principal always participated in the interview process. After the department chairperson-principal level interviews were completed, they verbally conferred with regard to the candidate. ^{4/} The department chairperson gave the principal his/her opinion of the candidate. The principal, after subsequently formulating his own opinion, then prepared, signed and forwarded the documentation required by the Central Administration (a memo assessing the candidate, a summary of the candidate's interview performance and a ranking of all the candidates considered). The Central Administration (Superintendent's Office) then decided upon which candidate to recommend to the Board for hire. The Superintendent (and subsequently, the Board) usually followed the recommendation received from the principal/department chairperson level. Occasionally, the Central Administration interviewed some of the candidates. The undersigned especially notes that the department chairperson generally prepared no documentation and spoke to no one about the candidates other than the principal.

Prior to 1974, department chairpersons' involvement in the evaluation function varied substantially as there was then no systematic or consistent program for teacher evaluation. Generally, department chairpersons performed classroom observations on teachers in their departments and submitted narrative summaries of the observations to the principal. These summaries were rather general in style -- unlike the Performance Evaluation Program's formative and summative evaluation components now being utilized. These observation summaries never went beyond the principal. Most importantly, all of the observation reports from this period except one were positive in tone.

^{4/} There is testimony indicating that on occasion, department chairpersons completed a 3 x 5 information card on interviewees and submitted same to principals. Sometimes there would be an indication on the card that a candidate was "good" or "not good," but generally it contained objective rather than subjective information.

Some department chairpersons' observations were oral, some written. (T3/34, T4/55). Any year-end evaluations which were completed were done by principals (T3/83, T4/5, 67). Principals and vice principals usually did the observations for non-tenured teachers (T4/5, 66). Most important, other than one incident involving Department Chairperson Killino,^{5/} during this period no department chairperson gave a negative observation. At worst, recommendations were made for improvement within the overall context of a positive recommendation. No department chairperson recommended a non-renewal or a withholding of increment. (T1/25, T3/8, 16). Any department chairperson input into teacher evaluations was informal (T1/25, T4/55). Department chairpersons were not involved in initiating, administering or meting out discipline to teachers. Department chairpersons were not involved in the grievance process on the Board's behalf.

In determining whether the Cinnaminson department chairpersons are supervisors within the meaning of the Act, a useful comparison may be made to prior Commission cases involving similar personnel. In In re River Dell Board of Education,^{6/} E. D. No. 76-28 (1976), and In re Sterling Board of Education,^{7/} P. E. R. C. No. 80 (1976), the Commission found that department chairpersons (Coordinators in Sterling) were supervisors within the meaning of the Act. However, in those cases, department chairpersons had a more direct and effective hiring role than was in evidence here. Department chairpersons solicited and screened employment applicants. Thereafter department chairpersons interviewed and assessed candidates and pared down the list of candidates who would be given further consideration. The recommendations which the Superintendent received from

^{5/} Mr. Killino completed an observation which indicated that unless improvement was made, he (Killino) would recommend non-renewal. Killino kept in close touch with the principal (the former high school principal, Mr. Paternoster) concerning the problem. Mr. Paternoster eventually told Killino to record the problem in written form. Subsequently, Mr. Paternoster conducted a conference attended by the teacher in question, a CTA representative and Department Chairperson Killino. After the conference, the teacher eventually resigned.

^{6/} In re River Dell Board of Education, *supra* n. 2.

^{7/} In re Sterling Board of Education, P.E.R.C. No. 80 (1974).

the principal contained specific reference to the positive recommendation received from the department chairperson. Without positive recommendations from both the department chairperson and the principal, the superintendent would not hire a candidate.

In River Dell, department chairpersons were directly involved in the evaluation function; they performed classroom observations, rendered evaluations of teachers and made specific recommendations for continued employment. Department chairpersons evaluated both tenured and non-tenured teachers. Department chairpersons signed the evaluation form which was forwarded to the principal. Where several non-tenured teachers were not reemployed, all had received negative recommendations from their department chairpersons. The superintendent testified that he gave greater weight to evaluations from department chairpersons than those from principals.

Based upon consideration of the entire record in this matter, the undersigned concludes that, prior to 1974, department chairpersons employed by the Cinnamon Board of Education were not supervisors within the meaning of the Act. While the undersigned recognizes that the department chairpersons did perform certain functions which were, to a limited extent, supervisory in nature, such performance did not rise to the level of supervisor within the meaning of the Act. Their role in such matters as hiring, evaluation, and discipline of staff was not consistent and their level of involvement in such functions was often inconclusive or not substantial. ^{8/}

Of particular importance -- in view of the testimony indicating that department chairpersons' recommendations were followed -- was the absence of any negative recommendations from the department chairpersons. There were no recommendations for non-renewal, withholding of increment, discipline, etc., although

^{8/} Cf. River Dell, supra, n. 2.

such actions were taken by the Board during this period. The fact that such adverse actions did occur during this period but that department chairpersons were not involved therein bespeaks a significant lack of activity in certain crucial areas of supervision. Also, there was no indication in the record that department chairpersons exerted an effective veto power over the hiring process to the extent that a candidate would receive no further consideration if the department chairperson rated the candidate poorly. The record indicates that the hard decisions -- negative decisions -- were consistently made by others. Accordingly, the undersigned concludes that department chairpersons were not supervisors within the meaning of the Act prior to 1974.

(2) History of the parties relationship:
established practice --

N.J.S.A. 34:13A-5.3 provides that except where dictated by established practice, prior agreement or special circumstances, a mixed unit of supervisors and non-supervisors is inappropriate. The Commission has determined that these statutory exceptions may be applied to a negotiations unit comprised of non-statutory supervisory employees and their subordinates whose joint presence in one unit gives rise to a conflict of interest. ^{9/}

The Commission has determined that the mere existence of one of the exceptions is not sufficient for the maintenance of a mixed unit. Rather, the Commission has found that "the sense of it (§5.3 of the Act) is that an appraisal and judgment is to be made to determine whether exceptional circumstances warrant, indeed require, a deviation from the norm." ^{10/}

In past decisions, the Commission has indicated the type and extent of relationship between parties (public employers and employee organizations) neces-

^{9/} In re City of Camden, P.E.R.C. No. 52, p. 5 (1971); In re City of Union City, P.E.R.C. No. 70, p. 5 (1972).

^{10/} In re West Paterson Board of Education, P.E.R.C. No. 77, p. 14-15, 9-10 (1973).

sary to support a claim of established practice. ^{11/} The measure of such a relationship as enunciated by the Commission requires

an organization regularly speaking on behalf of a reasonably well-defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement. ^{12/}

The Commission has further determined that the statutory exceptions were meant to apply only to pre-Chapter 303 circumstances. ^{13/} Without exception, the Commission has given a narrow interpretation to these terms. ^{14/}

To substantiate a claim of established practice, there must be clear and convincing evidence in the record which shows that such a negotiations relationship had timely existed. ^{15/} The mere labeling of an event as negotiations or calling a document a demand or proposal will not suffice to demonstrate the substantive nature of the proffered item. ^{16/} It must be demonstrated in the record that there exists a consistent and exclusive bilateral negotiations relationship between the parties such as is evidenced by an exchange of negotiations proposals on substantive terms and conditions of employment such as salary, method of payment, and various other economic and non-economic fringe items. Further, it must be shown that both parties entered the give-and-take relationship with an intent to consummate a mutually acceptable agreement.

Such a bilateral relationship -- a sort of "economic equilibrium" between the parties -- may be contrasted with circumstances wherein terms and conditions

^{11/} In re West Paterson Board of Education, P.E.R.C. No. 79 (1973); In re West Paterson Board of Education, P.E.R.C. No. 77 (1973); In re City of Camden, P.E.R.C. No. 53 (1971); In re City of Camden, P.E.R.C. No. 52 (1971); In re Middlesex County College Board of Trustees, P.E.R.C. No. 29 (1969); In re Township of Teaneck, E.D. No. 23 (1971); In re Hillside Board of Education, E.D. No. 2 (1970).

^{12/} In re West Paterson, P.E.R.C. No. 77, p. 10 (1973).

^{13/} In re West Paterson, P.E.R.C. No. 79, p. 4 (1973).

^{14/} In re West Paterson, P.E.R.C. No. 77, p. 9-10 (1973).

^{15/} In re Teaneck, E.D. No. 23, p. 7-8 (1971).

^{16/} Id., p. 8.

of employment are unilaterally determined by the public employer after consultations with public employees or their representatives. In the latter situation, a bilateral exchange or flow of ideas and proposals between the parties is lacking; it is essentially a static system.

In In re Town of Kearny, ^{17/} then-Hearing Officer Carl Kurtzman gave the following consideration to the issue of established practice:

The authors of this Act were convinced that a unit which included both supervisors and non-supervisors would not be a unit of employees appropriate for collective negotiation. The Act would permit an exception only where dictated by established practice, prior agreement or special circumstances. The intent of the exception was to permit the continuation of an otherwise unsatisfactory unit where life, history and experience had proven that, notwithstanding the apparent inappropriateness of the unit, the composition of the unit had not been a deterrent to the achievement of effective collective negotiations.... The intent of the Act was to prevent the disruption of a collective negotiations relationship which had proven to be functional in practice. The Act would sanction a continuation of the composition of the unit where there was proof that in actual experience, the conflict of interest, which is inherent in a unit containing both supervisors and non-supervisors, had not become a reality. ^{18/}

In order to find an established practice herein, several factors must be satisfied:

- (a) that department chairpersons employed by the Cinnaminson Board of Education were supervisors within the meaning of the Act prior to 1968;
- (b) that the department chairperson position was included in a collective negotiations unit with non-supervisory professional employees of the Board prior to 1968;
- (c) that the above-referred mixed collective negotiations unit (containing both supervisors and non-supervisory personnel) was represented by an employee organization who engaged in meaningful collective negotiations with the public employer.

^{17/} In re Town of Kearny, P.E.R.C. No. 78, Hearing Officer's Report (1973).

^{18/} Kearny, H. O. Report, supra, at 11-12.

Having already found that department chairpersons were not supervisors within the meaning of the Act prior to 1968, the undersigned declines to find an established practice in the instant matter.

However, assuming arguendo that it is found that department chairpersons were supervisors prior to 1968, an answer to questions (b) and (c) above would be warranted. Based upon the record herein, there is no indication that, prior to 1968, the position of department chairperson was included in the collective negotiations unit represented by the CTA. The undersigned is aware that Exhibit J2, stipulation number 4, states that department chairpersons were in the CTA unit prior to '68 and that one witness testified that department chairpersons were in the negotiations unit. The undersigned has no doubt that Leo Carr, Emory Markovic, Frank Killino and Alice Shultz were included in the employee unit represented by the CTA. However, they were included in that unit by virtue of their position as teachers. ^{19/} There is no showing in the record that, prior to 1968, the parties ever discussed the needs of department chairpersons or terms and conditions of employment that were specific to department chairpersons (T2/112-118). Any discussions which occurred -- limited as they were -- were applicable only to the position of teacher. Further, in November 1966, a recognition was given by the Board to the Association, recognizing the Association as the sole negotiations representative for teachers in Cinnaminson. Hence, while certain persons, who were department chairpersons, may have been represented by the CTA prior to 1968, the representation was of persons filling teacher positions, not department chairperson positions. Accordingly, the undersigned concludes that the department chairperson position as such was not shown to be included in the collective negotiations unit with non-supervisory employees prior to 1968.

^{19/} In this regard, the Hearing Officer notes the testimony indicating that in pre '68 years, department chairpersons were in fact considered as teachers by the Board.

Upon careful consideration of the record herein, the Hearing Officer finds that there is no clear demonstration in the record of a collective negotiations relationship between the Board and the Association sufficient to support a claim of established practice.

In support of the assertion that the parties had entered into collective negotiations prior to 1968 are the following: (a) a letter from a former Board Secretary dated November 11, 1966, indicating that the Board had voted to recognize the Association as the sole negotiations representative for the teachers of Cinnamonson, provided the Association certifies in writing that it represents at least 50% of the teachers; (b) a letter from the Board President, dated November 8, 1966, to the Association, acknowledging receipt of the Association's letter requesting meetings on certain topics; (c) testimony by an NJEA UniServ Representative concerning the asserted negotiations relationship between the Association and the Board in 1966-67; (d) testimony by two department chairpersons concerning the asserted negotiations relationship in 1964-65 and 1965-66.

The Board Secretary's letter indicates that the Board did recognize the Association as the sole negotiations representative of the Cinnaminson teachers. The recognition is clearly a solid base from which to build a showing of a negotiations relationship; without more, however, it does not establish meaningful, pre '68, collective negotiations.

The Association representative's testimony indicated that the parties met on four occasions to discuss issues of mutual interest. In December of the 1966-67 school year the Association submitted proposals to the Board concerning the length of the school day, hiring of teachers aides, audio-visual equipment, teaching load and class size. The Board's response was a salary amount. The Association representative's testimony indicates agreement was reached on salary as a

result of this exchange and said agreement was reduced to writing. Further, there is testimony that there were proposals and counterproposals and that the Association caucused to consider the Board's offer.

Testimony offered by one of the department chairpersons indicates that in 1965-66, the parties met on two occasions. He indicated that there was give and take, caucuses, and "pretty much what we do today." The first time the parties met, the department chairperson indicated that he "assumes" the Association made a presentation to the Board President. The Board President then responded with some figures jotted on the back of an envelope. The department chairperson expressed disappointment at the lack of consideration indicated by such a gesture. The parties adjourned and reconvened the following week and reached agreement. The only thing considered was salary.

But not all the testimony presented on this topic was useful in showing an established practice. The Board President's letter in response to the Association's request for meetings on certain topics, agrees that meetings to "discuss" or "consider" those topics would be useful. The Board's response to a range of eight or nine Association proposals was a salary figure for the next year. Indeed, it would seem that the response was not responsive.

Testimony indicates that there were "proposals" and "counterproposals," "caucuses," and "negotiations" and that agreement was reached as a result of the meetings. These statements are largely conclusionary -- calling something a "counterproposal" or "negotiations" does not make it so. Without further elaboration, the label alone is insufficient to carry any weight.

While it was indicated that a written agreement was reached, none was produced for the record; no negotiations notes or other documents concerning negotiations were produced.

At the end of the Board President's letter to the Association concerning an upcoming meeting in November 1966, the letter states the Board's apparent intention concerning the meetings:

We are looking forward to these meetings as an opportunity for improving communication and understanding... but, more importantly...improving the educational opportunities for the children of Cinnaminson. 20/

Contrast this with River Dell, where the Board presented the agreed-upon salary guide at a public Board meeting and stated that it was the result of bilateral discussions between the Board and the Association. Compare also the number of meetings involved in the Cinnaminson relationship -- one, two and four in different years -- with the number of meetings between parties in other successful, contested established practice cases: seven in W. Paterson and 12 and 15 in River Dell.

Finally, the Hearing Officer notes the testimony of one department chairperson who indicates that in 1964-65, there was one meeting, the Association presented its proposal and the Board responded by telling them what they were going to get.

Accordingly, the undersigned concludes that there has been no showing that the department chairpersons were supervisors prior to 1968, no indication that the department chairperson position was included in the Association unit or represented by the Association as part of that unit, and finally, there has been no clear and convincing demonstration of a meaningful collective negotiations relationship that existed prior to 1968 between the Association and the Board. Based upon the foregoing considerations and the entire record, the Hearing Officer determines that the claim of an established practice sufficient to warrant the inclusion of department chairpersons in the unit with non-supervisory teaching professionals has not been substantiated.

(3) Post '74 role of department chairpersons

In 1974-75, with the hiring of Superintendent Richard Holzman and High School Principal Robert Byrne, certain changes in the administrative-supervisory structure of the district were undertaken. Three overall observations concerning these changes may be instructive here: (a) administrative-supervisory roles were more clearly defined -- both to those performing the supervisory roles and to those who work with the supervisory personnel; (b) the administrative-supervisory process was systematized; and (c) a decision was made to redistribute certain supervisory responsibilities and duties.

In 1975, the Board instituted the Performance Evaluation Program (PEP) for the evaluation of non-supervisory professional staff. PEP was undertaken to improve the evaluation process and to assist the district in meeting its obligations under N.J.S.A. 18A (T2/25). Essentially, PEP is a two-pronged process:

(1) Formative Component -- There are periodic classroom observations made of a teacher during the school year. These are not recorded in narrative summaries; rather, the observations are recorded through the use of a uniform set of criteria.

(2) Summative Component -- Usually, near the end of the school year, an assessment of each teacher is completed using principally the formative summaries but also other information gathered by the evaluator. Again, this assessment is not done via a subjective, prose paragraph. Rather, it is made through the application of uniform criteria designed to measure desired teaching behaviors. Clearly, PEP is a much more detailed, more analytical evaluation system than what was previously used in Cinnaminson.

During this period of change at Cinnaminson, the State Legislature passed T & E legislation (1975) and very recently (1979) adopted legislation setting minimum requirements -- qualitative and quantitative -- for the evaluation of professional teaching staff by school districts. In part, Cinnaminson adjusted to the

new evaluation requirements through the redefinition of supervisory roles and the institution of the PEP system. 20a/

From 1974 to the present, no substantial changes have been made in the hiring process or in the role played therein by department chairpersons. If anything, that role has been limited. The principal continues to be the controlling hub of the hiring process. Dr. Byrne has adopted a team interviewing approach. A typical interview team may consist of Dr. Byrne, a vice principal, a department chairperson, and one or two teachers from the department. Dr. Byrne clearly states to the team that their role in the hiring process is advisory. He indicates that he is the chief interviewer and controls the interview. After the interview, the team discusses the candidate. After all interviews are completed, Dr. Byrne prepares the documentation on the candidate -- (a) cover letter with specific recommendations rating each candidate (b) interview summary on each candidate (c) reference summary for each candidate (d) summary of demonstration lesson performed by each candidate. Dr. Byrne has primary responsibility for completing the interview, reference and demonstration lesson functions and for preparing the summaries. Occasionally, he receives assistance with one or more of those tasks from a vice principal or a department chairperson. However, Byrne must complete the rating summary and sign that cover letter before sending the packet to the Central Administration for final consideration.

In the area of evaluation, the role of department chairpersons has expanded and at the same time has been sharply limited. A contradiction? Not quite. With regard to non-tenured teachers, as before, the principals and vice principals continue to be primarily responsible for their evaluations: the principals and vice principals do most of the formative observations on non-tenured teachers. Department chairpersons do some observations on these teachers, primarily to involve the department chairpersons with the instruction of new teachers. The prin-

20a/ Testimony indicated that the redistribution of supervisory duties suggested by the new department chairperson job description is necessary in order to free Dr. Byrne and the vice principals from being required to do as many observations and evaluations -- on non-tenured teachers and marginal tenured teachers -- as they are now doing. At this time they have little choice but to perform the evaluation function on these teachers as department chairpersons have not been permitted to become involved in such potentially controversial evaluations.

cipals and vice principals do the summative evaluations of all non-tenured teachers.

On the other hand, department chairpersons are primarily responsible for doing both formative observations and summative evaluations on non-marginal tenured teachers (i.e., those tenured teachers who are performing in a satisfactory fashion). The principals and vice principals occasionally do the PEP observations and evaluations of some of these teachers for the purpose of assisting them with further enhancement and improvement of their educational abilities and techniques.

However, tenured teachers whose performance is deficient are both observed and evaluated by principals and vice principals, not department chairpersons. Where the teacher is known to be having performance problems, ordinarily the department chairperson would never become involved. Sometimes, after one or two formative observations indicating difficulty, a department chairperson will advise Dr. Byrne of the situation and thereafter, Dr. Byrne and his vice principals would take over the entire situation.

This sharp role definition in the evaluation process has occurred by design, not by accident (see Exhibit E8). It was devised to avoid placing department chairpersons, who are currently in the Association negotiating unit, in conflict of interest situations. Consequently, department chairpersons are not involved in making recommendations for non-renewal or for withholding increments. Such recommendations are made by Dr. Byrne, the high school principal.

Department chairpersons continue to be conspicuously absent from other supervisory areas as well: discipline is administered by the principal. Grievance administration on behalf of the Board is done by the principal.

Department chairpersons' role in hiring is indirect. They are three steps removed from the final hiring step (department chairperson--principal--~~Superintendent--~~Board). Department chairpersons are not required to prepare any documentation regarding applicants (although on occasion, Dr. Byrne has received unsolicited documentation)

and their verbalized opinions go only as far as the principal. The principal receives verbal input from each interview team member, and that would include teachers. It is the principal who formulates the formal hiring recommendation which goes to the Superintendent.

On the other hand, department chairpersons are now performing a clearly supervisory function, at least with regard to non-marginal tenured teachers. However, the administration has designed its evaluation system so that the element of inherent conflict in having a "supervisor" in the unit with those supervised has been greatly reduced. The department chairpersons are "insulated" from having to make any decisions which could have adverse consequences for another unit member. And, because the department chairpersons continue to be uninvolved in other crucial supervisory areas, the undersigned would again conclude that their role does not rise to the level of a supervisor within the meaning of the Act.

While department chairpersons may not now qualify as supervisors, their role in the current administrative-supervisory system is clearly more supervisory than it had been previously. Testimony of Principal Byrne and Department Chairpersons Carr, Markovic, and Killino indicates that the department chairperson position has become more supervisory since pre 1968 days. Department chairpersons have been given an expanded role in a more extensive and more complex evaluation system. This has placed them squarely at the interface -- the friction point -- between the Board and the Association. Under the current administrative-supervisory structure, there is a great potential for conflict of interest -- situations where the good faith performance of supervisory obligations creates the potential for a substantial conflict of interest with other employees whose work he/she is obliged to oversee.

The record indicates that on at least two occasions, circumstances arose in which the potential for a substantial conflict was significant. In one instance, based upon their observations and evaluation of a teacher, the Central Administration

recommended a withholding of increment. The department chairperson, who had not observed the teacher during the year in issue, disagreed with the Administration and apparently did not keep that disagreement completely private. In the second instance, after the Central Administration had recommended non-renewal for a certain teacher, the department chairperson, at a meeting of the Cinnaminson Teachers Association, spoke publicly in favor of the teacher, saying she was competent and should be continued as a tenured teacher. Altering but one element in each of the foregoing situations could change the conflict implications from potential to actual. ^{21/} In fact, the Board's intention to implement the new job description (Exhibit J2-C) for department chairpersons could be precisely that element which, if altered in the circumstances set forth above, would precipitate a conflict of interest requiring the removal of the department chairpersons from the negotiating unit.

(4) Projected role of Department Chairpersons under the new job description

The most recent job description utilized for department chairpersons was one drafted by Dr. Byrne and dated January 1976 (Exhibit J2/A). This job description had never been adopted by the Board. Some of the salient provisions of this job description are as follows:

The department head serves as a technical specialist who maintains a collegial relationship as a professional equal with teachers within a given department. He/she advises, assists and counsels professional staff personnel toward the achievement of recognized goals of the high school and the school district. The department head serves as the first contact with both guidance and the administration and is responsible to be continually on the job station unless otherwise directed by the principal.

Conducts classroom observations and conferences with all teachers, both tenure and non-tenure, utilizing the PEP format.

^{21/} The Hearing Officer also notes that there have been several instances wherein persons who were employed as department chairpersons had either filed, prosecuted and/or testified in grievance hearings on behalf of the Association.

Attends all meetings of the principal's advisory council.

Advises the principal as to personnel performance, particularly when district standards are not met.

Interviews candidates for position vacancies and makes recommendations for employment.

The new job description (Exhibit J2/C), which the Board has stated and represented before this agency it will adopt forthwith upon the removal of department chairpersons from the negotiating unit (see Exhibit J2, Stipulation 6; T1/28, 52; brief of Board), states in part the following:

The Department Chairperson serves as line supervisor of the teachers in the department. He/she directs, advises, assists and counsels professional staff personnel toward the achievement of recognized goals of the high school and the school district. The Department Chairperson serves as the first contact with both guidance and the administration on teacher and student disciplinary and guidance matters and is responsible to be continually on the job station unless otherwise directed by the principal. This person is to be considered a member of the administrative/supervisory staff of the District.

Conduct classroom observations and conferences with all teachers, both tenure and non-tenure, utilizing the Performance Evaluation Program format.

Attend all meetings of the principal's advisory council.

Interview candidates for position vacancies and makes recommendations for employment.

Serve as immediate supervisor in the initial step of the grievance procedure and thus confer with teachers on personal and professional matters that might affect their morale, teaching efficiency and effectiveness.

Advise the principal as to personnel performance, particularly when district standards are not met.

Evaluate all staff members in the department, both tenure and non-tenure, using evaluation procedures required by the State and the Performance Evaluation Program.

Evaluate all tenure teachers at least once each semester and all non-tenure teachers at least three times per year prior to March 1 and prepare a written evaluation for the Principal.

Make recommendation for non-renewal or termination of employment when necessary.

Monitor and supervise teaching staff members with regard to Board policies and administrative regulations; may initiate disciplinary procedures whenever these policies or regulations are being violated.

The new job description and the testimony concerning the role of department chairpersons under that job description indicate an expanded role for department chairpersons -- both quantitative and qualitative -- in supervisory areas.

In the hiring process, the pivot point of the process will shift from the principal to the department chairperson. The department chairperson will screen applications, set up the interview, be the chief interviewer, discuss the applicant after the interview with the interview team, do the reference check, and set up and observe the demonstration lesson. Finally, the department chairpersons will assess the candidates, complete and sign all of the required documentation for the hiring process, including a rating of the candidates and written recommendations for hire. These recommendations will go to the principal who will forward them to the Superintendent. Clearly, the department chairperson has moved into the role formerly occupied by the principal. The department chairperson is now the hub of the hiring process. While the principal will maintain an involvement herein, he will no longer control and "do" the actual hiring process. That function has been delegated to the department chairpersons.

In the area of evaluations, the changes are even more significant. The department chairpersons will no longer be insulated from the difficult situations -- non-tenured teachers and marginal tenured teachers. Department chairpersons will be primarily responsible for doing observations and evaluations for all non-supervisory professional teaching staff -- tenured and non-tenured, marginal and non-marginal.

Thus, department chairpersons will now be responsible for making recommendations to withhold increments and for renewal or non-renewal of employment. Again, the principal will have a role in this process; but he will not be the primary mover in the evaluation process -- particularly in the difficult cases which the principal formerly took solely as his responsibility. Typically, the department chairpersons will do the observations; where difficulties are detected, the principal might undertake an observation of his own and thereafter confer with the department chairperson. Where a negative evaluation is warranted -- including withholding of increment or recommendations for non-renewal -- it is the department chairperson who will write and sign the negative evaluation, a task which they have absolutely not performed previously. To be sure, there were negative evaluations. However, all of them were done by the principal. This is a very significant shift of responsibility from the principal to the department chairperson.

In the area of discipline, department chairpersons had simply not been involved in this area before. Under the new job description, department chairpersons will be expected to administer the disciplinary process concerning areas within their departmental domain -- grading policy, course content, adherence to departmental procedures, etc. On the other hand, incidents which have building-wide or district-wide significance -- assaulting another staff member, fraternizing with students, etc. -- will continue to be handled by the principal.

Finally, department chairpersons formerly had no role in the administration of the grievance process on behalf of the Board; however, they were quite active in that process on behalf of the Association. Under the new job description, department chairpersons would become the first step -- in many ways the most significant step -- of the negotiated grievance procedure (on behalf of the Board) for non-supervisory professional staff.

There is testimony which indicates that formerly, the Board viewed department chairpersons as teachers, not supervisors. At most, they were viewed as a

"primary among equals." Department chairpersons themselves testified that they had little, if any, supervisory authority. That they did not consider themselves supervisors is evidenced by a letter, dated October 25, 1977 (Exhibit E-1), submitted by the department chairpersons as a group to Dr. Holzman, inquiring as to whether the department chairpersons would now be considered supervisors.

Clearly, the role of department chairpersons would be changed significantly under the new job description. The Hearing Officer disagrees with the Association's characterization of the situation -- that a department chairperson would merely become more of a supervisor than he/she was before the implementation of the new job description. Formerly, department chairpersons were involved in various supervisory processes; however, their degree of involvement was insufficient to make them supervisors within the meaning of the Act. Under the new job description, their degree of involvement has increased, both in form and in substance, to such an extent that they may now be considered supervisors within the meaning of the Act.

(5) Conflict of interest and established practice --

Under the new job description, with their roles in hiring, evaluation, discipline and grievance administration on the Board's behalf, department chairpersons will be in a position wherein their good faith performance as a supervisor would often put them at odds with those other unit employees who are supervised by the department chairpersons. Clearly, this was the kind of situation which the court in Wilton said should be avoided. 22/

22/ The undersigned notes that when asked if they currently had any problem performing their job as a department chairperson while being included in the Association negotiating unit, department chairpersons replied that their inclusion in the unit had not hindered their performance. However, when asked if their inclusion in the Association unit would hinder them in the performance of their job as described in the new job description, all replied that yes, unit inclusion would definitely pose serious problems.

However, the Association has argued that given the existence of an established practice, potential conflicts of interest are an insufficient basis for clarifying supervisors out of a unit in which they belong under the established practice exception. Assuming arguendo that an established practice exists herein, the undersigned does not believe that the Association's argument is appropriate. In West Paterson, the Commission stated that a potential conflict should not dislodge a supervisor who was included in a unit under an established practice exception. The Commission noted that a history showing a lack of actual conflict warranted the continuation of the unit under the established practice exception.

However, the facts herein are not closely analogous to West Paterson, where there was no change in the circumstances surrounding the inclusion of principals in the teachers' bargaining unit. Rather, the facts herein are more closely aligned with those in the Sterling matter, wherein the Board changed the job description of department chairpersons, made them department coordinators and gave them a new and expanded set of supervisory duties. The record indicated that an established practice did exist regarding the old department chairperson position. However, with regard to the newly created coordinators position, the Commission concluded that because coordinators would make hire recommendations and would generally perform duties which would raise an "incompatibility of interest" with teachers, they should be kept out of the teachers' unit.

The Hearing Officer believes the Sterling approach should be utilized herein -- although an established practice may exist vis-a-vis the old department chairperson position, the changed circumstances surrounding the new department chairperson position must obviate the effect of the established practice. Thus, the potential substantial conflicts of interest which would result from the inclusion of the new department chairperson position in the Association unit would dictate the exclusion of the department chairperson position from said unit.

(B) The Proposed Job Description and
the Board's Assurances Concerning
Implementation

The Association argues that (1) there is no assurance that the new job description will ever be implemented and (2) even if implemented there is no indication that the projected conflicts will develop. On the other hand, the Board states that it will not implement the new job description while the department chairpersons are included in the Association unit inasmuch as the Board is certain that such action would precipitate substantial conflicts of interest.

The above arguments and positions present the undersigned with a difficult choice. If the department chairpersons are removed from the unit and if the job description is thereafter not implemented or, if implemented, the projected conflicts do not develop, the undersigned would have needlessly disturbed a viable existing bargaining unit and disrupted the representation function of an exclusive majority representative. On the other hand, if the department chairpersons are not removed from the unit and the Board is forced to implement the job description and the projected conflicts do develop, the undersigned would have contributed to the destabilization of a labor relations system (Board and Association relationship) in Cinnaminson and interfered with the ability of the Board to manage its educational system.

The Commission has been cautious in removing titles from negotiating units based upon asserted employer intentions to revise a given title in such a manner that inclusion in the negotiating unit would be inappropriate. The Commission has taken this view where (a) there were no reasonably definite assurances that such revisions would occur and (b) not having been confronted with the actual revisions, it was impossible to determine whether such revisions would create conflicts of interest that would warrant exclusion of the title from the unit. ^{23/}

23/ See, In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976).

However, in Sterling, although the Board had actually enacted a new job description (a new position) for department coordinators, there was little if any experience with the title that could be utilized in making the unit placement determination. The Commission excluded the coordinators from the unit based largely upon their projected roles. The Commission stated:

Normally, the Commission would expect to be presented with a record demonstrating sufficient past conduct from which a pattern or routine could be established with reasonable conviction.... [In reaching a determination], we must accept as fact not only that which has occurred but that which the Board asserts to be the elements of its program for Coordinators. Those assertions must be deemed credible in the absence of contrary evidence or inherent improbability. 24/

In the instant matter, on several occasions, the Board has stated and stipulated before this agency its intention to implement the new department chairperson job description upon the removal of the department chairpersons from the Association unit. Further, the Board has already revised its administrative/supervisory structure so as to prepare the way for a quick and smooth transition once the new job description is implemented. At this time, the undersigned has no reason not to credit the Board's asserted intention.

The Hearing Officer has already concluded that under the new job description, department chairpersons would be supervisors within the meaning of the Act and the inclusion of department chairpersons in the Association unit would precipitate conflicts of interest sufficient to warrant their exclusion from the unit. Accordingly, in view of the foregoing, the undersigned shall recommend that department chairpersons be excluded from the Association unit.

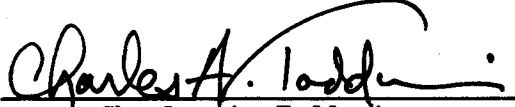
However, the Association further argues that should the Commission remove the department chairpersons from the Association unit, it should require that the Board demonstrate, after a period of time, that the new job description was in fact

implemented and that the new duties thereby conferred upon the department chairpersons have warranted their removal from the unit. The undersigned shall adopt this suggestion, as follows: Specifically, after a reasonable period of time (approximately one full school year beyond the date of a final decision herein), either party (or both) may request a reexamination of this matter upon a prima facie showing that the program as conceived has not materialized.

IV. Conclusions and Recommendations

Upon consideration of the entire record in this matter and the foregoing discussion, the Hearing Officer concludes that department chairpersons operating under the new job description will be supervisors within the meaning of the Act; the inclusion of department chairpersons (operating under the new job description) in the Association's negotiations unit will precipitate such actual or potential substantial conflicts of interest as would warrant the exclusion of department chairpersons from said unit; and finally, no established practice has been shown to exist herein that would dictate the inclusion of department chairpersons in the Association unit.

Accordingly, the Hearing Officer recommends the removal of department chairpersons from the Association's negotiations unit. The undersigned further recommends that after an appropriate time, either party (or both) may request a reexamination of this matter, upon a prima facie showing that the program as conceived has not materialized.


Charles A. Tadduni
Hearing Officer

DATED: July 18, 1980
Trenton, New Jersey