E. D. No. 16

STATE OF NEW JERSEY

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST PATERSON BOARD OF EDUCATION

Public Employer - Petitioner

and Docket No. CU-4

WEST PATERSON EDUCATION ASSOCIATION

Employee Organization

DECISION

Pursuant to Notice of Hearing to resolve a question concerning the unit status of certain job classifications of the West Paterson Board of Education, a hearing was held on March 17, 1970, before Hearing Officer Jeffrey B. Tener. All parties were given full opportunity to examine and cross-examine witnesses, present evidence and to argue orally. Thereafter, the Hearing Officer issued his Report and Recommendations, attached hereto and made a part hereof. Time for filing exceptions was extended, upon the request of the Petitioner, but no exceptions have been timely filed. The Executive Director has considered the record and the Hearing Officer's Report and Recommendations and on the basis of the facts in this case finds:

1. The West Paterson Board of Education is a public employer within the meaning of the Act, and is subject to its provisions.

2. The West Paterson Education Association is an employee representative within the meaning of the Act.

3. The Employer's petition for clarification seeks to exclude

from the negotiating unit the classifications of principals, vice-principals and supervisor of nurses. The employee representative contends that these classifications belong in the unit. Therefore, there is a question regarding the composition of the unit and the matter is properly before the undersigned for determination.

4. In the absence of Exceptions to the Hearing Officer's Report and Recommendation, the undersigned adopts the Hearing Officer's findings and recommendations pro forma. Accordingly, the petition is dismissed.

Louis Aronin
Executive Director

Dated: September 14, 1970
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST PATERSON BOARD OF EDUCATION

Petitioner - Public Employer

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Appearances
For the Public Employer: Harold L. Ritchie, Superintendent
For the Employee Organization: Cassel R. Ruhlman, Jr., Esquire

REPORT AND RECOMMENDATIONS

A petition was filed with the Public Employment Relations Commission on October 31, 1969 by the West Paterson Board of Education requesting a clarification of unit. Pursuant to a Notice of Hearing and two subsequent Orders Rescheduling Hearing, a hearing was held before the undersigned Hearing Officer on March 17, 1970, in Newark, New Jersey, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Upon the entire record in the proceeding, the Hearing Officer finds:

1. The West Paterson Board of Education is a public employer within the meaning of the Act and is subject to the provisions of the Act.

2. The West Paterson Education Association is an employee representative within the meaning of the Act.

3. The employee representative disagrees with the public employer that certain job titles should be excluded from the negotiating unit. Therefore, there is an appropriate question regarding the composition of the unit before the Hearing Officer for Report and Recommendations.

The public employer's petition for clarification filed October 31, 1969 requests that principals, vice-principals, and the supervisor of nurses be excluded from the unit.

The employer filed this petition even though he had voluntarily recognized the West Paterson Education Association as the "exclusive and sole representative for collective negotiations concerning the terms and conditions of employment" in a unit which specifically includes classroom teachers, nurses, psychologist, home instruction teachers, attendance officers, vice-principals, principals, custodians, custodian in charge of maintenance, secretaries and clerks but which specifically excludes the superintendent of schools and the secretary to the Board of Education. 1/

The recognition clause of the contract clearly includes the positions which the employer, though these proceedings, seeks to exclude.

There is no indication that this recognition was conditional upon the outcome of a proceeding before the Public Employment Relations Commission. There is no evidence that a reservation was filed by either party regarding the appropriateness of the recognized unit.

Furthermore, there is no evidence that the functions of the principals and vice-principals - positions which have been in existence for a number of years - have changed substantially subsequent to recognition although for the first time in the 1969-1970 school year, each principal was required to make a recommendation with respect to every teacher in his building. Prior to 1969-1970, principals were

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1/ Page 1.1 Article I of Agreement between the parties dated March 9, 1969 and received in evidence as Employee Organization Exhibit 1.

asked to make recommendations on non-tenure teachers only. However, this represents simply an extension of an old duty rather than addition of a new duty. It is true that the position "supervisor of nurses" is a new position which was decided upon about the time of the 1969-1970 contract negotiations. However, because the presently recognized unit is so broad - only the superintendent and board secretary are excluded - it is doubtful that the creation of this new title would justify formal clarification of unit proceedings.

On the facts outlined above - voluntary recognition of a broad unit by the public employer - there is a legitimate question as to the need for these proceedings. It would not be unreasonable in the opinion of the undersigned to contend that the unit does not require clarification and that, therefore, the petition should be dismissed.

However, the Commission or the Executive Director might prefer to consider the merits of the case. Arguably, the Board of Education did not anticipate the implications of recognizing a unit which included allegedly supervisory positions. Therefore, the Hearing Officer will make a Report and Recommendations based upon the entire record.

Issues

1. Managerial Executives. The first issue relates to whether or not the occupants of the positions in dispute are managerial executives. If they are managerial executives, as contended by the petitioner, then they would be excluded from coverage under the Act wherein it is provided as follows:

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to any managerial executive except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent... (Emphasis supplied)

2. Supervisors. The second question is whether or not the occupants of the positions in question are supervisors. The Act refers to supervisors as those "... having the power to hire, discharge, discipline, or to effectively recommend the same..."

3. Community of Interest. The statute specifies that "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned..." (Emphasis supplied) Accordingly, to uphold the petitioner would require a finding that the negotiating unit, as presently consituted, does not give "due regard" to the community of interest among the employees concerned.

4. Established Practice, Prior Agreement or Special Circumstances. Finally, if the occupants of the positions in question are found to be supervisors and if they are found to have a community of interest with nonsupervisors, the question becomes that of whether or not established practice, prior agreement or special circumstances justifies including supervisors in a unit with non-supervisors in view of the general statutory proscription in Section 7:

> ... nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor...have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership...

This proscription is repeated in Section 8(d):

> The division shall decide in each existence 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 non-supervisors...

Managerial Executives

The term "managerial executive" is not defined in the New Jersey Employer-Employee Relations Act although the Act does provide that "... in a school district the term managerial executive shall mean the superintendent of schools or his equivalent..."

The Commission in P.E.R.C. No. 8, West Orange Board of Education and Elizabeth Wilton and Administrators Association of West Orange Public Schools, found that the Director of Elementary Education is not a managerial executive because she is not "...the superintendent of schools or his equivalent..."

In the instant matter, there is a superintendent and he is different from the principals, vice-principals and supervisor of nurses. Therefore, the occupants of the disputed positions are not the superintendent or his equivalent.

Furthermore, the record does not support a claim that the positions in dispute are occupied by managerial executives.

The only evidence - aside from the contention that they are managerial executives - is that each principal comes in to work for three days during the summer when the superintendent is on vacation to provide coverage in his absence. The principal assumes the authority of the superintendent during this three-day period. (T.82)

The evidence offered does not support a finding that principals, vice-principals, and the supervisor of nurses are managerial executives and the undersigned so finds.

Supervisors

The superintendent stated that "A principal in West Paterson is required to evaluate teacher, clerical, and custodial performance and upon this basis recommend that the employee be rehired, dismissed, placed under tenure, and compensation." (T.15) The Association President confirmed that principals do evaluate teachers. (T.43)

The testimony of two of the three principals in the district also indicates that principals do make recommendations which are apparently effective at least to the extent that they are virtually always followed regarding the retention or non-retention of non-tenure teachers. Principals do not interview candidates for employment on a regular basis although they have interviewed in some cases. The record indicates that in most cases, the principal and superintendent have been in agreement on whether or not to hire a person for a position and there is at least one instance in which a principal testified that, as a result of his discussion with the superintendent, a person was not offered a position although the superintendent had been considering engaging the particular individual. In this case,

the recommendation obviously was effective.

The authority of the principal in the area of discipline must be considered. One principal testified that teachers in his building are subject to his discipline. What this meant, however, was that the principal would report matters to the superintendent if he felt discipline was called for. The principal himself cannot impose penalties, punishment, suspension or other disciplinary measures.

This seems to describe a recommendation regarding discipline and there is some indication that this recommendation is effective and no evidence that it is not effective.

The principals do attempt to correct abuses or shortcomings such as tardiness of teachers by discussing problems with them. If the problem persists, the principal reports the matter to the superintendent. It is clear that the principals do make effective recommendations regarding non-tenure teachers and, starting this year, they have been asked to observe and evaluate each teach in their school three times and to make recommendations with respect to that teacher on matters such as increments, reassignment and so on. On these facts, the Hearing Officer finds the principals to be supervisors within the meaning of the Act.

The record indicates that although vice-principals are full-time classroom teachers, they do have all of the powers and responsibilities of principals when principals are absent. They fill in regularly at lunch time as well as when principals are ill or at conferences.

They are paid $1500 more than classroom teachers although they are paid on the teachers' salary guide rather than on a ratio as are the principals. Therefore, they, too, are found to be supervisors.

The above findings are in conformity with the decision of the Commission in P.E.R.C. No. 27, Montgomery Township Board of Education and Montgomery Township Education Association and with the decision of the Executive Director in E.D. No. 3, Willingboro Board of Education and Willingboro Education Association.

The supervisor of nurses is a title that was created this year, having been proposed by the Board of Education. There is no written job description. The position carries a stipend of $300 a year above the nurses' guide. The incumbent of this position testified that her duties have not changed since she got the title and that she has not been asked to do more than she had been doing. She is still a school nurse assigned to a particular school and it seems that her duties do not differ appreciably from those of the other two school nurses. No attributes of a supervisor as defined in the Act were ascribed to her at the hearing. The supervisor of nurses is not found to be a supervisor within the meaning of the Act.

Community of Interest

The positions in question are in the negotiating unit which has been recognized voluntarily by the Board of Education. This fact alone provides substantial basis for a finding that a community of interest exists. The parties having agreed upon a unit themselves, it can be assumed - at least at the time of recognition - that both parties recognized the unit as appropriate. All employees of this public employer share many aspects of the employment relationship. Suffice it to say that virtually all benefits received by teachers and the occupants of the positions in question are identical except that, as 12-month as opposed to 10-month employees,

principals receive 12 sick days a year compared to 10 sick days for 10-month employees. Vice-principals receive the same pay as teachers plus an additional stipend. Principals are paid on a ratio based upon the teachers' salary guide. Thus, their salaries are really fixed at the time the teachers' guide is fixed unless the ratio is changed. Obviously, both vice-principals and principals are concerned with the determination of the teachers' guide.

Furthermore, the Board has offered no evidence that the present relationship in which principals and vice-principals are in the same unit as classroom teachers has had any serious affects on the school system although the superintendent contends that the potential for such conflict is present. The undersigned recognizes that principals in their roles as supervisors will have to take certain actions and make decisions which are covered by the collective agreement. There may be some conflict between a principal as a unit member and a principal as a supervisor. Nevertheless, inspite of the general provision of the law under which supervisors and nonsupervisors are to be in separate units, Chapter 303 does permit a conbined unit of supervisors and nonsupervisors "...where dictated by established practice, prior agreement, or special circumstances."

Based upon the above, the Hearing Officer finds that, in this case, the principals and vice-principals do have a community of interest with nonsupervisory employees. Therefore, the question of whether or not there is "established practice, prior agreement or special circumstances" must be faced. The supervisor of nurses, who was found not to be a supervisor within the meaning of the Act, is found to have a community of interest with other nonsupervisory employees.

Established Practice, Prior Agreement, Special Circumstances

In spite of a general prohibition against a unit which includes supervisors and nonsupervisors, the Act does permit such a unit in certain situations. These will be considered in turn.

First, is there an "established practice" which would justify a combined unit of supervisors and nonsupervisors?

The President of the Association testified that he believes that principals and vice-principals have always been members of the Association. (T.28) Negotiations which began in the fall of 1968 and which culminated in a signed agreement March 9, 1969 for the 1969-1970 school year - the first negotiations between the parties after the passage of the Act - included principals and vice principals. The only people who were excluded were the superintendent and the board secretary. (T.31) The contract between the parties which was received in evidence clearly reflects this in the recognition article as well as the schedule on principals' salaries (Schedule A-2) and the schedule on vice-principals' salaries (Schedule A-3).

The Association President also testified that he had been active in negotiations in 1965 for the 1966-1967 school year. In describing these negotiations, he said that "They were similar to those that we had last year." (i.e. 1968 which was after the enactment of Chapter 303 and which led to a written agreement) (T.38) He said that:

> There were proposals and counter-proposals made on both sides. There were arguments, give and take, discussions, and finally an agreement was reached. (T.38)

This agreement did cover principals and vice-principals. Received in evidence were the written proposal of the Association (Exhibit E.O.2) and the written "Results of the negotiations between the West Paterson Board of Education and the West Paterson Education Association."

(Exhibit E.O.3) The proposal and the final agreement are not the same. The witness testified that the agreement that was reached resulted from a series of meetings - probably more than five - with written proposals and counter-proposals coming from both the committee which represented the Board and the committee which represented the Association. The Association committee did include a principal. These meetings were not public Board meetings but rather were held at times mutually agreeable to both sides. This witness also testified that the Association could and on occasion did process grievances prior to 1968 (T.52) and that no other organization has ever represented any group of employees of the West Paterson Board of Education. (T.54)

A teacher who served as chief negotiator for the Association for the 1967-1968 agreement and as a member of the negotiating committee for the 1968-1969 agreement described negotiations in terms similar to those used to describe the 1966-1967 negotiations. In the negotiations which led to agreements for both the 1967-1968 and 1968-1969 school years, there were a number of meetings - perhaps six or seven each year - attended by committees of the two sides and including principals on the Association side. There were both written and oral proposals and counter-proposals and finally an agreement. Some of the written proposals and counter-proposals as well as the final agreements were received in evidence. At the meetings there was "...discussion of the proposals, counter-proposals, give and take, and discussions of various items until we finally came to the conclusion and settled the contract..." (T.60 and 61) Again, in both these years the agreements which were reached did cover both principals and vice-principals.

The undersigned finds that the relationship which existed between the parties at least since 1965 and prior to the passage of

Chapter 303 does constitute "established practice" in that there were negotiations each of these three years and these negotiations did include both principals and vice-principals.

Second, was there "prior agreement" as the Association contends? The term "prior agreement" must be distinguished from "established practice." Otherwise, it would not have been necessary to list both of these terms in the statute. In the opinion of the undersigned, the term "prior agreement" is different from "established practice" in that there is no requirement that the "prior agreement" had existed long enough to be "established." But it goes beyond "established practice" in that the agreement had to take a specific form. It seems reasonable to conclude that this form must have been written and that it must have been signed by the parties. The agreement in this case meets the former test but not the latter. It was written but it did not assume the form of a contract which was signed by both sides. Accordingly, the Hearing Officer does not find "prior agreement" in this case.

Finally, nothing has been offered which, in this Hearing Officer's opinion, constitutes "special circumstances" in this case. Therefore, there is no finding of "special circumstances".

Recommendation

Having found 1) that principals, vice-principals and the supervisor of nurses are not managerial executives, 2) that the principals and vice-principals are supervisors within the meaning of the Act but that the supervisor of nurses is not a supervisor, 3) that principals, vice-principals and the supervisor of nurses do have a community of interest with other unit employees, and 4) that there is established practice to warrant the inclusion of supervisory principals and vice-principals with nonsupervisory employees

in this case, it is recommended that the petition for clarification of unit be dismissed. The positions in questions should remain in the negotiating unit. There is no question of majority representative and there is no need for an election.

Jeffrey B. Tener
Hearing Officer

DATED: August 4, 1970
Trenton, New Jersey