STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-4/29/74

In the Matter of	
METROPOLITAN SUBURBAN BUS AUTHORITY,	
Employer,	BOARD DECISION
- and -	AND ORDER
SUBWAY-SURFACE SUPERVISORS ASSOCIATION,	CASE NO. C-0950
Petitioner.	

This matter comes before us on exceptions filed by the Metropolitan Suburban Bus Authority (employer) to a decision of the Director of Public Employment Practices and Representation determining that all dispatchers and foremen of the employer constitute an appropriate unit and ordering an election among such dispatchers and foremen unless the Subway-Surface Supervisors Association (SSSA) submits evidences sufficient to satisfy the requirements of §201.9(g)(1) of our Rules for certification without an election, Matter of Metropolitan Suburban Bus Authority, 7 PERB 4017. The case had been commenced by the filing of a petition on August 15, 1973 by SSSA which sought certification as the exclusive negotiating agent for all dispatchers and foremen employed by the employer. The employer opposed the petition on the theory that its dispatchers and foremen are "managerial" within the meaning of CSL §201.7(a)(ii) in that they have a major role in the administration of collectively negotiated agreements and/or in personnel administration which is not of a routine clerical nature and requires the exercise of independent judgment.

The facts are set forth in the decision of the Director and, insofar as they are relevant, they are supported by the evidence. The Director also states the law correctly. The employer's exceptions call attention to some misstatements of fact in the decision of the Director, but they are inconsequential and irrelevant.[1] The relevant facts indicate that dispatchers and

---

[1] e.g., the Director found that the employer operated bus lines that had previously been operated by seven private bus companies. The evidence indicates that there were ten such companies.

foremen are supervisory employees who exercise most of the normal responsibilities of supervisors, including authority to fire subordinate employees whose conduct violates standards of deportment imposed by the employer. It is the contention of the employer that the term "managerial" as used by CSL §201.7 embraces supervisory employees as that term is used by the National Labor Relations Act §§2(11) and 14(a). Indeed, much of its brief is devoted to the proposition that public sector employers, no less than private sector employers, require the services of supervisory employees who are excluded from the protections of labor relations law. Its arguments are largely drawn from Collective Bargaining in the Public Sector and the Need for Exclusion of Supervisory Personnel by Harry Rains,[2] 23 Labor Law Journal 257, and conclude with the proposition that unless supervisory employees are excluded it will not have sufficient high-level personnel to conduct its operations.

We do not deal with that part of the employer's position which argues that supervisors ought to be excluded from the Taylor Law. There is a division among the authorities as to whether differences between the public and private sector regarding the relationship of supervisors to management are sufficient to justify disparate treatment of supervisors in government. This is a question of public policy that is within the province of the Legislature. For our purposes, it is sufficient to note that in enacting CSL §201.7(a) the Legislature avoided the term "supervisor" and excluded only "managerial" employees from coverage under the law. That avoidance was purposeful; "supervisor" is a term of art; its meaning is well known and the Legislature chose to avoid that meaning. Although not so clearly defined in case law, "management", too, is an identifiable term. In Matters of Copiague and Hempstead, supra, we compared and contrasted the attributes of management and supervision. We now reaffirm the distinction between them and confirm the decision of the Director.

---

2 Mr. Rains has advocated his position before us unsuccessfully on behalf of a management client, Bd. of Ed. School Dist. #1 (Hempstead), In the Matter of Copiague and Hempstead Public Schools, 6 PERB 3002, affirmed Bd. of Ed. School Dist. No. 1 (Hempstead) v. Helsby, 42 AD 2d 1056 (2nd Dept. 1973), appeal to N.Y. Ct. of App. pending.

Accordingly, we determine that there shall be a unit of employees of the employer as follows:

Included: All dispatchers and foremen.

Excluded: All other employees.

and,

WE ORDER that an election by secret ballot shall be held under the supervision of the Director among the employees in the unit determined above to be appropriate and who were employed by the employer on the payroll date immediately preceding the date of this decision, unless SSSA submits to the Director, within seven days from the date of receipt of this decision, evidences sufficient to satisfy the requirements of §201.9(g)(1) of the Rules of this Board for certification without an election.

IT IS FURTHER ORDERED that the employer shall submit to the Director and to SSSA, within seven days from the date of receipt of this decision, an alphabetized list of all employees within the unit determined herein to be appropriate who were employed on the payroll date immediately preceding the date of this decision.

Dated: Albany, New York
April 29, 1974

Robert D. Helsby, Chairman

Joseph R. Crowley

Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2B-4/29/74

In the Matter of BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK, Charging Party, -and- PROFESSIONAL STAFF CONGRESS/CUNY, Respondent.	BOARD DECISION AND ORDER CASE NO. U-0904

This case raises a new and significant question: is the composition of Personnel and Budget Committees (P & B's) a mandatory subject of negotiations? These are the university committees that consider the reappointment, tenure and promotion of faculty. The issue was raised when, on June 22, 1973, the Board of Higher Education of the City of New York (BHE) charged the Professional Staff Congress/CUNY (PSC) with refusing to negotiate in good faith in violation of CSL §209-a.2(a) by demanding -- as a condition of agreement -- a contract clause prohibiting any of the constituent colleges of City University, other than John Jay College of Criminal Justice, from giving to students voting rights on academic committees concerned with faculty reappointment, tenure and promotion. The answer of PSC, filed on June 27, 1973, denied any violation because a contract clause that "prohibits or affords voting rights to students on academic committees concerned with faculty reappointment, tenure and promotion affects the terms and/or conditions of employment...."[1] At the request of the parties, we instituted our special procedure for scope of negotiations cases under §204.4 of our Rules and assigned the case for hearing by Professor Joseph R. Crowley, a member of this Board. He made no intermediate report, but submitted the record and briefs of the parties to the full Board, which heard argument on March 4, 1974. The elapse of time between the filing of the charge and the oral argument was occasioned by joint and several requests for adjournment by the parties.

---

1 The merits of the question of student participation in the evaluation of faculty is not before us.

FACTS

Traditionally, members of the faculty of the City University of New York (in common with members of the faculties of most universities) have been subject to the judgment of their peers with respect to such matters as appointment, reappointment, promotion and tenure. These judgments have been exercised through P & B's. They are but one of the many types of committees through which faculty participate in the making of college policy.[2] This traditional role of college faculty is part of what is called "collegiality".

Following student unrest in the late 1960's that afflicted many universities throughout the country, consideration was given to extending to students a role in the formulation of college policy. Among the areas of participation contemplated for students was the evaluation of faculty for reappointment, promotion and tenure. In 1969 an "ad hoc committee for guidelines of governance" (the Chandler Committee) was appointed to study and make recommendations about the governance of the University. In its report dated June 15, 1970, the Chandler Committee expressed a need to restructure the University to increase the participation of students in governance; it proposed a procedure by which students and faculty at each of the colleges of City University should decide whether or not students should participate in P & B's and, if so, the extent and manner of such participation. Upon receipt of the Chandler Committee report, the BHE consulted with many interested parties, including the University Student Senate, the University Faculty Senate, and the two employee organizations that later merged to become PSC. Subsequently, after submitting the question of student participation on P & B's to a vote by students and faculty under a procedure that differed from the one proposed in the Chandler Report, the BHE accepted the majority vote of the

---

2 See Matter of Fordham University, 193 NLRB 134, 1971 CCH NLRB ¶23,473.

faculty and students at John Jay College and City College for student voting on the P & B's of both colleges. Student participation at John Jay College, approved by BHE on May 3, 1971, is relatively direct; the procedure by which students vote on the P & B's at City College, approved by BHE on December 18, 1972, circumscribes student representation.

The procedure relating to reappointment, tenure and promotion is for the question to come before department P & B's in the first instance. It deliberates and votes on whether to make a favorable recommendation as to candidates who are members of the department. A favorable recommendation is advanced for consideration by the college P & B. A further favorable recommendation is referred to the president of the college, who, in turn, decides whether or not to make a favorable recommendation to the BHE, which has final responsibility to appoint, grant tenure or promote. Although affirmative action of the department P & B is a recommendation, negative action is final; it prevents candidacies from being acted upon at the next step. This final action is, however, conditioned by a right of the candidate to appeal at some colleges, and to grieve the denial of affirmative action pursuant to the collectively negotiated agreement.

During the course of negotiations for a contract, PSC made a demand in June 1972 for contract language barring student membership on P & B's. BHE opposed the demand on the merits and maintained it was not within the scope of mandatory negotiations. PSC continued to press the demand and carried it to factfinding. The factfinders declined to rule on the question of whether student membership on P & B's was a term and condition of employment and indicated in their report, dated May 17, 1973, that the question of negotiability was within the exclusive jurisdiction of this Board. They nevertheless made a recommendation on the merits; they proposed that the existing arrangement for student voting at John Jay College be retained, but that it would be inconsistent with the concept of peer judgment for the practice to be extended to other colleges (the factfinders apparently overlooked the arrangements

for student participation at City College). PSC accepted the factfinders' report; BHE did not. In the negotiations that followed, PSC continued to assert the demand for a contract clause prohibiting colleges other than John Jay College from giving to students voting rights on P & B's and BHE continued to object to the demand as not being within the scope of negotiations. This issue and a few other outstanding issues were resolved in October 1973. At that time, PSC dropped the demand in question and the parties reached an agreement.

DISCUSSION

A threshold question is whether PSC pressed its demand that students be barred from membership in P & B's to such an extent that it violated its duty to bargain in good faith if the participation of students on P & B's is not a mandatory subject of negotiation. PSC did not, in its answer, contest this aspect of the charge, but it did so in its reply brief and in oral argument. It argued that it never conditioned its participation in further negotiations upon BHE's acceptance of the demand and that its insistence upon it did not delay or interfere with the progress of negotiations. The U. S. Supreme Court in NLRB v. Borg Warner Corp., 356 U.S. 342 (1958), has declared that under the National Labor Relations Act a party may propose for agreement matters that are not mandatory subjects of negotiations, but it may not press such a proposal to the point of insistence. We determine that the test applied by the Supreme Court is the appropriate one to be applied to the duty to negotiate under the Taylor Law. It is, of course, difficult to draw a precise line between appropriate conduct in proposing non-mandatory contract terms and inappropriate insistence upon such a demand. We determine that the insistence on the demand in the instant case went too far when, over the objections of BHE, it was carried into factfinding and even beyond factfinding.

This resolution of the threshold question projects us into the primary question. Is student participation on P & B's a term and condition of employment of the faculty whose rights to

reappointment, tenure and promotion are affected by the deliberations of the P & B's? We determine that it is not.

With respect to employment of persons other than college teachers, we have already determined that the Taylor Law imposes no obligation upon an employer to negotiate with an employee organization over which persons should rate its members. In Matter of Board of Education of the City of New York, 5 PERB 3094 (1972), reconsidered and modified on other grounds, 6 PERB 3022 (1973), we said at p. 3095:

> "The assignment of responsibilities to one group of supervisors or to another is a management prerogative; within the meaning of the Taylor Law, it is a term and condition of employment of the supervisors involved, but not of the employees being supervised."

Obviously, the ratings determined by the supervisors, or in this case by the P & B's, affect the terms and conditions of the employees being rated. Although the employer is obligated to negotiate on the terms and conditions of employment thus affected (as we said in Matter of New Rochelle City School District, 4 PERB 3704 regarding the impact of management decisions), many matters that affect employees are not terms and conditions of employment and remain the prerogative of management.[3]

Related to the problem before us and illustrative of the nature of demands to relieve impact over which there is a duty to negotiate is our decision in Matter of Monroe-Woodbury Teachers Association, 3 PERB 3632 (1970), appealed on other grounds and affirmed, 42 AD 2d 265 (3rd Dept. 1973). In that case we found that an employer was obligated to negotiate over a demand for specified procedures to be followed in the evaluation and dismissal of non-tenured teachers. The procedures included such items as evaluation

---

3 See concurring opinion in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 220 (1964):

> "It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining."

conferences, written notifications, the right of the dismissed teacher to review his file and the right of appeal. Some of these negotiable terms and conditions of employment are enjoyed by the faculty of City University under the grievance procedure of its negotiated agreement. All are appropriate subjects of negotiation.

Closely related to our decision in Matter of Board of Education of the City of New York, supra, in which we held that the determination of which supervisors rate them is not a term and condition of the employees being supervised, is our decision in Matter of City of White Plains, 5 PERB 3013, in which we said (at p. 3016):

> "...although Fire Fighters' demands for adequate supervision would constitute a mandatory subject of negotiation, the specifics of their demands...that supervisors of specified rank be provided, does not."

Having reviewed our relevant decisions and the reasoning behind them, we reaffirm our determination that the composition of committees that evaluate employees is not a term and condition of the employees being evaluated. What makes this case unique is the application of this principle to college teachers, who traditionally have been evaluated by their peers. It is argued by PSC in this case that peer judgment is vital for the stability and academic soundness of colleges. Collaterally, it is argued by PSC that student participation on P & B's is detrimental to a college except to the extent that it is fashioned by collective bargaining between the employer and the employee organization representing the faculty. The merits of these arguments are not before us; we take no position on whether peer judgment is good or bad, and whether student participation on P & B's is either beneficial or detrimental.

More relevant is the further argument of PSC that because the faculty of City University has always been rated by P & B's that included no student representation,[3] they have an

---

[4] Actually, student representation on P & B's at City College antedates PSC's demands in this case. The demand in question would not preserve a circumstance that is pervasive throughout the City University. Rather, it would arrest what PSC suspects may be a process already in being; the demand was designed to prevent the extension to students at other colleges in the City University a right already enjoyed by the students at City College and subsequently extended to the students of John Jay College.

interest in the continuation of this practice, and that it constitutes a term and condition of their employment. This argument does not persuade us. There is a difference between the role of college teachers as employees and their policy-making function which goes by the name of collegiality. Unlike most employees, college teachers function as both employees and as participants in the making of policy.[4] Because of this dual role, it has been argued elsewhere that they are not entitled to representation in collective bargaining. In Matter of Fordham University, supra, the National Labor Relations Board dismissed this challenge to the right of college teachers to representation and pointed out that the two types of interests of college teachers are compatible because they are addressed in different institutional structures. The NLRB specifically noted that the policy-making responsibilities of college teachers are exercised through academic committees and faculty senates, while they remain employees for the purpose of determining their terms and conditions of employment under the National Labor Relations Act.

We, too, distinguish between the role of faculty as employees and its role as a participant in the governance of its colleges. In the former role, it has a right to be represented by the

---

5 Professor Clyde Summers has written:

> "Whoever heard of the Union in industry helping to choose the corporation, or the president, the plant superintendent, or the shop foreman? Do unions in industry decide what should be produced, what raw materials should be bought, or what processes should be used? The traditional structure of the University is that faculty members have a role...that reaches far beyond even the wildest dreams of the most radical unions."

(This appears in a paper entitled, "Exclusive Bargaining Contracts and the Ideals of the AAUP," presented at a Michigan Conference of the AAUP in 1967; it appears at pp 81-82 of the proceedings, which are entitled Michigan's Public Employment Act and the State's Colleges.)

employee organization of its choice in the determination of terms and conditions of employment. These terms and conditions of employment are, in their nature, similar to terms and conditions of persons employed in other capacities by other public employers; they do not include a voice in the structure of the governance of the employer. In the latter role, the faculty exercises prerogatives relating to the structure of governance of the employer. The right of the faculty to negotiate over terms and conditions of employment does not enlarge or contract the traditional prerogatives of collegiality; neither does it subsume them. These prerogatives may continue to be exercised through the traditional channels of academic committees and faculty senates and may be altered in the same manner as was available prior to the enactment of the Taylor Law. We note with approval the observation that, "faculty must continue to manage, even if that is an anomaly. They will, in a sense, be on both sides of the bargaining table."[6] We would qualify this observation, however; faculty may be on both sides of the table, but not their union.

Collective negotiations is a valuable technique to resolve questions between an employer and its employees concerning terms and conditions of employment. It is not designed to resolve policy questions regarding the structure of governance of a public employer or the nature of that public employer's responsibility to its constituency. Questions in the latter category often involve issues of social concern to many groups within the community other than the public employer's administrative apparatus and its employees.[7] It would be a perversion of collective nego-

---

6 Boyd, Collective Bargaining in Academe: Causes and Consequences, 57 Liberal Education 306, 317 (1971).

7 Report of the Survey Subcommittee of Committee T, 57 AAUP Bull. 68 (1971) notes faculty participation in decisions involving curriculum, degree requirements and types of degrees offered, the establishment of new educational programs, admissions requirements and extracurricular behavior for students; it even extends to programs for buildings and other facilities. At City University these matters of legitimate concern to the faculty are of no less legitimate concern to other groups in the community. Many of these were at issue in connection with the University's decision of social policy to alter its academic character by adopting open enrollment.

tiations to impose it as a technique for resolving such disputes and thus disenfranchising other interested groups. Such an approach would neither serve the interests of the community nor the requirements of the Taylor Law.

We now consider an alternative theory that might justify PSC's insistence upon its demand, albeit this theory was not advocated by PSC. There have never been student representatives on P & B's at colleges other than John Jay and City. This constitutes a past practice -- one that has a direct and consequential impact on the terms and conditions of faculty. It may be argued that an employer cannot alter such a past practice unilaterally even though it is not within the scope of negotiations. The effect of this proposition is that past practices enlarge the scope of negotiations.[7] We have rejected this notion that an employer may thus waive its management prerogatives under the Taylor Law. In Matter of Board of Education of the City of New York, supra, we determined that the Taylor Law imposes no obligation upon an employer to maintain a past practice that is not a term and condition of employment even though it may have obligated itself to do so contractually.[8] A fortiari, a past practice does not enlarge the Taylor Law obligations of an employer where, as in the instant case, there is no contractual obligation.[9]

---

7 See footnote 3 for a statement of facts concerning the past practice. Moreover, we note the absence of any past practice whereby the faculty dealt with the composition of P & B's through collective negotiations.

8 Accord: Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 US 203, 220 (1971); see also decisions of New York City Board of Collective Bargaining in Matter of City of New York and Social Service Employees Union, B-11-68 and Matter of City of New York and D.C. 37, AFSCME, AFL-CIO, B-4-74.

9 The reliance of arbitrators in grievance arbitration on past practices is consistent with our decision in Matter of Board of Education of the City of New York; arbitrators often read past practices into existing contracts which they then enforce. In our decision we acknowledge that the obligations of the employer under contract law may be different and in that instance greater than its obligations under the Taylor Law.

We note that PSC believed that the participation of students on P & B's was a mandatory subject of negotiations when it violated its duty to negotiate in good faith by insisting on its demand. We further note that eventually PSC withdrew its demand, thus facilitating a settlement.

Accordingly, WE ORDER that the Professional Staff Congress/CUNY cease and desist from insisting that non-mandatory subjects of negotiations be considered by a factfinder who is attempting to resolve an impasse in negotiations, or from persisting in a demand for a non-mandatory subject after factfinding.

Dated: Albany, New York
April 29, 1974

Robert D. Helsby, Chairman

Fred L. Denson

DISSENTING OPINION OF BOARD MEMBER JOSEPH R. CROWLEY

This issue was brought to this Board under the special procedures set forth in Section 204.4 of our Rules for scope of negotiations questions. The purpose of such procedures, at least as I understand them, is to provide an expeditious resolution of a good-faith dispute as to the scope of negotiations. I, therefore, do not believe that this Board should decide the issue as to whether or not the PSC made its proposal concerning student participation a condition of agreement, particularly where the charging party did not intend that it be an issue before this Board.[1] Thus, the sole issue before this Board, as stated by the parties, is whether the proposal of PSC is a term and condition of employment, and thus a mandatory subject of negotiation.

BHE conceded at the oral argument that the procedures for the evaluation of faculty were a mandatory subject of negotiations, but argued that the issue as to who would be the evaluator or evaluators was not a term and condition of employment, and thus was not a mandatory subject of negotiation. I agree that the evaluation procedures are a term and condition of employment and are, therefore, a mandatory subject of negotiations, and this Board has so held in Matter of Monroe-Woodbury Teachers Association, 3 PERB 3632 (1970), appealed on other grounds and affirmed, 42 AD 2d 265 (3rd Dept. 1973).

The question posed is whether or not a public employer is required to negotiate with an employee organization as to the person or persons who will evaluate employees represented by the organization. This issue is not one of first impression before this Board. In a prior decision, In the Matter of the Board of Education of the City of New York, 5 PERB 3094 (1972), reconsidered and modified on other grounds, 6 PERB 3022 (1973), we concluded that it was not a mandatory subject of negotiation. It would seem that such decision would be controlling here unless there are cir-

---

1 Counsel for the BHE stated at the hearing, "...we do not intend to make an issue in this hearing of whether or not this particular proposal of the PSC was...used as a condition of agreement back in negotiations." (Transcript, p. 14).

cumstances or factors present in this case which would preclude the application of that decision.

It would seem desirable to consider whether the principles of collective negotiations in the structure of a university are such as to warrant a different application of principles that are recognized and followed in the industrial model. The application of the principles of collective negotiations to the faculty within the structure of a university is fraught with difficulty. The National Labor Relations Board, in dealing with the implementation of rights of university faculty under the National Labor Relations Act, observed that it was on terra incognita in Matter of Syracuse University, 204 NLRB No. 84, 1973 CCH NLRB ¶25,517. In an earlier case, the NLRB had seen no reason why the policies it applied to the industrial model could not be applied to universities, Matter of Fordham University, 193 NLRB 134, 1971 CCH NLRB ¶23,473, yet shortly thereafter, in Matter of Adelphi University, 195 NLRB 639, 1972, CCH NLRB ¶23,950, and in the Syracuse case, it observed that the industrial model cannot be imposed blindly upon the academic world. The NLRB noted that though the basic employer-employee interests are the same, nevertheless the industrial model does not fit the university. I agree with this concept and have come to the conclusion that this Board's decision in the New York City Board of Education case supra cannot be imposed blindly in this proceeding and that it is, therefore, not dispositive here.

In many instances, standards and guidelines developed for the private industrial model will be inappropriate when applied to the labor problems of the university. In studying the collective bargaining process on the college campus, one university president observed:

> "One of the most important things administrators can do is avoid insisting on following an industrial model of collective bargaining." [2]

---

2 Boyd, Collective Bargaining in Academe: Causes and Consequences, 57 Liberal Education 306, 317 (1971).

The autonomy and self-discipline of the faculty, so necessary to their effectiveness as scholars,[3] and based upon a tradition founded in the Middle Ages,[4] is the basis for the concept of "shared authority" in university governance.

The concept of "shared authority," the term used to describe the shared responsibility of faculty and administration for the governance of a university, has become a matter of great interest to educators and laymen in recent years.[5] A report prepared for the American Association for Higher Education by a Task Force composed of scholars in the field of labor relations[6] suggests that shared authority involves a wide range of issues including educational and administrative policies, personnel administration, public issues and economic matters concerning either individuals or the university as a whole.[7] The Task Force, among others, suggests that extensive faculty authority is necessary for effective intellectual performance.[8] The validity of this point is

---

3 Brown, Professors and Unions: The Faculty Senate: An Effective Alternative to Collective Bargaining in Higher Education? 12 Wm. & Mary Law Rev. 252, 267-68 (1970).

4 Godfrey, Legal Education and the University, Part II, 19 Albany Law Rev. 206, 210 (1955).

5 A recent report by the Education Commission of the States, whose members are Governors, legislative education specialists and laymen from 45 states, concludes that "universities and colleges either are governed by or are aiming ultimately for a system of governance commonly known as shared authority. The essence of the principle of shared authority is a recognition of the inescapable interdependence and interaction between the governing board, the administration and the faculty." N.Y. Times, March 5, 1974, at 29, col. 3.

6 American Association of Higher Education, Task Force Report, Faculty Participation in Academic Governance (A. Weber, Ed. 1967).

7 Id. at 1.

8 Id. at 20. See also Mortimer and McConnell, Faculty Participation in University Governance, in The State of the University: Authority and Change (E. Kruytbosch and S. Messinger, eds. 1970); Clark, Faculty Authority, 47 AAUP Bull. 293, 301 (1961).

most clearly demonstrated in the area of faculty evaluation. The Task Force Report states that "faculty members must bear the main responsibility for determining their own standards of performance."[9] A statement jointly formulated and approved by the American Association of University Professors, the American Council on Education and the Association of Governing Boards of Universities and Colleges also makes clear that "[f]aculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure and dismissal."[10] Therefore, given the unique situation of the faculty employee and the existence of shared authority in the university setting, it is not dispositive, nor even helpful, to determine an issue to be one of "governance". Unlike the private industrial model, a matter of governance is not necessarily within the scope of management prerogatives. The significant question for purposes of collective negotiations is whether or not the issue involved is a term and condition of employment.

The New York Court of Appeals has held that a public employer must bargain as to all terms and conditions of employment unless there is an "applicable statutory provision [which] explicitly and definitely prohibits the public employer from making an agreement as to the particular term or condition of employment," Board of Education of Union Free School District No. 3 of the Town of Huntington, 30 NY 2d 122, 130; 331 NYS 2d 17, 30; 282 NE 2d 109, 113 (1972). In the instant case there is no applicable statutory prohibition.

Issues of appointment and promotion have traditionally been mandatory subjects of bargaining. In Board of Education, Union Free School District No. 3, Town of Hempstead, 4 PERB 3659 (1971), this Board affirmed the holding of the hearing officer that pro-

---

9 See footnote 6, supra.

10 Statement on Government of Colleges and Universities, 52 AAUP Bull. 375, 378 (1966).

cedures and policies relating to sabbatical leave are a mandatory subject of bargaining. P & B's decide questions of appointment, reappointment, promotion, tenure and sabbatical leave.

In the Matter of Board of Education, City School District of Rochester, 4 PERB 4597, 4599, affirmed 4 PERB 3703, the hearing officer stated that the phrase terms and conditions of employment, "is considered to cover any subject which has a 'significant or material relationship' to conditions of employment, unless it involves decisions concerning the basic goals and direction-the mission- of an employing enterprise." Further, the hearing officer recognized that, while qualifications for employment have been traditionally regarded as a managerial prerogative, an obvious exception would be a university, where the faculty have traditionally participated in their own governance in such matters as hire, tenure and dismissal.

I do not regard this narrow issue before us, i.e., the composition of the faculty evaluation committee, as involving the basic goals or mission of the university. The language of my brothers in the majority opinion appears to go far beyond the issue here. The issue in this case does not deal with the resolution of basic policy questions "regarding the structure of governance of a public employer or the nature of that public employer's responsibility to its constituency." Nor do I believe, as the majority seems to do, that all matters of university governance are excluded from the negotiating table.

The system of governance in a university, while it recognizes the collegial principle, is not a true system of collegiality[11], for, although the recommendations of faculty committees are generally accorded great weight, the ultimate authority does not rest with the faculty, the peer group, but with the board of trustees or, as here, with the BHE. Further, faculty committees in making their decisions are not advised that they are manage-

---

11 cf - Matter of Adelphi University, 195 NLRB 639, 1972. CCH NLRB ¶23,950.

ment's representatives or to advocate management's interests.[12] Nevertheless, it is true that faculty does participate in the governance of the university in a manner and to a degree not found in any industrial model or in other areas of public employment. Thus, of necessity, there has to be some accommodation of governance to the negotiation relationship and perhaps some accommodation of the negotiation relationship to adapt to the unique structure of university governance. Clearly, not all matters of governance are mandatory subjects of negotiations. BHE seemingly recognizes this, for the agreement between BHE and PSC provides that "All Bylaws...and all Governance plans...as currently in effect, or as the same may be hereafter adopted, supplemented or amended, shall be subject to the said stated terms of the agreement."

BHE admits that the matters considered by the P & B's, i.e. evaluation of faculty, are terms and conditions of employment. It also admits that questions of how and when these decisions are made, the procedure of the committees, would be mandatory subjects of bargaining. However, it maintains that the choice of who makes the evaluations is a management prerogative. In the traditional management-employee relationship of the industrial model, this would be the case. As noted previously in Matter of Board of Education of the City of New York, supra, this Board held that the rating of custodial employees by one group of supervisors or another is a management prerogative. The key to the difference between that case and this one lies within the language of that decision, which states that the rating responsibility of supervisors "is a term and condition of employment of the supervisors involved, but not of the employees being supervised." In the instant case, those rated and those doing the rating are all faculty. Since faculty members rate themselves as to competence and performance, that

---

12 Ibidem; cf. Matter of Long Island University, 189 NLRB 904, 1971 CCH NLRB ¶22,959.

rating is a term and condition of employment.

Further, I conclude the proposal of PSC to be a term and condition of employment because faculty evaluation by a peer group is a long-established and recognized practice. Admittedly, a past practice which does not involve or affect a term and condition of employment does not become a term and condition of employment simply because it is an established practice. However, in this case the initial evaluation of faculty has always been by peer judgment. Faculty members here were employed with the understanding that their retention and advancement would initially (but not finally) be decided by their peers. BHE has recognized this established tradition of peer evaluation in a university and it has always been part of its structure. It seems to me untoward to disregard this practice and tradition, to ignore the uniqueness of a university in a labor relations setting and to apply the policies of the industrial model, as the majority appears to do.

It is not simply that faculty have participated in this decision-making process that leads me to this conclusion; there are matters of governance in which faculty participates which would not become a term and condition of employment because of such participation, such as requirements for a degree or curriculum. Rather, in the instant case, the participation by faculty in the decision-making process deals with retention of faculty, reappointment of faculty, promotion of faculty -- all basic conditions of employment.

The system of peer evaluation is an established practice and BHE may not unilaterally alter it.[13] The fact that the evaluation by a peer group had not been incorporated in a prior contract is not dispositive.[14] The execution of an agreement which does not cover or provide for a mandatory subject cannot a se constitute a

---

13 It should be noted that the BHE does not regard student participation on evaluation committees as an absolute or as a matter that it mandates to be included in its By-laws. Rather, it would leave the matter to the community of each constituent institution to decide.

14 In the Matter of the State of New York, 6 PERB 3020 (1973).

waiver by either party of its right to negotiate with respect to such subject.

I conclude that the proposal of PSC was a mandatory subject of negotiations and the charge of BHE should be dismissed.

Dated: Albany, New York
April 29, 1974

Joseph R. Crowley

Joseph R. Crowley

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2C-4/29/74

In the Matter of	:	
NORTH BABYLON PUBLIC SCHOOLS,	:	
Respondent,	:	BOARD DECISION AND ORDER
- and -	:	
NORTH BABYLON TEACHERS ORGANIZATION,	:	CASE NO. U-0930
Charging Party.	:	

The North Babylon Teachers Organization (teachers) filed a charge alleging that the North Babylon Public Schools (employer) refused to negotiate in good faith in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act).[1] The gravamen of the charge is that the employer abolished a number of teaching positions and refused to negotiate with teachers on the impact of such action on terms and conditions of employment.

The hearing officer found that the employer violated §209-a.1(d) of the Act.

The employer filed exceptions to the hearing officer's decision. The thrust of the exceptions is two-fold: (1) the teachers never made a clear demand on the employer to negotiate on the impact of its decision to abolish teaching positions; (2) following the abolition of the positions, the employer meticulously fulfilled its contractual obligations with respect to the terms and conditions of employment of the remaining teachers and there was, therefore, no impact on terms and conditions of employment.

ISSUE OF DEMAND

On May 8, 1973, the employer invited officers of the teachers to a meeting at which it informed the teachers that because of financial difficulties it had no "choice but to eliminate certain positions." The employer was not prepared at that date to specify

---

1 This section makes it an improper employer practice "...to refuse to negotiate in good faith with the duly recognized or certified representatives of its public employees."

the program or positions that would be affected. A few days later, the employer, at a public hearing, announced the programs and positions that would be involved.

On May 17, 1973, the teachers wrote to the president of the employer wherein the teachers expressed their concern as

> "We are obviously concerned with the firing of staff members at this late date.... Of equal concern to us is the impact of loss of these positions on our educational program."

The letter sought a meeting with the employer to afford the teachers an opportunity to present their views.

The employer contends that was not a request to discuss impact on terms and conditions but evidences only a request to discuss the effect of the employer's decision to eliminate positions on educational programs. In support of this contention, the employer points out that the teachers filed a grievance that the employer violated the contract in not submitting the proposed changes to the Central Advisory Committee because of its effects on educational programs and curriculum.

We would agree that if the above letter were the only evidence of the teachers' demand on the employer to negotiate impact, it would not be sufficient upon which to predicate a finding of a violation of the duty to negotiate.

However, the president of the teachers testified that at the Budget hearing he had a "heated exchange" with the president of the employer as to the employer's action and the impact of such action and the refusal of the employer to discuss these questions. He further testified that the employer stated there would not be any impact.

Admittedly, a witness for the employer testified that the teachers never made an express demand to discuss impact. The hearing officer resolved this issue of credibility in finding that the teachers "communicated their desire to negotiate impact". We agree and adopt the hearing officer's finding.

ISSUE OF IMPACT

This Board has held that the decision of a public employer to curtail or limit the services it provides to its constituency is not a mandatory subject of negotiations but that the employer is obligated to negotiate on the impact of such decisions on the terms and conditions of employment.[2] The employer here contends, however, that there was no impact on terms and conditions of employment and, therefore, there was no obligation to negotiate.

An employer cannot avoid a duty to negotiate by simply making a unilateral determination that there is no impact any more than an employer could avoid an obligation to discuss a grievance on the ground that in its judgment the grievance is without merit. The employer has an obligation to meet with the teachers and discuss the issue of impact. The act of meeting and discussing would not constitute a concession on the employer's part that there is an impact on terms and conditions.

The employer does not rest its case solely on its factual conclusion as to the absence of impact, but relies upon a contractual theory. The employer and the teachers entered into an agreement covering the period July 1, 1972 to June 30, 1974 setting forth terms and conditions of employment during that term. Thus, the program modifications and job elimination involved in this proceeding occurred in the mid-term of the agreement. In implementing these modifications the employer states and the teachers seemingly concede that the employer did not violate the agreement as to the terms and conditions therein provided.

The employer argues therefrom that since it did not alter or modify the contractual terms and conditions, there was no impact and, therefore, no duty to negotiate.

---

2 In the Matter of City School District of the City of New Rochelle, 4 PERB 3704 (1971).

It would seem that the employer misunderstands the scope of the duty to negotiate. The duty to negotiate does not terminate upon the execution of a collectively negotiated agreement. It continues during the term of the agreement. For example, an employer has a duty to negotiate grievances which arise during the term of the agreement. Further, absent an explicit waiver, an employer may not alter a term and condition of employment which is not covered by the agreement. Finally, an employer does have a duty to negotiate upon request as to terms and conditions which are not provided for in the contract if the employee organization, as here, has not waived its right to do so.

Significantly, when this charge was filed on July 5, 1973, the teachers were not as yet informed as to how the programs would be modified and thus were not in a position to make a judgment as to the extent of impact, if any. This fact itself points out the need for the discussion requested by the teachers.

In reaching the conclusion that the employer had an obligation to negotiate with the teachers on the question of impact, we do not find that there was, in fact, an impact on terms and conditions not covered by the contract between the parties. What we do say is that the teachers should have been afforded the opportunity to state their claim as to impact on terms and conditions of employment not covered by the current agreement, and to have negotiations with the employer concerning their claim.

NOW, THEREFORE, it is ordered that the employer cease and desist from refusing to negotiate, upon request, with the teachers regarding the impact of its abolition of teaching positions in May 1973.

Dated this 29th day of April, 1974
Albany, New York

ROBERT D. HELSBY, CHAIRMAN

JOSEPH R. CROWLEY

FRED L. DENSON

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD #2D-4/29/74

In the Matter of STATE OF NEW YORK, Employer, -and- NEW YORK STATE EMPLOYEES' COUNCIL 50, AFSCME, AFL-CIO, et al, Petitioner, -and- CSEA, INC., Intervenor.	AMENDED BOARD ORDER CASE NO. C-0002, et al.

On November 27, 1968, we issued a Decision and Order in this case (1 PERB 3226) in which we determined five units to be appropriate for employees of the State of New York other than uniformed members of the State Police and the faculty of the State University. The units then created were:

1. Institutional Services Unit
2. Operational Services Unit
3. Security Services Unit
4. Administrative Services Unit
5. Professional, Scientific, and Technical Services Unit

Thereafter, the precise dimensions of each of the units were determined in decisions reported at 2 PERB 3303 (Institutional Services Unit), 2 PERB 3307 (Operational Services Unit), 2 PERB 3313 (Security Services Unit), 2 PERB 3320 (Administrative Services Unit), 2 PERB 3335 (Professional, Scientific, and Technical Services Unit). Elections were then held, as a consequence of which the Security Unit Employees' Council 50, AFSCME, AFL-CIO was certified as negotiating representative for employees in the Security Services Unit and CSEA was certified as negotiating representative for employees in the other four units (2 PERB 3484).

Subsequently, the Security Unit Employees' Council 50, AFSCME, AFL-CIO was redesignated Council 82, AFSCME, AFL-CIO.

During the years that have elapsed since the issuance of these decisions, the State of New York, CSEA and Council 82, AFSCME, AFL-CIO, have become concerned about the need for a procedure to allocate newly created and reclassified jobs to one or another of the five units. Most such newly created and reclassified jobs are so allocated by the State of New York upon notice to the employee organizations and with their concurrence, but on occasion the parties disagree. They have now joined in a request that this Board assert continuing jurisdiction over the allocation of job titles to units and that it resolve such disputes as may arise from time to time concerning these allocations. They urge that these disputes should not be resolved in the context of future representation cases because the large number of new positions created by the State and jobs reclassified could occasion extensive litigation which, if adjudicated in the context of a representation case, could delay subsequent negotiations. We are persuaded by these representations of the parties and note that the size of this employer makes this case sui generis. We agree to consider requests for unit clarifications with respect to newly created and reclassified jobs expeditiously, the unit allocations of which are in doubt. Such disputed unit allocations should be submitted to us during the month of July each year.

Accordingly, we now amend so much of each of the orders as concerns the allocation of job titles as follows:

2 PERB 3303 (Institutional Services Unit) at 3305:

IT IS ORDERED that the Institutional Services Unit shall consist of job titles as set forth in Appendix A and all other similar job titles created from time to time here-

after. All other job titles are excluded from the Institutional Services Unit;....

2 PERB 3307 (Operational Services Unit) at 3311:

IT IS ORDERED that the Operational Services Unit shall consist of job titles as set forth in Appendix A and all other similar job titles created from time to time hereafter. All other job titles are excluded from the Operational Services Unit;....

2 PERB 3313 (Security Services Unit) at 3319:

IT IS ORDERED that

1. The Security Services Unit shall consist of job titles as set forth in Appendix A and all other similar job titles created from time to time hereafter. All other job titles are excluded from the Security Services Unit....

2 PERB 3320 (Administrative Services Unit) at 3322:

IT IS ORDERED that the Administrative Services Unit shall consist of job titles as set forth in Appendix A and all other similar job titles created from time to time hereafter. All other job titles are excluded from the Administrative Services Unit....

2 PERB 3335 (Professional, Scientific, and Technical Services Unit) at 3345:

IT IS ORDERED that the Professional, Scientific, and Technical Services Unit shall consist

of job titles as set forth in Appendix A and all other similar job titles created from time to time hereafter, except for those individual positions excluded in Appendix C. All other job titles are excluded from the Professional, Scientific, and Technical Services Unit....

Dated: Albany, New York
April 29, 1974

Robert D. Helsby, Chairman

Joseph R. Crowley

Fred L. Denson

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of	
CITY OF YONKERS, Employer,	#2E-4/29/74
-and-	
POLICE CAPTAINS, LIEUTENANTS AND SERGEANTS ASSOCIATION OF YONKERS, INC., Petitioner,	Case No. C-1015
-and-	
POLICE BENEVOLENT ASSOCIATION OF THE CITY OF YONKERS, INC., Intervenor.	

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that POLICE CAPTAINS, LIEUTENANTS AND SERGEANTS ASSOCIATION OF YONKERS, INC.

has been designated and selected by a majority of the employees of the above named public employer, in the unit described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit:

Included: All employees holding the permanent civil service title of police sergeant, lieutenant and captain.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with POLICE CAPTAINS, LIEUTENANTS AND SERGEANTS ASSOCIATION OF YONKERS, INC.

and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Signed on the 29th day of April , 19 74.

ROBERT D. HELSBY, Chairman

JOSEPH R. CROWLEY

FRED L. DENSON

PERB 58(2-68)