TOWN OF WELLESLEY SCHOOL COMMITTEE AND WELLESLEY TEACHERS' ASSN.
MUP-2009, CAS-2005 (4/25/75).

(10 Definitions)
15. Supervisory and managerial employees
17.1 confidential employees
(30 Bargaining Unit Determination)
35.2 confidential
35.671 principals and department heads
35.7 supervisory and managerial employees

DECISION AND ORDER

Statement of the Case

On July 1, 1974, the School Committee of the Town of Wellesley (School Committee) filed a Petition for Clarification or Amendment with the Labor Relations Commission (Commission) pursuant to the provisions of Massachusetts General Laws Chapter 150E (the Law) seeking to exclude certain employees from a bargaining unit represented by the Wellesley Teachers Association (Association).

On July 12, 1974, the Association filed a Complaint of Prohibited Practice with the Commission pursuant to the provisions of Section 10 of the Law, alleging that the School Committee had engaged in certain practices proscribed by Section 10 of the Law. The Commission investigated the Complaint pursuant to its authority under Section 11 of the Law. The investigation revealed that the complaint of prohibited practice involved a refusal to bargain by the School Committee based upon the alleged inappropriateness of the recognized bargaining unit. In accordance with the provisions of said Section 11, the Commission issued an Interim Order on July 16, 1974, consolidating the Petition for Clarification and Amendment with the Complaint of Prohibited Practice, ordering an expedited hearing on the cases, and directing the parties to bargain in good faith pending resolution of the dispute.[1]

Copies of the Petition, Interim Order, and Notice of Hearing were served on all interested parties pursuant to the Rules and Regulations of the Commission.[2] Hearings were held at the offices of the Commission in Boston on August 1, 1974, before Alexander Macmillan, Chairman, and Garry J. Wooters, Hearing Officer; on August 2, 1974, before Alexander Macmillan, Chairman; on August 9, 1974, before Alfonso M. D'Apuzzo, Executive Secretary; and on August 19, 20, 21, 29, September 23, and October 8, 1974 before Garry J. Wooters, Hearing Officer. All parties were given full and fair opportunities to be heard, to

[1]The School Committee agreed to bargain pursuant to the Interim Order by letter of July 19, 1974. The parties have since concluded an agreement with each side reserving all rights affected by this decision.

[2]The Massachusetts Teachers Association and the Massachusetts Association of School Committees each made a timely Motion to Intervene. The interventions were allowed for the limited purpose of filing briefs. The Massachusetts Teachers Association requested that its brief in the matter of New Bedford School Committee, CAS-2006 be considered in these matters. This request was granted.

examine and cross-examine witnesses and to introduce testimony.[3] Briefs were timely submitted by all parties, and have been considered.

Findings of Fact

Upon all of the evidence and the record as a whole we find:

1. The Town of Wellesley is a municipal corporation, situated in the County of Norfolk, and is a "Public Employer" within the meaning of the Law.

2. The School Committee of the Town of Wellesley is the representative of the Public Employer for all purposes relating to employees of the school system within the meaning of Section 1 of the Law.

3. The Wellesley Teachers Association is an "Employee Organization" within the meaning of Section 1 of the Law.

4. The Wellesley Teachers Association is the exclusive representative for the purpose of collective bargaining of certain employees of the Wellesley Public Schools.

5. These consolidated matters arise out of a dispute over the status of certain school administrators in the Town of Wellesley Some explanation of the background of the controversy is essential to a clear understanding of the issues.

A. The Genesis of the Dispute--MUP-666

On November 28, 1973, Governor Francis W. Sargent signed into law Chapter 1078 of the Acts of 1973.[4] One of the changes made by the new statute was to denominate a class of employees, "managerial employees," who were to be precluded from exercising collective bargaining rights. The effective date of the enactment was July 1, 1974.

During the early months of the 1973-74 school year, the School Committee and the Association bargained with respect to successor contracts for the professional employees of the school system. On or about January 8, 1974, the School Committee voted to break off negotiations with regard to certain employees, in the belief that they were or would be "managerial employees" under Chapter 1078 of the Acts of 1973.

This refusal to bargain generated a Complaint of Prohibited Practice by the Association, MUP-666, filed with the Commission on January 31, 1974. After investigation, issuance of a Formal Complaint, and conduct of a Formal Hearing,

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[3]We find the rulings of the hearing officers free from error. Those rulings are hereby affirmed.

[4]The legislative history of the Law, as it relates to the issues raised by the cases sub judice, is discussed in the Appendix to this decision.

we issued a Decision and Order on May 6, 1974. In that decision, we rejected the argument of the School Committee that the issue of "managerial" status of the employees in question should be examined. As the employees were entitled to bargaining rights under the law then in effect, speculation over their status under the new law was premature. We ordered the School Committee to cease and desist from refusing to bargain, and ordered other affirmative relief.

The School Committee appealed the Decision and Order under the provisions of the Administrative Procedure Act, and we cross-petitioned for enforcement of our order. Those cases remain pending.

After July 1, 1974, when there remained no question as to the ripeness of the issue, the School Committee again sought to test the status of certain employees under the managerial exclusion of the new law by filing CAS-2005. The refusal to bargain with these employees continued and the Association filed a new Complaint of Prohibited Practice, MUP-2009. Since a controversy clearly existed within the meaning of Section 11 of the Law,[5] we issued our Interim Order of July 16, 1974, referred to above.

B. The Issue Defined

For a number of years, the Wellesley School Committee has recognized the Wellesley Teachers Association as the exclusive representative of a unit described in the most recent agreement as:

> UNIT B: All Principals, Assistant Principals, Directors, Coordinators and Department Heads, and no other professional or non-professional employees of the Wellesley Public Schools.

As so defined, the unit includes thirty eight individuals: one senior high school principal; one junior high school principal; two assistant principals, senior high school; two assistant principals, junior high school; thirteen department heads; nine elementary principals; two guidance directors; two physical education directors; two art directors; one director of library services; a music director; one elementary curriculum coordinator; and one staff development coordinator.

The School Committee takes the position that each of these positions should be excluded from bargaining as being managerial, confidential, or both. The Association asserts that none of the employees are either managerial or confidential. The issue is one of first impression under the provisions of Chapter 150E of the General Laws. Also in dispute are considerations fundamental to

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[5] Chapter 150E, Section 11 provides, in pertinent part:

> "Whenever it is alleged that a party has refused to bargain collectively in good faith with the exclusive representative as required in section ten and that such refusal is based upon a dispute involving the appropriateness of a bargaining unit, the commission shall, except for good cause shown, issue an interim order requiring the parties to bargain pending its determination of the dispute."

public sector collective bargaining.[6] We believe that determinations made on unit structure and unit placement of supervisory and managerial employees have an important impact with respect to all governmental affairs, and not merely with respect to public employee labor relations.[7] The issues presented herein have significance beyond the Wellesley Public Schools.

C. Scope and Structure of the School System

The Wellesley School Committee is an elected body with responsibility for the operation of nine elementary schools, one junior high school, and one senior high school. The system employs approximately four hundred teachers (UNIT A) and thirty eight administrators in the general classifications of principal, assistant principal, department head, director and coordinator (UNIT B). The annual budget is more than nine and three quarter million dollars. The chief administrative official of the system is the Superintendent of Schools, Dr. William Goodman. Dr. Goodman reports directly to the School Committee, and has the primary responsibility for the day-to-day operation of the public schools. He makes recommendations on all matters which come before that body. Below the Superintendent are four central office administrators, including the Associate Superintendent for Curriculum and Development, the Assistant to the Superintendent for Special Services, and the Director of Buildings and Grounds. The authority of each of these officials is systemwide. The Assistant to the Superintendent for Curriculum and Development is concerned with educational and curriculum policy development and implementation. The Assistant to the Superintendent for Business Services is a fiscal official with primary responsibilities in the area of budget development and non-academic programs. The Assistant for Special Services aids the central administration in the areas of speech, psychology and special education. The Director of Buildings and Grounds oversees the operation and maintenance of the physical plant operated by the school system.

The Policy Making Process

The School Committee is obligated by law to pass on most important matters

[6] See, e.g., Balfour, "Report and Recommendations on Unit Determination and Representation in the State Classified Civil Service", Michigan Civil Service Commission (January 31, 1974) at 18-19; Rains, "Collective Bargaining in the Public Sector and the Need for Exclusion of Supervisory Personnel," Labor Law Journal (May 1972) at 275; Shaw and Clark, "Determination of Appropriate Bargaining Units in the Public Sector", 51 Ore. L. Rev. 151, 168-171 (1971); Sullivan, "Appropriate Unit Determination in Public Employee Collective Bargaining," 19 Mercer L. Rev. 402, 409 (1968); Smith, Edwards & Clark, "Labor Relations Law in the Public Sector," 259-281 (1974).

[7] See, e.g., Massachusetts Port Authority, CR-2940 (Supp. Decision 6/7/66); Massachusetts Bay Transportation Authority, CR-3270 (10/16/72).

affecting the operation of the school system.[8] The Committee has retained its authority to act in these areas by enacting a policy on Powers and Duties of the School Committee.[9] In practice, however, the School Committee has delegated a vast area of decision-making to the Superintendent and his subordinates. The judgment of the Superintendent is generally accepted by the School Committee unless the subject matter of the recommendation is of major import (gross dimensions of the budget) or particularly controversial or of public interest. In

[8] See Mass. Gen. Laws Ch. 71, sec. 37-38.

[9] "POWERS AND DUTIES OF THE SCHOOL COMMITTEE

1. The School Committee is the over-all policy-making group for the schools, with responsibility to take such action as provided by law. It is the lay committee of representative citizens who can interpret to the Superintendent the needs and wishes of the townspeople and, in turn, evaluate the proposals for changes in policy, program, and procedure made by the Superintendent and the school personnel.

2. It is the function of the School Committee to:

Determine the scope of the educational offering to be maintained.

Set up the length of the school year and vacations.

Decide upon the extent of expenditures to be made for edudation, approve and adopt an annual budget, and make regulations for the accounting of all school funds.

Recommend educational specifications for buildings to be provided for school purposes and provide for the maintenance, repair, and the use of school buildings.

Employ a professional school executive to administer the schools, and evaluate and appraise his services.

Employ all school personnel, upon recommendation of the Superintendent.

Adopt pay scales and schedules.

Pass upon instructional procedures.

Determine policies regarding age of school entrance, promotion of pupils from grade to grade, and requirements for graduation from the various units of the system.

Provide for the protection and promotion of health and safety of pupils and school personnel.

Represent the community's attitude toward the public schools and interpret the schools to the public.

Adopt textbooks.

Voted November 6, 1972"

most matters affecting the day-to-day operation of the schools, the decision of the Superintendent is, of necessity, "rubber stamped." Among the important examples of this delegated authority are decisions on hiring, the tenure of professional personnel, decisions on course offerings, codes of student and staff conduct, length of school day and year.

The Superintendent meets regularly with two committees which discuss current matters of concern within the school system. The "Executive Council" is composed of the secondary principals, two elementary principals who serve on a rotating basis, and the Assistant and Associate Superintendents. Discussions by this group might cover any topic from the building of a second high school to examination policies and attendance practices. The meetings are free-wheeling, with a rough agenda prepared by the Superintendent, who chairs the meetings. The council has no specific authority, and does not decide anything. It functions as a sounding board and a source of "input."

Similarly, the elementary principals, coordinators and directors meet with the Superintendent on a regular basis. As with the Executive Council, their role is loosely defined. Discussions may be wide ranging and deal with important issues, but the group has no decision-making authority per se.

Input from the professional staff is also gathered from a number of less formalized sources. Individual faculty or administrators may communicate a particular concern to the Superintendent or one of the central office staff. Seldom, if ever, do individual administrators have direct contact with the School Committee on department business.

Budget Preparation in Wellesley Public Schools

The Wellesley Public Schools adopted a "program" approach to preparing the budget for academic year 1974-75.[10] Each school building constitutes a "program," as do secondary departments, and specialized programs such as physical education, special activities, library and others. Each program leader (department head, principal, director or coordinator) is required to prepare a probram budget. Some Unit B administrators are involved in the preparation of more than one budget. Each program budget consists of two narrative sections--an annual report and a statement of goals and objectives for the upcoming year,--and a proposed budget. The budget is broken down into three elements. The major element, approximately eighty to ninety percent of a typical program budget, is salary. Salary for school department employees is fixed by collective bargaining, and the program leaders have no responsibilities in this regard. The other components of the budget are "expenses" and "outlay." In

[10]Consideration of the budget process is somewhat complicated by the fact that this process was used for the first time in school year 1974-75 and will be modified in the upcoming fiscal year.

the normal course of events, a program leader adjusts his previous year's figures for these accounts by some factor attributable to inflation or size of program. These guideline figures are pre-set by vote of the School Committee before the preparation of program budgets. Any substantial deviation from the guideline figure is likely to require justification to a higher authority. Program budgets are generally submitted to central office staff for review. If problems appear, the program leader and his superior will work out a resolution in conference.

The School Committee looks to the Superintendent for the preparation and submission of the final budget. The task of compiling the separate program budgets and preparing supporting data falls to central office staff.

Budget review is one of the major functions of the School Committee. Thus, it is not uncommon for substantial changes to be made in the budget submitted by the Superintendent. These changes are reflected in the ultimate budget for each program.

The School Committee is generally concerned with gross budget figures, rather than inspection of particular program components. Thus, the School Committee may require reduction of the personnel budget by a certain amount to reflect reduced enrollment, but will not dictate as to where the cuts must be made.

Once a program budget has been approved as part of the School Committee budget for the year, the program administrator has certain flexibility in the use of funds for particular purposes. For example, within the overall expense account, he may shift certain items to adapt to changed cost factors or policy. The distribution of outlay funds between projects may be altered also, within the budget figure.

Conduct of Collective Bargaining

The Wellesley School Committee bargains collectively with six employee groups--classroom teachers (Unit A), administrators (Unit B), health nurses (Unit C), cafeteria employees, custodial employees, and educational secretaries. The bargaining team for the School Committee is headed by a professional negotiator who is assisted by one or two members of the School Committee and central office staff. The School Committee representatives keep that body informed continually on the progress of negotiations.

Bargaining on the Unit A and B contracts has been conducted concurrently. The Association's chief negotiator is an outside professional, who is assisted by a bargaining committee composed of both Unit A and Unit B members. In prior years the Superintendent had attended bargaining sessions for the professional contracts. He has now determined that faculty relations will be improved by delegating the responsibility for direct participation to other central office staff. The Superintendent is available to the management bargaining team for consultation at most sessions.

No Unit B administrator participates directly for the School Committee in negotiations for professional staff contracts. Some rough data is, however, solicited from the administrators which may be included in the proposals.

Wellesley School Committee, MUP-2009, CAS-2005

As certain Unit B administrators supervise one or more employees in the educational secretaries unit, their input is solicited as to possible changes or modifications in that agreement. In addition, two Unit B administrators were asked to participate in the negotiation of the secretaries contract, but declined when informed by the Association that such participation might cause their exclusion from the administrators unit.

Agreements reached by the School Committee negotiating team must be ratified by the full body.

Contract Administration

The collective bargaining agreement for the Unit A classroom teachers contains a grievance procedure which provides that a grievance be taken up initially[11] with the employee's "supervisor." The "supervisor" is defined as "the immediate administrative superior (his Department Head, Director, Coordinator or, in an Elementary School, his Principal)."[12] If the grievance is unresolved at this level, it is referred to the next appropriate level of supervision which, in the case of secondary teachers, is the secondary principal. For other employees it is the Superintendent. In each case where a secondary teacher employee has filed a grievance, all supervisors below the level of superintendent have agreed with the grievant and passed the grievance along to the next level. Department heads consider their role in the administration of this contract to be limited.

The procedure under the administrators contract is similar, with grievances being first submitted to the immediate superior, with the second step being the Superintendent. No Unit B personnel are involved above the first step of this grievance procedure, however.

Unit B administrators also have a limited role in the administration of the educational secretaries contract. Those Unit B employees who supervise secretaries are the first step in their grievance procedure.

The record does not disclose any instance in which the representation of three groups by affiliates of the Massachusetts Teachers Association has caused difficulties.

The contracts for the educational secretaries and classroom teachers provide for evaluation of unit employees by their supervisors. Thus, Unit B

[11] A dispute normally begins as a "complaint." The "complaint" is defined by the contract as an expression of dissatisfaction with working conditions. Employer's Exhibit 80, Article 18. The complaint is brought to the attention of the supervisor, and if not resolved, is reduced to writing, signed by the grievant and the union, and becomes a "grievance" Id.

[12] Employers Exhibit 80, Article 18.

employees evaluate classroom teachers and some evaluate educational secretaries. Non-tenured teachers are evaluated yearly on forms provided by the central office. Tenured personnel have an informal evaluation yearly, with formal review every three years. The evaluations are used to determine eligibility for step increases which, under the Unit A contract, have a merit component, and to make tenure and re-hire determinations. The evaluations of educational secretaries are used to make judgments as to eligibility for step increases. In practice step increases under both the Unit A and educational secretaries contracts are automatic. There has apparently never been an occasion on which an employee who was entitled to an increase based on length of service was denied the increment because of a poor performance rating.

III. OPINION

A. The "Policy" Question

The General Court has provided us with a three-part test to determine whether an individual is a "managerial" employee within the meaning of Section 1 of the Law.

> Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility, involving the exercise of independent judgment of an appellate responsibility not initially in effect, in the administration of a collective bargaining agreement or in personnel administration.

The legislative history of Chapter 150E makes it clear that the General Court studied similar language in other statutes.[13] It is further clear that the legislature did not intend to exclude employees from the protection of the Law if they were merely "supervisory" as that term is defined in the National Labor Relations Act (NLRA) and similar legislation.[14] Therefore, the decisions of the National Labor Relations Board (NLRB) and state agencies interpreting the term "supervisor" are of little assistance in interpretation of the new statutory language.

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[13] See Appendix at pages 1411, 1413, 1415.

[14] This principle has been discussed in numerous decisions of the Commission dealing with both the public and private sector. See, e.g., City of Chicopee, MCR-1228 (11/18/74); Town of Needham, MCR-1225 (1/21/74); Brookline Hospital, CR-3402 (1/18/74); Massachusetts Port Authority, supra note 7; Massachusetts Bay Transportation Authority, supra note 7. Since the adoption of the "supervisor" amendment to the National Labor Relations Act in 1947, our General Court has consistently refused to similarly amend state legislation. Thus, we consider the principle that "supervisors," qua supervisors, are entitled to bargaining rights as too well-established to require lengthy treatment herein.

We are not totally without guidance, however, The term "managerial employee" has been utilized by labor relations boards and agencies for some time. Although no other board or agency deals with the terms as precisely defined in our statute,[15] some insight may be gained by reviewing precedents elsewhere dealing with the general terms.

he NLRB has created by decisional law a class of employees which it refers to as "managerial" employees. The Board has considered as managerial those employees who formulate or effectuate labor relations policy.[16] Such employees were considered to have interests so distinct from rank and file employees that they could not be placed in the same bargaining units. Their interests were seen as more closely alligned with management.[17] The Board has always considered the designation of employees as managerial and their exclusion from units of rank and file employees as an exercise of its discretion under section 9 of the NLRA to shape bargaining units. This conclusion has recently been called into question by the Supreme Court decision in Bell Aerospace, Division of Textron Corporation v. NLRB,[18] suggesting that there

[15]At least ten jurisdictions have excluded managerial employees from the coverage of one or another of their public sector bargaining laws. See, Hawaii Rev. Stat. Ch. 89, sec. 89-6: Kan. State. Ann. sec. 75-4322(e); Prince Georges Code of Ordinances and Regulations Ch. 13A, sec. 2(i) (Maryland); Rev. Code of Mont. Tit. 59, sec. 59-1602 (2); N.J. Stat. Ann. Tit. 34, sec. 34: 13A-5.3; New Mex. State Personnel Board Regs, sec 1 E 12; Consol Laws of N.Y. Ann., Civil Service, art. 14, sec. 201.7; N. Y. City Admin. Code Ch. 54, sec. 1173-4.1; Penna. State Ann., Tit. 43, sec. 1101.301(16). Others have excluded them by decision of their public employee relations boards (Michigan,) Source, Industrial Relations Center, University of Hawaii, Guide to Statutory Provisions in Public Sector Collective Bargaining, Unit Determination, Occasional Publication 102 (1974).

None of these jurisdictions have concluded that secondary school principals are excluded as managerial. Kansas and Montant, have specifically granted bargaining rights to secondary principals in spite of a managerial exclusion.

[16]See, e.g., CE & I Steel Co., 196 NLRB 470, 80 LRRM 1063 (1972).

[17]See, e.g., Buckeye Village Market, Inc., 175 NLRB 271, 70 LRRM 1529 (1969).

[18]U.S., 85 LRRM 2945 (1974). In the Textron case, the Board directed an election in a unit of buyers, employees arguably managerial under the Borad law since they had discretion to commit the credit of the employer. The Board argued that, as the managerial determination was discretionary, it could create a unit of all managerial employees. The employer appealed and asserted that "managerial" employees were outside the coverage of the Act, and could not be included in any bargaining unit. The case reached the Supreme Court which remanded for a determination by the Board on the issue of managerial status. The majority seemed to be suggesting a test based upon conflict of interest, as included in the "formulate or effectuate labor relations policy" test previously approved by the courts. 85 LRRM at 2952-53.

Wellesley School Committee, MUP-2009, CAS-2005

may be a statutory class of employees other than supervisors who are excluded from protection of the Act.

Certain of the experience of the NLRB with its managerial classification is relevant to interpretation of Chapter 150E. Our stautory criteria clearly incorporate the Board's doctrine of excluding those who are involved in developing labor relations policy. Yet we must conclude that the legislature wanted us to exclude all employees whose participation in general policy-making is sufficiently significant. Otherwise the qualifying language would have restricted the term "policy" to labor relations policy.

In addition, the conclusion of the United States Supreme Court that any employee whose duties make the exercise of bargaining rights inconsistent with his duties as an employee must be excluded from any bargaining unit, may similarly be adopted. Even before the Textron decision, we held similarly that the definitions of "employer" and "employee" contained in Chapter 150A of the General Laws were mutually exclusive.[19] In so concluding, we rejected the doctrine of the NLRB and the earlier view of Supreme Court as expressed in Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397 (1947):

> "We do not disagree with the [Packard] majority that employees other than rank and file have certain economic interests common to all those who perform labor for another. We believe, however, that certain classes of employees exercise such a level of authority on behalf of their employer, that the exercise of collective bargaining rights by such individuals is incompatible with the purposes of the Act. The Commission believes that the intent of the legislature in so defining "employer" as to include those acting on behalf of an employer, directly or indirectly, was to indicate that such a class existed. The problem has been to properly define this group."[20]

Our view, in accord with Justice Douglas' dissent in Packard, has since received support from the Supreme Court majority in Textron, and the legislative definition of a managerial class within the new public sector bargaining law. We are therefore persuaded that, whatever the content of the managerial exclusion, it must be at least as broad as the "inherent conflict" test in Brookline would require.[21]

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[19] Brookline Hospital, supra note 7.

[20] Id. at 14.

[21] That no such inherent conflict exists in the instant case is clear. The administrators have engaged in collective bargaining for a number of years without significant interference with the function of the public schools. Other jurisdictions have reached the same conclusion, granting bargaining rights to school administrators by statute. States such as Alaska, Kansas, North Dakota and Minnesota have mandated a separate unit for supervisory personnel in the public schools, as does Nevada where the administrative unit would have five

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Wellesley School Committee, MUP-2009, CAS-2005

More direct interpretive assistance is provided by an examination of the New York Public Employee Relations Board (PERB) decisions interpreting the Taylor Law. Amendment of that law in 1971 created a definition of managerial employees who were to be excluded from coverage of that law.

Because of the similarity of the exclusionary language, we have given attention to certain PERB decisions.

Board of Education, Beacon Enlarged City School District, 4 PERB 4344 (1971) represented the first determination by the PERB on whether public school principals formulated policy within the meaning of the New York law. The factual presentation was similar to the case sub judice. Discretion of the principals was total as regards hiring. They operated their respective buildings under the general direction of the superintendent and the school committee. Administrators met once or twide a week to discuss matters of interest including the progress of negotiations, especially with the classroom teachers. Principals prepared budgets for submission to the superintendent, and could veto any requisition made by a teacher. One principal attended all bargaining sessions on the classroom teacher talks and kept other administrators informed as to the progress. On this record, the PERB concluded that the principals (and assistant principals, whose status was also in dispute) were not managerial:

> "An individual will be deemed "managerial" under the first statutory criterion if he or she "formulates policy." Only the Board of Education is ultimately empowered to make policy for the school district. It is regularly joined in its deliberations, both in executive sessions and otherwise, by the superintendent and the business administrator. Both these individuals are in a position to take a broad overview of the district's problems, goals, and capabilities because of their district-wide jurisdiction. There is no doubt that they have a direct and powerful influence on policy formulation. The principals, however, have an altogether different type of involvement in the policy-making process. Their spheres of influence are building, not district wide. They do not participate in Board of Education policy discussions, but instead only meet with the superintendent during administrative council meetings to consider administrative and educational matters. Certainly they are expected to advise the superintendent of their views about existing or potential policies. But in the final analysis it is the superintendent and the Board of Education who have the burden of weighing the special interests and concerns of each constituent group in the entire district (principals, teachers, non-teaching employees, and (students) before making a decision.) The advisory role which the principals play does not, I find, afford them the type of primary involvement in policy formulation contemplated by the Act."

21(cont'd)

or more employees. Montana and Vermont permit the principals and assistant principals to determine if they wish a separate unit, or to be included with the teachers. Maine and Washington, also guarantee rights to principals. See generally, Industrial Relations Center, University of Hawaii Guide to Statutory Provisions in Public Sector Collective Bargaining, Unit Determination, Occasional Publication 102 (1974). Compare City of Chicopee, supra note 14.

This conclusion was re-affirmed in another decision involving a community similar in size to Wellesley.[22] Board of Education School District No. 1 (Hempstead Public Schools), 5 PERB 4040 (1972). Building principals were considered by the superintendent to be as "the captain of a ship."[23] As a consequence they exercised great discretion in the operation of the school buildings. Principals met regularly with the superintendent to discuss important matters. Budget preparation was similar to the Wellesley Public Schools, with each principal submitting a proposal for supplies, materials, equipment and certain capital improvements. Once a budget was approved, the principal had broad discretion in transferring funds between accounts. Principals provided input and suggestions for the collective bargaining agreement covering the classroom teachers, but had little direct involvement. Dispite these clear indications of supervisory authority the PERB concluded that the principals did not formulate policy within the meaning of the Taylor Act amendment. That determination has been affirmed by the highest court in New York. Board of Education School District No. 1 (Hempstead Public Schools) v. Helsby, 36 N.Y. 2d 877, 323 N.E. 2d 191 (1974), aff'g 42 App. Div. 2d 1056 (1973).

These cases are persuasive. Although we do not necessarily believe that the authority of a managerial employee must be systemwide (such an interpretation in state government would lead to untenable results) the scope of discretion whould be significant when considered in relation to the mission of the public enterprise. The authority exercised by the principals in Wellesley appears however to be supervisory rather than managerial.

Managerial employees make the decisions, and determine the objectives. Supervisory employees transmit policy directives to lower levels, and, within certain areas of discretion, implement the policies. "...[I]f one is merely a 'supervisor', he is still an employee and entitled to participate in an appropriate bargaining unit." Brookline Hospital, supra at 13. Although the issue in the Brookline case did not involve the application of the specific criteria with which we now deal, the dichotomy is valid still. As the PERB concluded,

> Another indicia of legislative intent may be found in the Legislature's choice of words to label and define the excluded categories. Only "managerial" and "confidential" employees are

[22] Hempstead operates seven elementary schools, a middle school and a high school, with a professional staff including 355 teachers and a central office staff of a superintendent and four assistants. The Wellesley school system includes nine elementary schools, one junior high school, and one senior high school, approximately four hundred teachers, and a central office staff of four assistants and a superintendent.

[23] Compare with the assertion of the School Committee that the Wellesley principals are "branch managers."

> excluded by the Act from representation rights; "supervisors" are not mentioned at all. In view of the long private sector tradition, as evidenced by the National Labor Relations Act, as amended, to exclude supervisors from coverage, it must be concluded that the Legislature's choice of a different term - "managerial" - was deliberate rather than accidental. Such action signals an intent to delineate a category of personnel with other than supervisory functions. This conclusion is reinforced by a comparison of the statutory definition of "managerial" with either the definition of "supervisor" in the private sector legislation or that which this Board has employed. Managerial status depends upon the exercise by the personnel involved of broad authority directly resultant from their intimate relationship "to the top" (e.g., to a board of education or a superintendent of schools), while supervisory status is manifested by an individual's relationship to (and direct control over) "rank and file" employees. The distinction is substantive, not semantic; those individuals who perform managerial functions will in all likelihood possess either direct or indirect supervisory authority, but the reverse is not true. And it is the Legislature's will that only those individuals whose authority in labor relations matters goes beyond traditional supervisory concerns are to be excluded from rights under the Act. [citations omitted.]

Beacon Enlarged City School District, supra at 4348.

The New York Board reached the issue of managerial status of school principals again in City School District of the City of New York, 6 PERB 4028 (1973). In the huge school system involved in that case, the principals had substantial input into personnel policies, including the recommendation of tenure, discipline of teachers, interviewing and hiring of substitutes. Principals prepared and supplied a budget to their assistant superintendent. Within the account for supplies each principal had absolute discretion as to how funds were expanded. Each school was allocated a certain number of teaching positions, department heads, and teacher aides. Within these general allocations, the principals had considerable discretion. The principals played a major role in curriculum determination and program offerings, developed in conjunction with community school boards. Principals were required yearly to prepare statements of objectives and goals.

Upon consideration the PERB again concluded that principals were non-managerial.

> "To be meaningful, the concept of policy formulation must be applied not at the lowest operating unit of the employer, but at a level of responsibility sufficiently high to encompass a discrete department or agency. Principals, of course, do not satisfy this standard; their spheres of influence do not extend beyond their individual schools..." Id at 4034.

In New York City, Beacon Enlarged School District, and School Board No. 1 building principals attended sessions at which overall school policy was discussed, as in Wellesley. But in those systems, as in Wellesley, the

decision-making authority of principals does not extend beyond their own building. Althtough such individuals are expected to be leaders within each building, they do not make the basic policy decisions for the system. Such are committed by law to the School Committee, which consults in the practical exercise thereof with the central administration, notably the Superintendent.

We contrast the conclusion of the PERB in City of Elmira, 6 PERB 4024 (1973) where it was determined that the Chief of Police, a department head, was a managerial employee, in part because of his participation in the formulation of policy. The Chief had the authority to determine the objectives of the department, and select among the available methods of accomplishing that purpose.[24]

We confess that there is no easy test to apply in determining whether an employee is a "policy maker." The entire employment relationship must be examined. Yet, we are persuaded that the approach of the New York ERB is sound. Policy decisions are those of major importance when examined in the light of the objective of the public enterprise. Thus, we cannot consider the "decision to have a written policy" in some area to be a policy decision. Further, to be considered as policy, the decision must impact a significant part of the public enterprise. Thus, policy determinations with respect to weapons, final examinations, schedules, bicycle use, and safety patrols are not substantial determinations within the meaning of the Law.

Limited participation in the process by which true managerial decisions are made is likewise insufficient to make an employee "managerial." Thus, while decisions with respect to educational philosophy and class size may constitute policy, the participation of the administrators in Wellesley is only advisory in nature. Attendance and participation in periodic discussions with higher administrators on major policy matters does not constitute policy formulation or determinations. Though the "executive council" may discuss the need for a second high school, the real judgment will be made by the School Committee. Only the central office staff participates in School Committee deliberations on a regular basis. The School Committee retains the legal authority as decision-maker and must act on all important matters.[25] Substantial discretion is vested in the central office staff, however, to operate the system.

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[24] See General Laws Chapter 41, Section 97A, granting similar authority to centain police chiefs in Massachusetts.

[25] See note 9, supra. This Policy on Policies indicates that the Committee is the final authority in all major areas such as curriculum offerings, class size, and many others. It is, however, clear from the record that the exercise of this retained authority is often pro forma. Tr. 1, 36-47. Great reliance is placed on the judgment of the superintendent in routine matters.

We do not accept the argument of the Association that the authority of the School Committee in managerial areas is non-delegable. Brief for the Association at 45. The cases cited for this proposition are not persuasive. Danvers v. School Committed of Worcester 329 Mass. 370, 108 N.E. 2d 651 (1952) dealt with the narrow issue of whether service performed for a school department, encouraged by a superintendent but not approved by the School Committee, could be counted toward the acquisition of tenure. The Court concluded that only the

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The same may not be said of the role of the principals and other administrators. Their input into the process is advisory. They have little or no direct access to the decision-making process. Thus, although a procedure exists whereby an administrator may go over the head of the superintendent and present a proposal directly to the School Committee (a further indication of the retained power and authority of that board) it has seldom if ever been used. Decisions or proposals of principals and other administrators are screened through a higher level before implementation or presentation to the School Committee.

Such an advisory function cannot be characterized as "substantial participation" in the formulation or determination of policy within the meaning of Chapter 150E. Any wise administrator consults those who will be affected by or have the responsibility for implementing, a decision. Those so consulted are not, in consequence, decision-makers.[26]

We conclude that the secondary and elementary principals do not exercise the breadth and scope of decision-making authority necessary for a finding that they are managerial employees. They are, to be sure, supervisors.[27] They are involved in some personnel decisions, and have operational control of the buildings for which they are responsible. Yet, the authority of the School Committee is not shared with these employees in any legal or practical sense. Principals contribute knowledge, practical judgments as to the impact

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25(cont'd)
School Committee could approve employment. O'Brien v. City of Pittsfield, 316 Mass. 283, 55 N.E. 2d 440 (1944) is similarly inapposite. The issue presented was whether the School Committee could delegate its ultimate authority to approve a budget for the school department to another branch of the municipal government, the City Council. We conclude that these cases are irrelevant to a determination of managerial status. In applying the three-part test, the focus of our inquiry is the effective exercise of authority. It is obvious that the School Committee bears the ultimate responsibility for the actions of those to whom it delegates responsibility. This is shown by the requirement of School Committee action on certain routine matters totally within the functional discretion of the central office staff. Yet, the purpose for the managerial exclusion is, at least in part, to insure that public bodies such as school committees have sufficient personnel on whom to rely in performing the duties entrusted to them by statute.

26See Groton School Committee, MUP-702 (12/14/74), where we held that a teachers association committed a prohibited practice when it insisted on bargaining with respect to the functions of a "curriculum committee," voluntarily established by the employer, which advised on "managerial" decision.

27The Pennsylvania Labor Relations Board concluded that principals in McKeesport were first-level supervisors rather than "management level employees" within the meaning of their act. McKeesport Area School District, PERA Case No. R-4745-W, LRRM (1975).

of proposed policies, suggestions and advice which are carefully considered by those who make the judgments--the School Committee, the Superintendent and his staff.

As we have concluded that the principals do not "participate to a substantial degree in the formulation or determination of policy" within the meaning of the statute, close examination of the duties of other disputed positions is unnecessary. Department heads and assistant principals, as they are below the principals in the chain of command, must be non-policy-makers also. They have no authority broader than that of the principal above them. In the exercise of their responsibilities they are subject to review by the principals or assistant principals. Although the department heads do participate to a degree in the physical preparation of the budget, as concluded above, this participation is not substantial. The computation is largely mechanical, using predetermined figures to adjust the previous budget to account for factors such as inflation. Guidelines for expenditures are determined by the School Committee. The budget documents are scrutinized by several levels of administration before being included in the total budget recommendation submitted to the School Committee. Substantial revisions are made in a program leader's budget without consultation or consent.

Some attention should, however, be given to the positions of coordinator and director. These classifications do not fall into the line of authority running from classroom teacher to department head to principal or assistant, and central office personnel.

The Director of Library Services is a specialist position which is responsible for the coordination of library services for the entire system. The incumbent is a program leader, and as such is responsible for the preparation of a budget in the same manner as other program leaders. The Director is responsible to the Associate Superintendent for Curriculum and Instruction. Although this individual has "system-wide" responsibilities, we cannot accept the conclusion that the incumbent formulates or determines policy to a substantial degree. The area of responsibility is narrow. Within that narrow area, direct supervision is afforded by an assistant superintendent. Thus, this position has two levels of authority between it and the school committee.

Also responsible to the Associate Superintendent for Curriculum and Instruction is the Elementary Curriculum Coordinator. This employee works in an advisory capacity in the elementary schools, where he participates with the principals and resource teachers in planning and developing elementary curriculum. This coordinator serves as a resource, providing specialized knowledge and expertise to elementary teachers. As with the Library Director, there are two levels of supervision between this employee and the School Committee. Input into policy is largely informational and limited in scope. We conclude that this position does not meet the standard on policy formulation.

The authority of the Director of Guidance, Secondary Schools, is limited to the senior high school, where this employee reports to the principal. Within the single school, the authority and responsibility of this individual are limited to counseling students. We do not consider his role as "policy-making" consistent with the discussion above. The similar position at the junior-high is, for the same reasons, considered non-policy-making.

Wellesley School Committee, MUP-2009, CAS-2005

The Director of Music exercises a function analagous to that of the Director of Libraries already discussed. This individual serves all of the schools in the system in an advisory and coordinating capacity. Unified leadership is provided in this specialized area. The relationship of this position to other professional employees of the system is advisory and supportive, rather than supervisory or managerial. Although this employee does have supervisory authority over a small staff, the major function is to coordinate the music programs throughout the system. The Music Director is accountable to the Associate Superintendent for Curriculum and Instruction and the various building principals. Because of the narrow range of responsibilities and the remoteness of this employee from the decision-making process, we find no substantial input into policy.

Position descriptions for the Director of Art (secondary and elementary) indicate that these employees supervise and direct a small staff of instructors of art. The secondary director reports to the two secondary principals, and, on matters of curriculum, to the Associate Superintendent for Curriculum and Instruction. The Director of Elementary Art Education normally reports to the Associate Superintendent. The primary responsibility of each of these employees is the development and supervision of the art program in the public schools. The area of responsibility is restricted to the specialized area of art education. We conclude that the scope of authority exercised by these employees is supervisory rather than managerial.

The physical education responsibilities, like those in guidance and art, are divided between two positions--Director of Physical Education and Athletics, Secondary Schools, and Director, Elementary Physical Education. As with the other specialist positions, these employees coordinate rather than make policy or even supervise. These employees also report to the Associate Superintendent for Curriculum and Instruction. We conclude that the program area with which these employees are concerned is narrow in comparison to the scope of school systems' operations. As specialists, they are consulted on decisions affecting their specialized area of competence, but a consultative role does not constitute policy-making as defined in Section 1 of the Law.

The Staff Development Coordinator designs and schedules programs to provide for the continuing development of the professional staff. In this capacity, this employee attends meetings of principals and department heads, plans and schedules programs and speakers, and coordinates similar developmental programs. The Director is expected to develop and have available information for use by the professional staff. This employee is a resource specialist, and is not a policy-maker within the meaning of the Law.

B. Conduct of Collective Bargaining

The second element of the statutory test poses less difficulty in application. To be considered managerial under this standard, one must "participate to a substantial degree in the preparation for or conduct of collective bargaining." Massachusetts General Laws Chapter 150E, Section 1.

Participation by Unit B administrators in collective bargaining is limited. One elementary principal participated in the negotiation of the educational secretaries contract to the extent of attending one meeting. Unit B administrators are occasionally asked their opinion on possible problem areas in the

administration of the Unit A agreement or the educational secretaries agreement. None sit on the management bargaining committee. None prepare any proposal for contract talks, determine bargaining objectives or strategy, or have a voice in conditions of settlement.[28]

As described above, supra at 1394-1395, the normal practice for bargaining with the professional employees of the school system is for a professional negotiator employed by the School Committee to head the management team. Assisting him have been one or more members of the School Committee, who participate actively, and a central office administrator. In prior years, that administrator had been the superintendent. In the last round of negotiations, the Assistant to the Superintendent for Business Services has functioned in that capacity, with the Superintendent available for consultation at most bargaining sessions, but not present. On the Union side of the table is a joint committee, comprised of three representatives from Unit A and three from Unit B.

The School Committee negotiates with four other bargaining units--the cafeteria and custodial employees, the nurses, and the educational secretaries. No Unit B employees participate directly in these negotiations except as they may be asked to identify problem areas under the educational secretary contract. There is no involvement with the decision-making process in either the "preparation for or conduct of" agreements.

Thus, with the single exception of the one-time participation of an elementary principal in a bargaining session for a non-professional contract, there has been no direct participation of administrators in bargaining. The only informational participation of the Unit B administrators is with regard to the non-professional contracts.

We cannot conclude that such participation is "substantial" within the meaning of the statute.[29] Nor can we accept the argument that, but for the bargaining rights of these employees under the prior law, their participation would have been more substantial. The fact is that the Commission must examine what their duties are, not what they might have been. The employer argues that we should exclude employees whose participation in bargaining may at some future time become substantial. We need only observe that the system has functioned well despite the possession of organizational rights by supervisory personnel for a number of years, and has an excellent reputation for providing quality education. Speculation as to the status of employees under a set of

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[28] Compare the situation in some towns where central administration consists of a solitary superintendent. In re Nantucket School Committee, MUP-525 (6/14/74).

[29] New York has reached the same conclusion--that participation in decision-making is required to satisfy the second element of the "managerial" test. See State of New York , 5 PERB 3001, 3005 (1972). Compare Nantucket School Committee, note 28 supra.

facts which does not now obtain is not sufficient reason to deprive such employees of existing rights. Evidence on the record leads us to the conclusion that there is no irreconcilable conflict between the exercise of bargaining rights by supervisory personnel in a separate unit, and their essential duties as supervisors, or their loyalty to the school system. Town of Chicopee, supra.

The record fails to support the argument of the School Committee that Unit B administrators "participate to a substantial degree in the preparation for or conduct of collective bargaining."[30]

C. Personnel Administration--The Third Test

We are directed by the statute to determine if the employees in question "have a substantial responsibility, involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration." Here the statute employs terminology more familiar in labor relations law. In particular, we think the term "independent judgment" should have the meaning attributed to it by the National Labor Relations Board and the Courts in interpreting the definition of "supervisor" in the National Labor Relations Act. Thus, there must be more than a coincidence of recommendation and acceptance by higher authority. If the judgment is considered to be "independent" it must lie within the discretion of the employee to make without consultation or approval.

In addition, the role in the administration of contracts must be "of an appellate nature not initially in effect." It is clear that an individual who functions for management at the first step in a grievance procedure may not be considered to be exercising "appellate" authority.

Finally, we must bear in mind the substantiality requirement. The responsibility of an individual must be important. There must be some impact and significance to the judgment. If it is perfunctory, clerical, routine or automatic, it may not be considered a "substantial responsibility."

Application of such a standard compels the conclusion that the Unit B employees are non-managerial. Only the secondary principals play a role above the first step of any grievance procedure. Where a grievance has been filed by a secondary teacher, the principal would constitute the second step of the procedure. Above the principal are the Superintendent, the School Committee,

[30]The employer calls our attention to a decision of the New York PERB, in Copinague Public Schools, 5 PERB 4043 (1972) where it was held, on application of a similar test, that rotational participation by principals in classroom teacher bargaining made them managerial. We need not determine whether we would adopt this rule, as we do not consider the attendance at one meeting for one contract to have established such a pattern.

and, in appropriate cases, arbitration. In the only two grievances ever to arise under this contract provision, the secondary principal had no authority to adjust the grievance of the employee. The principal (as well as the department head, of course) served merely as a conduit, passing the matter on to a higher level for adjustment.

The School Committee would have us consider the possibility of some other type of grievance arising, which would be within the discretion of the principal to determine. We decline to so speculate. The parties might conversely change the grievance procedure to eliminate any appellate responsibility of the secondary principals. The statutory standard must be applied to the actual duties of the employees involved. The record demonstrates that significant appellate authority has never been exercised by any Unit B employee. Further testimony indicates that the department heads consider their role in the grievance procedure to be perfunctory. Viewed in this light, any exercise of authority by a secondary principal would be initial as a practical matter, not appellate. The conclusion is clear that the role of the principals in the administration of the Unit A contract is neither substantial nor appellate in nature.

The other major personnel administration function performed by Unit B employees is evaluation of the professional and non-professional staff. As indicated above, the impact of such recommendations has been minimal. A professional employee is entitled to see evaluations, to an informal appeal procedure and to have a written response to any evaluation placed in his file.[31] As no adverse evaluation has ever resulted in the denial of a scheduled increase, and given the levels of authority above the Unit B evaluator who revaiews these decisions as they effect tenure consideration, we may not conclude that this evaluation function is more than an exercise of limited supervisory authority, neither substantial, nor appellate in nature. Evaluation of subordinates is incidental to the primary function of the Unit B employees in all cases. None have substantial personnel or labor management functions, and we conclude that none are managerial by this standard.

D. The Issue of Confidentiality

The only issue remaining for consideration is the assertion by the School Committee that each of the Unit B employees is "confidential" within the meaning of section 1 of the Law. The statute provides:

> Employees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter.

We have determined above that none of the Unit B employees are managerial, or otherwise excludable from the existing unit. Thus, the only employees of the School Department for whom a Unit B administrator might act in a confidential capacity would be either the Superintendent or his four central office assistants. Such relationships do not exist.

[31] Employer's Exhibit 80.

The School Committee would have us accept the argument that the role of Unit B personnel in evaluation of employees renders them confidential. We must disagree. While an evaluation may itself be "confidential" in the ordinary sense, the evaluator is not thus "confidential" in a labor relations sense. Neither we nor the National Labor Relations Board have ever held that mere access to "sensitive" material other than material relating directly to collective bargaining, renders an individual "confidential." Stated otherwise the statutory exclusion is designed to protect certain personal relationships, which must exist if a collective bargaining system is to function at the cost of denying bargaining rights to individuals who are themselves in no sense managerial. Individuals who handle "sensitive" material do not necessarily have a confidential relationship with managerial personnel.

Unit B employees are not privy to confidential materials concerning negotiations,[32] salaries, or similar matters. They may provide gross data or input which might (although the record does not so reveal) be eventually incorporated into some confidential document or decision. The employees supplying the data are not asked to keep it secret. Rather, the information is often obtained at meetings of the Executive Council or the Elementary Principals meetings.

The contention that such employees are confidential is without merit.

IV. DECISION AND ORDER

We have determined that none of the contested positions in Unit B represented by the Wellesley Teachers Association are managerial or confidential. We thus conclude that the refusal of the Wellesley School Committee to bargain, dating from January of 1974, was unjustified and in violation of section 10(a)(1) and (5) of the Law. In fashioning an appropriate remedy, however, we are persuaded that the action of the School Committee was not taken in bad faith. Bargaining under the terms of an Interim Order, the School Committee and Association reached an agreement, subject only to out decision in the instant matters. Under such circumstances,[32a] no bargaining order is necessary.

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[32] We do not accept the conclusion of the Association that the information must relate to labor relations policy. Brief for the Association at 12-17. We agree that this is the consistent interpretation given to the doctrine of confidentiality by the NLRB. See e.g., National Cash Register, 168 NLRB 210, 67 LRRM 1041 (1967). Our statute, however, provides a definition of the term which is considerably broader than the Board's discretionary doctrine. Any employee who works in a confidential capacity to any managerial employee is excluded.

[32a] In response to the Interim Order of the Commission, the School Committee indicated that it would continue "to bargain collectively in good faith with the Wellesley Teachers Association over wages, hours, and terms and conditions of employment of such administrators pending resolution of the above cases. Commission Exhibit 1. The agreement reached under the Interim Order is subject only to the proviso "that it would not be applicable to any administrator ultimately found to be excluded from coverage under the Act as a managerial or confidential employee." Brief of the Association at 5, n. 1. See note 1, supra.

Wellesley School Committee, MUP-2009, CAS-2005

In considering whether other affirmative action would be appropriate, we note that no employee was deprived of any benefit or entitlement by the premature refusal to bargain in January. However, in order to remedy any coercion or restraint generated by the improper refusal to bargain, we conclude that the posting of a Notice to Employees is warranted. We emphasize that our concern is with the residual effects of the technical refusal to bargain, and is not meant or intended as condemnation of the conduct of the School Committee from July 19, 1974 to the present. We consider that the method chosen to test the status of these employees was appropriate after July 1, 1974.

WHEREFORE, in accordance with all of the evidence in this matter, and the record as a whole, the Commission ORDERS:

1. The Petition in CAS-2005 is DISMISSED.

2. The School Committee is directed to post the Notice to Employees accompanying this Decision and Order in a conspicuous location, and to leave said notice posted for a period of thirty days.

3. The School Committee is directed to notify the Commission within ten days of receipt of this Decision and Order of the steps it has taken to comply herewith.

APPENDIX

LEGISLATIVE HISTORY OF THE MANAGERIAL EXCLUSION IN CHAPTER 150E

In the 1969 legislative session, the constant pressure to amend the existing legislation dealing with public employee labor relations caused the General Court to create a special study commission under the chairmanship of Senator George Mendonca to study the entire area. See Chapter 97, Resolves, (1969). The mandate of the commission was periodically extended, allowing the issuance of five interim reports, the last of which was produced in the 1973 legislatie session.

Prior to the adoption of Chapter 1078 of the Acts of 1973, separate legislation governed the rights of municipal and state employees. Chapter 763 of the Acts of 1965 gave municipal and county employees the right to bargain over wages, hours, terms and conditions of employment. State employees, on the other hand, were restricted to bargaining on localized working conditions. See, General Laws Chapter 149, Section 178F. Although bills were occasionally introduced to exclude supervisors from coverage by such legislation, the General Court declined to do so.[33] The municipal law excluded only "elected officials,

[33] Similar attempts to exclude "supervisors" from coverage under private sector bargaining law, Chapter 150A, have been annually rejected since 1947.

board and commission members, and the executive officers of any municipal employer." General Laws Chapter 149, Section 178G.[34] The law governing state employees precluded "the head of any department, board, commission, or other agency who is appointed by the Governor, and members of any board, commission or agency who are so appointed, and any other person whose participation or activity in the management of employee organizations would be incompatible with his official duties" from coverage under the Act. General Laws Chapter 149, Section 178F.

The final product of the Mendonca Commission, the Fifth Interim Report, contained an Appendix proposing comprehensive revision of the public employee bargaining laws. This revision, introduced in the 1973 session as H-6194, contained a number of controversial provisions. It equalized the bargaining rights of state and municipal employees. It abolished both the Labor Relations Commission and the Board of Conciliation and Arbitration, and replaced them with a new, consolidated agency. It granted public employees a limited right to strike. The definition of "employee" in H-6194 was essentially the same as that contained in the existing statute governing state employees but added the qualifying language: "...excluding any other managerial or confidential employee..." Such employees were to be excluded from any unit found appropriate. The language defining managerial employees was borrowed from the amendments to the New York Taylor Law, and provided:

> Employees may be designated as managerial only where they (1) formulate policy, or (2) may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective bargaining, or have a major role in the administration of agreements, or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only where they directly assist and act in a confidential capacity to a person otherwise not entitled to coverage under this chapter.

The stated intent of the Mendonca Commission was "not [to] deny bargaining rights to supervisory employees who are not at the managerial level." Summary of Proposed Public Employee Bargaining Law. 5th Interim Report, supra.

At the hearings on H-6194, the exclusion of managerial employees drew strong opposition from public employee unions.

Following the public hearings, a redrafted bill, still containing a managerial exclusion, was reported out favorably by the Public Service Committee and sent to the Senate for consideration. S-1771, as the proposal was now designated, reached the floor of the Senate and was crushed under the weight of more tha 100 amendments. Much of the controversy centered on the rights

34 See Harrison v. Labor Relations Commission, ____ Mass ____, 296 N.E. 2d 196 (1973); and compare Chapter 526 of the Acts of 1974, discussed Infra at page 44.

of supervisory and managerial employees. Groups representing public employers sought to broaden the exclusionary class by adding language which would prevent "supervisors" from exercising bargaining rights.[35]

Some employee organizations, on the other hand, were concerned that the managerial language was already overly broad, and might eliminate certain existing bargaining rights.[36] The bill was recommitted to the Senate Committee on Ways and Means for redraft.

Senate Ways and Means, with some help from the Public Service Committee, subsequently produced a new bill, S-1929, on September 18, 1973. This draft left the managerial/confidential language substantially unchanged, and opposition to these provisions and others prevented progress towards passage. Unable to reconcile conflicting views and amendments, the Senate abandoned the comprehensive approach, and adopted a bill which minimally amended existing legislation and contained no managerial exclusion. S-1935 defined "employee" in the same way as had General Laws Chapter 149, Section 178F, quoted above.

The House subsequently revived the comprehensive approach, using as a basis the original language of S-1929. By this time, the right to strike for public employees and other controversial amendments had been dropped, and the Governor had vetoed a separate bill which would have given binding arbitration of contract disputes to the firefighters. Thus a re-alignment of forces resulted in House approval of a bill containing a managerial exclusion, binding arbitration for police and firefighters, and no right to strike, designated H-7715. After initial non-concurrence in the Senate, the matter was sent to a joint conference committee. The conference committee made certain amendments not relevant to our considerations, and reported out an amended, comprehensive public employee labor relations bill, again designated S-1929. As the pressure for prorogation increased, further concessions were made, and, in the final days of the 1973 session, a final text received legislative approval on November 21, 1973. When signed by the Governor on November 26, it became Chapter 1078 of the Acts of 1973.

The pertinent language of Chapter 1078 of the Acts of 1973 read:

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[35]The Secretary of Administration had proposed adding such language to H-6194 in a May 17, 1973 letter to the Chairman of the Joint Committee on Public Service. By letter of transmittal of May 21, 1973, the Massachusetts League of Cities and Towns proposed amendments to S-1771 which included broadening the scope of the managerial exclusion to cover supervisory employees. The City of Worcester suggested a requirement that the Commission consider "supervisory relationships" as a factor in unit determination. Memorandum, D.M. Moschos, Special Counsel for Labor Relations to City Manager Francis J. McGrath, to Public Service Committee.

[36]For example, the Massachusetts Teachers Association was concerned that the language in S-1771 would exclude "principals and supervisors" from bargaining, and assigned this as one reason why it could not support S-1771. August 14, 1973, Memorandum to Senator Alan Sisitsky, Representative John R. Buckley, Senator Mendonca from William B. Hebert, John H. Sullivan. It is clear that there was no agreement as to the effect of the language contained in S-1771.

Wellesley School Committee, MUP-2009, CAS-2005

> Employees shall be designated as managerial employees only if they (a) participate in formulating or determining policy, or (b) are reasonably required on behalf of a public employer, to assist directly in the preparation for or conduct of collective bargaining, or (c) have a substantial responsibility, involving the exercise of independent judgment of an appellate responsibility not initially in effect, in the administration of a collective bargaining agreement or in personnel administration.

Although somewhat changed from the original wording in H-6194, the similarity to the New York language is still apparent.

Certain amendments to Chapter 150E in the 1974 legislative session are also relevant to the issue of managerial status. Chapter 526 of the Acts of 1974 precluded the Commission from finding any uniformed employee of a municipal fire department below the rank of Chief of Department to be a managerial employee. Although Chapter 1078 of the Acts of 1973 contained language preventing the Commission from finding firefighters "professional," the firefighters apparently feared that the Commission might be required to find certain officers "managerial" who were traditionally placed in the same unit with rank and file employees.

The General Court resisted all other attempts to either include or exclude certain job titles from the definition of "employee." In particular, the issue of the status of secondary school principals was a matter of concern to both the unions and the municipalities. A compromise measure, S-1582, proposed the addition of a requirement of substantiality to each of the three parts of the managerial test. As with other proposals in this area, the groups most affected were concerned about the possible interpretations which could be given to this language. Thus, the Massachusetts League of Cities and Towns wrote to the Governor and the legislative leadership that the addition of the word "substantial" "...denotes a very heavy burden on a public employer to establish that the highest level employees of its departments are management."[37]

In the opinion of others, the changes made were not significant. In response to an administration inquiry with regard to S-1582, Alexander Macmillan, Chairman of the Labor Relations Commission, indicated that the Commission would likely have read such a substantiality requirement into the law in any event.[38] The measure was passed, and sent to the Governor. On May 31, 1974, Governor Sargent returned the bill with a veto message indicating his view that the amendments constituted a major erosion of the managerial exclusion, which would have a significant impact on public management.[39]

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[37] Letter, Sean M. Dunphy to Francis Sargent, Alan Sisitsky, Anthony Scibelli (May 10, 1974).

[38] Letter, Alexander Macmillan to Edward S. Morrow, Legislative Secretary to the Governor, (May 16, 1974).

[39] The full text of the message was as follows:
"TO THE HONORABLE SENATE AND HOUSE OF REPRESENTATIVES:
(cont'd)

Wellesley School Committee, MUP-2009, CAS-2005

The veto was overridden, resulting in the present language of Section 1 of the Law.

> Employees shall be designated as managerial employees only if they (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or conduct of collective bargaining on

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39(cont'd)

I am returning, herewith, without my approval, Senate Bill No. 1582 entitled "AN ACT RELATIVE TO THE DESIGNATION OF MANAGERIAL EMPLOYEES UNDER THE LAW REGULATING COLLECTIVE BARGAINING BY PUBLIC EMPLOYEES."

On July 1, 1974 the provisions of "An Act Relative to Collective Bargaining by Public Employees" (St. 1973, c. 1078) will take effect. This significant statute was developed over a long priod of time and reflects the efforts of many different groups.

The right of public employees, and particularly state employees, to negotiate with respect to their wages, hours and terms and conditions of employment was substantially strengthened.

At the same time, the drafters of the new statute recognized that state and local government agencies cannot effectively bargain with their employees, or administer collective bargaining agreements, unless a reasonable number of employees are permitted to sit on the "management" side of the table. The responsibility for determining whether a particular employee is "managerial" is left to the State Labor Relations Commission which must apply certain statutory criteria in making its determination.

Senate Bill No. 1582 would significantly revise the criteria which the Commission must apply in making such a determination. Chapter 1078 provides that employees shall be designated as managerial employees only if they "(a) participate in formulating or determining policy, or (b) are reasonably required, on behalf of a public employer, to assist directly in the preparation for or conduct of collective bargaining, or (c) have a substantial responsibility... in the administration of a collective bargaining agreement or in personnel administration." (St. 1973, c. 1078, s. 2) This legislation would revise the first two criteria and provide that employees shall be designated as managerial only if they "(a) participate to a substantial degree in formulating or determining policy or (b) assist to a substantial degree in the preparation for or conduct of collective bargaining on behalf of a public employer...."

The magnitude of this change should not be minimized. It will significantly restrict the types of employees who may be classified as managerial. The proposed amandment would impair the ability of government units to perform their managerial functions by extending bargaining rights to persons who clearly belong on the management side of the table. Moreover, the inclusion of management personnel in bargaining units is not in the long range interest of the great bulk of public employees.

Finally, I believe it is unwise to make substantive changes in the comprehensive new law at this eleventh hour. Both public employees and public employers must be prepared, before the month is out, to engage in a complex new relationship. It will be difficult enough for the parties, acting in good faith, to develop this new relationship without changing the rules of the game and the identity of the players at this crucial point in time. I believe it would be better to gain experience with the statute in its present form and then base any changes on that experience.

(cont'd)

behalf of a public employer, or (c) have a substantial responsibility, involving the exercise of independent judgment of an appellate responsibility not initially in effect, in the administration of a collective bargaining agreement or in personnel administration.

Although the original draft of H-6194 underwent rather substantial changes, the language of the managerial definition emerged still strikingly similar to the New York statute.[40]

The 1975 legislative session again saw the introduction of numerous bills to amend the definition of employee in Section 1 of the Law, or legislate the composition of bargaining units for public employees.[41] These bills have all been rejected, leaving resolution of such matters, in each case, to the Labor Relations Commission for an initial determination.

39(cont'd)

For the reasons set forth above, I cannot in good conscience approve the measure, and I return the bill without my approval.

Respectfully submitted,

s/FRANCIS S. SARGENT
Governor
Commonwealth of Massachusetts"

[40]"Employees may be designated as managerial only if they are persons: (i) who formulate policy, or (ii) may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective bargaining or to have a major role in the administration of agreements or in personnel administration; provided that such role is not of a routine or clerical nature, and requires the exercise of independent judgment." Taylor Act, Section 201.7

[41]A dozen bills sought to amend the definition of employee in section one of the Law. See, e.g., S-1188 (to include school principals within the definition of employees); S-1220 (to exclude supervisors); H-826 (to remove the prohibition on finding fire department employees managerial); H-1852 (to exclude supervisors from coverage under tha Law); H-2748 (to alter the definition of managerial and confidential employees under tha Law).

These bills confirm our belief that managerial status must be determined on a case-by-case basis. People with the same job titles may have widely varying responsibilities. They further reinforce the Conclusion that "managerial" as it is currently defined means something different from "supervisory."

Wellesley School Committee, MUP-2009, CAS-2005

COMMONWEALTH OF MASSACHUSETTS

LABOR RELATIONS COMMISSION

NOTICE TO EMPLOYEES OF THE WELLESLEY SCHOOL COMMITTEE

The School Committee of the Town of Wellesley agrees that it will not restrain employees in the exercise of their right to bargain collectively. The School Committee of the Town of Wellesley will bargain collectively in good faith with the Wellesley Teachers Association over wages, hours, standards of productivity and performance, and other terms and conditions of employment for all principals, assistant principals, directors and coordinators.

For the Wellesley School Committee