P.E.R.C. NO. 90-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer-Petitioner,

-and- Docket No. CU-85-32

RUTGERS COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY
PROFESSORS CHAPTERS,

Employee Representative-Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that there is no established practice of collective negotiations permitting the continued presence of supervisors employed by Rutgers, the State University in a non-supervisory unit represented by Rutgers Council of American Association of University Professors Chapters.

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PROFESSORS CHAPTERS,

Employee Representative-Respondent.

Appearances:

For the Petitioner, before the Hearing Officer, Carpenter, Bennett & Morrissey, Esqs. (John J. Peirano and James E. Patterson, of counsel; Maria J. Dittmar, on the brief); before the Commission (John J. Peirano, of counsel; James E. Patterson, on the brief)

For the Employee Representative, Reinhardt & Schachter, P.C. (Denise Reinhardt, of counsel)

DECISION AND ORDER

On December 4, 1984 and February 7, 1986, Rutgers, The State University ("Rutgers") filed a petition and amended petition for clarification of unit seeking the removal of 13 library titles from the collective negotiations unit represented by the Rutgers Council of American Association of University Professors Chapters ("AAUP"). Rutgers contends that the titles are either managerial, supervisory or confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. It further contends that representation by AAUP creates a conflict of interest and that the parties previously agreed to exclude two of

the titles. The AAUP contends that the employees are not managerial executives, supervisors or confidential employees and have no conflict of interest requiring exclusion from its unit.

On December 19, 1985, a Notice of Hearing issued. On February 25, 26 and 27, 1986, Hearing Officer Mark A. Rosenbaum conducted a hearing on two of the titles. On February 27, AAUP argued that a pre-1968 negotiations relationship and/or special circumstances existed under N.J.S.A. 34:13A-5.3, thereby allowing supervisors to remain in a unit which represents nonsupervisory employees.[1/] The Hearing Officer then bifurcated the proceedings and conducted fifteen more days of hearing concerning the parties' pre-1968 relationship. At the conclusion of the hearing on May 5, 1987, the Hearing Officer directed AAUP to submit proposed findings of fact and afforded Rutgers an opportunity to respond. The parties then filed briefs and replies by February 8, 1988.

On September 2, 1988, the Hearing Officer issued his report and recommendations. H.O. No. 89-2, 14 NJPER 599 (¶19255 1988). He found that any pre-1968 negotiations relationship would have been between the New Brunswick Chapter of The American Association of

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

University Professors ("New Brunswick Chapter") and Rutgers as to the New Brunswick faculty only (not Camden or Newark). Relying on Atlantic City Convention Center, P.E.R.C. No. 85-108, 11 NJPER 303 (¶16107 1985), he concluded that the established practice exception cannot apply to the current negotiations between Rutgers (at all three campuses) and AAUP (made up of Camden, Newark and New Brunswick AAUP chapters). He also found that while the New Brunswick Chapter vigorously advocated employee interests during the pre-Act period, the AAUP failed to demonstrate by clear and convincing evidence an established practice of collective negotiations which would allow supervisors to remain in a negotiations unit with nonsupervisors. He also found that the collegial relationships at Rutgers did not create "special circumstances" warranting the continued inclusion of supervisors in the nonsupervisory unit.

On December 30, 1988, after numerous extensions of time, the parties filed exceptions. AAUP excepts to many factual findings and argues that: (1) the established practice, prior agreement and special circumstances exceptions protect post-Act as well as pre-Act relationships; (2) the "clear and convincing" standard of proof is without basis; (3) the standard of conduct considered to constitute established practice is unreasonably restrictive; (4) there are special circumstances, particularly collegiality, which dictate preserving the existing unit; (5) the Hearing Officer erred by crediting the conclusory statements of witnesses about events twenty years ago in the face of contradictory contemporary records; (6) the AAUP represented and continues to represent these employees, and (7)

the parties engaged in give-and-take on several terms and conditions of employment. Rutgers supports the Hearing Officer's conclusions but contends that proof of pre-Act majority status and exclusive representation are essential to a finding of established practice and excepts to the Hearing Officer's rejection of these arguments.

On July 3 and 6, 1989, respectively, after numerous extensions of time, Rutgers and AAUP filed replies. Rutgers argues that the well-established standards concerning exceptions to the statutory ban on mixed units are reasonable and fully consistent with the purposes of the Act and that the Hearing Officer properly applied them. AAUP argues that the Hearing Officer correctly concluded that majority support sufficed to demonstrate pre-Act representation, and correctly found that the AAUP had demonstrated such support. It also argues that proof of exclusive representation is not required and, in any event, collegial participation in governance does not, as a matter of law, preclude exclusive representation.

We have reviewed the record. The Hearing Officer's findings of fact (pp. 6-12) are accurate. We incorporate them here. We also agree with the Hearing Officer's conclusion that there is neither an established practice nor special circumstances which would allow supervisors to remain in AAUP's nonsupervisory unit. We have considered the parties' lengthy submissions and now address each exception.

The AAUP argues that the "established practice" exception should apply to post-1968 relationships. We have long held otherwise. As early as 1970, the Executive Director adopted a hearing

officer's recommendation holding that a post-Act agreement is not an established practice within the meaning of the exception. Cumberland Cty. Coll., E.D. No. 4 (5/26/70). We have consistently followed that interpretation.

> As previously indicated, our prime concern is with the statutory exception of "established practice" and "prior agreement." Upon careful analysis, we have concluded that the quoted phrases were intended to apply solely to circumstances in existence prior to the arrival of Chapter 303 [effective July 1, 1968]. We view and we are convinced that the Legislature viewed mixed units as inherently unworkable and therefore in most cases inappropriate. In order not to disturb those rare relationships involving mixed units which were crystalized prior to Chapter 303, and which managed to succeed despite the heavy odds against success, the exceptions of "established practice" and "prior agreement" were formulated. [West Paterson Bd. of ED., P.E.R.C. No. 79 (1973)]

AAUP is legitimately concerned that the "pre-Act" requirement permits an employer to destabilize negotiations relationships even, as here, after 19 years of post-Act negotiations and written agreements. However, when the Legislature decided that supervisors would be entitled to the protections of the Act,[2/] it also decided that supervisors could not be represented by organizations that admit nonsupervisors to membership except under very limited circumstances. It created an exception, but, in light of the general statutory proscription against mixed units, we have interpreted that exception narrowly and continue to do so today. It may seem harsh to disturb functioning mixed units, but the Legislature has provided employers with that right in order to

protect against conflicts of interest. Cf. Truck Drivers Local Union No. 807 v. NLRB, 755 F.2d 5 (2d Cir. 1985), cert. den. 474 U.S. 901 (1985).[3/]

The AAUP next argues that there is no basis for requiring clear and convincing evidence of an established practice. In Tp. of Teaneck, E.D. No. 23 (1969), the Executive Director reasoned that "[u]se of the statutory language 'dictated' [in section 5.3] indicates that there must be clear and convincing evidence that one or more of these three exceptional situations exists." We have followed that view and the Appellate Division has implicitly affirmed. Tp. of Bloomfield, P.E.R.C. No. 84-86, 10 NJPER 117 (¶15060 1984), aff'd App. Div. No. A-2850-83T3 (1/24/85).[4/] Our cases have looked for clear and convincing evidence of an

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2/ The National Labor Relations Act, 29 U.S.C. §141 et seq., the model for our Act, does not afford supervisors collective bargaining rights.

3/ We minimize the destabilizing effects of decisions separating mixed units by delaying implementation until the expiration of an existing contract. Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

4/ The usual burden of proof for establishing claims in contested administrative adjudications is a fair preponderance of the evidence. In re Polk, 90 N.J. 550 (1982). But representation hearings are investigatory, not adversarial. Their purpose is to develop a full and complete factual record. N.J.A.C 19:11-6.2. Neither party has a traditional burden of proof. In fact, hearing officers are instructed that they have the burden of establishing a complete record. Here, the Hearing Officer explained at the start of the hearing that there is no burden of proof per se (1T9).

established practice or prior agreement because mixed units are a narrow exception to a general prohibition. That standard has served the Act's purposes for two decades. We find no compelling reason to alter it now.

AAUP next argues that the standard of conduct considered to constitute established practice is unreasonably restrictive. It contends that we have virtually eliminated the "established practice" exception by requiring evidence of post-Act type negotiations during the pre-Act period when it claims that public employees could not have lawfully engaged in collective negotiations.

The Act contains a general prohibition against mixed units of supervisors and nonsupervisors with three exceptions. We have interpreted those exceptions narrowly, but have not, as AAUP claims, conflated the "prior agreement" and "established practice" exceptions. While we have found an established practice in only a few cases, that does not mean that our standards are too strict. In fact, there have been only a small number of cases where this issue was in dispute and in some of those cases, we found an established practice. E.g., E. Paterson Bd. of Ed., P.E.R.C. No. 18 (1969); Henry Hudson Reg. Sch. Dist. Bd. of Ed., E.D. No. 12 (1970); W. Paterson Bd. of Ed., E.D. No. 16 (1970); E. Orange Bd. of Ed., E.D. No. 34 (1971); W. Paterson Bd. of Ed., P.E.R.C. No. 77 (1973); River Dell Bd. of Ed., P.E.R.C. No. 77-10, 2 NJPER 286 (1976); Bor. of Metuchen, D.R. No. 78-27, 3 NJPER 395 (1977); Paramus Bd. of Ed., D.R. No. 82-7, 7 NJPER 556 (¶12247 1981); Watchung Hills Reg. H.S.

Bd. of Ed., P.E.R.C. No. 85-116, 11 NJPER 368 (¶16130 1985); Town of W. New York, P.E.R.C. No. 87-114, 13 NJPER 277 (¶18115 1987). Those pre-Act practices existed even though employee organizations could not compel good faith negotiations through our unfair practice proceedings.[5/] The exceptions set by the Legislature are a specific recognition of that fact.

The AAUP next argues that collegiality is a special circumstance which dictates preserving the existing unit. We agree with the Hearing Officer that there is nothing unique to collegial participation in governance that either required or prohibited pre-Act collective negotiations.

Finally, the AAUP claims it has proved that Rutgers administrators and the AAUP had an established practice of dealings amounting to negotiations. Specifically, the AAUP excepts to the Hearing Officer's crediting oral testimony in the face of allegedly contradictory contemporary records. The AAUP claims that the New Brunswick Chapter and Rutgers met and corresponded often and reached several accords regarding faculty. It further claims that the parties exchanged oral and written proposals and counterproposals and that salary and benefit improvements were set by reciprocal agreement before the administration presented the proposed improvements to the Board of Governors and the State.

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5/ The Act was amended in 1974 to establish our unfair practice jurisdiction.

The record does not support these claims. The scores of documents in this case confirm the testimony of witnesses who described the parties' pre-1968 relationship.[6/] The New Brunswick Chapter vigorously and continually sought to influence Rutgers' course of conduct concerning terms and conditions of employment. Whether for faculty salaries, sabbatical leaves, pensions or other fringe benefits, the New Brunswick Chapter made proposals, provided supporting documentation, lobbied and often achieved its goals. But despite evidence of numerous meetings and exchanges of correspondence, we are unable to characterize the interaction as collective negotiations. Our benchmark is the understanding of negotiations set forth in Middlesex Cty. Coll., P.E.R.C. No. 29 (1969) instead of merely:

> the solicited or unsolicited submission by the employee representative of wage and fringe benefits demands.... There must be the give and take of negotiations including a bilateral relationship rather than a unilateral establishment of terms and conditions of employment.... [Slip opinion at 3]

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6/ The AAUP argues that the Hearing Officer erred in excluding an article it claims would have concluded that the parties' pre-Act relationship was "akin to negotiation." We have reviewed the AAUP's offer of proof. The author's factual summary of the parties' pre-Act relationship adds little to the evidence already before us. His conclusion that the relationship was "akin to negotiations" is irrelevant. We must make that ultimate determination.

Some pre-Act relationships have met this test.[7/] But this relationship does not. Our determination does not call into question either the intentions or the effectiveness of the New Brunswick Chapter's efforts. It simply recognizes that the relationship between Rutgers and the New Brunswick Chapter reflected the most common form of employer-employee interaction during that period. As we stated in River Dell:

> [T]he Commission has generally refused to find either condition [established practice or prior agreement] existed because the evidence failed to establish that the process of negotiation was the method whereby significant employee conditions were determined. Based on the Commission's experience, it appeared that many, perhaps most, employer-employee relationships prior to 1968 were characterized by an organization's request for improvement of a particular condition or resolution of a particular grievance. Upon submission the matter was considered privately by the employer and his decision was later announced. There was seldom evidenced a sense of a mutual undertaking for the resolution of differences or an intent to achieve common agreement. [Slip. op. at 9]

Here, there were no agreements reached regarding faculty salaries and benefits; no submission of counterproposals, and no intent that differences be resolved through negotiations. Instead, the AAUP made proposals and the parties met and discussed those

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7/ E.g. Henry Hudson (proposals and counterproposals; differences adjusted in order to reach mutual agreement); W. Paterson (proposals and counterproposals; arguments; give and take; discussions and agreement); W. Paterson (negotiated agreements on a regular basis); River Dell (regular meetings in attempt to reach agreement); Metuchen (dialogue in which both parties attempted to reach agreement); Paramus (give and take with intent to reach agreement); W. New York (pre-1968 negotiated agreements).

proposals on a continuing basis. Sometimes, the parties coordinated efforts at lobbying the Legislature to achieve mutual goals to improve the university's standing.

The New Brunswick Chapter's proposal for a change in pension systems provides a noteworthy example of the parties' relationship. The New Brunswick Chapter studied the pension system and proposed a change to the administration and the Board of Governors. The change was considered by the Board's Committee on Budget and Finance, with the assistance of the administration and the New Brunswick Chapter. The Board then passed a resolution, which noted administration consultation with the State Department of Treasury and the New Brunswick Chapter's proposal and provided for a study of the proposed change. While the Board waited for the results of its study, the New Brunswick Chapter presented its own draft legislation. When the Board's study recommended adoption of the pension change, the New Brunswick Chapter urged the Board to accept the recommendation and begin legislative action. The Board then approved the study recommendation and authorized action to effectuate the change. Rutgers drafted proposed legislation and sought the New Brunswick Chapter's input. The New Brunswick Chapter supported the proposal and the Board authorized submission to the Legislature. The legislation was enacted.

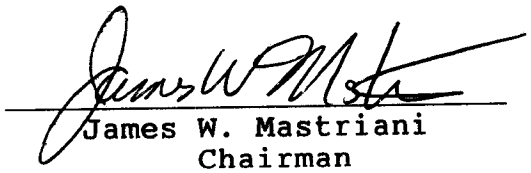
As with this pension example, the New Brunswick Chapter actively pursued its goals at many levels. It met with administration officials, the Board of Governors, Board committees, elected officials, legislative committees, and major party platform committees. Sometimes it worked with the administration to achieve

legislative goals. Other times it operated independently in applying its multi-tiered approach to investigating, informing and pressuring to achieve its goals. The bottom line, however, is that the pre-1968 relationship between the New Brunswick Chapter and Rutgers was not characterized by an intent to reach agreement. Accordingly, there is no established practice of collective negotiations permitting the continued presence of supervisors in the AAUP's non-supervisory unit.[8/]

ORDER

There is no established practice of collective negotiations permitting the continued presence of supervisors in the AAUP's non-supervisory unit. This matter is transferred to the Director of Representation to schedule proceedings on the remaining issues.[9/]

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith, Ruggiero and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained from consideration.

DATED: January 31, 1990
Trenton, New Jersey
ISSUED: February 1, 1990

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8/ Given this finding, we need not address whether AAUP represented employees at all or some of Rutgers campuses during the pre-Act period.

9/ Hearing Officer Rosenbaum is no longer employed by the Commission.

H.O. NO. 89-2

STATE OF NEW JERSEY
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Docket No. CU-85-32

RUTGERS COUNCIL OF AMERICAN
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PROFESSORS CHAPTERS,

Employee Representative-Respondent.

SYNOPSIS

A Hearing Officer finds that the Rutgers Council of AAUP Chapters has not demonstrated either established practice or special circumstances which would allow supervisors to remain in a unit for nonsupervisory employees under Section 5.3 of the Act.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exception 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.

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Appearances:

For the Petitioner, Carpenter, Bennett and Morrissey, Esqs. (John J. Peirano and James E. Patterson, of counsel; Maria J. Ditmar, on the brief)

For the Employee Representative, Reinhardt and Schachter, Esqs. (Denise Reinhardt, of counsel)

## HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On December 7, 1984, as amended on February 7, 1986, Rutgers, The State University (Rutgers or University) filed a Clarification of Unit Petition with the New Jersey Public Employment Relations Commission (Commission) seeking the removal of 13

titles[1/] from the collective negotiations unit represented by the Rutgers Council of American Association of University Professors Chapters (AAUP or Rutgers Council). The University contends that the titles are managerial, supervisory and/or confidential within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) and/or that conflicts of interest require the exclusion of these titles from the existing unit. The AAUP contends that the employees are not managerial executives, supervisors or confidential employees and have no conflicts of interest which would require their exclusion from the AAUP's negotiations unit.

On December 19, 1985, the Director of Representation issued a Notice of Hearing. On February 25, 26 and 27, 1986, I conducted a hearing on two of the disputed titles. In the February 27 hearing, the AAUP raised for the first time its contention that a pre-Act negotiations relationship and/or special circumstances existed between the AAUP and Rutgers which would allow supervisors to remain in a unit which represented nonsupervisory employees under N.J.S.A. 34:13A-5.3. In view of this position, I bifurcated these

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1/ The titles are Associate University Librarian for Technical Services; Assistant University Librarian for Public Services; Director, Special Collections and Archives; Deputy University Librarian; Personnel Officer; Director, Archibald Stevens Alexander Library; Director, Library of Science and Medicine;Director, Mabel Smith Douglas Library; Director, Kilmer Library; Director, Camden College of Arts & Sciences Library; Director, John Cotton Dana Library; Director, Newark Law Library; and Director, Camden Law Library.

proceedings to first hear testimony on the pre-Act and special circumstances issues. I conducted hearings on May 29, June 18, June 25, July 10, July 24, July 29, September 29, October 14, December 10 and December 22, 1986 and January 19, February 2, February 5, April 8 and May 5, 1987.[2/] After the last day of hearing I directed the AAUP to submit proposed findings of fact, and provided Rutgers an opportunity to respond. The parties then filed briefs and responsive briefs by February 8, 1988.

ESTABLISHED PRACTICE/SPECIAL CIRCUMSTANCES

N.J.S.A. 34:13A-5.4(a)(3) provides:

> ...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....

In W. Paterson Bd. of Ed., P.E.R.C. No. 77 (1973), the Commission defined established practice as a relationship preceding the passage of the Act in 1968 involving

> 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)

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2/ Transcript citations are as follows: TA - February 25, 1986; TB--February 26, 1986; TC--February 27, 1986; TD--May 29, 1986; TE--June 18, 1986; TF--June 25, 1986; TG--July 10, 1986; TH--July 24, 1986; TI--July 29, 1986; TJ--September 29, 1986; TK--October 14, 1986; TL--December 10, 1986; TM--December 22, 1986; TN--January 19, 1987; TO--February 2, 1987; TP--February 5, 1987; TQ--April 8, 1987; TR--May 5, 1987.

> with an employer who engaged in the process with an intent to reach agreement. [slip op. at p. 10].

Further, as the Commission stated in City of Camden, P.E.R.C. No. 53 (1971):

> Established practice includes the joint determination of terms and conditions of employment through negotiation on bilateral basis. There must be the give and take of negotiation as contrasted with the unilateral determination of terms and conditions of employment by a public employer following discussions with public employees or their representatives. To require less would render meaningless a statutory prohibition based upon accepted principles of labor relations. [slip op. at p. 3].

The Commission has stressed that the "mixed units [are] inherently unworkable and therefore in most cases inappropriate." In re W. Paterson Bd. of Ed., P.E.R.C. No. 79 (slip at p. 4). Accordingly, the Commission has consistently given narrow construction to the exception and has required proof by a clear and convincing evidence standard. Tp. of Teaneck, E.D. No. 23 (1971) and Parsippany-Troy Hills Bd. of Ed., D.R. No. 82-51, 8 NJPER 283 (¶13128 1982). The exception does not apply "where the circumstances underlying the pre-existing relationship no longer exist...." Ramapo-Indian Hills Board of Education, D.R. No. 81-26, 7 NJPER 119, 120 (¶12048 1981). Accordingly, the Commission has refused to apply the exception where the responsibilities of employees have changed significantly (see e.g. Ramapo and Borough of Metuchen, D.R. No 84-3, 9 NJPER 524 (¶14212 1983)) or where the identity and structure of either of the parties has changed (see Atlantic City Convention Center, P.E.R.C No 85-108, 11 NJPER 303 (¶16107 1985).

The Commission has also emphasized what is not established practice. It "does not mean the solicited or unsolicited submission by the employee representative of wage and fringe benefit demands without more nor does it mean a limited 'history' of an employee's employee organization relationship with the public employer. There must be the give and take of negotiations including a bilateral relationship rather than a unilateral establishment of terms and conditions of employment...." Middlesex Cty. Bd. of Trustees, P.E.R.C. No. 29 (1969)(slip op. at p. 3). In that case, "no agreements were reached by the parties, let alone reduced to writing and executed...," and the Commission rejected the established practice argument. While a document resembling a contract is not a prerequisite for established practice, the only compelling substitute is clear and convincing evidence of oral or written agreement by the parties as to terms and conditions of employment. See Henry Hudson Regional School District Bd. of Ed., E.D. No. 12 (1970) (slip opinion at p. 3) and River Dell Bd. of Ed., E.D. No. 76-28, 2 NJPER 89,95 (1976), req. for rev. and reopening granted, 2 NJPER 286 (1976), rev'd. on other grounds, 4 NJPER 252 (¶4128 1978).

"Special circumstances" language of Section 5.3 of the Act has also been given limited effect by the Commission. In Tp. of Mine Hill, D.R. No. 79-4, 4 NJPER 297 (¶4148 1978), req.for rev. den., P.E.R.C. No. 79-8, 4 NJPER 416 (¶4186 1978), the Director of Representation rejected a hearing officer recommendation that a supervisor could be in a unit with nonsupervisors where there was no

other unit to which the supervisor could belong. Similarly, in Tp. of Maple Shade, D.R. No. 79-10, 4 NJPER 440 (¶4199 1978), the Director of Representation rejected a claim that special circumstances should allow the continued inclusion of non-policeemployees and police employees in one unit. To date, the Commission has limited "special circumstances" to the continued inclusion of employees in a negotiations unit, otherwise inappropriate for inclusion in that unit, until the expiration of a collective negotiations agreement. In re Clearview Reg. High School Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 252 (1977).

## FINDINGS OF FACT

The AAUP submitted 379 proposed findings of fact. Rutgers filed extensive responses and objections to the proposed findings of fact, as well as 69 additional proposed findings of fact. While the parties differ on the terminology (i.e. whether or not meetings were "negotiations") and weight of record evidence, their submissions generate few substantive factual disputes. Where relevant, I have resolved these disputes;[3/] the remaining proposed findings of the parties accurately portray the record and are summarized, as relevant, below.

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3/ Rutgers raised substantive factual disputes as to AAUP proposed findings of fact numbers 12, 16, 17, 18, 19, 20, 21, 23, 30, 37, 40, 41, 47, 53, 54, 58, 63, 64, 65, 68, 69, 70, 71, 117, 140, 160, 188, 196, 219, 234, 284, 374, 375 and 377. Other Rutgers objections to AAUP proposed findings of fact concerned lack of relevance or transcript/documentary references, or opposition to conclusory language.

1. Rutgers, The State University, has been "the instrumentality of this State for the purposes of operating the State University" since 1956. N.J.S.A. 18A:65-1. Its Board of Governors has "general supervision over and [is] vested with the conduct of the University..." N.J.S.A. 18A:65-25. See also N.J.S.A. 18A:65-28. The President of Rutgers "hold[s] office at the pleasure of the board of governors." N.J.S.A. 18A:65-31.

2. The President of the University during the pre-Act period was Mason Gross. Other administrative officers of the University at that time included Richard Schlatter, Provost and Vice President; John Swink, Vice President and Treasurer; and Karl Metzger, Secretary.

3. The Board of Governors' committee structure during the pre-Act period included a Budget and Finance Committee and an Educational Planning and Policy Committee.

4. The American Association of University Professors has had a chapter in New Brunswick since at least 1963 (Exhibit EO 10-729).[4/] Separate chapters existed in the Newark and Camden (then "South Jersey") campuses of Rutgers; faculty at those campuses did not vote for officers of the New Brunswick chapter, but had their own officers (TN67-68). New Brunswick AAUP officers in the pre-Act period who testified are Allen Robbins, Peter Lindenfeld and

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4/ Employee Organization exhibit numbers reflect a prior numbering system; to minimize confusion, the prior numbering system was retained.

David Lester. AAUP committees during the pre-Act period included a Committee on Salary and Fringe Benefits, a Committee on Academic Freedom, and a Committee on University Governance.

5. Beginning in early 1965, the AAUP provided information and/or advocacy of specific proposals to the Board of Governors and the administration concerning faculty salaries,[5/] pensions[6/] and sabbatical leave programs.[7/] Communications occurred through a variety of written documents and meetings between AAUP and University officers. AAUP efforts were constant and vigorous on these three topics for almost three years. Administration officials, especially President Gross, agreed generally with AAUP goals, but favored a gradual approach which would improve faculty terms and conditions of employment over time. As for specific AAUP proposals presented to the Board of Governor's Budget and Finance Committee, AAUP witness David Lester conceded that "[c]ertainly it's not my recollection that the university or at least [the] budget and

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5/ See AAUP proposed finding of fact numbers 20, 24, 30, 33, 44, 48, 50, 52, 54, 56 62, 66, 67, 91, 101, 110, 111, 113, 120, 121, 130, 135, 145, 148, 155, 158, 186, 200, 205, 209, 227, 234, 238, 245, 248, 251, 252, 254, 257, 275, 284, 287, 288, 292, 295, 296, 309, 310, 311, 315, 317, 322, 328, 340, 364 and 368, together with cited exhibits.

6/ See AAUP proposed finding of fact numbers 47, 58, 59, 60, 74, 75, 76, 80, 81, 83, 87, 98, 99, 102, 105, 108, 109, 114, 118, 124, 129, 140, 172, 192, 228, 237 and 240, together with cited exhibits.

7/ See AAUP proposed findings of fact numbers 47, 245, 248, 254, 255, 266, 268, 274, 276, 294, 295, 297, 301, 302, 308, 315, 322 and 364, together with cited exhibits.

finance committee was willing to do anything more than to discuss these proposals." (TN 11-12).

6. AAUP influence on the Rutgers Administration and Board of Trustees during the pre-Act period is evident in many actions and correspondence of President Gross. Gross was open to all suggestions of the AAUP; when interested, he would refer issues and proposals to his subordinates for study. He also solicited information from the AAUP which might support his proposals to the Board of Governors.8/

7. AAUP also contacted State government appointed and elected officials, seeking improvements in the pension system and State budgetary allocations sufficient to fund salary increases sought by the AAUP. AAUP representatives also appeared before committees of the Legislature and presented testimony in annual budget hearings.9/

8. In some areas, Rutgers and the AAUP coordinated and/or supported each other's efforts to influence the legislative and executive branches of State government. For example, Administration and AAUP leaders discussed a coordinated approach to a proposed Higher Education Bill, and supported each other's efforts to gain

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8/ (see, e.g. AAUP proposed finding of fact numbers 247, 281, 283 and 293 and Exhibits EO-10-276, 277, 91, 236, 237, 251.

9/ See AAUP proposed findings of fact numbers 208, 210, 213, 214, 236, 239, 242, 286 300, 309 and 317, together with cited exhibits.

legislative support for higher faculty salaries and creation of an alternative faculty pension system.10/

9. Before, during and after the above AAUP efforts, the University Senate and Faculty Assembly existed pursuant to University regulations. Those bodies discussed a wide variety ofissues overlapping the issues raised by the AAUP to the administration.11/

10. During a four-year period preceding the passage of the Act, the AAUP assisted seven faculty members who filed complaints with University committees upon denial of tenure, promotion or reappointment.12/ There was no established grievance procedure negotiated between the AAUP and Rutgers; instead, faculty members could appeal adverse personnel decisions to the "Committee of Review" of their college within the university. Half of each committee was appointed by the college dean; the other half was elected by the college faculty in elections where the AAUP had no role. An aggrieved faculty member did not have to be represented by the AAUP in proceedings before a committee of review; the AAUP had no right to be present during proceedings if their representation was not requested; and there was no mandatory procedure for appeal

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10/ See e.g. AAUP proposed finding of fact numbers 116, 230, 232 and 317 and Exhibits EO-10-84, 93 and 295.

11/ See Rutgers proposed finding of fact numbers 23 and 24.

12/ See AAUP proposed finding of fact numbers 127, 128, 160, 168, 258, 260 and 312, and Rutgers proposed findings of fact numbers 57-65.

of college committee of review decisions (the University President could appoint his own committee of review, again with no established AAUP role). When the AAUP did intervene, it wrote letters and/or met with University officials and committees. AAUP President Robbins described AAUP efforts as "intercession" through "informal procedures." There is no record document setting forth an agreement between the AAUP and the administration concerning a particular grievant. (TG 11-18)

11. For the 1967-68 academic year, the Legislature funded the National AAUP "A" average salary level for Rutgers faculty, which the AAUP had sought for the 1966-67 academic year (see Rutgers proposed finding of fact numbers 41 and 42).

12. For the 1967-68 academic year, the Legislature enacted legislation allowing Rutgers faculty to enroll in an alternative pension program administered by TIAA-CREF, which the AAUP had sought since May 1965 for academic year 1966-67 (TG 99-100; TL 130-131; Exhibit EO-10-1148).

13. The AAUP sought a sabbatical leave program for Rutgers faculty since early 1965. No sabbatical leave program was implemented in the pre-Act period (TL 131-132; Exhibit EO-10-1148).

14. There is no record evidence of a signed agreement between the AAUP and Rutgers concerning any term and condition of employment in the pre-Act period, and AAUP witnesses conceded that no such pre-Act document was ever proposed or executed (TL 110; TQ 16).

15. Joel Jacobson, former Executive Vice President of the New Jersey AFL-CIO, was a member of the Rutgers Board of Governors from 1959 through 1974. He recalled that President Gross often informed the Board of meetings which Gross held with AAUP officers, and of Gross's concerns that, absent improvements in faculty wages and benefits, some faculty would leave the university. While Gross and the Board were sympathetic about the problem, "[n]obody was ready to throw bombs about it...." Jacobson could not recall any "collective bargaining," which he defined as talking, reaching agreements and expressing disagreements between Rutgers and the AAUP (TQ 3 and 10-16).

## ANALYSIS

I. Was Rutgers Council of AAUP Chapters "an organization regularly speaking on behalf of a reasonably well defined group of employees"?

Rutgers argues that the Respondent Rutgers Council of AAUP Chapters cannot demonstrate an established practice exception under the Act because it has not demonstrated that it was "an organization regularly speaking on behalf of a reasonably well defined group of employees." West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973)(slip. op. at p. 10). In support of this argument, Rutgers contends: 1) The AAUP failed to demonstrate that membership in the AAUP by more than half of the faculty at any time during the pre-Act period; 2) The AAUP could not have been an exclusive representative since the University Senate and Assembly debated and formulated proposals

concerning terms and conditions of employment for faculty members at Rutgers; and 3) The Respondent Rutgers Council of AAUP Chapters did not exist in the pre-Act period; any relationship which did exist was solely between the New Brunswick Chapter of the AAUP and the University and therefore is not probative as to any relationship between Rutgers and the Rutgers Council of AAUP Chapters.

While the AAUP did not demonstrate membership constituting a majority of the faculty during the pre-Act period, such a showing is not necessary to make out an established practice exception. Indeed, a majority representative who is certified by PERC election may not and need not have a membership of a majority of the unit it represents. In either case the employee organization need only demonstrate a majority of support; in the pre-Act setting, such demonstration is reasonably inferred from the treatment received by an organization from a public employer. Here, written and oral communications between representatives of the AAUP and Rutgers established that Rutgers considered the AAUP to be an organization which represented faculty; the University's willingness to meet with other groups and other individuals to discuss faculty interests does not diminish the status which it accorded to the AAUP by its conduct (see Finding of Fact No. 5).

I also reject the contention that AAUP's status as a representative of the faculty is undermined by the existence of the University Senate and Assembly in the pre-Act period. As the Commission noted in Rutgers, The State University, P.E.R.C. No.

76-13, 2 NJPER 13,15 (1976), there need be no conflict between collegial institutions like the University Senate or Assembly and the collective negotiations rights and responsibilities of a majority representative of faculty in a university setting.

Rutgers also argues that the established practice exception cannot apply to the Rutgers Council of AAUP Chapters because that organization did not act on behalf of faculty members during the pre-Act period. Instead, the record demonstrates that the New Brunswick Chapter of American Association of University Professors was the body whose officers repeatedly interacted with Rutgers officials as to faculty concerns in New Brunswick. The faculty at the Rutgers Newark and Camden (then "South Jersey") Campuses had their own officers and did not participate in the election of New Brunswick officers nor did they authorize New Brunswick Chapter officers to act on their behalf.

Rutgers has accurately summarized the facts in this area (see Finding of Fact No. 4). At the same time, there is no record evidence that the Rutgers Chapter ever ceased its existence, or that there was any lack of continuity between the New Brunswick Chapter and the Rutgers Council of AAUP Chapters with respect to New Brunswick faculty. However, there is no evidence that the New Brunswick Chapter in the pre-Act period ever spoke on behalf of faculty at Newark or Camden or was ever authorized to do so. Assuming for the moment that an established practice is demonstrated between the New Brunswick Chapter of the AAUP and Rutgers, the

question becomes whether or not the successor organization, Rutgers Council of AAUP Chapters, is entitled to rely upon such established practice.

As noted above at page 4, the Commission has narrowly construed this exception and refuses to apply it where either the responsibilities of relevant employees have changed significantly or where the identity and structure of one of the parties has changed. Thus, in Atlantic City Convention Center, the Commission refused to apply the established practice exception notwithstanding clear and convincing evidence of a pre-Act negotiations relationship because the employer had changed since the pre-Act period. The City of Atlantic City administered the Convention Center in the pre-Act period but since 1982, the Convention Center was run by a separate authority created by statute. Here, the identity and structure of the employee organization has not only changed since the pre-Act period, but the scope of the unit of employees which the Rutgers Council represents is much broader than that represented by the New Brunswick Chapter in the pre-Act period. While the Commission has not previously ruled in such circumstances, the extension of the established practice exception to this factual pattern is not consistent with the Commission's previous narrow constructions of the exception. Accordingly, I recommend that the Commission find that the established practice exception cannot apply to the current

collective negotiations relationship between Rutgers and the Rutgers Council of AAUP Chapters.13/

II. Did the New Brunswick AAUP Chapter have an "established practice" relationship with Rutgers?

Assuming that the Commission finds the change in identity, structure and scope of the unit represented by the Rutgers Council of AAUP Chapters to be no impediment to application of the established practice exception, I proceed to the issue of whether established practice existed. This inquiry focuses on whether or not AAUP efforts to improve employee conditions and resolve differences occurred with an employer who "engage[d] in the process with an intent to reach agreement." West Paterson, P.E.R.C. No. 77 (1973)(slip opinion at p. 10). The AAUP acknowledges that "[c]oncededly, there was neither formal recognition nor a written agreement [in the pre-Act period] which would be considered as a contract today." AAUP Brief at p. 5. As noted above at page 5, evidence of a pre-Act contract or like document is not a prerequisite to demonstrate established practice. However, there must be clear and convincing evidence of oral or written agreement by the parties as to terms and conditions of employment. Henry Hudson Reg. School Dist. Bd. of Ed. and River Dell Bd. of Ed.

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13/ Since the application of the established practice exception to a majority representative under these facts is a matter of first impression, the issue is appropriately addressed under a complete record as developed here. See Essex County Educational Services Commission, P.E.R.C No. 83-65, 9 NJPER 19,20 (¶14009 1982)

The AAUP argues that it has demonstrated oral and written agreements between the AAUP and Rutgers concerning terms and conditions of employment of faculty in the pre-Act period. However, despite a thorough record showing vigorous efforts of the AAUP to influence University, legislative and executive officials, there is not a single document from an employer representative indicating agreement with and commitment to a specific proposal of the AAUP as to a term and condition of employment. Instead, employer documents and testimony show sympathy and support for AAUP goals and, over a period of years, an evolution of University positions in areas of concern to the AAUP. Indeed, the record amply demonstrates that the AAUP officers were respected by administration officials and had influence on them. But influence and negotiations are not interchangeable. In the final analysis, any actions taken by the University were unilateral, were taken without prior agreement with the AAUP, and were implemented notwithstanding AAUP disagreement or lack of support (see Finding of Fact Nos. 5,8,11 and 14). AAUP letters to the Administration and mailings to AAUP members, extolling AAUP efforts on behalf of its members, do not change the fact that Rutgers acted unilaterally.

The AAUP's role in grievance administration in the pre-Act period again demonstrates influence but not negotiation. The grievance procedures were not negotiated or established with AAUP consent; the AAUP had no exclusive role in those procedures in terms of representing grievants; and AAUP witnesses described their

efforts as "intercession" in "informal procedures" rather than full participation in the resolution of grievances (see Finding of Fact No. 10). When AAUP intervention led to results which were satisfactory to and accepted by a grievant, the AAUP and the grievant wrote letters to each other indicating their satisfaction. Again, influence of the AAUP is evident but negotiation with the University is not. The testimony of all witnesses leads to the same conclusion. The two primary AAUP witnesses were Allen Robbins and David Lester, President of the AAUP and Chairman of its Committee on Salary and Fringe Benefits, respectively. Neither witness could testify to handshakes or oral agreements with any administration officials or members of the Board of Governors of the University. Robbins and Lester had many meetings and communications with University representatives and undoubtedly influenced the thinking of those officials. However, they also testified that those officials did not reach agreement with them nor did the officials indicate an intent to reach agreement (see Finding of Fact Number 5); rather, University officials were receptive to information and advocacy provided by the AAUP which might help achieve common goals of raising salaries and benefits for University professors and achieving/maintaining a first-rate university. In addition, John Swink, University Vice President and Treasurer, and Joel Jacobson, a member of the Board of Governors during the pre-Act period, denied that negotiations in any form took place. Jacobson's testimony is particularly compelling, since he is an experienced labor leader

with years of experience negotiating collective agreements. Jacobson stated unequivocally that collective negotiations did not take place between Rutgers and the AAUP (see Finding of Fact Number 15). While the AAUP argues that Jacobson and Swink are not credible on the issue of whether or not negotiations took place since they did not attend meetings between President Gross and/or Vice President Schlatter and AAUP representatives, this argument is not persuasive. In their respective positions, Swink and Jacobson would certainly have been aware of actions taken by Gross which could bind the University if such actions occurred. They were in responsible positions with the University, had an overview of the initiatives of the University and cannot be accurately cast as unknowing players in the game. Jacobson, in particular, was called to testify by the AAUP; it is bound by his statements as those of an experienced labor leader rather than a novice without appreciation for the negotiations process. Indeed, as a member of the Board of Governors, throughout the relevant pre-Act period, Jacobson would have been aware of any delegation of authority to negotiate by the Board to Gross and/or Schlatter. As for Swink, one of the three top officers of the University and one who met regularly with Gross and Schlatter, it is not plausible that he would have no knowledge of binding agreements between Gross and/or Schlatter and AAUP representatives.

Notwithstanding the testimony and documents reviewed above, AAUP argues that, under the circumstances of the era and the

University setting, it did all it could do to represent faculty interests and is entitled to rely upon its efforts as an "established practice." AAUP argues that since it was "unlawful or, at best, unenforceable" for these parties to negotiate a contract prior to 1968, the lack of a contract or other agreements in the record should not be held against the AAUP in seeking the established practice exception (Brief at p. 28).

I reject this argument. In Henry Hudson Reg. School Dist. Bd. of Ed., the Commission's Executive Director rejected an employer argument that the absence of pre-Act collective negotiations rights in the public sector precluded "established practice." Instead, the Commission would review the history of the parties' relationship to discern whether the process engaged in, however labeled, "demonstrate[d] the desirability and propriety, in terms of the Act's objectives, of continuing that same relationship..." (slip opinion at p. 4). The Executive Director found an established practice even in the absence of a written contract, relying on the testimony of a board member and two employee representative witnesses. The board member's testimony was quoted by the Hearing Officer:

> Well, we would, I guess, go through the normal labor negotiations in a sense. We would be presented a packet as to the...demands of the teacher's association regarding salary, benefits, etc.-right down the line, plus policy, grievance committees and things of this nature. We would discuss this at this meeting and we would go to our Board and discuss it. We would have committee meetings, work shop meetings and the[n] go back again to the teachers and have another meeting and this would go back and forth until

> ultimately we came up with an agreement between the two bodies.

Similarly, in River Dell Bd. of Ed., the Executive Director adopted the findings of fact and recommendations of a hearing officer who found that the parties had reached oral agreements during the pre-Act period. 2 NJPER at 90, 95. There is no analogous evidence here; instead, even AAUP witnesses acknowledge that the parties did not reach specific oral agreements as to terms and conditions of employment nor did the University hold any meetings with the AAUP with the intent to reach agreement (see Findings of Fact 5 and 15).

In conclusion, I find that while the AAUP was a vigorous advocate for employee interests during the pre-Act period, it never reached any written or oral agreement with an employer with which it had an intent to reach any such agreement. Accordingly, applying Commission case law to the facts presented, I find that the AAUP has failed to demonstrate by clear and convincing evidence an established practice with Rutgers which would allow the supervisors to remain in a negotiations unit with nonsupervisory employees under Section 5.3 of the Act.

III. Special Circumstances

Alternatively, AAUP argues that the unique setting of Rutgers and the AAUP during the pre-Act period, together with the pre-Act history reviewed above, establishes "special circumstances" within the meaning of Section 5.3 of the Act which would allow supervisors to remain in a unit that represented nonsupervisory employees. The AAUP emphasizes the Commission's recognition of

collegiality as a "unique situation" for collective negotiations. As noted above, the Commission has held that collegiality (i.e. a system of faculty participation in University governance) need not conflict with collective negotiations. Rutgers, The State University.

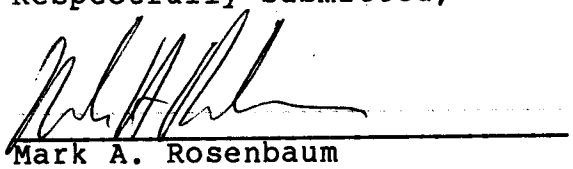
There is no precedent for this reading of the special circumstances exception; indeed, the Commission has strictly construed the term (see discussion at pp. 5-6). Given this history, I cannot recommend that the Commission apply the special circumstances exception to these facts. While the constant and vigorous efforts of the AAUP to represent faculty interests in the pre-Act period are impressive and well documented, I have already concluded that their relationship with Rutgers did not rise to the level of an established practice. I do not see where the collegial relationships at Rutgers, then and now, should create a special circumstance as intended in Section 5.3. Indeed, one need only examine the pre-Act practices of the parties as to grievances to reach this conclusion. Notwithstanding a collegial relationship, the University did not at that time accord the AAUP any exclusive or structured role in the presentation and resolution of grievances. In contrast, today's AAUP has an exclusive and structured role in the administration of processing and the resolution of grievances (see Exhibit J-1, Article IX). There is nothing unique to collegiality that would have precluded a more formal role for the AAUP in grievance administration in the pre-Act period than

post-Act. Accordingly, I conclude that there are not special circumstances which should allow supervisors to remain with nonsupervisors represented by the AAUP.

## RECOMMENDED ORDER

I recommend that the Commission find that Rutgers Council of AAUP Chapters has not demonstrated established practice or special circumstances which would allow supervisors to remain in a unit of nonsupervisors at Rutgers University. Although this is an interlocutory decision, I recommend, and the parties have previously agreed, that the Commission should review this report and issue a final order on these issues prior to the continuation of this case.

Respectfully submitted,



Mark A. Rosenbaum
Hearing Officer

Dated: September 2, 1988
Trenton, New Jersey