

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

OLD BRIDGE TOWNSHIP BOARD
OF EDUCATION,

Public Employer-Petitioner,

-and-

DOCKET NO. CU-81-23

OLD BRIDGE EDUCATION ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation adopts the recommendation of a Hearing Officer that the Research Assistant to the Assistant Superintendents for Personnel/Educational Sciences and Curriculum Instruction is a confidential employee within the meaning of the Act and determines that this position be removed from the negotiations unit effective the date of this decision. Noting the absence of exceptions, the Director confirms the findings of the Hearing Officer that the Research Assistant has significant functional responsibilities and advance knowledge of the Board's positions in matters of grievance processing and collective negotiations.

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Employee Representative.

Appearances:

For the Public Employer-Petitioner
Wilentz, Goldman & Spitzer, attorneys
(Gordon Golum of counsel)

For the Employee Representative
Rothbard, Harris & Oxfeld, attorneys
(Sanford R. Oxfeld of counsel)

DECISION

On October 15, 1980, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") by the Old Bridge Township Board of Education (the "Board") seeking a determination that the positions of State Compensatory Education/Title I Coordinator and Research Assistant are not in the negotiations unit represented by the Old Bridge Education Association (the "Association"). The Board relies on the following factors in support of its Petition: (1) The parties never agreed that these positions were included in the unit and never negotiated the terms and conditions of employment for

individuals in these two positions; and (2) both positions are supervisory in nature. In addition, the Board has asserted that the Research Assistant is a confidential employee.

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer Robert E. Anderson, Jr., on April 14, 1981, at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both parties filed post-hearing briefs by May 12, 1981. In its brief the Association stipulated that the State Compensatory Education/Title I Coordinator is a supervisory employee and, accordingly, agreed to his exclusion from the negotiations unit. The Association, however, maintained a position that the Research Assistant was and should continue to be a member of its unit because she is neither a supervisory nor a confidential employee. The Board and the Association have advised the Commission that the Board intended to rewrite the job description of the Research Assistant to exclude supervisory duties. As a result, the Board's request for the exclusion of the Research Assistant is based solely on the claim of confidential status.

The Hearing Officer issued his Report and Recommendations on July 6, 1981, a copy of which is attached hereto and made a part hereof. No party has filed exceptions to the Hearing Officer's Report.

The undersigned has considered the entire record including the Hearing Officer's Report and Recommendations, the transcript, and the exhibits, and on the basis thereof finds and determines as follows:

1. The Old Bridge Township Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees who are the subject of the Petition, and is subject to the provisions of the Act.

2. The Old Bridge Education Association is an employee representative within the meaning of the Act, and is subject to its provisions.

3. The Board has filed the instant Petition for Clarification of Unit seeking the exclusion of two titles from the negotiations unit represented by the Association; the parties subsequently resolved their difference with respect to one of the titles; and the only issue remaining in dispute involves the Board's contention that the Research Assistant title be excluded from the unit as a confidential employee within the meaning of the Act. The Association disputes this contention. Accordingly, there is a question concerning the composition of the collective negotiations unit and the matter is properly before the undersigned for determination.

The Hearing Officer recommended that the Research Assistant be deemed a confidential employee and removed from the Association's collective negotiations unit. The Hearing Officer based his recommendation upon factual findings which, in part, indicate that the Research Assistant possesses advanced knowledge of the Board's position on collective negotiations matters, and also is intimately involved, on behalf of management, in the parties' grievance procedure. The undersigned's review of the record herein confirms

the findings of the Hearing Officer, and his recommendation that the Research Assistant is a confidential employee is adopted.

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

"Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The record reveals the following:

(a) The Research Assistant reports to and works for the Assistant Superintendent for Personnel/Educational Services and the Assistant Superintendent for Curriculum Instruction. The Assistant Superintendent for Personnel/Educational Services is involved in the process of hiring, observing and evaluating staff personnel. He makes decisions at the second step of the grievance procedure, is a member of the Board's negotiating team and recommends personnel policies.

(b) The Research Assistant assists the Assistant Superintendent for Personnel/Educational Services in the performance of his various labor-relations functions, including collective negotiations and grievance processing.

(c) In the area of collective negotiations, the Research Assistant plays a significant role in developing an initial evaluation of the Association's contract proposals and in the preparation of the detailed initial Board negotiations proposal.

(d) In the area of grievance processing, the Research Assistant keeps records of the status of grievances, prepares the

information needed for the processing of the grievances and assists in the development of the Assistant Superintendent's position at the second step of the grievance procedure.

(e) The Research Assistant is aware of the Board's negotiations proposals and strategy. For example, the Research Assistant had knowledge of the maximum percentage of salary increase the Board was prepared to eventually offer to unit members. The Research Assistant has advance knowledge of the Board's position and tactics with regard to grievance processing.

The undersigned is satisfied that the above activities are sufficient to establish that the Research Assistant has significant functional responsibilities and knowledge dealing with the issues involved in the collective negotiations process, the possession of which renders her membership in any appropriate negotiating unit incompatible with her official duties.

The decision herein is consistent with prior decisions concerning confidential status which have consistently sought to distinguish between low-level employees who merely assemble raw data which may be used in the future in developing negotiations proposals and those employees who have access to or are involved in the preparation of negotiations proposals and grievance resolution which provide them with confidential information which form the basis for management policy affecting negotiations or contract administration.

Therefore, on the basis of the record herein, and noting the absence of exceptions to the Hearing Officer's Report and

Recommendations, the undersigned finds that the Research Assistant is a confidential employee within the meaning of the Act and determines that the Research Assistant shall be removed from the instant negotiations unit immediately.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: October 23, 1981
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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OF EDUCATION,

Public Employer-Petitioner,

-and-

Docket No. CU-81-23

OLD BRIDGE EDUCATION ASSOCIATION,

Employee Organization.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission determines that a Research Assistant employed by the Old Bridge Board of Education is a confidential employee and should thus be excluded from a negotiations unit represented by the Old Bridge Education Association. The Research Assistant works under the Assistant Superintendent for Personnel/Educational Services and helps him prepare negotiations proposals, critique Association proposals, and evaluate and respond to grievances.

A Hearing Officer's Report and Recommendation is not a final administrative determination of the Public Employment Relations Commission. The report is submitted to the Director of Representation who reviews the Report, and exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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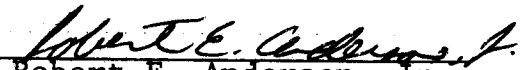
OLD BRIDGE EDUCATION ASSOCIATION,

Employee Organization.

ERRATA

The transcript in the above titled matter is hereby
corrected as follows:

<u>Page</u>	<u>Line</u>	<u>Incorrect Word(s)</u>	<u>Correct Word(s)</u>
7	21	included in	excluded from
99	6	extensive	extension
102	24	successor	success
107	20	principal's supervisor's	Principal - Supervisor's
109	9-10	non-vocational	non-instructional
132	1	classes	clauses
136	8	privied	privy
197	9	contracts	contract


Robert E. Anderson, Jr.
Hearing Officer

DATED: July 6, 1981
Trenton, New Jersey

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Appearances:

For the Old Bridge Township Board of Education
Wilentz, Goldman & Spitzer, Esqs.
(Gordon Golum, Esq.)

For the Old Bridge Education Association
Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On October 15, 1980, the Old Bridge Township Board of Education ("Board") filed a Clarification of Unit Petition with the Public Employment Relations Commission (A-1A). ^{1/} The petition alleged that pursuant to the recognition clause of a collective agreement effective until June 30, 1981, the Old Bridge Education Association ("Association") represented a unit of certain certified Board personnel including teachers. The petition sought a declaration that the positions of State Compensatory Education/Title I Coordinator and Research Assistant are not in

1/ Commission exhibits will be designated A-, Board exhibits P-, and Association exhibits R-.

the negotiations unit represented by the Association. The Board adduced two reasons for its request: (1) The parties never agreed that these positions were included in the unit and never negotiated the terms and conditions of employment of these two positions, and (2) both positions are supervisory in nature.

On March 4, 1981, the Director of Representation issued a Notice of Hearing which set a prehearing date of April 7, 1981, and hearing dates of April 13 and 14, 1981 (A-1B). On March 10, 1981, the Board's attorney, with the consent of the Association's attorney, requested a postponement of the prehearing date until April 7, 1981, because of a conflicting court engagement and a postponement of the opening of the hearing until April 14, 1981, because of the unavailability of the Association's attorney on April 13, 1981 (A-2A). The undersigned granted the requested postponements (A-2B; A-3B).

At the prehearing conference, the Board, in addition to reiterating the position set forth in its petition, asserted that the Research Assistant was a confidential employee.

At the April 14, 1981, hearing, the undersigned received stipulations concerning certain issues and facts. In particular, the parties stipulated that the following issues were in dispute:

(a) Are the positions of State Compensatory Education/ Title I Coordinator, ESL ^{2/} and Research Assistant in the unit as defined in the recognition clause of the 1978-81 collective agreement;

(b) Are the two positions supervisory within the meaning of the Act and therefore excluded from the unit; and

2/ "ESL" stands for English as a Second Language.

(c) Is the position of Research Assistant a confidential position within the meaning of the Act and therefore excluded from the unit which the Association represents (Tr. 6-8). The undersigned then afforded all parties an opportunity to examine witnesses, present evidence, and argue orally.

On May 12, 1981, the undersigned received post-hearing briefs from both parties. In its brief, the Association stipulated that the State Compensatory/Title I Coordinator, ESL was a supervisory employee and accordingly agreed to his exclusion from the negotiations unit (pp. 1-2). The Association, however, reiterated its position that the Research Assistant was and should continue to be a member of its unit. The Board reasserted its previous positions.

On May 18, 1981, the Board submitted a letter replying to the Association's brief. However, by letter dated June 23, and received June 25, 1981, the Board's attorney advised the undersigned that the Board was rewriting the job description of the Research Assistant to exclude supervisory duties, hence making moot the issue of supervisory status. By letter dated June 30, and received July 2, 1981, the Association's attorney attached a copy of a June 11, 1981 Report on Board Committee Meeting confirming the Board's intent to so revise the pertinent job description.

FINDINGS OF FACT

Based on the entire record in this proceeding, the Hearing Officer makes the following findings of fact:

1. The Old Bridge Township Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq. (the "Act"), is subject to its provisions, and is the employer of the employees who are the subject of this proceeding (Tr. 6).

2. The Old Bridge Education Association is an employee representative within the meaning of the Act and is subject to its provisions (Tr. 6). Under the recognition clause of the 1978-81 collective agreement (which expired on June 30, 1981), it represented all certified personnel employed by the Board listed as follows:

"...teachers, special teachers, resource teachers, Title III specialists, guidance personnel, psychologists, social workers, supplementary teachers, nurses, learning disabilities, home-school coordinators, librarians, department heads, director of guidance at the high schools, coordinator of personnel services in middle school, coordinator of Title III programs, secretaries, substitutes, substitute caller, para-professional aides, custodians, attendance officers, and transportation personnel."
(J-1).

3. In light of the parties' post-hearing concessions, the only issues now in dispute are:

a) Is the Research Assistant a member of the Association's unit; and

b) is she a confidential employee within the meaning of the Act and thus excluded from the unit as a matter of law?

Accordingly the following findings of fact and conclusions of law concern solely the status of Research Assistant.

4. On October 27, 1976, the Board posted a notice of an opening in the newly created C.E.T.A. position, effective December 15, 1976, of Research Assistant (R-1). The notice stated that the person hired must meet all CETA eligibility requirements, that the job would be a ten-month position, and that the salary would be \$10,000. An attached job description provided a summary of duties:

The Research Assistant functions as a part of central administration. His/her purpose is to provide assistance in the general administration of all matters relating to the educational program and instructional staff. He/she is under the supervision of the Superintendent of Schools and the Assistant Superintendent of Secondary and Elementary Education.

Specific duties included planning and implementation of the programs designed to meet thorough and efficient education mandates, processing requests for professional leave, and coordinating programs concerning substitute teachers, student teachers, student educational trips, noon hour supervisors, teacher aides, outdoor education, and research and development of district educational needs and problems. The description's last clause provided that the Research Assistant would perform "other duties as assigned by the Superintendent and the Assistant Superintendents." (R-1; P-21) ^{3/}

5. The present Research Assistant has been the only occupant of this position (Tr. 161). While on paper she was a ten-

^{3/} Technically, this job description apparently remains in effect. A new description was drafted for review by the Board in the Spring of 1979 (P-17). This description duplicated much of the original description, but added the following duties: Assisting with the development of curriculum in elementary and secondary schools and the development of an evaluation program for non-instructional personnel, helping to plan district staff in-service programs, assisting with the professional staff evaluation program, reviewing the district's Minimum Basic Skills test results, and developing a professional resource and research library. The description also specified that the Research Assistant must hold a New Jersey Teaching Certificate and would work an 11-month year. In the Fall of 1979, a reorganization plan resulted in the redefinition of duties performed by the Assistant Superintendents and persons under their command and the consequent submission of a package of new job descriptions to the Board for approval (Tr. 119). Apparently, the job descriptions for Research Assistant and four other positions were inadvertently omitted from the package (Tr. 120). The Board adopted a motion to "approve all job descriptions" (Tr. 123). The Board has not yet formally reviewed the descriptions omitted from the package (Tr. 124). The Board has apparently requested that a new job description excluding supervisory duties be prepared for its review.

month employee when first hired, in actuality she worked as an 11-month employee the first year (Tr. 161). During the first six months, she was paid solely from CETA funds; during the following 12 months, she was paid jointly from CETA and Board funds. After the first 18 months of employment until this summer, her salary was equated to the teaching salary scale with a stipend for additional time worked in the summer (Tr. 116-117, 199) and she was included on a seniority list for teachers (Tr. 198-199). Under a contract which she has just signed, her salary is no longer pegged to a teaching salary, but is rather part of the Central Administration's negotiating package (Tr. 116-117). Further, she has become a 12-month employee (Tr. 157-159).

6. The Research Assistant works in the Central Office (Tr. 97) and receives a vacation entitlement similar to that received by administrators rather than teachers (Tr. 105). She works from 9 a.m. to 4 p.m., and is entitled to unlimited professional leave; both these terms and conditions differ from those which affect teachers (Tr. 105-106, 162).

7. The Research Assistant holds a Principal-Supervisor Certificate and an Elementary School Teacher Certificate (P-19; P-20). On November 21, 1980, the Certification Coordinator for the Middlesex County Office of the Department of Education, in response to the Research Assistant's inquiry, advised her that the qualifying certificate for her position should be Principal and the appropriate title should be Administrative Assistant (P-17; P-18; Tr. 106-107). The Board has not yet required a Principal Certificate for the Research Assistant position (Tr. 106). The Research Assistant does

attend regularly scheduled meetings of building-level principals and district-level supervisors for the purpose of discussing personnel and educational services and curriculum issues. She also attends superintendent-level meetings concerning building principals and supervisors (Tr. 104-105).

8. The most recent organizational chart for the Old Bridge Township Public Schools shows that the Research Assistant reports to and is evaluated by the Assistant Superintendent for Personnel/Educational Services and the Assistant Superintendent for Curriculum/Instruction (P-23; Tr. 115). The former reviews all observations and evaluations of professional staff, recommends the hiring of staff members; handles the second step of grievance proceedings, serves on the Board's negotiating team, and recommends personnel policies (Tr. 178).

9. The Research Assistant testified that she spends the majority of her time working under the catch-all clause of her job description rather than on areas specifically enumerated and defined in the description (Tr. 165). ^{4/} Pursuant to the job description's broad instruction "...to provide assistance in the general administration of all matters relating to the...instructional staff" and the catch-all clause, she assists the Assistant Superintendent for Personnel/Educational Services in his labor-related duties, including negotiations and grievance processing (Tr. 140-141; 170-171).

10. The Research Assistant provided a variety of services

^{4/} She also testified that she does not presently perform three of the duties listed on P-17: (1) screening professional leave requests, (2) providing research assistance associated with the development of an evaluation program for non-instructional personnel, and (3) assisting in the coordination of the district student teacher program (Tr. 108-110).

in connection with the recent negotiations which culminated in the collective agreement effective July 1, 1981. For example, the negotiating committee instructed the Assistant Superintendent for Personnel/Educational Services to survey all principals, administrators, and supervisors to determine what concerns they had with the 1978-81 contract and what improvements they would desire in the successor agreement; the Research Assistant summarized all responses and also summarized specific proposals received from Board members (Tr. 187-188). For example, she alerted the negotiating team to the principals' concern that teaching staff should be more involved in lunch room supervision (Tr. 98) and a Board member's suggestion that the amount paid for unused sick leave be increased (Tr. 188). After she prepared her summary, the Assistant Superintendent for Personnel/Educational Services, the Board's Secretary/Business Administrator and the Research Assistant met, went through the summary line by line, and put together the package which the Board approved and the negotiating team in turn submitted to the Association (Tr. 187-188; see also Tr. 132-135).

The Research Assistant also performed research which was helpful in the Board's formulation of a contract proposal. For example, she studied a sample agreement prepared by the New Jersey School Boards Association; this agreement contained comments on the legality and wisdom of specific clauses (Tr. 129-130). She used the information gleaned from this material to advise the negotiating team of problems lurking in Association proposals and past contractual clauses. In particular, she critiqued the Association's proposed clause on pregnancies and child care leaves and provided the team

with optional approaches to avoid the pitfalls she foresaw (Tr. 98-99, 130-131).

The Research Assistant also keeps informed of Appellate Court, PERC, Commissioner of Education, and State Board decisions concerning labor matters, either through reading the whole decisions or by reading summaries provided in various periodicals (Tr. 98; 126-129). She maintains files on these decisions (Tr. 128-129). When a particular problem arises, she will target her research towards obtaining helpful information (Tr. 129). Also, she studies past contractual clauses and Association proposals to determine if they illegally implicate managerial prerogatives. She stated, for example, that she was knowledgeable of the Ridgefield Park decision which she believed made the contractual clause (J-1, P. 14) on class size an illegal topic for negotiations ^{5/} and that she so advised the negotiating team (Tr. 127).

The Research Assistant has also participated in meetings relative to the formulation of the Board's contract proposal and has served as a sounding board for ideas put forth by Board members, administrators and the Assistant Superintendent for Personnel/Educational Services (Tr. 99-101, 148-149, 192). Sometimes she was asked to sit in on these meetings which occurred at the Central Administration Office so that she could provide relevant information

^{5/} As the Association's attorney points out, Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) specifically found a clause on transfers and reassignments, not a clause on class size, illegal. However, the logic of Ridgefield Park has been extended to preclude negotiations on class size, so the confusion of the Research Assistant on this point is readily understandable. See, e.g., In re Watchung Hills Regional School Board, P.E.R.C. No. 81-86, 7 NJPER 91 (¶12036, 1981).

from her research and could stay abreast of developments; at other times she was in the meeting room and was not asked to leave when the meeting commenced (Tr. 174-175). During the recent negotiations, she acquired information at these meetings concerning the salary amounts --specifically including the maximum percentage increase -- which the Board of Education was prepared to offer the Association (Tr. 99-100; 173-175, 192). She was not, however, involved in the procedures by which the Board determined the bottom line on salary offers nor could she say how the overall percentage increase would affect particular employees such as the Athletic Director (Tr. 138). Further, she frequently discusses negotiations with her boss -- the Assistant Superintendent in charge of personnel -- in the course of her job (Tr. 101).

The Research Assistant rendered the above services prior to the initial submission of the Board's proposal and after the submission of the Association's proposal. The negotiating team did not solicit her research skills or advice concerning wording of particular clauses thereafter (Tr. 131-132). She did not attend any negotiations sessions (Tr. 133).

11. Since the Spring of 1980, the Research Assistant has helped the Assistant Superintendent for Personnel/Educational Services in handling grievances at the second step of the grievance procedure (Tr. 150, 178). She maintains a log which reflects each grievance's date of filing, subsequent history, substance, and whether or not the Board should arbitrate the matter (Tr. 101-102, 144, 189). When a grievance comes in, she first verifies that all portions of the grievance are complete and that all filing pro-

cedures have been properly followed (Tr. 102, 142-143). She then performs background work on each grievance and obtains specific information at the request of the Assistant Superintendent (Tr. 145-146). Thus, she will check citations and clarify them for the Assistant Superintendent (Tr. 101-102, 189) and will review personnel files for points pertinent to an employee's grievance (Tr. 189). A secretary could not perform the latter function (Tr. 189).

After securing the background information, she will discuss cases with the Assistant Superintendent and assist him in formulating a response (Tr. 102). He occasionally asks for and accepts her opinion on how to handle a grievance (Tr. 189). Further, joint attendance at training sessions on grievance handling has resulted in a melding of viewpoints on most cases (Tr. 149). However, his expertise is greater, and, if there is a difference, his opinion clearly governs (Tr. 147-148).

The Research Assistant has no independent authority to resolve grievances (Tr. 147). She is never present at any grievance proceedings or settlement discussions with Association representatives (Tr. 142).

12. In the course of her duties, the Research Assistant has access to personnel information, sometimes confidential, unrelated to negotiations or grievance processing. Thus, the Superintendent recently directed her to summarize how many different assignments each staff member has had so that the Board could consider its policy on teacher transfers (Tr. 115-116, 170). She has also summarized information concerning observations on substitute teachers (Tr. 116). The Assistant Superintendent for Personnel/Educational

Services reviews all observations and evaluations and occasionally asks the Research Assistant to take note of a particular teacher in trouble so that his performance may be more closely monitored (Tr. 183-184). He takes her into his confidence on these matters because of her competence and his need for assistance in performing his manifold duties (Tr. 183-184).

13. The Research Assistant has worked with principals on two cases of increment withholding involving unit personnel (Tr. 103-104). She has advised the principals on procedural prerequisites to withholding and on the need for supporting documentation and the proper formatting of responses. She does not, however, play a role in making the decision to withhold an increment (Tr. 155-157).

ANALYSIS OF ISSUES AND CONCLUSIONS OF LAW

1. The Hearing Officer first considers whether the Research Assistant is a "confidential employee" within the meaning of the Act. N.J.S.A. 34:13A-5.3 excludes confidential employees from the protections and rights afforded by the Act. N.J.S.A. 34:13A-3(g), added to the Act in 1974, defines "confidential employees" to mean those "...employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties." ^{6/}

^{6/} Prior to this statutory addition, N.J.A.C. 19:10-1.1 defined confidential employee as "...any employee for whom a principal duty is to assist and act in a confidential capacity to persons who formulate, determine and effectuate management policy in the area of labor relations...The term 'confidential employee' shall be narrowly construed." This definition has since been deleted from our regulations. (Continues)

The Commission and the Director of Representation have decided a myriad of cases involving questions of confidential employee status. Each case has turned on a close examination of its own facts, rather than on a mechanical application of broad legal principles. The Director of Representation's three most recent decisions in this area establish the contours of legal analysis and illustrate the significance of particular facts within these contours. See In re Jersey City, D.R. No. 80-36, 6 NJPER 278 (¶ 11132, 1980) ("Jersey City"); In re Township of Parsippany-Troy Hills Board of Education, D.R. No. 80-35, 6 NJPER 276 (¶ 11131, 1980) ("Parsippany-Troy Hills"); In re Little Ferry Board of Education, D.R. No. 80-19, 6 NJPER 59 (¶ 11039, 1980) ("Little Ferry"). ^{7/}

In Jersey City, the Director of Representation concluded that the Director and Assistant Director of Nursing Services were not confidential employees. These employees, while present at negotiations sessions, were not part of the employer's negotiating team, did not prepare, evaluate, review, or have knowledge of or input into the employer's proposals, and did not evaluate the feasibility

^{6/} (Continuation)... The Federal Labor Management Relations Act, 29 U.S.C. 141 et. seq., does not contain a statutory definition of confidential employee. Instead, case law has developed an exclusion for employees who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. See, e.g., Ford Motor Co., 66 NLRB 1317, 17 LRRM 394 (1964); Gorman, Basic Text on Labor Law, pp. 38-39 (1976). Apparently, private sector precedent formed the basis for the definition previously found in N.J.A.C. 19:10-1.1.

^{7/} The following decisions also contain helpful discussions of confidential employee status. In re Passaic County Regional High School District No. 1, Board of Education, P.E.R.C. No. 77-19, 3 NJPER 34 (1976), affirming H.E. No. 77-3, 2 NJPER 268 (1976); In re Board of Education of Township of West Milford, P.E.R.C. No. 56 (1970); In re Woodbridge Township Board of Fire Commissioners, District No. 1, P.E.R.C. No. 51 (1974); In re Springfield Board of Education, E.D. No. 52 (1974); In re Plainfield Board of Education, E.D. No. 1 (1970); In re Jersey City Board of Education, D.R. No. 80-15, (Continues)

and implications of the union's negotiations proposals. Further, the Director did not exercise discretion in resolving grievances and was only involved in grievances at a low level which the employee representative was free to bypass while the Assistant Director had no involvement in the grievance process.

In Parsippany-Troy Hills, the Director of Representation found that the Secretary to the Assistant Superintendent of Planning and Evaluation was a confidential employee. There, the Assistant Superintendent participated on an administrative team which reviewed negotiations proposals. He received confidential envelopes from the Director of Employee Relations containing negotiations proposals. After he had read the proposals, his secretary filed them in his negotiations files. In contrast to low level employees who only assembled raw data which might later be used in formulating negotiations proposals, see e.g., In re Board of Education of Township of West Milford, supra, the secretary had access to and a reasonably certain potential for knowledge of negotiations proposals and personnel files which formed the basis for management policy affecting negotiations or contract administration. The Director also noted that the secretary worked in the same location as a number of the highest ranking personnel of the Board.

In Little Ferry, the Director of Representation concluded that the secretary to the Board's Secretary/Business Administrator was a confidential employee while the secretary to the Superintendent was not. The former's boss was instrumental in reviewing the Board's

7/ (Continuation)... 5 NJPER 61 (¶ 10040, 1979); In re Rahway Board of Education, D.R. No. 80-12, 5 NJPER 506 (¶ 10261, 1979); In re Brookdale Community College, D.R. No. 78-10, 4 NJPER 32 (¶ 4018, 1977), affirming H.E. No. 77-7, 3 NJPER 108 (1977); In re Mercer County Community College, H.O. No. 80-3, 5 NJPER 336 (¶ 10181, 1979).

negotiations proposals; in assisting her boss, the secretary performed such confidential functions as typing negotiations proposals and recommended board budgets, maintaining files on negotiations and grievance information, and costing out negotiations proposals. The latter's boss played some role in developing and reviewing the Board's negotiations proposals, but the record did not disclose any instances in which his secretary utilized or was exposed to confidential labor relations materials. Thus, she typed grievance responses which had already been crystallized and needed only to be sent to the Teacher Association's grievance committee. Also, her canvassing of other school districts' salary guides involved nothing more than a collection of raw, nonconfidential data. While she did have access to locked files containing some confidential labor relations notes as well as other material, the Director concluded that this factor, standing alone, did not make her a confidential employee.

In the instant case, one of the persons directing the Research Assistant -- the Assistant Superintendent for Personnel/Educational Services -- unquestionably formulates, determines, and effectuates management's labor relations policy. Thus, the Assistant Superintendent serves on the Board's negotiating team along with the Board's Secretary/Business Administrator, makes decisions at the mandatory second step of the grievance procedure, reviews all observations and evaluations of professional staff, and recommends personnel policies. Compare Parsippany-Troy Hills; Little Ferry; In re Plainfield Board of Education, supra (secretary to Assistant Superintendent of Schools for Personnel and Curriculum is a confidential employee).

The Assistant Superintendent for Personnel/Educational Services entrusts the Research Assistant with functional responsibilities which constitute a significant part of negotiations and contract administration. Thus, with respect to negotiations, the Research Assistant is closely involved in the initial critique of the Association's proposals and the item-by-item preparation of the Board's negotiations package. Based on her research, she advises the board's negotiating team of the illegality and wisdom of particular clauses. Further, with respect to grievances, she has responsibility for maintaining a status log, developing background information on each grievance, and assisting with the formulation of the Assistant Superintendent's second step response.

The role the Research Assistant plays as part of her assigned job duties in negotiations and contract administration necessarily results in her obtaining confidential information which might compromise the Board's labor relations policy if leaked to the Association. ^{8/} Thus, far from only having access to raw data, she gained knowledge of each negotiations proposal the Board made and also the proposals the Board choose not to make or to reserve for fall back position purposes. Compare Parsippany-Troy Hills; contrast Jersey City, supra. For example, she knew the maximum percentage of salary increase the Board was prepared to offer unit

8/ The Hearing Officer rejects the Association's contention that the Research Assistant has gained such knowledge as a matter of happenstance rather than from performing her duties. The Assistant for Personnel/Educational Services has clearly required her involvement in the negotiations process by assigning her concrete duties, such as summarizing management concerns, reviewing Association proposals, meeting to prepare Board proposals, maintaining a grievance status log, performing research on grievances, and reviewing grievances with him.

members. She also has advance knowledge of management's thinking and strategy on each grievance and of the evidence that it will use to support its position. Compare In re Township of Dover, supra (secretary to Assistant Superintendent a confidential employee because she had intimate knowledge of Board's position on grievances since her boss handled second step grievances); In re Passaic County Regional High School District No. 1, Board of Education, supra.

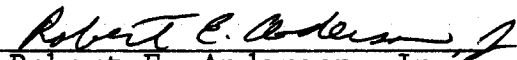
Viewed from the perspective of potential conflict of interest, the responsibilities and knowledge of the Research Assistant establish the necessity of her removal from the Association's unit. In effect, she serves as part of the Board's negotiating team during the stages prefatory to submission of the Board's initial proposal. Were her advice on the illegality of certain clauses ^{9/} or her summary of concerns distorted, the solidarity of the Board's negotiations team would be splintered. Were her background research or input on grievances biased or her status log inaccurate, management's handling of grievances would be undermined. Additionally, management's ability to withhold increments in appropriate cases would be eviscerated if the Research Assistant did not provide reliable advice on proper procedures and documentation. Compare In re Plainfield Board of Education, supra.

9/ While she bases this advice on her reading of public materials rather than on confidential information, it is the possibility of skewed advice and not the nature of its source that raises a question concerning her loyalty and hence her status.

In sum, the undersigned concludes that Parsippany-Troy Hills and Little Ferry's discussion of the confidential status of the secretary to the Board's Secretary/Business Administrator are factually closer to the instant case than Jersey City and Little Ferry's discussion of the nonconfidential status of the secretary to the Superintendent. The Research Assistant performs duties intimately connected to collective negotiations and contract administration and gains knowlege of information which the Board legitimately needs to keep secret. The responsibilities she must meet and the knowlege she obtains make membership in the Association's unit incompatible with the performance of her official duties. 10/

CONCLUSIONS AND RECOMMENDATIONS

Upon consideration of the entire record and the foregoing discussion, the Hearing Officer concludes that the Research Assistant is a confidential employee within the meaning of the Act. Accordingly, the Hearing Officer recommends the removal of this position from the Association's negotiations unit.


Robert E. Anderson, Jr.
Hearing Officer

DATED: July 6, 1981
Trenton, New Jersey

10/ Based on this conclusion, the undersigned need not and does not consider whether the recognition clause of the 1978-1981 contract encompasses the position of Research Assistant.