

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

In the Matter of

TOWNSHIP OF WARREN,

Public Employer,

-and-

COUNCIL #73, AMERICAN FEDERATION
OF STATE, COUNTY & MUNICIPAL
EMPLOYEES, AFL-CIO,

DOCKET NO. CU-80-9

Petitioner,

-and-

WARREN TOWNSHIP PLANNING BOARD,

Party-at-Interest.

SYNOPSIS

The Director of Representation finds that the Township and the exclusive representative of white collar employees did not intend to include the Planning Board Clerk in the negotiations unit upon its establishment, and determines that the exclusive representative may not utilize a clarification of unit petition to seek to include the Clerk in its negotiations unit. The Director determines that the issue raises a question concerning representation, and therefore, adopting the recommendations of a Hearing Officer in this regard, dismisses the clarification of unit petition.

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WARREN TOWNSHIP PLANNING BOARD,

Party-at-Interest.

Appearances:

For the Public Employer & Party-at-Interest
Appruzzese & McDermott, attorneys
(Frederick T. Danser of counsel)

For the Petitioner
Carlton Steger, Council Representative

DECISION

A Petition for Clarification of Unit was filed on August 17, 1979, with the Public Employment Relations Commission (the "Commission") by Council #73, American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME"). AFSCME is the exclusive representative of white collar employees employed by the Township of Warren (the "Township") and a dispute has arisen

concerning the inclusion of the Clerk of the Warren Township Planning Board (the "Board") in the unit.

Pursuant to a notice of hearing, a hearing was conducted before Hearing Officer Arnold H. Zudick, on October 10, 1980, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. Thereafter, the Hearing Officer, on January 9, 1981, issued his Report and Recommendations, a copy of which is attached hereto and made a part hereof. On January 22, 1981, AFSCME filed exceptions to the Hearing Officer's Report and Recommendations. Neither the Board nor the Township excepted to the Hearing Officer's Report, nor have they filed a reply to AFSCME's exceptions. The undersigned has carefully considered the entire record herein, including the transcript, the exhibits, the exceptions, and the Hearing Officer's Report and Recommendations, and finds and determines as follows:

1. The Township of Warren 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"), and is subject to the provisions of the Act.

2. Council #73, American Federation of State, County and Municipal Employees, AFL-CIO, is an employee representative within the meaning of the Act and is subject to its provisions.

3. AFSCME has filed a Petition for Clarification of Unit seeking a determination concerning the composition of the white collar negotiations unit of Township employees which it represents. Specifically, AFSCME asserts that the title of

Planning Board Clerk is included in its unit. The Township and the Planning Board asserted that the title in question was not placed in the white collar unit at its formation and object to the inclusion of this position in the unit at this time.

4. The Hearing Officer found that the disputed title was in existence at the time the unit was formed and that the parties did not intend to include the title in the unit. The Hearing Officer recommended the dismissal of the Petition because a clarification of unit petition was an inappropriate means for adding a title where the parties had previously intended the exclusion of the title.

5. AFSCME excepted to the Hearing Officer's finding that it was aware of the existence of the title in question at the time of the consent election agreement conference which preceded the election and certification issued in this unit by the Commission. AFSCME also excepted to the Hearing Officer's finding that, at the consent conference, there was a mutual intent to exclude the title in question from the negotiations unit.

In In re Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979), aff'd P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11029 1979), the undersigned adopted the National Labor Relations Board precedent which precludes the utilization of a clarification of unit petition in order to include a classification of employees which were in existence at the time the negotiations unit was formed. See also In re Fair Lawn Bd. of Ed., D.R. No. 78-22,

3 NJPER 389 (1977). Normally, where it is found that a particular employee title or group of employees was in existence at the time of the formation of the negotiations unit, a clarification petition should be dismissed unless there is evidence of a mutual intent on the part of the parties to include the classification within the recognition clause of their agreement. Wayne, supra, at 423.

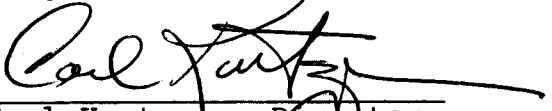
Having reviewed the record herein, the undersigned finds ample evidence to support the Hearing Officer's conclusion that the Planning Board Clerk position was in existence at the time the unit was established, and AFSCME was aware of its existence. The transcript and documentary evidence establish that the Planning Board Clerk title and its occupant was not included among the titles included in the unit. At the consent conference, the Township indicated that it would not consider this title as included in the unit, and AFSCME apparently acquiesced. AFSCME advised its supporters that it would seek the inclusion of the disputed title subsequent to the election by filing a clarification of unit petition. AFSCME received a copy of the eligibility list for the election which was prepared by the Township, and did not raise a dispute concerning the omission of the title and occupant from the list.

The undersigned concludes from the above that the Planning Board Clerk was not intended to be included in the unit at the time unit members were afforded an opportunity to vote for or against representation. If the Commission were to permit a clarification of unit petition under those circumstances, it

would be approving a procedure which might lead to the addition of the occupant of the title to the unit in the face of the illegitimate disenfranchisement of that employee's voting rights in the previously conducted representation election.

Accordingly, since the undersigned finds that there was no mutual intent on the part of the parties to include the classification within the recognition clause of their agreement, it follows that the petition raises a question concerning representation. Therefore, the undersigned concludes that the Hearing Officer correctly found the clarification of unit petition to be a procedurally incorrect vehicle to accomplish the inclusion of the title in question in the unit, and hereby dismisses the instant Petition. ^{1/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: August 27, 1981
Trenton, New Jersey

^{1/} Having concluded that the Association's filing of a clarification of unit petition is inappropriate, necessitating the dismissal of the petition, the undersigned need not address at this juncture the additional issues raised before the Hearing Officer.

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

In the Matter of

TOWNSHIP OF WARREN,

Public Employer - Respondent,

- and -

COUNCIL #73, AFSCME, AFL-CIO,

Docket No. CU-80-9

Petitioner,

- and -

WARREN TOWNSHIP PLANNING BOARD,

Intervenor.

SYNOPSIS

In a Clarification of Unit Petition filed by Council #73, AFSCME, a Hearing Officer of the Public Employment Relations Commission recommends that the Warren Township Planning Board is not a public employer within the meaning of the Act, and that the Township of Warren is the public employer of the Secretary to the Board/Planning Board Clerk. The Hearing Officer found that the disputed title was not a supervisor, confidential, or managerial executive employee within the meaning of the Act.

However, the Hearing Officer recommended that the instant petition be dismissed based upon procedural grounds. Relying upon the Commission decision in In re Wayne Board of Education, D.R. No. 80-6, 5 NJPER 422 (Para. 10221 1979), affd. P.E.R.C. No. 80-94, 6 NJPER 54 (Para. 11028 1980), the Hearing Officer found that a question concerning representation existed which could not be resolved through a CU proceeding.

A Hearing Officer's Report and Recommendations 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, any 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.

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

In the Matter of

TOWNSHIP OF WARREN,

Public Employer - Respondent,

- and -

COUNCIL #73, AFSCME, AFL-CIO,

Docket No. CU-80-9

Petitioner,

- and -

WARREN TOWNSHIP PLANNING BOARD

Intervenor.

Appearances:

For the Respondent and Intervenor
Apruzzese & McDermott, Esqs.
(Frederick T. Danser of counsel)

For the Petitioner
Carlton Steger, Council Representative

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") on August 17, 1979, by Council #73, AFSCME, AFL-CIO (the "Council"), seeking a clarification of a negotiations unit which it represents, the employees of which are employed by the Township of Warren (the "Township"). The Council seeks a decision by the Commission that the title of Planning Board Clerk is included in its negotiations unit. The Township and the Warren Township Planning Board (the "Board") argue that the Board is a separate public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq.

(the "Act"), and that the disputed title is an employee of the Board and cannot be part of the Council's unit. The Township also argues in the alternative that even if the Board is not a separate public employer, that the disputed title does not have a community of interest with the Council's unit. The Township further argues and moves for dismissal of the instant petition alleging the same was the incorrect petition to file in this matter. The Council maintains that the Board is not a separate public employer, and therefore, the disputed title must be included in its negotiations unit, it also argues that the instant petition was correctly filed.

Pursuant to a Notice of Hearing dated June 4, 1980, a hearing was scheduled herein for July 29, 1980. However, the parties agreed to postpone the hearing while attempts were made to resolve the matter.^{1/} Finally, by agreement of the parties a hearing was held in this matter on October 10, 1980, in Trenton, New Jersey. All parties were given the opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Subsequent to the close of hearing the parties filed timely briefs in this matter, the last of which was received on December 22, 1980.

Based upon the entire record in these proceedings, the Hearing Officer finds:

1. The Township of Warren is a public employer within the meaning of the Act and is subject to its provisions.
2. Council #73, AFSCME, is an employee representative within the meaning of the Act and is subject to its provisions.
3. The Council seeks a clarification of the collective negotiations unit it represents of Township employees. The Council maintains that the title of Planning Board

^{1/} When the Petition was originally filed a dispute also existed with regard to the title of Municipal Court Clerk. However, prior to the hearing the Council amended its position and withdrew all of the issues with respect to that title. The instant matter, therefore, only concerns the Planning Board Clerk except to the extent set forth in footnote 2 infra.

lerk ^{2/} is included in its unit, and the Township and Board dispute that position. Therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.

4. Prior to any testimony in this matter the Township and Board moved for dismissal of the instant petition. They argued that a CU (Clarification of Unit) petition was not an appropriate petition with regard to the instant title, and that only an RO (petition for certification of public employee representative) petition was appropriate. The undersigned initially agreed to consider that motion prior to reviewing the facts with respect to the instant title. See Transcript ("T") p. 18. However, having already conducted a full hearing in this matter it would be inappropriate to consider the motion first, because regardless of which petition is proper, the Commission would, either now or at some later time, be required to determine the public employer issue and the community of interest issue of the relevant title. In addition, if there is a finding that the Board is the public employer of the instant title, or that the title is inappropriate for inclusion in the unit, a decision on the motion will be unnecessary. Furthermore, if the Director of Representation were to ultimately deny the motion to dismiss, he would then need to review the decision based upon the merits of the petition. Therefore, in the interest of preventing

^{2/} During the hearing the planning board clerk, Agnes Wimmer, testified that on October 9, 1980, the day prior to the instant hearing, she was appointed Secretary to the Board (of the Planning Board) Transcript ("T") p. 20. Ms. Wimmer also testified that on that date the Board eliminated the position of Planning Board Clerk, T. p. 22, and that now she only holds the position of Secretary to the Board.

However, the evidence shows that in past years Ms. Wimmer has performed in the capacity of Secretary/Clerk, thereby holding the positions of both Secretary to the Board and Planning Board Clerk. Ms. Wimmer testified in length concerning the duties she performs and stated that her work will not differ in anyway now than what it has been since 1966 T. p. 43. She also testified that the duties of Secretary include all of the duties of the Clerk, T. pp. 38-39, but that the Secretary duties are official and the Clerk's duties are not. T. p. 33.

Although the evidence shows a difference between the duties of Secretary and Clerk, it is very clear that Ms. Wimmer has been performing both functions, and continues to perform both functions even though the Planning Board Clerk position has been technically eliminated. Therefore, the undersigned believes that the real title at issue herein is the Secretary to the Board or the hybrid Secretary/Clerk position which Ms. Wimmer has held since 1966.

a relitigation of the same issues, a decision upon the motion will be made subsequent to a decision upon the other issues raised by the instant petition.

5. The parties agree that aside from the motion to dismiss the issues in this matter are as follows:

a) Whether the Warren Township Planning Board is a separate public employer within the meaning of the Act.

1) Whether the Planning Board Clerk or Secretary to the Board is an employee of the Board or the Township.

b) Whether the Planning Board Clerk or Secretary to the Board is a supervisor or confidential employee within the meaning of the Act.

c) Whether the Planning Board Clerk or Secretary to the Board has a community of interest with the titles included in the Council's unit.

ANALYSIS

I. Is the Warren Township Planning Board a Separate Public Employer?

A public employer is defined in the Act as follows:

... the State of New Jersey, or the several counties or municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authorities, commission, or board, of any branch or agency of the public service. N.J.S.A. 34:13A-3(c).

The Commission has interpreted the meaning of that provision on several occasions, and has concluded that public employer status is determined by a number of factors. Those factors include, but are not limited to, a review of who hires, directs and supervises the title(s) in question, who can promote, discharge or discipline the title(s) in question, and who pays the employees, and where do they work. The factors are often combined into one larger question of who controls

the "labor relations" of the affected title(s).^{3/} The Commission has adopted a policy that although one branch of the public service considers a given title under its control, the employer is actually that branch of the public service who controls the labor relations of the title(s) in question.

For example, in In re Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 137 (Para. 4069 1978),^{4/} it was determined that the Superintendent, and not Mercer County was the employer of the titles employed in the Superintendent's office. The Commission held that although the Superintendent's employees were paid from County funds that did not justify a finding that the County was the employer. The Commission found that the Superintendent hires, assigns, directs, disciplines, and discharges employees and fixes their salaries. This established an employer status over employees working for the Superintendent.

The Commission and the Courts reached a similar conclusion in finding that the county prosecutors were public employers over their employees and not the county itself even though the employees salaries were paid from county funds.^{5/}

^{3/} In a matter placed before the Commission, In re Monmouth County Board of Recreation Commissioners, E.D. No. 76-36, 2 NJPER 127 (1975) (Hearing Officer's opinion attached), the Executive Director adopted the findings and recommendations of the Hearing Officer which identified some of the factors relevant to employer status identification:

These indicia have been identified as the supervisory control and authority to select, appoint, and pay employees; control over work, appointment, removal authority, duties and salaries within limits of available appropriation; day to day control of personnel practice, final control of wages, personnel selection; and the right to select the employees, the power to discharge him, and the right to direct both the work to be done and the manner in which such work shall be done. (Citations omitted).
2 NJPER, at 132, 133.

^{4/} Request for review denied P.E.R.C. No. 78-78, 4 NJPER 221 (Para. 4111 1978), Affd. App. Div. Docket No. A-4586-77, February 28, 1980.

^{5/} In re Berger and Mercer County Prosecutors, D.R. No. 78-34, 4 NJPER 104 (Para. 4047 1978), Affd. P.E.R.C. No. 78-77, 4 NJPER 220 (Para. 4110 1980), Affd. App. Div. Docket No. A-4785-77 February 28, 1980).

The facts of the instant matter raise a peculiar issue. There is no doubt that the Board is a public entity. The question is whether the Board is really an employer. The undersigned finds, after reviewing the evidence, that the Board does not exercise most of the normal indicia of labor relations control over the instant title and is therefore not the employer of the Secretary to the Board/Planning Board Clerk.

The evidence reveals several important facts. First, the Board is not really an autonomous body separate and apart from the Township, and Township control. The facts show that the Board itself is composed of nine members, all of whom are appointed by the Township Committee. Moreover, two of the Board members are actually Township Committee members, one is an official of the Township, and one is a member of the Township Environmental Commission.^{6/} The remaining members are not affiliated with the Township. Nevertheless, this demonstrates that the Township can exercise substantial control over the creation and operation of the Board, and that Board decisions are, to some extent, decisions of the Township since Township officials and committee members serve on the Board.

Second, the Board has no taxing authority of its own, but fees are collected from the filing of documents with the Board.^{7/} These filing fees are turned over to the Township's treasurer and co-mingled with other Township funds.^{8/} Although the accounting figures itemize how much money is collected from the Board and paid out on behalf of the Board, the evidence shows that the Board does not keep money separate and apart from the Township, and that it does not have a separate salary account of its own. Ms. Wimmer is paid from the Township's general salary account and on a Township check.^{9/}

^{6/} T. p. 63.

^{7/} T. p. 63.

^{8/} T. pp. 64, 83-84, 93.

^{9/} T. pp. 52, 85.

Third, the Board is required to prepare a budget which is included in the overall Township budget.^{10/} Mr. Schuster, the Township Administrator, testified that the Board's budget is submitted to the Township Committee in the form of a recommendation, and the Township Committee has the authority to approve or disapprove that budget.^{11/} Under these circumstances the Township has final authority over the Board's operating budget which is another indication of the degree to which the Township controls the Board's operations.

Fourth, the evidence shows that the Board's offices are located in the Township municipal building;^{12/} that Ms. Wimmer gets the same benefits and insurance coverage as Township employees;^{13/} that the Township Clerk keeps the records of Ms. Wimmer's vacation and sick leave as well as all Township employees;^{14/} and, that when Ms. Wimmer is on leave or needs assistance she is replaced or assisted - at least with respect to her clerical functions - by a regular Township clerk.^{15/} The evidence further shows that when Ms. Wimmer schedules a vacation or seeks approval for compensatory time she must check with the Board Chairmen as well as the Township Administrator;^{16/} and, that Ms. Wimmer has spoken with the Township Administrator concerning a salary increase.^{17/} These factors, especially when considered in conjunction with the other factors, demonstrate that most of the labor relations aspects of the Board's operations are intertwined with those of the Township.

^{10/} T. p. 48.

^{11/} T. pp. 75-76.

^{12/} T. p. 44.

^{13/} T. pp. 51, 53.

^{14/} T. p. 89.

^{15/} T. pp. 46, 52-53, 90.

^{16/} T. p. 52, 55.

^{17/} T. pp. 50, 86.

Based upon the above factors and the cited cases the undersigned believes that the Board is not a public employer separate and apart from the Township. The Board itself is comprised of Township officials, the Board's budget is controlled by the Township, Ms. Wimmer is paid by the Township, and a portion of her work is often done by Township clerks. Consequently, the Board is too closely aligned with the Township to be considered a separate public employer.

Further evidence that the instant title is employed by the Township is available upon examining the joint exhibits. Exhibit J-5, a copy of the January 1980 minutes of the Board's organizational meeting, show that Ms. Wimmer was appointed Secretary/Clerk and:

shall receive such remuneration
therefore as is provided by the
Township Committee.

If the Board were Ms. Wimmer's employer it could fix her salary itself. Exhibits J-3A and J-3B, are copies of Township ordinances listing the titles and salaries to be paid to certain Township employees, and the Planning Board Clerk is among them. The evidence supports the Council's contention that the Township is Ms. Wimmer's employer.

II. Supervisory or Confidential Status, and Community of Interest

The Township (and Board) argued in the alternative that even if the Township were the employer of the disputed title, that said title was supervisory and/or confidential or managerial and lacked any community of interest with the remainder of the Council's unit. The undersigned, however, cannot agree. The evidence demonstrates that Ms. Wimmer is neither a supervisor nor confidential or managerial employee within the meaning of the Act. In the first instance Ms. Wimmer has no one to supervise. The record shows that although Township clerks occasionally assist Ms. Wimmer, they are not permanently assigned to that department (the Board). Ms. Wimmer admitted that no one ever told her whether she had the authority to recommend firing, and she has never

exercised any authority of that nature.^{18/} She also testified that she doesn't think that such recommendations are her responsibility, but would be the Township Administrators'.^{19/} Ms. Wimmer further testified that she has never had an occasion to interview or hire an employee on behalf of the Board or Township.^{20/}

The only hint of supervisory authority that Ms. Wimmer has exercised was an oral recommendation that a particular Township clerk not be asked to assist her again at the Planning Board.^{21/} This was not a recommendation concerning hiring or firing and does not meet the definition of supervisor within the meaning of the Act.^{22/}

Ms. Wimmer did testify, however, that if she obtains a full or part-time assistant that she thinks she would make recommendations on hiring and would be in a position to recommend discipline or discharge of such a future employee.^{23/} Despite Ms. Wimmer's belief of what her future responsibilities might include, that does not establish her position as a supervisor within the meaning of the Act at this time. If Ms. Wimmer actually performs those duties at some future time the Township could raise anew the supervisory issue.

^{18/} T. P. 49.

^{19/} T. P. 61.

^{20/} T. p. 62.

^{21/} T. p. 61.

^{22/} A supervisor within the meaning of the Act is defined as one who has the ability to hire, discharge, discipline or effectively recommend the same. N.J.S.A. 34:13A-5.3.

^{23/} T. pp. 67-68.

The Township's argument with respect to confidential status is without merit. The Township never even suggested that Ms. Wimmer is in any manner involved with negotiations that affect the Council's collective agreement. The Township only suggests that Ms. Wimmer performs work of a confidential nature, but it does not meet the definition of confidentiality as set forth in the Act.^{24/}

The Township also maintained that Ms. Wimmer was a managerial executive within the meaning of the Act and must therefore be excluded from any negotiations unit. Managerial executives are defined as:

...persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices....
N.J.S.A. 34:13A-3(f).

Although Ms. Wimmer performs several important functions with respect to her Secretary to the Board position, none of the evidence even suggests that she is in any way responsible for the formulation of Board policies and practices, nor does she direct the effectuation of such policies. The evidence merely establishes that she performs (rather than directs) the duties she is instructed (by the Board) to perform. This does not classify her position as a managerial executive.

Having found that Ms. Wimmer is neither a supervisory nor confidential or managerial employee, and having found that Ms. Wimmer receives the same benefits as other Township employees, reports to Mr. Schuster as do other Township employees, and performs work which other Township employees occasionally perform, the undersigned

24/ Confidential employees are defined as:

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

believes that a community of interest exists between her position and the remainder of the Council's unit. The fact that Ms. Wimmer occasionally works part of her 35 hours a week at night, or performs official Planning Board work, does not negate the fact that she shares a basic community of interest with other Township employees.

III. The Motion to Dismiss

Although Commission Rules and Regulations do not specify when CU petitions may be filed, the Commission policy with respect to the filing of CU petitions has been enunciated in two leading decisions. In In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), the Commission defined the difference between CU and RO petitions, set forth the various uses of a CU petition, and when they may be filed, and indicated when CU determinations would be effective. In In re Wayne Board of Education, D.R. No. 80-6, 5 NJPER 422 (Para. 10221 1979), affd. P.E.R.C. No. 80-94, 6 NJPER 54 (Para. 11028 1980), the Commission set forth a test to be applied to determine whether a CU petition is appropriate in a given set of circumstances.

In Clearview, supra, the Commission indicated that there are two categories of proceedings to resolve disputes concerning representational status. First, those proceedings which resolve questions concerning representation through election, and second, those proceedings which resolve questions concerning the composition of bargaining units by interpreting the existing language that defines the unit. The Commission stated that RO petitions are filed in instances where unrepresented employees seek to form a unit; where unrepresented employees seek to be added to a unit already in existence; where represented employees seek to become part of another unit; and other

situations. It also stated that CU petitions are filed to determine whether a particular title is contemplated within the scope of the unit. Examples of when CU petitions are filed are where there are changes in the job functions of a particular title; when a new title is created entailing job functions similar to those already covered by the unit; and when either party to a collective agreement seeks the exclusion of a given title(s) because of its managerial, confidential or supervisory status.

In Wayne, supra, the Commission actually clarified the distinction between CU and RO petitions. The Commission held that it was inappropriate to use CU petitions to include a title(s) which was in existence at the time the unit was formed, or where a union had, for a considerable period of time, "slept on its rights" concerning the unrepresented title.^{25/} The Commission stated that under these circumstances a question concerning representation exists and the CU petition should be dismissed. In Wayne the Commission further indicated that when a disputed title existed at the time the unit was formed, as the Secretary to the Board/Clerk was in the instant matter, a determination must be made as to whether there was a mutual intent by the parties to include that title within the unit recognition clause. In the absence of a mutual intent to include the title a question concerning representation exists and a CU petition would be dismissed.

The Commission established the following criteria to utilize in a CU proceeding to determine whether a question concerning representation exists:

1. Whether there was a mutual intent to include the disputed title,
2. Where an intent to include was initially present, it must then be determined whether the subsequent conduct of the parties demonstrated a mutual agreement to exclude the title, and,

^{25/} In re Wayne Board of Education, supra, at slip. op. p. 5.

3. Whether the subsequent conduct of the majority representative constituted an abandonment or waiver of the claim that the title was represented in the unit.

The Commission further stated:

In those cases where it is found that there has been an agreement to exclude or evidence of a waiver on the part of the majority representative it will result in the conclusion that this Petition raises a question concerning representation. If it is found with regard to any classification that a question concerning representation exists, that portion of the Clarification Petition relating to such classification will be dismissed. Wayne, supra at slip. op. p. 6.

It is clear from the evidence gathered herein that the Secretary to the Board/Planning Board Clerk title(s) was in existence prior to the formation of the instant unit in 1978. Ms. Wimmer testified that she has performed the same duties since 1966.^{26/} The evidence also shows that pursuant to a consent election agreement signed on November 9, 1978, the Commission conducted an election concerning the instant unit on December 14, 1978. The Director of Representation issued a certification of public employee representative on December 22, 1978 for the following collective negotiations unit:

All white collar employees employed by the Township of Warren but excluding all other employees including confidentials, professionals, craft workers, managerial executives, police and supervisors within the meaning of the Act.

The current negotiation clause is basically the same, except that it includes all blue and white collar employees.

In order to determine whether a mutual intent to include the disputed title in the Council's unit existed at the time of the consent agreement and at the time of the election, the undersigned has reviewed certain information in the original

^{26/} T. p. 43.

representation petition, Docket No. R0-79-90, as well as testimony gathered at the hearing. These facts show that there was no mutual intent to include the disputed title in the unit. Mr. Schuster, the Township Administrator, testified that he prepared the eligibility list for the election, that he was present at the consent conference, and that the parties had orally agreed to exclude Ms. Wimmer's title,^{27/} as well as other titles.^{28/} Ms. Wimmer testified that she was aware of the election but that she did not go down to vote because she felt that she was ineligible.^{29/}

The final testimony on this issue was provided by Paul Duchamp, President of the Council's unit. Duchamp testified that he took part in the negotiations that led to the instant contract and that the Planning Board Clerk title was mentioned during negotiations. He testified that the Council had to clarify a few individuals - including the Planning Board Clerk - at the negotiation meetings, but,

it was decided that we would not hold up the negotiations for three or four people ... so we decided to just drop it at that time, knowing that we could always pick it up at a later date with a CU petition. At T. p. 103.

Duchamp testified that subsequently, an agreement was reached.

Under cross-examination Duchamp was questioned about when - during negotiations - the disputed title was mentioned. Duchamp admitted that he was very unclear of the whole situation.^{30/} Duchamp later testified that he was informed by an individual who represented the Council at the consent conference that the union representative stated that they would pick up the disputed titles later with a

^{27/} T. pp. 94-96

^{28/} T. p. 74, 95-96.

^{29/} T. pp. 100-101.

^{30/} T. p. 106

CU petition. ^{31/} Duchamp acknowledged that this would be done after the election. ^{32/}

A review of the representation file shows that neither Ms. Wimmer's title nor her name appears on the eligibility list. Moreover, there were no challenged voters at the election. The undersigned believes that Duchamp's testimony cannot be fully relied upon. He admitted he was unsure about when the disputed title was discussed in negotiations, and he was not present at the consent conference and had no personal knowledge of what occurred therein. ^{33/} There is no basis upon which to conclude that the Council disputed the exclusion of the instant title at the consent conference, or that the parties at any time agreed to defer the inclusion or exclusion of the instant title to a CU proceeding. Although Council representatives may have believed that they could accrete the instant title into the unit after the election through a CU proceeding, this does not establish that the Township was ever aware of that intention or agreed to that procedure nor does it establish that there was a mutual intent to include the title at the consent conference. On the contrary, Mr. Schuster testified that the parties excluded the disputed title at the consent conference, and there is insufficient basis upon which to dispute that testimony.

Having reviewed all of the evidence concerning this issue the undersigned sustains the motion to dismiss. The facts show that the Council was aware of the existence of the Secretary/Clerk title at the time of the consent conference, and during negotiations, and that there was no mutual intent to include that title in the Council's unit. Consequently, pursuant to Wayne, supra, a question concerning representation exists regarding the instant title which can only be raised through an RO petition. The CU petition must therefore be dismissed.

^{31/} T. p. 110.

^{32/} T. p. 111.

^{33/} T. pp. 110-111.

RECOMMENDATIONS

Based upon the foregoing discussion the undersigned Hearing Officer recommends the following:

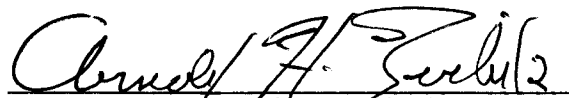
1. The Warren Township Planning Board is not a separate public employer within the meaning of the Act.

a) That the Township of Warren is the public employer of the title of Secretary to the Board/Planning Board Clerk.

b) That the above title is not a supervisory, confidential or managerial executive employee within the meaning of the Act, and does share a community of interest with the remainder of the Council's unit.

2. That a question concerning representation exists with regard to the above title which warrants the dismissal of the instant CU petition.^{34/}

Respectfully Submitted,


Arnold H. Zudick
Hearing Officer

DATED: January 9, 1981
Trenton, New Jersey

34/ Despite the recommendation that the instant petition be dismissed based upon procedural grounds, the undersigned recommends a finding based upon the merits of the petition in order to prevent a relitigation of those issues at a later time, and in the event that the Director does not sustain the motion to dismiss. Of course, if the duties and responsibilities of the instant title subsequently change, the Township may bring that information to the Commission's attention through an appropriate petition.