E.D. NO. 3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF EDUCATION

Public Employer

and

WILLINGBORO EDUCATION ASSOCIATION Docket No. R-76

Petitioner

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the unit status of certain employees of Willingboro Board of Education, a hearing was held on June 24, July 25, and August 19, 1969 before ad hoc Hearing Officer Daniel House at which all parties were given an opportunity to examine and cross-examine witnesses, present evidence and to argue orally. Thereafter on December 5, 1969 the Hearing Officer issued his Report and Recommendations. Exceptions and supporting brief were filed by the Willingboro Board of Education to that Report and Recommendations. The State Federation of District Boards of Education filed a brief, as amicus curiae, in opposition to the Report and Recommendations. The Willingboro Education Association filed replies to exceptions and to the amicus brief. The Executive Director has considered the record, the Hearing Officer's Report and Recommendations, the exceptions, briefs, and replies, and on the basis of the facts in this case finds:

1. The Willingboro Board of Education is a public employer within the meaning of the Act and is subject to the provisions of the Act.
2. The Willingboro Education Association is an employee representative within the meaning of the Act.

3. The Employer disagrees that certain classifications are properly included in the existing negotiating unit; therefore a question concerning the unit placement of public employees exists and the matter is appropriately before the Executive Director for determination.

4. The dispute in this case centers upon the inclusion, within a unit of teachers, of the following professionals: Principals, Vice-Principals, Assistant Principals, District Coordinators, Guidance Directors and Reading Supervisors (hereafter, the "administrators"). The Association seeks their inclusion, the Board opposes it. The Hearing Officer found that, except for the last two mentioned titles, the disputed classifications were supervisory within the meaning of the Act, and that all disputed categories enjoyed a community of interest with the teachers. He further found that prior agreement and established practice "mandated" the inclusion in the same unit of the supervisory personnel in question with the nonsupervisory teachers. The Employer excepts on the following grounds: One, the Reading Supervisor and the Guidance Director are supervisory employees within the meaning of the Act; two, there is insufficient evidence to warrant the application of any statutory exception whereby it would be permissable to combine supervisory and nonsupervisory employees in the same unit; three, in any event, a community of interest between the disputed categories and the teachers has not been demonstrated, and thus without this essential predicate there is no basis upon which to find appropriate a unit which combines the two groups, even assuming one or more of the statutory exceptions is met. The Employer also excepts on the grounds that the Hearing Officer's conclusions violate state and federal constitutional provisions. Finally it claims prejudicial error by the Hearing Officer's exclusion of expert testimony. In the absence of

exceptions, the Executive Director adopts the Hearing Officer's recommendation that Principals, Vice-Principals, Assistant Principals and District Coordinators be found supervisors within the meaning of Act.

The Willingboro Board of Education currently employs about 600 professional employees. The individuals whose status is in dispute number about 24. The Association was formed in 1959; during the next year or so it met infrequently with the Board to disucss education and teacher problems. At the end of 1961, the Association requested recognition as the representative of all professional employees in the district. In August 1962 the Board, by motion, granted the request: recognition to continue as long as the Association maintained its majority status and unless terminated by mutual consent. At that time, it appears, the role of the Association as a negotiating representative was not as clearly defined as it later came to be. Its Articles of Constitution expressed a variety of objectives including professional, civic and educational as well as protection and advancement of its members' interests. 1/ In the early stages of their relationship, the parties met, typically, to discuss a topic at a time, economic or otherwise. In November 1963, the parties agreed to, and the Board adopted as policy, a statement of Philosophy and Procedure which provided, in part, that the parties engage in good faith discussions on salaries, personnel policies, and other conditions of professional service with the intent of arriving at mutual understanding and agreement. From that point foreward it appears that, generally speaking, the approaches of the parties toward one another became more sophisticated with respect to terms and conditions of professional employment, so that as of February 1968 they had negotiated and executed their first

1/ As one Association witness, instrumental in the recognition effort, put it: "...now we had been recognized, and the second question was: recognized to do what..."

comprehensive collective negotiating agreement, also known as the Redbook agreement. Prior thereto the parties had negoitated and reached agreement on proposals of various scope ranging from transfer of sick leave credit to a two year salary guide.

The genesis of the present dispute concerning the administrators is found in the earlier stages of the relationship discribed above. Following the Association's request in 1961 for recognition in a unit of all professionals, and the Board grant of recognition for that unit in August 1962, the Board allegedly dispatched to the Association in May 1963 a letter confirming the fact of recognition, but indicating that, so far as the Board was concerned, recognition did not extend to representation by the Association of the administrators. 2/ Chronologically, the next development was the adoption of the statement of Philosophy and Procedure regarding negotiations, but that made no specific reference to a unit disagreeemnt; it simply refers to the "professional staff." In late 1963, early 1964 the parties discussed a salary guide for the period 1964-1965, but it is not clear from the record that the guide which was finally adopted covered administrators. It appears that administrators received an increase at the same time the teachers did, but it also appears that there were salary adjustments for all categories e.g. maintenance, clerical etc.. However, in announcing the new guide, the Superintendent recommended to the Association that "further consideration be given to the proposed ratios for administrative salaries and that all members of the administrative staff be included as recommended by the Willingboro Education Association Salary Committee." Sometime later in 1964 the parties developed a program for the vacation and work schedule of 12 month employees, which at that time consisted of administrators only.

2/ The Association's counsel denies receipt of this letter and disputes that it was ever sent.

In the fall of 1964, the Board requested a meeting with the Association's Executive and Salary Committees to discuss the administrators' salary guide for 1965-1966. The Salary Committee, in cooperation with the Superintendent and "Administrators" had been studying the problem and the Committee, with the approval of its membership, now proposed a plan keyed to what was termed a responsibility factor. The Board, on the other hand, had developed a ratio plan which the Association opposed. While the problem was under consideration, the administrators, as a group, submitted for the Board's adoption the following proposed policy: "The administrative and supervisory staff shall deal directly with the superintendent of schools and through him with the Board of Education on all matters pertaining to their salaries, welfare and general well being." 3/ Within the week, the Board adopted as policy the administrators' proposal as submitted and at the same time it adopted its ratio plan as the basis of administrators' compensation. Thereafter, at various times during 1965, the Association sought Board recision of its policy whereby the administrators dealt directly with the superintendent and the Board. 4/ The Association argued that this policy conflicted with the Board's 1962 recognition for a unit of all professionals. In November 1965 the Board responded in accord with the legal opinion received: there is no conflict because the recognition granted in 1962 was not denominated Board "policy", was not renewed upon the recorganization of the Board and therefore was not binding on the later Board.

3/ The Association offered testimony that the subscribers to this proposal did not intend thereby to disassociate themselves from the Association. There is, however, no evidence that the Board was privy to this reservation, if such in fact existed.

4/ When the Board was reorganized in February, 1965 it renewed this policy through the blanket adoption of then existing policies.

At about this same time the Association was submitting its proposals for a salary schedule as well as a health benefits program for 1966-1967. No specific salary proposal was submitted concerning administrators; the Association understood that the ratio system would be continued and that any increase in teacher salary would proportionately increase adminstrator salaries by virtue of the ratio. The record is silent on whether the Association's health benefits proposal included the administrators. The Board's response 5/ was a continuation of the existing salary guide with no increase for anyone; it proposed a health insurance program covering all employees in the district. The parties came to impasse and sought third party assistance whose recommendations, favorable to the Association, were rejected by the Board. To cure the deteriorating relationship, a tri-partite committee was established in May 1966, consisting of representatives of the Association, the Board and "Central Administration" (this last group being represented by the Superintendent, the Assistant Superintendent and an Administrative Assistant).

The first subject considered was a re-statement of recognition of the Association by the Board. Having reached a preliminary disposition that recognition should cover all professional employees, the committee decided to submit the matter to the administrators for their reaction. The committee was informed that the administrators "would give it [inclusion with the teachers] a try for a year." It was now September 1966 and the committee, having agreed to a recognition statement for

5/ The Board continued to deal with the Association even though it had taken the position that the earlier recognition, granted in 1962, did not survive the life of the particular Board that granted it. There is no evidence that this later Board formally recognized the Association as representing any particular group. At the next reorganization of the Board, in February 1966, no conclusion was reached with respect either to adopting the earlier policy of dealing separately with administrators or to granting recognition for any group.

submission to the Board moved on to the negotiation of an agreement. That task was finally completed over the next 18 months with the execution of the Redbook agreement, effective from February 1, 1968 to December 31, 1968. Therein, the Board recognized the Association as exclusive representative for "....all employees certificated by the New Jersey Department of Education...." in that district. This agreement also provided (Article XIII) that any sucessor agreement "..shall apply to all members of the professional staff..."

In the Fall of 1968 when negotiations commenced for a successor agreement, the present dispute was brought into focus; the Board objected to continued representation for those now in dispute plus assistant superintendents, administrative assistants to the superintendent and the school business administrator. 6/ The parties subseqently concluded a successor agreement with the understanding that the status of the administrators would be resolved by the Commission. That successor agreement, effective February 17, 1969 to December 31, 1969, contains no recognition clause as such; it states certain "objectives", one being that the agreement is meant to establish salaries and other employment conditions for "...all members of the professional staff." The salary provisions specifically exclude all those whom the board maintains should not be included in the unit.

There remains one series of pertinent facts, regarding grievances processed by the Association on behalf of those in dispute. In the salary guide adopted in 1966 - a two year guide which preceded the Redbook agreement - there was a provision for longevity increments. The Principals found, when their contracts were renewed, that they were not receiving these increments. As a group, they grieved through the

6/ The Association later agreed that these latter three titles should not be included in the teacher uit.

Association and ultimately prevailed. During the term of the Redbook agreement, the Association, on behalf of elementary principals grieved the Board's elimination of certain levels of the ratio salary guide. It also grieved the involuntary transfer of a high school principal.

In arriving at his conclusion that an all embracing unit is appropriate the Hearing Officer reasoned that the Redbook agreement and the practice established by that agreement required the inclusion of supervisors under Sec. 8(d) of the Act. Apparently he also gave some weight to the "on and off recognition since 1962" and to what he construed to be the success of the trial period in terms of effectuating the purposes of the Act.

A reasonable construction of the statutory prohibition against the inclusion of supervisors with nonsupervisors and of the statutory exceptions thereto 7/ is that the Legislature intended that, as a general rule, the policies of the Act would best be effectuated by separating the two groups for purposes of representation; but that on occasion exceptional circumstances may be so compelling that to give effect to the prohibition would do damage to the Act's objectives rather than advance them. The Act enumerates three such circumstances. We consider, first, "established practice." A minimum requisite for the successful application of this exception is a showing, in the context of the negotiating process, of such a clear pattern of supervisory inclusion for such a significant period of time that the parties have demonstrated by that experience the desirability and propriety, in terms

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7/ Section 8(d): "...except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors..."

of the Act's objectives, of continuing that inclusion. Such a minimum showing is not evident here. The parties' relationship with respect to the representation of administrators has been plagued with uncertainty; the Board has vacillated between agreement and disagreement; nor does it appear that the Association, at least in the early years of its representation, pursued the proposition of administrator inclusion with dedication. For their part, the administrators, by their own acts, in effect took themselves out of the unit and later put themselves in. The pattern that emerges is one of inconsistency rather than uniformity. The undersigned concludes that no practice has been established during the eight year relationship requiring the inclusion of supervisors in the teachers unit.

We consider next the exception of "prior agreement". Since it may be fairly assumed that the Legislature intended that "prior agreement" not be synonomous with "established practice", and since any practice established through negotiations must ordinarily have been based on a prior agreement, this exception is construed to refer, minimally, to a particular kind of agreement, namely, a written agreement, reached in the context of collective negotiations, executed by both parties, and providing for the inclusion, in a single unit, of supervisors and non-supervisors. The Redbook agreement meets these minimal requirements. The question remains, however, whether this agreement of the parties dictates a unit determination which would combine teachers and supervisors. The record is clear that it was not so much the parties' agreement to include the administrators as it was the parties' acquiesence in letting the administrators decide the question themselves and thereby decide for the parties. It seems beyond question that had the administrators

opted for exclusion, that decision would have been given equal effect. In a real sense, therefore, their inclusion is more the product of third party choice than agreement of contracting parties. Furthermore, once the administrators' reaction was made known, both parties understood that the Association's representation of this group was on a probationary basis. It is immaterial who would determine the success or failure of the trial period. The significant fact is the parties' realization that the question of representation for administrators still had not been resolved with finality and was subject to being reopened. These conditions are not the sort of compelling circumstances which will support an exception to the general rule; the agreement produced merely deferred the question and offered no clear prospect for later stability. The assertion that upon the expiration of that contract the administrators desired to continue the arrangement is of no consequence to the issue that the now expired contract should dictate their inclusion. Had the Legislature concluded that their desires should be controlling, it presumably would have provided for self-determination of their unit placement, as it did for professional and craft employees. The undersigned concludes that the prior agreement does not dictate the inclusion of supervisors in a unit of non-supervisory teachers.8/

The undersigned further concludes that nothing in this record

8/ This conclusion is not overcome by the contract's provision that any successor agreement "...shall apply to all members of the professional staff..." If the Redbook agreement had been given a literal interpretation, the administrators would have received no compensation over and above their teaching experience because the ratio principle, on which their pay is based, is not mentioned in the contract. A literal reading also indicates that the Superintendent would be in the negotiating unit, yet no one suggests this conclusion. It is also pertinent to note the language of the successor agreement wherein

(continued)

would support a finding that the third statutory exception, "special circumstances," has been satisfied.

There remains for consideration the Employer's exception to the finding that Reading Supervisor and Guidance Director are non-supervisory positions. Concerning the former position, the only evidence of the incumbent's exercise of supervisory authority is that she shares in the evaluation of reading teachers and an assumption on the part of the Board witness that her approval is required before a reading teacher is appointed. Neither comment is persuasive. The former fails to indicate the effectiveness, if any, of her share of the evaluation; the latter is more guess than knowledge. 9/ The undersigned finds the position of Reading Supervisor not to be supervisory within the meaning of the Act. Regarding the position of Guidance Director, the record simply shows that the incumbent evaluates six counselors and makes recommendations to the principal regarding discharge. Here again the effectiveness, if any, of such actions is not established. Accordingly, the position is not found to be supervisory. It is further found, in accord with the Hearing Officer, that these two positions share a community of interest with the teachers by virtue of a variety of common conditions of employment

8/ (Continued) it states that the agreement is meant to set employment conditions for all members of the professional staff. Yet obviously that is not so. In short, the contract language does not consistently reflect the intent of the parties and consequently this successor clause will not be read to reach a conclusion that does not square with their expressed intent. This conclusion is supported by the fact that neither party has referred to this successor provision at any time in this proceeding. Their silence suggests that they likewise do not read this clause literally.

9/ The Employer cites a specific instance where the incumbent participated in a joint decision to "demote" a reading specialist to the rank of teacher. Presuming such transfer to be a demotion, the record does not indicate what weight, if any, was given to the incumbents' "suggestion".

and the close relationship of their job functions to the teaching profession. These two positions shall therefore be included in the teachers unit. Since there is no question of what organization represents the existing unit, but only a question of the composition of that unit, no election will be directed.

In view of the conclusions above, it is unnecessary to consider the Employer's other exceptions relating to state and federal constitutional questions and the exclusion of expert testimony.

Louis Aronin
Executive Director

DATED: May 18, 1970
Trenton, New Jersey

STATE OF NEW JERSEY

BEFORE THE PUBLIC EMPLOYMENT

RELATIONS COMMISSION

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In the Matter of the Representation Proceedings Concerning

WILLINGBORO BOARD OF EDUCATION

and

WILLINGBORO EDUCATION ASSOCIATION

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Docket No. R - 76

REPORT AND RECOMMENDATIONS

OF HEARING OFFICER

The undersigned, Daniel House, was designated by the Commission as ad hoc hearing officer in the above matter to conduct hearings concerning the question of representation involved and to make a report and recommendations in the matter. Pursuant to notice of hearing dated May 22, 1969, hearings were held before me in Trenton, New Jersey, on June 24, July 25 and August 19, 1969. Time for each party to file a brief was given to October 13, 1969, and for reply briefs to October 27, 1969. Each party filed a brief and neither filed a reply brief.

On the basis of the entire record I find:

1. The Willingboro Board of Education, referred to herein as the Board, is a public employer within the meaning of Section 3(c) of the Act and is subject to the provisions of the Act.

2. The Willingboro Education Association, referred to herein as the Association, is an employee representative within the meaning of Section 3(e) of the Act.

3. The Association having requested and the Board having refused to recognize the Association as the exclusive representative for a negotiating unit including certain allegedly supervisory employees in the unit with other non-supervisory employees, a question of representation of public employees exists and the matter is appropriately before the Commission.

4. In January 1968, the Board entered into a collective agreement with the Association for the period February 1 through December 31, 1968, covering all certificated employees of the Board; this unit included all of the disputed categories of employees with the "basic" teachers' unit. In October 1968, the Board refused to negotiate for a successor agreement covering the same employees (excluding only the Superintendent of Schools as mandated by the Act), seeking to exclude also the Assistant Superintendents of Schools, the School Business Administrator-Board Secretary, District Coordinators, Principals, Vice Principals, Assistant Principals, Guidance Directors and Reading Supervisors. An agreement was negotiated between the parties to cover the basic teachers' unit, and this proceeding was commenced. At the hearing the dispute was narrowed somewhat by the Association's withdrawal of its request to include in the unit the Assistant Superintendents of Schools, the administrative assistants to the Superintendent and the School Business Administrator-Board Secretary.

The Board contends: 1. That the employees in the remaining disputed categories are supervisors under the Act; 2. that examination of the job responsibility and function of the disputed categories and of those in the teachers' unit proves a lack of community of interest between the two groups, so that they may under

no circumstances be included in one unit together; and 3. that none of the exceptions in Section 8(d)(1) exists here so that the supervisors may not be placed in the same unit with the supervised. The Board also argues that any attempt by the Commission to interpret the Act (in finding that either the practice of the parties or their prior agreement constituted exceptions under Section 8(d)(1)) as imposing on the Board the obligation to bargain with the unit including the "supervisors" with the nonsupervisors would violate the United States Constitution by impairing the obligation of contracts.

The Association contends that the employees in the disputed categories are not supervisors under the Act; and that even if they were, their inclusion in the teachers' unit is dictated by the exceptions in Section 8(d) for established practice and prior agreement; the Association also argues that the disputed employees have a clear community of interest with the teachers in the basic unit.

Expert Witnesses

The Board proposed to prove through witnesses expert in the field of education administration that there could be no community of interest between the supervisors and the teachers because the differences "run so deep that they could not possibly be within the same organization..."; and that if they were placed in the same unit for negotiations as the teachers, the superintendent "could not effectively run a school system, such as the Willingboro School System; thus having a clear impairment of the effective operation

of the public school system in contradiction to the New Jersey Constitution." On objection by the Association to the relevance of the expert testimony, I ruled that, if the witnesses were properly qualified as expert in the field of labor relations they might give relevant expert testimony regarding community of interest (which is, after all, community of interest about the collective negotiations), but that their testimony as experts in education administration about the effective operation of the schools would not be relevant to the inquiry before me, and that their testimony about community of interest as experts only in the field of education administration would have no weight, unless they were also qualified as expert in labor relations. In response to my suggestion that the Board might wish to make an offer of proof, the Board stated only the generalized position recited above, and decline to call the witnesses on the terms I set out.

As has been set forth in other reports and recommendations, the Act under which this proceeding is conducted sets forth a limited number of criteria to be applied in determining which unit is appropriate in any case which may arise; only one of these is explicitly mandated as a consideration - that is, community of interest must be given due consideration; (the 'with exceptions' mandatory exclusions of supervisors, professionals and craftsmen from units which include respectively nonsupervisors, nonprofessionals and noncraftsmen are mandates that, unless the exception prevails, community of interest among these combinations be found inadequate for the combination to be in one unit.) The only other consideration which flows from the Act is that for a unit to be appropriate it must

be deemed viable for the purpose of carrying out the purposes of the Act by means provided in the Act - that is by permitting the public employees involved to exercise their rights to be represented by and negotiated for through representatives of their own choice, except as those rights are otherwise restricted in the Act. Unlike the New York Public Employment Relations law, and, significantly, adopted by the New Jersey legislature after the New York law and with that New York law available to it, the New Jersey statute does not specify a criterian of administrative convenience. Thus the testimony of expert witnesses about administrative convenience would not be relevant to an inquiry under the New Jersey law and would lend no aid in the task of the Hearing Officer and the Commission in determining the appropriate unit under the New Jersey law.

The Constitutional Questions

The Act provides by necessary inference from the exceptions in Section 8(d)(1) that there are conditions under which it is proper to include supervisors in the same unit with non-supervisors. The Board's constitutional arguements are based on the idea that if under any circumstances supervisors are included in the same unit with nonsupervisors a constitutional violation will occur. I do not believe it is within the competence of the ad hoc Hearing Officer assigned to develop the facts on the basis of which to make a recommendation as to the appropriate unit under the Act as it was passed to determine either of the constitutional questions raised by the Board; I must assume that the Act as passed by the Legislature is constitutional.

Community of Interest

A prima facie case that the disputed categories have a community of interest with the "basic" teacher's unit in the outcome of negotiations with the Board is made by the fact that they are all employed by the Board; the record supplements this case by showing that many of the working conditions and benefits are common to all the professional categories. The record, however, shows that, except for the Guidance Director and the Reading Supervisor, the disputed categories are supervisory as that term is used in the Act; thus, unless one of the exceptions applies, the Act mandates that they may not be placed in the same unit with the nonsupervisory personnel.

The Exceptions Applied to this Case

The "special circumstances" which, in this case, mandate that the disputed categories, including those which are supervisory, be in the same unit with the nonsupervisory personnel are the prior agreement of the parties and the practice established by them in that agreement.

In 1962 the Board recognized the Association for an all inclusive professional unit for, among other things, negotiating about wages and other conditions of employment. At the end of 1964 the Board passed a policy requiring that the administrative and supervisory staff deal directly with the superintendent on all such matters; this resulted in a dispute between the Board and the Association which was not resolved until 1968. Following further deterioration of the relations between the parties as a result of a wage dispute, a

committee was established composed of representatives of the Association, which still included administrators and supervisors, of the Board and of the Superintendent's office. Following a year and a half of work by this committee and as a result of the negotiations conducted by the committee, the parties in January, 1968 entered into a comprehensive agreement about wages, hours and working conditions for an all inclusive unit of professional employees, including the disputed categories. The inclusion of the disputed categories was on a trial basis to see if it worked out.

According to the evidence adduced at the hearing both the Board and the Association boasted publicly about how well it had worked out; no evidence was offered that the operation of the school system was in fact adversly affected by the operation of the agreement covering the all inclusive unit.

The Board argues that this 1968 recognition should be given no weight as a prior agreement for an all inclusive unit or as establishing a practice for such a unit, since it was on a trial basis for one year. If there were evidence that the trial showed that the all inclusive unit could not function effectively for the purposes of the Act, or that the operation of the school system was in fact adversly affected, then I would consider the Board's argument as weighty; but the Board argues as if the trial were only for the Board unilaterally to determine, not whether it worked, but whether the Board wished to continue its all inclusive recognition.

I conclude that the exceptions apply in this case: in the circumstances of the on and off recognition since 1962, and especially in light of the successful trial of the all inclusive unit in 1968 (successful from the point of carrying out the purposes of the Act), I find that the unit proposed by the Association is the appropriate unit, and I recommend that the Commission so find.

December 5, 1969

Daniel House

DANIEL HOUSE, Hearing Officer