E. D. NO. 74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD,
Public Employer,

and

LOCAL UNION 866, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

and

CRANFORD EDUCATION ASSOCIATION,
Intervenor.

Docket No. RO-725

SYNOPSIS

The Executive Director dismisses a petition filed by the Petitioner in which the Petitioner sought to sever certain nonprofessional employees from an existing overall unit composed of both professional and nonprofessional employees. He adopts, pro forma, the finding of the Hearing Officer that the petition was timely filed but dismisses exceptions filed by the Petitioner, finding the existing overall unit to be appropriate and finding that the incumbent organization has met its statutory obligation regarding the provision of responsible representation to the employees sought.

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DECISION

Pursuant to notice, a hearing was held to resolve a question concerning the representation of certain employees employed by the Cranford Board of Education ("Board"). A post-hearing brief was filed by the Board. On March 20, 1975, Hearing Officer Robert M. Glasson issued his Report and Recommendations, attached hereto and made a part hereof. Timely exceptions were filed by Local Union 866, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Petitioner") April 4, 1975.

The undersigned has considered the entire record, the Hearing Officer's Report and Recommendations, the exceptions, and, on the basis of the facts in this case, finds:

1/ As amended at hearing.

1. The Board of Education of the Township of Cranford is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

2. Local Union 866 and the Cranford Education Association ("Intervenor")[2/] are employee representatives within the meaning of the Act and are subject to its provisions.

3. The Board has refused to grant recognition to the Petitioner and neither the Board nor the Intervenor will consent to the holding of an election among the employees sought by the Petitioner. Accordingly, there is a question concerning the representation of public employees and the matter is appropriately before the undersigned for determination.

4. The Petitioner seeks to represent a unit of employees described as follows: Matrons, Custodial 1, Custodial 2, Head Custodians, Maintenance, Grounds, Bus Drivers, Courier and Working Foremen excluding Professional, Office Clerical, Guards, Craft Employees, and Supervisors as defined in the Act. Although the Board and the Intervenor contend that the petition is untimely, the Hearing Officer found the petition to have been timely filed in accordance with N.J.A.C. 19:11-1.15. No exception to that finding was taken and the undersigned adopts that finding for the reasons cited by the Hearing Officer. The contract which is asserted as constituting a bar to the timely filing of the instant petition was not signed by the parties until after the petition

2/ The Intervenor is hereby accorded status as an intervenor in accordance with N.J.A.C. 19:11-1.13.

herein was filed.

5. The Petitioner seeks to represent the approximately 60 employees described above. Those employees for several years have been part of an overall unit consisting of approximately 450 employees including all certificated personnel as well as secretarial and clerical employees.[3/] The Petitioner seeks to sever the above-listed employees from the existing unit, asserting that the unit sought is an appropriate unit and that the employees sought to be represented have not been properly represented in the overall unit.

The first question to be considered relates to the appropriateness of the unit. The undersigned has carefully considered the exceptions filed by the Petitioner regarding this issue. These exceptions are found either to be without merit or to be unrelated or not germane to the conclusions and recommendations of the Hearing Officer. Furthermore, the undersigned adopts the conclusions and recommendations of the Hearing Officer and his reasons therefor.

3/ The recognition clause of the agreement signed December 2, 1969 covering the term July 1, 1969 through June 30, 1970 (Exhibit ER-1 in evidence) extends recognition to the Intervenor in a unit including "...all certificated personnel...secretarial and clerical personnel and building service employees...." The recognition clauses of the 1970-71, 1971-72 and 1972-73 agreements were unchanged from the 1969-70 agreement (Exhibits I-1, I-2, and I-3 in evidence). The 1973-74 agreement, which has previously been found not to constitute a bar to these proceedings, specifies those certificated personnel who are included within the unit and also lists the included non-certificated personnel: ...secretaries, clerks, matrons, custodians and maintenance men..." (Exhibit C-1A in evidence). It is not clear that the courier is included in the existing unit. If there is a dispute regarding this job classification, machinery exists for the resolution of such a dispute by the Commission.

The policy of the Commission is clear. The exceptions of the Petitioner notwithstanding, this situation involves an attempt by the Petitioner to sever certain non-professional employees of the Board excluding secretarial and clerical employees from the existing unit which includes non-professional employees as well as certificated employees. The existing unit is not on its face inappropriate. Therefore, the decision of the Commission in Jefferson Township[4/] is controlling.

The factual settings in the two cases are similar in respects pertinent to this issue. In each case, there was an existing overall unit of professional and non-professional employees.[5/] Petitions were filed to represent certain of the nonprofessional employees although there was a certain bargaining history - 2 contracts in Jefferson Township and 4 contracts in the instant matter - in each case wherein both professionals and nonprofessionals were included in the same unit.

The Commission is obligated to determine the appropriate unit giving, as the statute requires, "due regard for the community of interest among the employees concerned."[6/] However, as the Supreme Court said in a recent case,[7/] giving "due regard" for community of interest does not require that exclusive reliance be placed thereon. This determination must be made within the framework of the general statutory intent and purpose of promoting

4/ Jefferson Township Board of Education, et al, P.E.R.C. No. 61 (October 21, 1971).
5/ The so-called "professional option" will be considered below.
6/ N.J.S.A. 34:13A-5.3.
7/ In re State of New Jersey and Professional Association of N.J. Dept. of Education, 64 N.J. 231 at page 257 (1974).

permanent employer-employee peace[8/] or, as the New Jersey Supreme Court has put it, "...the establishment and promotion of fair and harmonious employer-employee relations in the public service."[9/]

Thus, even assuming, consistent with the Hearing Officer's finding that the unit sought would be appropriate in a de novo situation, that there is a community of interest among the employees sought by the Petitioner, that fact, by itself, is insufficient to permit the disruption of the existing relationship.

Therefore, absent a showing that the existing overall unit is not providing responsible representation consistent with the statutory intent, the unit sought will not be found to be appropriate.

However, before considering that issue, we shall discuss the appropriateness of the existing unit in light of the statutory language regarding mixed units of professional and nonprofessional employees:

> "The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes...(2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit..."10/

8/ N.J.S.A. 34:13A-2.
9/ Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971).
10/ N.J.S.A. 34:13A-6(d).

While the record indicates that there was never a vote among the professional employees to be represented with nonprofessional employees, the undersigned does not regard this as significant. There are a number of reasons for this conclusion. First and most importantly, the purpose of the statutory requirement is to protect the interests of professional employees, not nonprofessional employees. The numerically superior professional employees in this case do not need the protection provided by the statute vis-a-vis the minority of nonprofessional employees.[11/] Second, the record indicates that the Executive Committee did vote to accept building service personnel within the negotiating unit.[12/] Third, there is ample evidence of the desire of the professional employees to be represented with the nonprofessional employees including the participation of the Intervenor in the instant proceeding. Fourth, this unit was created by voluntary recognition and was not created by the Commission. Four contracts going back to 1969-1970 were successfully negotiated before the instant petition was filed. Such a longstanding relationship should not be disturbed because the employee representative did not conduct a vote over five years ago on a question that appears to have been clearly answered in

11/ It is noteworthy that an Illinois Study Commission has recommended that both professionals and nonprofessionals be given the opportunity to vote on the question of whether they desire to be grouped with the other. Illinois Governor's Advisory Commission on Labor-Management for Public Employees, Report and Recommendations, p. 20 (March 1967). However, the New Jersey legislature did not adopt such a requirement.

12/ Tr. 5-23-74 p. 159.

the subsequent period of time, i.e., whether professional employees desire to be represented with nonprofessional employees. Finally, the professional employees are the only ones to receive this self-determination option and if any group has suffered a diminution of its rights, it is the professional employees, not the nonprofessional employees. Yet it is not the professional employees who are raising this issue.

Accordingly, the existing unit is not found to be inappropriate on the basis that the professional employees, as a group, did not vote on the question of inclusion with nonprofessional employees back in 1968 or 1969 when the existing unit was established.[13/]

Several other points should be made before considering the question of the type of representation provided by the Intervenor. The Petitioner asserts in its exceptions that the existing unit is inappropriate not only because there was no vote among the professional employees to be represented with the nonprofessional employees, but also because it includes both supervisors and nonsupervisors and both craft and non-craft employees. Suffice it to say that the record does not clearly establish that the unit includes craft employees as defined in the Commission's Rules or supervisors within the meaning of the Act. In any event, no one has petitioned to represent the craft employees in a separate unit

13/ It is recognized, as the Petitioner points out in its exceptions, that the unit did not then include bus-drivers. At that time, the Board did not employ bus drivers. However, bus drivers were added to the unit when they were employed.

so that question is not before the undersigned and, with respect to allegedly supervisory employees being in the unit, there is a mechanism available to the public employer or the majority representative to clarify an existing unit. That question is not before the undersigned at this time.

Also, the undersigned dismisses the exception of the Petitioner to the finding of the Hearing Officer, and agrees with the Hearing Officer, for the reasons cited by him, that the building service employees properly authorized the Intervenor to represent them in the existing unit. The fact that some of these employees now seek separate representation does not mean that they were improperly included in the unit initially. Furthermore, there is no evidence of coercion or intimidation surrounding the circumstances under which the building service employees came to be represented by the Intervenor.

Having considered each of the exceptions of the Petitioner relating to the appropriateness of the existing unit, the undersigned finds the existing unit, consistent with Jefferson Township, to be appropriate, subject to a determination relating to the type of representation afforded the employees sought by the Petitioner.

The Petitioner excepts to the finding of the Hearing Officer that the Intervenor has met its representation responsibilities to the employees sought by the Petitioner. There are two basic elements to this group of exceptions: one relates to membership restrictions on the employees sought as "Associate"

members of the Intervenor and the other relates to the actual representation both at the negotiations table and in contract administration.

With respect to the membership restrictions on the employees sought - the fact that they cannot hold office, or serve on the "primary" negotiating team[14/] - the undersigned agrees that the Hearing Officer has properly applied established Commission policy to the facts in this case. Board of Education of the Township of West Milford, et al., PERC No. 56, (July 8, 1971). See also Township of Hanover and Local 128, P.B.A., E.D. No. 41 (December 23, 1971).

The Commission has determined that such restrictions or limitations, while they may become an element in assessing representation, do not, per se, preclude an employee representative from providing the kind of representation mandated by the statute.[15/] Accordingly, the exceptions with respect to this issue are found to be without merit.

14/ The primary negotiating team consists of five professional employees. Representatives of various sub-groups including building service employees do attend negotiating sessions and meet with the Board's representatives to present demands, but do not participate further in direct negotiations.

15/ The undersigned would personally be more comfortable if degrees of membership were eliminated. However, the practical effect of such a change would not be likely to be significant given the composition of such units: approximately 350 professional employees, 60 custodial and maintenance employees, and 50 secretarial and clerical employees in this case. The professional employees will necessarily dominate numerically in any event. Nevertheless, removal of the restrictions would create the possibility and the appearance of broader based participation in various aspects of representation activity.

Finally, we consider the question of whether the representation provided was "responsible" in accordance with statutory requirements and Commission policy.

Again, having carefully considered the Petitioner's exceptions, the undersigned agrees with and adopts the finding of the Hearing Officer that the Association has met its obligations regarding the representation of the building service employees.[16/] There is no evidence that this responsibility was not met with respect to grievance handling or contract administration generally or with respect to representation at the negotiations table.

The Petitioner did not establish that any grievances had not been processed by the Intervenor but instead relies upon the fact that an Association president testified to only one example of a grievance of a building service employee being considered. However, it would not be reasonable to infer - absent evidence - that the Association had failed to represent building service employees during the terms of the contracts. In fact, the only evidence points in the opposite direction.

Similarly, there is no evidence that the Association failed to represent the interests of the building service employees at the negotiating table and the available evidence cited by the Hearing Officer indicates the contrary: similar coverage of both professional and nonprofessional employees in many areas

16/ In this regard, see Union County Board of Chosen Freeholders, et al., E.D. No. 49, especially pp. 7-10, (May 24, 1974) in addition to the cases cited by the Hearing Officer.

including the grievance procedure, sick leave, temporary leaves of absence, personal days, extended leaves of absence, maternity leave, and health insurance protection; certain provisions unique to building service employees including vacations, holidays, overtime, stipends, etc.; a similarity of salary increases for all members of the unit; and a negotiated tenure provision for custodial employees which extends to these employees by contract a benefit not commonly enjoyed by such employees which both professional and secretarial employees enjoy as a matter of law.

While it is true that the Intervenor's so-called primary negotiating team consists of five professional employees, the record indicates that the various sub-groups including building service employees had representation on the negotiations committee, had an opportunity to develop demands for presentation at the table, had an opportunity to present and discuss these demands across the table for the Board's negotiations committee, and had an opportunity to attend ratification meetings.[17/] These facts, coupled with the above-cited results of these procedural aspects of representation do not support the claim of the Petitioner that the Intervenor has failed in its duty of responsible representation.

In its exceptions, the Petitioner cites a case decided by the Commission[18/] in which a minority classification of employees

17/ The Petitioner's contrary assertion is not supported by any evidence. For support, see Tr. 9-11-74 pp. 19-20, 44, 53-55, 73-74, 83-85, and 93-96.

18/ Town of Kearny, P.E.R.C. NO. 78 (December 4, 1973).

was severed from an existing overall unit because, inter alia, the majority group - firefighters in that case - had resisted efforts of the minority group - fire captains - to change the salary differential between the two groups.

That case is distinguishable from the instant matter in several respects. First, the captains were found to be supervisors within the meaning of the Act and the supervisory status was found to be a principal cause of the deficiency relating to the representation of captains. That element is not present in the instant matter. Furthermore, the captains were severed because the record indicated that their special interests were not being reflected or represented by the negotiating agent. As stated above, there is no such evidence in the instant matter.

Based upon the above, it cannot be concluded that the Association has failed in its duty to responsibly represent the employees sought to be carved out from the existing unit.

Having found the existing relationship to be stable and having found the representation afforded to the employees in dispute to have been responsible, it is concluded that the existing overall unit is an appropriate unit. Accordingly, the instant petition is hereby dismissed.

BY ORDER OF THE EXECUTIVE DIRECTOR

Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
June 9, 1975

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CRANFORD BOARD OF EDUCATION
Public Employer

-and-

LOCAL UNION 866, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA
Petitioner

Docket No. RO-725

-and-

CRANFORD EDUCATION ASSOCIATION
Intervenor

Appearances:

For the Public Employer
James F. Kervick, Esquire
For the Petitioner
Howard A. Goldberger, Esquire
For the Intervenor
Joel Selikoff, Esquire 1/
Edward Butrym, Esquire 2/

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission on November 5, 1973 by Local Union 866, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, seeking to represent certain employees of the Cranford Board of Education. 3/

1/ Appeared on May 23, 1974.

2/ Appeared on September 11, 1974.

3/ Matron, Custodial 1, Custodial 2, Head Custodian, Maintenance, Grounds, Bus Drivers, Courier, and Working Foreman excluding Professional, Office clerical, Guards, Craft Employees, and Supervisor as defined in the Act.

On November 30, 1973, the Cranford Education Association, which is the majority, representative of the petitioned for employees, advised the Commission by letter, of their intervenor status by contract. 4/ Pursuant to a Notice of Hearing dated April 2, 1974, and two subsequent Orders Rescheduling Hearing dated April 13, 1974 and May 8, 1974, a formal hearing was held on May 23, 1974. Hearing adjourned on that date and pursuant to an Order Scheduling Hearing dated June 4, 1974, and Order Rescheduling Hearing dated August 16, 1974, a second day of formal hearing was held on September 11, 1974, in Cranford, New Jersey before the undersigned Hearing Officer. At both hearings all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Pursuant to a request by Petitioner, the time for the filing of briefs was extended to November 8, 1974. Based on the entire record in this matter, the Hearing Officer finds:

1. The Board of Education of the Township of Cranford (hereinafter the "Board") is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to the provisions of the Act.

2. The Cranford Education Association (hereinafter the "Association") and Local Union 866, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter the "Teamsters") are Employee Representatives within the meaning of the New Jersey Employer-Employee Relations Act and are subject to the provisions of the Act.

3. On October 29, 1973, the Teamsters requested recognition from the Board and the Board refused to grant such recognition in the unit described above unless and until the Petitioner was certified by the Commission. By letter

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4/ N.J.A.C. 19:11-1.13(a).

dated November 8,1973, the Cranford Education Association, which is the recognized majority representative, indicated its opposition to the unit petitioned for. Accordingly, there is a question concerning representation and the matter is appropriately before the Hearing Officer for Report and Recommendations.

BACKGROUND

On December 2, 1969, the Board and the Association entered into a written collective negotiating agreement for the school year 1969-70. The recognition clause of the above agreement indicates that the Board recognized the Association as the "exclusive representive for collective negotiations concerning terms and conditions of employment for all certificated personnel...and also including the following non-certificated personnel under contract or employment,...: secretarial and clerical personnel and building service employees..." 5/

The recognition clause indicates that the above recognition was granted pursuant to Chapter 303 of the Laws of 1968. 6/ The Board and the Association subsequently negotiated agreements for 1970-71, 1971-72, and 1972-73. 7/ The record indicates that there are eleven school buildings within the district: 8 elementary schools, 2 junior high schools, and a senior high school. The present negotiating unit includes approximately

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5/ Agreement between the Board of Education, Township of Cranford and the Cranford Education Association (Unit A), Article I, Recognition, page 1, ER-1 in evidence.

6/ Examination of the above recognition will be discussed where appropriate.

7/ I-1, I-2, I-3 in evidence. The Board and the Association negotiated an agreement for 1973-74 which will be discussed with respect to the issue of a "contract bar" to the filing of the instant petition.

350 certificated personnel, 53 custodians, 4 matrons, 45-50 clerical employees, five maintenance employees, and four bus drivers. The Teamsters' petition is for a unit of all Building Service personnel with the exception of clerical employees. Historically, these employees have been referred to as "Building Service personnel" and hereinafter the undersigned will refer to this group as the Building Service personnel.

MAIN ISSUES

1. Is the instant petition timely filed pursuant to Section 19:11-1.15 of the Commission's Rules and Regulations?

2. Is the unit sought an appropriate unit for the purposes of collective negotiations "with due regard for the community of interest among the employees concerned"? /N.J.S.A. 34:13A-5.3(7)/

3. Have the Building Service employees been represented without discrimination and without regard to employee organization membership? /N.J.S.A. 34:13A-5.3(7)/

CONTRACT BAR ISSUE

POSITION OF THE BOARD AND THE ASSOCIATION

The Board and the Association assert that there is a contract bar to the filing of the instant Petition inasmuch as all of the terms of the contract dealing with the Building Service personnel had been agreed to by the parties and had been in effect prior to the filing of the instant petition by the Teamsters. The record indicates that the Board and the Association commenced negotiations for the 1973-74 school year in the fall of 1972. The

Association ratified an agreement on June 12, 1973 but thereafter, a dispute arose with respect to the placement of nurses on the appropriate salary guide. The parties submitted the outstanding issue to Fact-Finding 8/ on July 31, 1973.

The Fact-Finder issued his Report and Recommendations on August 28, 1973, and subsequently the parties reached agreement on the issue regarding the placement of nurses on the appropriate salary schedule. On September 18, 1973, the Board ratified and submitted an agreement to the Association which was not ratified because of a dispute over the length of the school day and the representation of "home" and "supplementary" instructors. Finally, after continuing negotiations, the Board and the Association entered into an agreement on November 14, 1973. 9/ The petition in this matter was filed with the Commission on October 31, 1973.

CONTRACT BAR ISSUE

POSITION OF THE TEAMSTERS

The Teamsters contend that the filing of the instant Petition for Certification is in all respects timely filed in accordance with Section 19:11-1.15 of the Commission's Rules and Regulations.

DISCUSSION OF THE CONTRACT BAR ISSUE

The pertinent section of the Commission's Rules and Regulations with respect to the timely filing of a petition is as follows:

8/ Pursuant to N.J.A.C. 19:12-2.1, The Executive Director of the P.E.R.C., when after the appointment of a mediator, and upon the report of a failure to resolve the impasse by mediation, may invoke fact-finding with recommendation for settlement.

9/ Transcript, P.153.

(c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:

3. In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

(d) For the purposes of determining a timely filing, an agreement for a term in excess of three years will be treated as a three year agreement; an agreement for an indefinite term shall be treated as a one year agreement measured from its effective date.

It is abundantly clear from an examination of the record that the instant petition was filed after the expiration of the 1972-73 agreement and prior to the formal written execution of the 1973-74 agreement. Since the petition was filed after the expiration of the 1972-73 agreement there is no need to discuss the concept of an "insulated" period, which in a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement. In order for the 1972-73 agreement to constitute a contract bar, the instant petition would have to be filed between the period September 1, 1972 and October 15, 1972. The instant petition filed by the Teamsters is properly filed in accordance with Section 19:11-1.15 (c)(3).

The Board and the Association assert that the 1973-74 agreement constitutes a bar to the filing of the instant petition inasmuch as all of the terms of the agreement pertinent to the Building Services personnel had been agreed to and had been in effect prior to the filing of the instant Petition by the Teamsters. The New Jersey Employer-Employee Relations Act states that

when an agreement is reached on the terms and conditions of employment, it should be embodied in writing and signed by the authorized representative of the public employer and the majority representative. 10/ The record indicates that the parties executed an agreement to be effective from July 1, 1973 to June 30, 1974 on November 14, 1973. While the Board and the Association claim that the matters pertinent to the Building Service personnel were in ffect prior to the final execution of the 1973-74 agreement and the filing of the instant Petition the Hearing Officer finds this argument without merit.

The Commission, in the matter of Township of Franklin, P.E.R.C. No. 64 (December 3, 1971), spoke with regard to the contention of the Public Employer that a petition be dismissed because of the pendancy of a mediation matter:

> As the petition was filed on March 18, 1970, it postdates the specific expiration date of the earlier agreement and predates the execution of the March 20 Memorandum of Agreement between the Township of Franklin and FTMEA; it is, therefore, a timely petition. (Emphasis mine)

In addition, the Commission stated:

> It surely cannot be reasonably argued that after the expiration of an agreement, the parties should be protected for however long it takes them to reach a successor agreement on the theory that otherwise one or both parties will be reluctant to "take a chance" and advance to final positions. Such a proposition could negate all opportunity for employees to seek a change in their representative. To deny an otherwise timely petition on this ground would void the legitimate aspirations of employees who have petitioned for representation of their choice in the absence of legal or procedural restrictions on this right. (Emphasis mine)

Article XXXVII (Duration of and Execution of Agreement) of the 1972-73 Agreement contains the following language: 11/

10/ N.J.S.A. 34:13A-5.3(7)

11/ I-2 in evidence.

> This agreement shall be effective as of July 1,1972, except where otherwise provided, and shall continue in effect until June 30, 1973, subject to the Association's right to negotiate over a successor agreement as provided in Article II. This agreement shall not be extended orally and it is expressly understood that it shall expire on the date indicated. (Emphasis mine)

Article II(A) (Negotiation Procedure) 12/ must be read together with the above Article XXXVII:

> The parties agree to enter into collective negotiations over a successor agreement in accordance with Chapter 303, Public Laws 1968, in a good-faith effort to reach agreement on all matters concerning the terms and conditions of employee employment. Such negotiations shall begin not later than October 1 of the calendar year preceding the calendar year in which the agreement expires. Any agreement so negotiated shall apply to all employees in Unit A, be reduced to writing, be signed by the Board and the Association, and be adopted by the Board. (Emphasis mine)

The above contract language clearly indicates that the execution date of the 1973-74 agreement is November 14, 1974. Although the terms and conditions of the agreement were made retroactive to July 1, 1973, the final agreement was not executed until after the filing of the instant Petition. For the above reasons the undersigned finds that the contentions of the Board and the Association are without merit; therefore, the instant Petition is timely filed pursuant to the Commission's timeliness rules as set forth in N.J.A.C. 19:11-1.15.

12/ I-2 in evidence.

APPROPRIATENESS OF THE UNIT ISSUE

POSITION OF THE BOARD/ASSOCIATION 13/

The position of the Board and the Association is that the unit petitioned for by the Teamsters is not an appropriate unit for purposes of collective negotiations in view of the mandate of Chapter 303, Laws of 1968 14/ and certain Commission decisions.

The Board and the Association place great emphasis on the decision of the Commission in Jefferson Township Board of Education, et al., P.E.R.C. No. 61 (October 22, 1971). The Board and Association contend that the only appropriate unit for pursposes of collective negotiations is the unit presently recognized and that severance of the Building Service Personnel would not "promote permanent employer-employee peace or the establishment and promotion of fair and harmonious employer-employee relations" as stated by the Commission in Jefferson Township Board of Education, supra.

POSITION OF THE TEAMSTERS

The Teamsters contend that the Building Service personnel constitute an appropriate unit for purposes of collective negotiations and as such should be severed from the existing all-inclusive unit for the following reasons:

13/ The Public Employer, Cranford Board of Education, and the Intervenor, Cranford Education Association, have advanced similar arguments with respect to the above question. Distinction will be made where appropriate.

14/ The New Jersey Employer-Employee Relations Act, approved April, 30, 1941 (P.A. 1941, c. 100) as said short title and act were assembled and supplemented by P.L. 1968, c. 303, and P.L. 1974, c. 123. P.L. 1974, c. 303, has not been changed in any manner pertinent to the instant matter.

1. The Teamsters contend that the Building Service employees enjoy a community of interest separate and distinct from other Board employees.
2. The Teamsters contend that the unit, as it presently exists, is inappropriate due to the lack of exercise of the "statutory option" by professional employees to vote to be included in a unit that contains non-professional employees.
3. Finally, the Teamsters contend that the employees petitioned for herein have not been fairly represented by the Association.

DISCUSSION OF THE APPROPRIATENESS OF THE UNIT ISSUE

N.J.S.A. 34:13A-5.3 states in part that, "/t/he negotiating unit shall be defined with due regard for the community of interest among the employees concerned...". It is generally recognized that factors that are particularly relevant in determining whether a group of public employees possess a "community of interest" include the extent to which the employees involved possess a similarity in training skills, and level of education; the pertinent collective negotiations history, if any, among the employees involved; the scope of their job functions and responsibilities; their relative placement within the pertinent supervisory and organizational structure; and an examination of the economic and non-economic benefits accorded to members of the negotiating unit.

In view of Commission and judicial decisions on the question of the appropriateness of certain petitioned-for collective negotiating units, the critical issue facing the undersigned is whether the petitioned-for unit of Building Service personnel possess a sufficient community of interest that will first be responsive to the legislative intent and statutory purpose of Chapter 303, Laws of 1968 which is declared to be, among other things, the promotion of permanent employer-employee peace, 15/ or as the New Jersey Supreme Court phrased

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15/ Lullo v. I.A.F.F., Local 1066, 55 N.J. 409 (1970)

it"../t/he establishment and promotion of fair and harmonious employer-employee relations in the public service," 16/ and yet also be reflective of the Commission's pronouncements and apposite judicial decisions that assert that an established structure for negotiation should not be altered or upset by the filing of a severance petition except for clear and compelling reasons.

Traditionally, a severance petition is limited to a sub-group of employees who claim to have unique responsibilities and qualifications which entitle them to separate representation. The experience of the National Labor Relations Board indicates that a petition for severance will be denied unless it is established that the employees petitioned for constitute "a functionally distinct group with special interests sufficiently distinguishable from those of the Employer's other employees to warrant severing them from the overall /existing/unit". 17/

The majority in the above Kalamazoo matter, in dismissing the petition, reviewed the historical development of severance cases and concluded:

> In more recent time, while the Board has occassionally made reference to the existence of some of these factors /differences in wages, job responsibilities, etc./in granting severance of truck drivers from more comprehensive units, it has, for the most part, not required an affirmative showing in each case that their interests and conditions of employment substantially differed from those of other employees in the established unit.18/ (Emphasis mine)

Similarly, the Federal Labor Relations Council in Department of the Navy, Naval Air Station, Corpus Christie, Texas /FLRC No. 72A-24 (1973) GERR

16/ Board of Education of the Town of West Orange v. Elizabeth Wilton, et al., 57 N.J. 404 (1971).

17/ See in this regard, Kalamazoo Paper Box Corp., 136 NLRB 134 at 139 (1961).

18/ Id. at 137.

Reference File 21:7079/ has upheld the Assistant Secretary of Labor's so-called Davisville 19/ rule, wherein the Assistant Secretary of Labor established the considerations he would take into account in determining whether to grant severance of a group of employees from an established, represented unit:

> These include the effect severance would have on the effectiveness of employee representation; the past history of bargaining; the stability of labor relations as related to effective dealings and the efficiency of agency operations; the appropriateness and distinctness of units; and the overall community of interest of the employees involved.
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> * * *
>
> Although each case can be expected to have its individual differences, the general theory of a severance case remains the same. Therefore, for future guidance I conclude it will best effectuate the policies of the Executive Order that where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, a separate unit carved out of the existing unit will not be found to be appropriate except in unusual circumstances.

The Commission, in dismissing a petition by a group of nurses desiring to be severed from a larger unit composed of teachers, nurses, guidance counselors, and librarians, reached the following conclusion.

> The Commission concludes, under all the circumstances of this case, that it is not appropriate to permit the separation of nurses from the contract unit. It is not enough to observe that nurses enjoy a community of interest among themselves. Any group having common qualifications, duties and conditions of employment will meet this test. The issue is whether their interests are

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19/ United States Naval Construction Battalion Center, A/SLMR No. 8 (1971) GERR Reference File 21:4011

> so distinct from those with whom they were formerly grouped as to negate a community of interest...Under all the circumstances, the Commission concludes that the interests of nurses are so closely related to the educational process that the factors distinquishing nurses from teachers are submerged in recognition of the broader community of interest shared by the two groups. Futhermore, in this case, the nurses have been included with the teachers for purposes of representation for approximately six years. This history of prior representation constitutes an additional factor in determining their community of interest. 20/ (Emphasis mine)

In this same South Plainfield Board of Education matter, the Commission spoke to another common argument offered in support of severance petitions:

> It is axiomatic in labor relations that in determing an appropriate unit or in achieving an agreement, the specific wishes of each group may not always be satisfied. If the desires of each group of employees were to be given controlling weight complete chaos would result since, in any appropriate unit, there are groups whose interests are of some variance to the total complement of the unit and there are employees who do not want the designated representatives to represent them for purposes of collective negotiations... Were all such groups whose needs were not met permitted to obtain separate representation or none at all, the concepts of an appropriate unit for collective negotiations and the exclusivity of majority representation would soon disappear to be replaced by individual or group dealings. Whether this unit is one established by this Commission or is one agreed upon by the parties to a contract is not material providing it is basically an appropriate unit. Thus, where as here, the parties to a contract have agreed upon an appropriate unit without reservation, the existence of some dissatisfaction by numbers of the unit will not constitute a basis to separate or sever a dissatisfied group from an appropriate unit. 21/ (Emphasis mine)

20/ South Plainfield Board of Education, PERC No. 46 (August 28, 1970) pp. 6-7.

21/ South Plainfield Board of Education, pp 5-6.

The above-cited South Plainfield matter is concerned with the severance of a group of "professional" employees from a larger comprehensive "professional" unit. With respect to the issue of inclusion of a group of non-professional employees in a unit of professional employees the Commission observed in the West Milford matter: 22/

> The Employer finally excepts to the finding that a community of interest exists between those in the recognized unit 23/ and the office personnel building aides...the Commission concludes that such community of interest does exist. Granting the existence of disparity in job qualifications and in certain working conditions and benefits, we nevertheless find that the aides and office personnel perform functions immediately related or necessarily adjunct to the education functions performed by members of the existing unit. Beyond that the office personnel share in common with teachers substantially the same benefits, a similar number of hours of work and calendar, tenure and transfer "rights". (Emphasis mine)

The Commission, in Jefferson Township Board of Education, et al., P.E.R.C. No. 61 (October 21, 1971), dismissed the petition of Local 866, a/w International Brotherhood of Teamsters, who sought to represent all bus drivers employed by the Jefferson Township Board of Education and the petition of the American Federation of State, County and Municipal Employees AFL-CIO, (AFSCME), who sought to represent all clerical, custodial and maintenance employees, cafeterial workers, and head custodian employed by the Board of Education. The Jefferson Township Education Association had represented all the employees sought by the Teamsters and AFSCME as well as teachers, department heads, specialists and nurses in a single negotiating unit. Contracts between the Board and the Association covering the employees in the overall unit were in

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22/ Board of Education of the Township of West Milford, et al., (July 8, 1971), page 4.

23/ The West Milford Education Association sought the inclusion of office personnel and building aides in a previously recognized unit consisting of teachers, nurses, and instructional aides.

effect from July 1, 1969 to June 30,1970 and for July 1, 1970 to June 30, 1971. In reaching its decision to dismiss the above petition the Commission balanced the language of Chapter 303, Laws of 1968, which requires that "the negotiating unit shall be defined with due regard for the community of interest among the employees concerned" /N.J.S.A. 34A13A-5.3/ with the "statutory purpose which is declared to be, among other things, the promotion of permanent employer-employee peace...":

> The issue is correctly stated to be the appropriateness of the bus driver unit sought by the Teamsters. However, that question does not turn solely on whether there exists a community of interest among bus drivers. Undoubtedly, there is a kind of common interest among those of any group who perform the same duties. But the unit issue here cannot be determined by simply measuring the common interests of drivers, one to another and ignoring other material facts, namely, that the drivers are part of an existing unit which is not on its face inappropriate and which has been the subject of two successive collective negotiations agreements. The statute requires that in defining units the Commission give "due regard" to community of interest. But, consideration must also be given to legislative intent and the statutory purpose which is declared to be, among other things, the promotion of permanent employer-employee peace or as Justice Francis phrased it "...establishment and promotion of fair and harmonious employer-employee relations in the public service." (Emphasis mine)

In striking a balance between "community of interest" and the "promotion of permanent employer-employee peace" the Commission added:

> The underlying question is a policy one: assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course would predictably lead to continuous agitation and

> uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.
>
> Here we have a unit created by recognition, not demonstrated to be inappropriate, covered by two successive agreements, and represented by an organization not shown to have provided less than responsible representation. Under these circumstances, the Commission is not prepared to upset that relationship on the single premise that bus drivers enjoy a variety of common interests. The Commission concludes that the unit sought is not one appropriate for collective negotiations in these circumstances. In view of this disposition, the remaining exceptions of the Teamsters fall. (Emphasis mine)

The aforementioned decision on the topic of severance petitions are also illustrative of numerous Commission decisions that have asserted that negotiating units in the public sector should be organized along broad-based functional lines rather than by distinct occupational groupings and thus should be larger and less fragmented than industrial units have been in the private sector. 24/

An important factor relied upon the Commission in its rejection of separate collective negotiating units organized primarily along occupational lines concerns an essential objective of Chapter 303, Laws of 1968 - discussed hereinbefore - the promotion of employer-employee peace and the protection of the public interest. 25/ The Commission has carefully reasoned that if unit parameters were dictated by the desires of certain employees to be represented along occupational lines rather than broad-based functional lines, the statute's

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24/ See, for example, State of New Jersey (Neuro-Psychiatric Institute, et al.), P.E.R.C. No. 50 (1971), Board of Chosen Freeholders of the County of Burlington, P.E.R.C. No. 58 (1971), Bergen County Board of Chosen Freeholders, P.E.R.C. No. 69 (1972) and, especially State of New Jersey (Prof. Assoc. of N.J., Dept. of Ed., et al.), P.E.R.C. No. 68 (1972).

25/ N.J.S.A. 34:13A-2

objective would be jeopardized as a consequence of the multiplicity of units that would thus be organized. A large number of negotiating units within the public sector would unnecessarily encumber the entire negotiations process by encouraging wide-spread whipsawing; would mandate the hiring of additional management personnel to handle "simultaneous negotiations" with a myriad of employee organizations; and, in general, would force the taxpayer to bear the brunt of the spiraling costs involved. 26/

The New Jersey Supreme Court in the recently rendered decision State of New Jersey v. Professional Association of New Jersey Department of Education, et al, 64 N.J. 231 (1974) affirmed the Commission's determination in State of New Jersey, et al, P.E.R.C. No. 68 (May 23, 1972) that one all-inclusive unit of professional employees was the statutory optimum and agreed that the two

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26/ Commentators in this field almost unanimously agree with the Commission's position on collective negotiating units in the public sector. See in this regard the following: Report of Task Force on State and Local Government Labor Relations, 1967 Executive Committee - National Governor's Conference (Library of Congress Catalog 67-31610); Shaw and Clark, "Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems" 51 Oregon Law Review 151 (1971); Edwards, "The Developing Labor Relations Law in the Public Sector" 10 Duquesne Law Review 357 (1972); Sullivan, "Appropriate Unit Determinations in Public Employee Collective Bargaining", 19 Mercer L. Review 402 (1968); Rock, "The Appropriate Unit Question in the Public Service: The Problem of Proliferation" 67 Mich. L. Rev. 1001 (1969); and Anderson, "Public Employee Collective Bargaining: the Changing of the Establishment", 7 Wake Forest L. Review 175 (1971)..

Recent legislation and judicial decision have sought to avoid the undue fragmentation of negotiating units in the public sector. See, for example, Executive Order 11491 Section 10 (b), 5 U.S.C.A Section 7301 (Supp. 1973); N.Y. Civil Service Law Section 207 ("Taylor Law") (McKinney); Pa. Stat. Ann. Title 43 Section 1101.604(1) (ii) (Supp. 1973); Kansas Stat. Ann. Section 75-4327(e) (Supp. 1972); and Hawaii Rev. Laws Section 89-1 et seq., Section 89-6 (Supp. 1972).

Also see in this regard the landmark decision State of New Jersey v. Professional Association of New Jersey Department of Education, et al, 64 N.J. 231 (1974) and also Civil Service Employees Association v. Helsby 303 N.Y.S. 2d 690 (1969) affirming the opinion of the Appellate Division, 300 N.Y.S. 2d 424 (1969).

petitioned-for professional units of registered nurses and professional educational employees in the Departments of Education and Institutions and Agencies, composed of 800 employees and 1,200 individuals respectively, should be dismissed as being inappropriate.

In emphasizing that the Commission was under a duty to make a determination as to the most appropriate negotiating unit not merely an appropriate unit, in deference to the clear import of Chapter 303, Laws of 1968, the New Jersey Supreme Court reaffirmed the substance and rationale of the Commission's decisions concerning, in general, the concept of broad-based collective negotiating units organized along functional lines and, more specifically, the issue of severance petitions. 27/

FINDINGS

Both the Board and the Association oppose severance, arguing that the Building Service personnel enjoy a community of interest with other members of the existing negotiating unit. They argue that any occupational distinctions which may exist between them is insubstantial in view of the fact that the "operation of both those areas are related to the overall operation of the district". 28/ The Board and the Association maintain that the unit is appropriate on its face because of the overall interrelationship in terms of operational requirements of the Board of Education 29/ Further, they point out that the Board is responsible for establishing labor relations policy for all employees in the school district. 30/

27/ State of New Jersey v. Professional Association of New Jersey, Department of of Education, 64 N.J. 231 at page 257.

28/ Transcript, P. 50.

29/ Transcript, P. 50.

30/ Transcript, P. 52.

The Teamsters maintain that the Building Services employees constitute an appropriate unit for purposes of collective negotiations and should be severed from the present unit since there is no similarity of duties, skills and working conditions, different job classifications, different total employee benefits, no interchange or transfer between the groups, separate supervision, different educational requirements and no common promotional ladder.

Examination of the record clearly reveals that the Building Service personnel possess distinct duties, functions and working conditions separate from the Board's other employees. In consideration of the above factors, the undersigned Hearing Officers finds that Building Service unit would constitute an appropriate unit in a de novo situation. However, considering that the Building Service employees have a four-year history of inclusion in an existing unit and have been covered by four consecutive agreements during that time, additional factors must be considered to justify severance, specifically the Teamsters are required to demonstrate that the existing unit "is unstable or that the incumbent organization has not provided responsible representation". 31/

Before discussing the issue of fair representation the undersigned Hearing Officer will discuss the Teamsters contention that the present unit is inappropriate since "no unit shall be appropriate which includes...both professional and non-professional employees unless a majority of such professional employees vote for inclusion in such unit..." 32/

31/ Jefferson Township, et al, P. 4.

32/ N.J.S.A. 34:13A-6(d)

Chapter 303, Laws of 1968, prohibits the inclusion of professional employees in an appropriate unit unless such professional employees vote for inclusion in such, except where dictated by established practice, prior agreement or special circumstances. The pertinent section of the Act is C 34:13A-6(d) which states in part:

> The division /Commission/ shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit, or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit.

In the Jefferson Township matter, the Commission found that the statutory requirement of a professional "option" had been satisfied:

> The uncontroverted evidence reveals that prior to the establishment of the existing unit, separate elections were conducted among the several groups of employees including bus drivers, secretaries, custodians, cafeteria personnel, etc. in which majorities of each of those groups voted to be represented by the Association. The professional employees, who were already represented by the Association, voted to include these non-professional groups in a single unit with themselves. Following these elections, the Association requested and received recognition from the Board as the sole and exclusive representative for collective negotiations for the employees described above. In accordance with the recognition, a contract was entered into April 14, 1969 between the Association and the Board for the term July 1, 1969 to June 30, 1970. (Emphasis mine)

The record indicates that after the passage of Chapter 303, the Association requested and received recognition from the Board as the majority

representative of all professional employees. 33/ Subsequently, the Association solicited authorization from a majority of the Building Service personnel to represent them in collective negotiations. 34/ The record indicates that the Director of Business and Plant Operations, who was then the supervisor of the custodial staff, was present during the Association's solicitation meeting. No evidence has been presented with regard to the effect of the presence of the supervisor. Also, in this regard, the undersigned notes that the instant Petition was filed more than four years after the authorization was extended. Accordingly, the undersigned finds that the Building Service employees properly authorized the Association to represent them.

With respect to the issue of professional "option" the record indicates that the Executive Committee of the Association "unanimously" voted to extend membership to the non-professional employees. 35/ The record indicates that the Executive Committee was "made up of the elected officers and the building representatives who were elected by the grass roots membership". The undersigned notes the statutory mandate that /t/he negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the Commission shall not intervene in matters of recognition and unit definitions except in the event of a dispute.36/ Accordingly, the undersigned finds that the Association satisfied the intent of the Act and furthermore, it would be improper to find the unit inappropriate on this basis since there is no evidence that the professional employees are dissatisfied with the inclusion of non-professional employees in the unit.

33/ Transcript, P. 173.

34/ Transcript, P. 18, (September 11, 1974).

35/ Transcript, P. 159.

36/ N.J.S.A. 34:13A-5.3.

ISSUE OF FAIR REPRESENTATION

The Teamsters contention that Building Service employees have not been fairly represented by the Association center on the process of negotiations, ratification procedures, grievance processing and Association membership requirements.

Chapter 303 of the Laws of 1968 provides that "/a/ majority representation of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership". /N.J.S.A. 34:13A-5.3(7)/

The New Jersey Supreme Court, in considering a constitutional challenge to the Act's provision requiring the majority representative to be the exclusive representative, emphasized the nature and the extent of the duty of representation: 37/

> The benefits and advantages of the collective agreement are open to every employee in the unit whether or not he is a member of the representative organization chosen by the majority of his fellow workers. He can be certain also that in negotiating with the employer the representative is obliged to be conscious of the statutory obligation to serve and protect the interests of all the employees, majority and minority, equally and without hostitility or discrimination. And he can rest secure in the knowledge that so long as the union or other organization assumes to act as the statutory representative, it cannot lawfully refuse to perform or neglect to perform fully and in complete good faith the duty, which is inseparable from the power of exclusive representation, to represent the entire membership of the employees in the unit.

37/ Lullo v. I.A.F.F., Local 1066, 55 N.J. 409 (1970).

In West Milford, supra, the Commission reconciled the aforementioned Section 7 responsibilities with the Supreme Court's reasoning in Lullo: 38/

> The foregoing clearly establishes the statutory responsibility of an employee organization to represent fairly not only its active and associate members, but even non-members who may be included in the unit. The Employer argues in effect that the Association's restriction of certain categories of employees to less than full membership and attendant denial to them of the right to vote and hold office necessarily precludes the possibility of their fair representation as contemplated by the law. We do not agree. The duty to represent obviously transcends the presence or absence of organization membership and presents a broader question. If one elects not to be a member, in any form, that fact does not relieve an organization of its duty. The measure of fair representation is ultimately found at the negotiating table, in the administration of the negotiated agreement and in the processing of grievances. A qualified form of membership may or may not become an ingredient in the kind of representation given. It may become an element of proof to a claim of inadequate representation once the opportunity to represent has been established and allegedly been abused. And in terms of internal administration, it may require the organization to be unusually preceptive and sensitive to the needs of those holding restricted memberships in order to insure that the organization meets its statutory obligation. But standing alone, this restriction on membership cannot at this time be said to constitute, necessarily an impediment to fair representation prior to the Association's opportunity to demonstrate its compliance with the statutory obligation, notwithstanding this restriction. In short, the restriction does not, per se, limit its capacity to comply. Were it otherwise, there would be no possibility of fair representation for those who elect to be non-members. The Commission finds therefore, no disqualification of the the Association. (Emphasis mine)

38/ West Milford, supra, pp. 2-3.

The Teamsters contend that the Building Service employees were denied the right to hold office, serve on the negotiating committee and participate in ratification meetings. Testimony indicates that the Building Service employees do not have full membership in the Association but they do enjoy membership as "Associate" members. "Associate" members are not permitted to hold office nor are they permitted to be members of the Association's "primary" negotiating team which is comprised of the President, Vice-President, and three other professional employees. The record indicates that the representatives of the sub-groups attend negotiating sessions and meet with the Board to present the sub-group demands. In this regard, it is important to note that the Association's negotiating procedures require that representatives of all sub-groups, /custodians, nurses, secretaries, coaches/ " to retire to another room and wait till (sic) they're called." 39/ The representative of the Building Service sub-group testified that the negotiating procedure had been in effect for "four or five years" and that his dissatisfaction with these procedures had not been discussed with the Building Service employees that he represented. 40/

The Teamsters also contend that the Building Service employees have been denied the opportunity to participate in "ratification" meetings. In this regard, testimony was received that Building Service employees were unable to attend a "ratification" meeting since the meeting was held during normal working hours. There is no evidence that Building Service employees were denied the right to attend ratification meetings because of the time that they were scheduled.

The undersigned is not required to place exclusive weight on the above membership and voting restrictions which exist between Building Service employees

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39/ Transcript, p. 99, (September 11, 1974).

40/ Transcript, p. 102, (September 11, 1974).

and professional employees in the negotiating unit.

The Executive Director, in Township of Hanover and Local 128, P.B.A., E. D. No. 41, (November 23, 1971), reviewed the West Milford conclusion and distinguished between the N.L.R.A. and C. 303 definition of "labor organization" and "representive" as they relate to participation in the internal affairs of the organization:

> The Commission was presented with a similar contention based on essentially the same fact situation in Board of Education of the Township of West Milford, P.E.R.C. No. 56. After considering the statutory mandate that a majority representative represent the interests of all unit employees without discrimination and without regard to organization membership, and the Supreme Court's comment that exclusive representation carries with it the duty of good faith representation of all unit employees, the Commission concluded that the unavailability of full membership for all unit employees does not necessarily disqualify an organization from the opportunity of being designated their exclusive representative. The Commission cautioned, however, that the disability of less than full membership would be a revelant factor in assessing the adequacy of representation given once the organization had acquired status as the exclusive representative. That approach is dispositive of the contention here, with one additional comment. The Employer points to the obstacles confronting the sergeants in their ability to participate in the internal affairs of the organization, and asks that recognition be given to the approach in the private sector under federal regulation wherein participation is considered an essential ingredient. That approach is required by federal statute which makes employee participation the first mentioned element in the definition of "labor organization". By comparison the New Jersey statute contains no such requirement in its definition of "representative"; it simply says that the term includes "...any organization...designated by a ... group of public employees...to act on its behalf and represent it or them. Consequently, the federal experience is inapposite and not persuasive here. In view of the controlling statute's language and the Commission's earlier disposition of essentially the same issue, this exception is found to be without merit. 41/

41/ Township of Hanover and Local 128, P.B.A., E.D. No. 41, (December 23, 1971) p.5.

As previously indicated, the Commission is not persuaded that "restrictions of certain categories of employees to less than full membership and attendant denial to them of the right to vote and hold office necessarily precludes the possibility of their fair representation..." 42/ The Commission policy is that membership restrictions become an element of proof of inadequate representation once the opportunity to represent has been established and allegedly been abused. 43/ The undersigned is further guided by the Commission's pronouncement in West Milford, that "/t/he measure of fair representation is ultimately found at the negotiating table, in the administration of the negotiated agreement and in the processing of grievances." 44/

Accordingly, the undersigned will first examine the area of grievance administration. Examination of the four agreements negotiated between 1969 and 1973 indicate that a formal grievance procedure is contained in all of the agreements. Further examination of the grievance procedure indicate that there are no limitations on the rights of Building Service employees to file and process grievances. The Teamsters offered no evidence that the Association failed to process grievances on behalf of Building Service employees.

Therefore, the undersigned finds that there is no evidence that the Association has failed to represent "the interest of all such employees without discrimination and without regard to organization membership 45/in the processing of grievances.

The final area that must be examined is whether the Association represented the interests of the Building Service employees without discrimination and without regard to organization membership in negotiations with the Board.

42/ West Milford, supra, p.2.
43/ West Milford, supra, p.2.
44/ West Milford, supra, p.2.
45/ N.J.S.A. 34:13A-5.3(7).

Examination of the record, particularly, the aforementioned contracts indicates that there are numerous benefits which apply to all unit members regardless of their position. Example of these provisions include: grievance procedure, sick leave, temporary leaves of absence, personal days, extended leaves of absence, maternity leave, and health insurance protection. The contracts contain several sections which apply only to professional employees but, there are also several sections which apply to the Building Service personnel: Salary guides, vacation schedule, holiday schedule, credit for prior service outside the school district, overtime compensation, and stipends for certain responsibilities. With respect to salaries, the undersigned notes that there appear to be similar increases granted to all members of the negotiating unit represented by the Association.

Finally, the undersigned notes that Article XXXIV of the 1972-73 Agreement provides that custodial employees shall be eligible for tenure under provision of Title 18A after five (5) consecutive years of probationary service in the district. Title 18A provides that a teaching staff member acquires and is protected by tenure after employment in the district: (a) for three consecutive calendar years or any shorter period set by the employing board; or (b) at the beginning of the fourth consecutive academic year, or (c) for the equivalent of more than three academic years within a period of four consecutive academic years. 46/ Persons holding clerical or secretarial positions acquire tenure by satisfying the requirements of (a) or (b) above. 47/ Building Service

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46/ N.J.S.A. 18A:28-5.

47/ N.J.S.A. 18A:17-2.

type employees are not guaranteed the right to tenure by Title 18A as provided above. Tenure is acquired by Building Service type employees if not appointed for a fixed term, but a janitor who is appointed for a definite term does not acquire tenure. 48/ The fact that the Association negotiated the right to tenure for Building Service employees is significant in view of the fact that Title 18A does not provide for acquisition of tenure and also in view of the fact that tenure is not commonly enjoyed by Building Service employees in other school districts. Finally, the Teamsters have not made any specific reference to the failure of the Association to fairly represent the interests of the Building Service employees in negotiations with the Board. The Teamsters have focussed on procedural standards which, as previously discussed, are not dispositive of the issue of fair representation.

Accordingly, the undersigned finds that the Association has represented the interests of Building Service employees without discrimination and without regard to organization membership in the process of negotiations.

Having found that the Association provided fair representation to the Building Service employees, the undersigned recommends the continued inclusion of the Building Service employees in the existing recognized negotiating unit. The fact that Building Service employees or any other subgroup of employees have a degree of separate community of interest does not warrant their severance solely on that consideration.

In conclusion, the undersigned finds that for all the reasons set forth in this report, the Teamsters have not set forth clear and compelling reasons to warrant the severance of Building Service employees from the presently recognized unit.

48/ N.J.S.A. 18A:17-3

RECOMMENDATION

The undersigned respectfully concludes that the unit petitioned for is inappropriate and recommends that the Petition in this instant matter be dismissed.

RESPECTFULLY SUBMITTED

Robert M. Glasson

Robert M. Glasson
Hearing Officer

Dated: March 20, 1975
Trenton, New Jersey