

D.R. No. 78-22

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

In the Matter of

BOARD OF EDUCATION OF FAIR LAWN,

Public Employer,

-and-

DOCKET NO. CU-76-8

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation sets forward the standards by which new employee classifications may be accreted to an existing negotiations unit. Applying these standards to the facts of the instant case, the Director in agreement with the Hearing Officer, finds that the disputed employee classification may properly be accreted to the Petitioner's unit. The Director also determines, based upon the facts, that Petitioner has not "slept on its rights" since this matter involves a new operation. In accord with his recent decision, In re Clearview Board of Education, D.R. 78-2, this determination is effective immediately.

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Docket No. CU-76-8

FAIR LAWN EDUCATION ASSOCIATION,

Petitioner.

Appearances:

For the Public Employer

Jeffer, Walter, Tierney, DeKorte, Hopkinson & Vogel, Esqs.
(Reginald F. Hopkinson, Esq.)

For the Petitioner

Mandel, Wysoker, Sherman, Glassner, Weingartner & Feingold, Esqs.
(Jack Wysoker, Esq.)

DECISION AND ORDER

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a negotiating unit of public employees, a hearing was held on March 22, March 31, April 23 and May 17, 1976, before Hearing Officer Joel G. Scharff, at which all parties were afforded an opportunity to present evidence, to examine and cross-examine witnesses and to argue orally. At the hearing the parties entered into a joint stipulation of certain relevant facts which was made a part of the record. Post-hearing briefs were filed by both the Petitioner and the Public Employer.

Thereafter, on February 9, 1977, the Hearing Officer issued his Report and Recommendations (H.O. No. 77-6), a copy of which is attached

hereto and made a part hereof. On February 18, 1977, the Commission received a request from the Public Employer for an extension of time to file exceptions to the Hearing Officer's Report and Recommendations. On February 23, 1977, the Director of Representation extended the time to file exceptions in this matter to February 28, 1977. The exceptions subsequently filed by the Public Employer were received by the Director of Representation on March 1, 1977. ^{1/}

The undersigned has carefully considered the entire record in this proceeding including the Hearing Officer's Report and Recommendations, the briefs, and the exceptions and on the facts in this case finds and determines as follows:

The Fair Lawn Board of Education (the "Board") is the employer of the employees in question, a public employer and is subject to the provisions of the New Jersey Employer-Employee Relations Act (the "Act"), as amended.

The Fair Lawn Education Association (the "FLEA") is an employee representative within the meaning of the Act and is subject to its provisions.

A Petition for Clarification of Unit was filed with the Commission on August 11, 1975, by the FLEA seeking a determination that approximately 21 support teachers employed by the Board are included or should be included, in a negotiating unit of approximately 425 classroom teachers. The Board takes the position that the support teachers are not, and should not be included in the negotiating unit. Therefore, there is a question concerning the composition of a negotiating unit of public employees and the matter is properly before the undersigned for a decision.

The Hearing Officer recommended that regular part-time support teachers be included in a unit of regular teaching personnel represented by

^{1/} Although not timely filed, the undersigned has considered the exceptions filed by the Public Employer as if they had been timely filed, pursuant to his authority under N.J.A.C. 19:10-3.1(a) and (b).

FLEA. This conclusion was predicated on his findings that: 1) The support teacher program was not in existence at the time of the formation of the FLEA unit; 2) There is a substantial community of interest between support teachers and regular classroom teachers; 3) Support teachers perform work that had been performed by the FLEA unit at the time it was formed; 4) the Association did not abandon its claim to represent support teachers at the time the unit was formed; and 5) correspondence received by the Commission from certain of the support teachers was not dispositive of the decision in this matter.

The exceptions filed by the Board argued that the Hearing Officer:

A) Erroneously concluded that correspondence from support teachers does not justify a conclusion that said support teachers do not wish to be represented by the FLEA; B) Improperly attempted to mitigate the fact that the classroom teacher is the ultimate authority in the classroom and that the support teacher works for the classroom teacher; C) Failed to conclude any importance to FLEA's failure to include predecessor teacher aides, which the Board contends are support teachers known by another name, until negotiations during the 1974-75 school year; D) Incorrectly stated that there is no conflict of interest in FLEA representing both support and regular full-time teachers and concluded that the Board has misplaced fears in believing that this would inappropriately undermine the educational purposes; and E) That the entire basis of a community of interest between support and regular teachers, as concluded by the Hearing Officer, is erroneous in every particular.

The undersigned, having carefully considered the exceptions filed by the Board, finds them to be without merit. Treating the issues raised by the exceptions seriatum, the undersigned concludes that the Board's initial exception mistakes the law governing Clarification of Unit Petitions. In evaluating Clarification Petitions brought pursuant to the Act and its

attendant rules, the Commission is guided by the long experience and the adjudications under the National Labor Relations Act, (the "NLRA"). ^{2/}

It is well settled law under the NLRA that a unit clarification petition is the proper method to "add" a new employee classification or the employees in a new, but analogous operation, into a pre-existing bargaining unit, if certain conditions are present. ^{3/} Where such an "accretion" is appropriate, no self-determination election is afforded to those employees so accreted into the bargaining unit as this would be disruptive of a stable bargaining relationship. ^{4/} However, where the disputed employees do not constitute an accretion to the existing unit, the correct procedure is not a petition for clarification. Rather, this latter situation raises a question concerning representation which may only be handled by a timely Petition seeking a representation election. ^{5/} Thus, the initial determination in this matter is whether the petition requests a valid accretion to Petitioner's unit or whether the Petition raises a question concerning representation. If it is found that accretion of the support teachers is appropriate, the disputed employees will be accreted to Petitioner's unit without recourse to the desires of the disputed employees. If a question concerning representation exists, the Clarification Petition is to be dismissed as improper. In either case, the undersigned's decision will be made without any recourse to the Hearing Officer's conclusions concerning the desires of the disputed employees.

^{2/} The Supreme Court of New Jersey has sanctioned such recourse to the experience and adjudications of the NLRA in representation questions under the New Jersey Act, see Lullo v. Firefighters, Local 1066, 55 N.J. 409 (1970).

^{3/} See Solar, Division of Int'l Harvester Co., 18 NLRB 739; Monsanto Research Co., Mound Laboratory 195 NLRB 336 (1972); Printing Industry of Seattle Inc., 202 NLRB 558; See also Nat'l Cash Register v. Machine Technicians and Engineers Assn., 170 NLRB No. 118 (1968) and Worthington Corp. v. Office Employees Int'l Union, 155 NLRB No. 18 (1965).

^{4/} Borg Warner Corp., 113 NLRB 152 (1955); Goodyear Tire and Rubber Co., 147 NLRB 1233 Note 6 (1964); and National Cash Register, supra.

^{5/} The Mountain States Telephone and Telegraph Co., 175 NLRB 553 (1969); Gould-Nat'l Batteries Inc., 157 NLRB 679 (1966), etc.

With regard to the Board's second exception, it is clear that the record supports the finding that classroom teachers are the ultimate authority in the classroom. However, the record does not support a finding that the classroom teacher is the "supervisor" (as that term is defined in the Act) of the support teacher. There is no evidence that classroom teachers hire, discharge, discipline, direct, or formally evaluate support teachers. Nor is there any evidence that classroom teachers effectively recommend or participate in the aforementioned processes with regard to support teachers. On the contrary, the record reveals that classroom and support teachers work literally side-by-side, as professionals, to enhance the educational experience afforded to their students. Suffice it to say, this is not the divided loyalty situation envisioned either by N.J.S.A. 34:13A-5.3 or by the Court in Board of Education of West Orange v. Wilton, et al, 57 N.J. 404 (1971).

The Board's third exception questions the propriety of treating the instant Petition as an "accretion" to the existing unit. Precedent under the NLRA forestalls accreting a group or classification of employees which were existent at the time the negotiations unit was formed,^{6/} or where a union had long "slept on its rights" concerning the unrepresented titles.^{7/} In both cases a question concerning representation would be found and the unit clarification petition dismissed. Conversely, the start of a new operation by an employer whose employees perform the same or substantially similar work to that performed by employees in the existing unit, is fertile ground for an "accretion" petition.^{8/}

^{6/} Gould Nat'l Batteries Inc., supra. [other citations omitted].

^{7/} Remington Rand Div. of Sperry Rand, 132 NLRB 1093 (1961).

^{8/} See Lullo v. Fire Fighters, Local 1066, supra, at note 2.

On examination of the relevant testimony the undersigned finds that the uncontroverted testimony of the Board's Superintendent of Schools and its Director of Elementary Education indicates that the support teacher program is a new operation, predicated on the Board's written educational policy decision to institute a pilot program of individualized instruction, substantially different in both kind and degree from that which existed previously with regard to support teachers and which amounted to an entire reorganization of the school district's elementary reading and mathematics programs. ^{9/}

In order to carry this program forward the Board instituted a precise formula, keyed to class size, for the employment of professionally certified teachers. The teachers, herein referred to as support teachers, were to be responsible for individualized instruction in reading and mathematics of multi-age, homogeneous groupings of students. In prior school years reading and mathematics instruction was provided by regular classroom teachers. ^{10/}

Prior to the implementation of this program, the two or three auxiliary teachers employed by the Board were utilized to relieve a specific problem of overcrowding in certain elementary grades. ^{11/}

Based upon these facts, the undersigned finds, in accordance with the Hearing Officer and for the reasons cited by him, that FLEA did not waive its rights to represent support teachers by virtue of the fact that it did not, prior to the 1974-75 school year, seek to represent those titles known as auxiliary teachers.

^{9/} Tr. (4/23/76) pp 12-13; 79-84; stipulations #1, 2 and 10.

^{10/} Ibid.

^{11/} Tr. (4/23/76) pp 12; 80; #3 and 4.

The objection to the conclusion of the Hearing Officer contained in the fourth exception filed by the Board is unsupported by the facts and the applicable law. That portion of the exception which alleges that the proposed unit inclusion would undermine the educational process, is made without any evidence that such a result would accrue. The Board's contentions concerning a purported conflict of interest arising by virtue of FLEA representing both regular and support teachers in the same unit raise a question concerning potential unfair representation. The undersigned is not prepared to assume, In Futuro, absent clear evidence, that a majority representative of public employees will abrogate its statutory duty to fairly represent all employees in the unit without regard to union membership. ^{12/}

In its final exception to the Hearing Officer's Report and Recommendations, the Board alleges that the Hearing Officer incorrectly concluded that there is a community of interest between support and regular teachers. As the undersigned has already determined that the instant Petition is a technically proper attempt to accrete employees of a new operation into an existing negotiating unit, it is now proper to consider the question of community of interest.

The Hearing Officer's report correctly states and applies the standards under the NLRA for determining the community of interest among employees in an existing unit and employees sought to be accreted into that unit. ^{13/} The undersigned finds that the record amply supports the conclusion that there is a substantial community of interest among regular teachers and support teachers. Accordingly, the undersigned hereby adopts the findings of the Hearing Officer with respect to community of interest.

^{12/} N.J.S.A. 34:13A-5.3; Belen v. Woodbridge Township Board of Education, 142 N.J. Super 486 (App. Div. 1976).

^{13/} H.O. No. 77-6, pps. 16-20.

The Board's further observation that titles not subject to the within Petition also share certain attributes of a community of interest with classroom teachers does not mitigate the Hearing Officer's conclusion, in which the undersigned concurs, that classroom teachers and support teachers share a vital community of interest. Additionally, while community of interest is given due regard, it is not the exclusive determining factor in representation determinations.

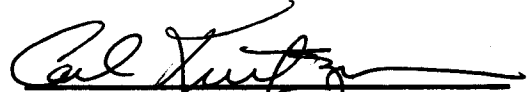
In response to the Board's contention that the existing unit has been virtually unchanged for six years, the undersigned notes that the Board has, in 1974-75, promulgated a significant new program employing support teachers whose functions encompass duties traditionally performed by members of the existing unit. Thus, in accord with the Hearing Officer and for the reasons cited by him, the undersigned finds that support teachers may properly be accreted to the existing FLEA unit.

Based upon the above findings, the undersigned hereby adopts the Report and Recommendations of the Hearing Officer, substantially for the reasons cited by him. The negotiations unit represented by the FLEA shall be and is clarified to include those personnel employed as support teachers by the Fair Lawn Board of Education.

In view of the fact that the clarification of unit question was raised before the Commission prior to the execution of the parties' most recent contract, in accordance with the policy enunciated in In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 247 (1977), the undersigned finds that the disputed title shall immediately be included in

Petitioner's collective negotiations unit.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director
of Representation

DATED: November 4, 1977
Trenton, New Jersey

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SYNOPSIS

A Commission Hearing Officer, in a Clarification of Unit proceeding, recommends that regular part-time support teachers employed by the Board of Education be included in a unit of regular teaching personnel represented by the petitioning association. The Hearing Officer concludes after a review of the record, that the support teacher program was not in existence at the time of the formation of the unit of regular teachers. He finds that there is substantial community of interest between support teachers and regular classroom teachers, and that the support teachers perform work that had been performed by the teachers at the time the unit was formed. Additionally, the Hearing Officer finds that the Association did not abandon its claim to represent support teachers by initially agreeing at the time the unit was formed to exclude those existing part-time personnel employed by the Board from its negotiating unit.

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 Proceedings 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.

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For the Public Employer

Jeffer, Walter, Tierney, De Korte, Hopkinson &
Vogel, Esqs.

By: Reginald F. Hopkinson, Esq.

For the Petitioner

Mandel, Wysoker, Sherman, Glassner, Weingartner
& Feingold, Esqs.

By: Jack Wysoker, Esq.

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Clarification of Unit was filed on August 11, 1975, by the Fair Lawn Education Association (hereinafter "FLEA"). FLEA seeks a determination as to whether approximately 21 support teachers employed by the Fair Lawn Board of Education (hereinafter the "Board") are included, or should be included, in a negotiating unit of approximately 425 classroom teachers. Specifically, at the time of the filing of the clarification of unit petition FLEA and the Board were parties to a negotiated Agreement effective July 1, 1974 through June 30, 1975 which contains a recognition provisions as follows: "...all certified personnel under contract, on leave, employed or hereinafter employed under contract by the Board of Education of Fair Lawn, New Jersey as included herein: all certified personnel whose annual salary is based on the teacher guide. All certified personnel who are on the teachers salary guide and who receive differential

payment in addition to their salary but excluding those whose duties are exclusively administrative and supervisory." The recognition clause goes on to list by title those supervisory and administrative personnel who are excluded from the unit. The Board takes the position that the support teachers are not, and should not be included in the negotiating unit.^{1/}

A hearing was held before the undersigned Hearing Officer on March 22, 1976, March 31, 1976, April 23, 1976, and May 17, 1976 at which all parties to the proceeding had the opportunity to present evidence and argue orally. At the hearing, in addition to testimonial and documentary evidence the parties entered into a Joint Stipulation of some facts. Thereafter, the parties submitted post-hearing briefs for consideration by the undersigned.

The undersigned has carefully reviewed the entire evidentiary record and finds, as fact, the following:

1. The Fair Lawn 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"), and is subject to its provisions.

2. The Fair Lawn Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The parties have entered into joint stipulations of fact contingent upon their being supplemented by testimonial evidence.

Having reviewed the entire evidentiary record, I accept the joint stipulations and incorporate them in total herewith: ^{2/}

^{1/} FLEA filed an unfair practice charge with the Commission on May 21, 1975, alleging that the Board refused to extend FLEA contractual benefits to the support teachers. After an exploratory conference, FLEA withdrew the unfair practice and filed the instant unit clarification petition.

^{2/} Prior to the hearing the undersigned provided the parties with a list of questions designed to facilitate the process of preparing relevant evidence to be submitted into the record. These questions were utilized as a basis for the above stipulations. Each designed item of the stipulations refers to the same numbered question posed. The list of questions, designated as Exhibit C-2 is attached to this report as Attachment A and should be read in conjunction with each stipulated item.

Item 1. Definition of a Support Teacher: A support teacher is a part-time, hourly-paid, certified teacher whose duties are to teach language arts or mathematics to small groups of students, usually in groups of from 6 to 8, in the 7 elementary schools. The support teachers would get its group of students either from a regular teacher, or 2 or 3 regular teachers in the same grade, or might combine students from a regular teacher in different grades.

The support teacher would teach the subject matter in the same manner as the regular teacher, drawing up her own lesson plans, teaching the students in her group, giving tests and grading them and papers, and also giving an overall mark to the regular teacher, which the regular teacher would formulate and incorporate in the report card.

The support teacher program operated differently in each elementary school, since it was the responsibility of the building principal to carry out the program. After the support teacher was finished with the particular group of students, that group would then return to the regular teacher for the rest of the day.

The support teacher worked regular hours, and her duties in teaching the students in her group as described hereinabove were the same as those of the regular teacher performing the same functions. In fact, the support teacher sometimes assumed the responsibility for the complete mathematics and/or language arts instruction that a particular group of students would receive.

The support teachers are not part of any other collective bargaining unit, and have made no attempt to organize or to be recognized as a bargaining unit.

There are approximately 160 to 170 regular teachers in the 7 elementary schools, and during the 1974-1975 School Year, the support

teachers at the 7 elementary schools were as listed on the attached sheet.

[See Attachment B, annexed to and incorporated as part of this Report]

Job Description: There is no written job description for the support teacher, supplemental teacher, substitute teacher and bedside teacher.^{3/}

Item 2. There is a certification requirement for Support Teachers, as well as supplemental, substitute and bedside teachers.

Item 3 & 4. Beginning November 17, 1969, the Board has employed a number of personnel on a regular part-time basis to assist certain elementary classroom teachers in the instruction of students for the areas of language arts and mathematics. Specifically, two in school years 1969-1970 in the fifth grade; two in 1970-1971 in the third and sixth grades; two in 1971-1972 in the fourth grade; three in 1972-1973 in the fifth grade; three in 1973-1974 in the sixth grade; twenty-one in 1974-1975 in a combination of classes and grades. With respect to 1974-1975, the parties agree to the submission of the attached sheet (Attachment B) to this document reflecting teachers and units and grades. And twenty-one in 1975-1976, also a combination of classes and grades.

Item 5. No written contract is offered to Support Teachers similar to the type of written contract given non-tenure, regular teachers. However, they are hired either by telephone call, by speaking to them directly, or by letter from duly authorized school authorities so that the agreement of hiring is either oral or written.

The Board of Education, during the summer months prepares a list of teachers, which list bears the caption "Substitute/Bedside/Supplementary

^{3/} FLEA argues that all references to supplemental teachers (as their duties are now constituted), substitute teachers, and bedside teachers are irrelevant to this proceeding. However, FLEA accepts the factual items relating to these titles.

Teacher List", and contains approved teachers that can fulfill all of these functions. This generally embraces a list of perhaps 100 or more individuals. This list is then approved by the Board of Education. This functions in this manner because all of said teachers on this list are paid the same salary of \$6.80 per hour, except for the bedside teachers as heretofore explained. Each principal then goes to the lists and selects the individual that will be needed as a substitute, a bedside or supplemental teacher, or as a support teacher. At the present time, the hiring of support teachers is based on a formula depending on the number of students in either a class or in a grouping.

Item 6. The goal is to hire Support Teachers for the school year, although on occasion this may not occur, like if some variations occur because of anticipated enrollment. The master list described in #5 above is generally adopted by the Board during the August meeting as the basis for hiring Support Teachers for that school year. During the school year, there may be additional persons placed on this master list.

Item 7. Support Teachers work a regular schedule of a certain number of classes at certain specific times each day during the school week. Support Teachers generally work 2 hours per day for 5 days per week. Of the 21 Support Teachers, only 2 work 4 hours per day for 4 or 5 days per week. Thus, the average is 10 hours per week for most of them, with a maximum of 18 hours for 2 Support Teachers. The regular schedule of the Support Teachers is arranged by the separate building Principals.

Item 8. The Support Teacher applied [assigned (?)_] in each building is recommended to be hired by that particular building principal. However, all teachers in the categories described in #5 above are placed on a master list and it is from this master list which support teachers as

well as all other teachers are hired. In general, to be placed on the masterlist, support teachers as well as all others, are interviewed by the principal and also interviewed by the central office and administrative staff of the Board of Education. Thus, participation in hiring is both with the principal and the central office of the Board of Education. Exceptions occur based on availability of principals primarily during vacation periods.

Item 9. Support Teachers only perform teaching functions, and this may occur in hallways, faculty lounges, unused classrooms, sometimes in same classroom as regular teacher, occasionally have own classroom. This varies from school to school.

Item 10. (a) Assignment to a school comes from administrative offices of the school system. Assignment to a location in the school is made by building principal.

(f) Support teachers are utilized in accordance with a formula. The budget appropriation set forth this formula as follows:

"Support teachers will be provided in Kindergarten where class size is 22 or more, at the daily rate of $2\frac{1}{2}$ hours. Support will be provided at the minimum rate of $1\frac{1}{2}$ hours per class where multi-aging takes place. Support will be increased in half hour increments as average class size increases as follows:

22 to 23 and so on in grades 1 and 2
 24 to 25 and so on in grades 3 and 4
 26 to 27 and so on in grades 5 and 6

Maximum support provided any class will be $2\frac{1}{2}$ hours."
 (Budget for 1975-76 Fiscal Year, "Salaries of Teachers",
 p. 15.3)

(g) Support Teachers cannot reject assignments at will.

(h) Non-retention of Support Teacher is recommended by building Principal.

Item 11. Support Teachers are paid \$6.80 per hour. Their salary is set by the Board of Education. They receive checks monthly under a special payroll as do the supplementary teachers, bedside teachers and substitute teachers. Regular teachers receive a check on the fifteenth of the month and [at the] end of the month.

Item 12. Support Teachers are not paid if they are absent.

Item 13. A substitute is not appointed for an absent Support Teacher, except if there is a long absence of a Support Teacher, that Support Teacher is replaced.

Item 14. Support Teachers do not receive sick days, personal/professional days, medical insurance, or other benefits beyond \$6.80 per hour.

Item 15. We think that Support Teachers generally are not offered or expected to advise extra-curricular activities, but do know that on occasion some Support Teachers have attended "back to school night" and "grade nights" on their own time.

Item 16. Support Teachers almost never substitute for absent teachers; there would have to be a real emergency when the school could not get another person from the master list as a substitute.

Item 17. Support Teachers do not monitor hall duty, bus duty, study hall, homeroom.

Item 18. Fairlawn Education Association has been recognized for bargaining purposes since the first written agreements were authorized by Ch. 303, Public Laws of 1968, but had been recognized as representative of the Fairlawn Teachers for more than 20 years.

Item 19. The first written agreement between FLEA and Fairlawn Board of Education was executed before school began in September, 1969.

Item 20. The unit recognition language has remained either the same or substantially the same since the initial 1969-1970 contract. On November 17, 1969, the school authorities then hired two fifth grade teacher assistants for two to two and a half hours per day. At that time the education association did not raise a claim to represent those teacher assistants. When the present unit recognition language was agreed to in the first contract, there were no support teachers but there were supplemental, substitutes and bedside teachers and the subject of support teachers was not discussed by the contracting parties. In fact, the subject of including them in the unit recognition language was not discussed until after the 21 support teachers were hired for the 1974-1975 school year. When the subject was first raised by the association in its contract proposals around February, 1975, when the association proposed eliminating the phrase "under contract," and also deleted reference to "teachers" salary guide in the unit recognition article 1.

Item 21. Written agreements exist covering these years: 1969-70; 1970-71; 1971-73; 1973-74; 1974-75; 1975-76. Negotiations underway for 1976-77 agreement.

From the testimonial and documentary evidence elicited at the hearing, I make the following additional findings of fact:

4. The Board and FLEA commenced negotiations towards a first formal written agreement in the summer of 1969. At about this time or shortly prior thereto, the parties agreed to exclude substitute teachers, bedside teachers, and supplemental teachers from the unit. Supplemental teachers currently work on a one-to-one basis with children with learning disabilities. While the functions and purpose of supplemental teachers in 1969 is less clearly delineated in the record, they did then work individually with students in

a similar fashion. FLEA decided not to have substitute and bedside teachers represented in the unit, in part because the groups were too nebulous to define. FLEA approached the supplemental teachers about being included in the unit, but the supplemental teachers declined and FLEA did not pursue the matter further. Thus, FLEA has never claimed to represent substitute teachers, bedside teachers, and supplemental teachers.^{4/}

5. The parties entered into their first formal written agreement on September 18, 1969. The recognition clause of that agreement, as it has reference to the instant issue, is essentially the same recognition clause embodied in the 1974-1975 agreement, which was in effect when the present dispute arose. In November 1969 the Board hired two teacher assistants as auxilliary teachers. These aides worked with groups of students of overpopulated classes performing functions similar to those performed by support teachers. The teacher assistants could be termed support teachers, but their numbers remained small until the 1974-1975 school year, when their number increased from two to twenty-four, and the educational concept for their being and a program structure concerning their utilization first became clearly defined. A witness who testified as to the teacher assistants during their first years confused them with supplemental teachers. FLEA first demanded to negotiate on behalf of support teachers during negotiations for a successor to the 1974-1975 contractual agreement. The Board has not negotiated with FLEA over support teachers.^{5/}

6. Support teachers are designated by building principals to work with a particular teacher or teachers. For example, in one situation a support teacher will work in the classroom setting with the regular teacher, either with a small group of students, or with the majority of pupils while

^{4/} T. 3/22/76: 45, 47; T. 3/31/76: 24.

^{5/} Exhibit J-2; T. 3/31/76: 7-34, 53; T. 4/23/76: 78, 80.

the regular teacher works with a small group. In another situation, the support teacher removes an assigned group of students from the class for independent instruction. A group of students may be gathered from several classrooms.^{6/}

7. Beyond the possible request by a regular teacher to a principal that a support teacher be assigned, the regular classroom teacher is not in any way involved with the hire, fire or discipline of a support teacher, nor with the determination to assign a support teacher to the teacher. Support teachers are evaluated and observed by the building principal. The principals will irregularly and informally discuss a support teacher with the regular classroom teachers; however, the context of these conversations are not intended to be formal reviews concerning any observations.^{7/}

8. A support teacher working independently with a group of pupils outside the classroom generally does not coordinate the instruction of that group with the classroom teacher. A specified group of pupils is more or less permanently assigned to the support teacher. The support teacher is, within the framework of the curriculum guide, responsible for preparing her own lesson plans, developing and administering any tests, and submits a grade for the pupil in the subject matter taught. In no instance has a classroom teacher questioned or rejected that grade. Additionally, no other teacher will instruct the pupil in the subject taught by the support teacher.^{8/}

9. A support teacher working in a classroom with the regular teacher may "pick up a lesson" for the classroom teacher. The support

^{6/} T. 3/22/76: 48-54, 74-76, 90, 98, 102; T. 3/31/76: 39-41, 106, 112, 113, 151, 119, 170, 182; T. 4/23/76: 36, 44, 97.

^{7/} T. 3/22/76: 50, 76, 91, 95-97; T. 3/31/76: 41, 57, 60-62, 112, 113, 142, 171, 184; T. 4/23/76: 36, 46-57.

^{8/} T. 3/22/76: 54, 55, 63, 68, 75-77; T. 3/31/76: 39-43, 150-152.

teacher will thus be expected to teach certain subject matter as directed. The classroom teachers consistently stated that in this context they do not instruct the support teacher on how to teach the material. Classroom teachers clearly consider themselves the ultimate authority in the classroom, but they state that the relationship between a teacher and a support teacher is one of professional association rather than what might be expected of a student teacher-teacher relationship. Where the support teacher works independently in the classroom with a group of students, the regular teacher's only contact with that group is occasionally over-hearing what is happening. A support teacher working independently in the classroom functions similarly to a support teacher who works outside the classroom.^{2/}

10. An example of a support teacher's role is demonstrated in the testimony of Betty Schwartzburg. In school year 1974-1975 Ms. Schwartzburg taught as a support teacher in the regular classroom, and presently, in 1975-1976, works as a support teacher in her own classroom.

Ms. Schwartzburg testified that as to 1974-1975 she worked in the classroom with nine students and was exclusively responsible for their reading and language program. She tested her pupils, graded them, gave them assignments, and was responsible for their daily work. She ordered teaching films directly. Both she and the regular classroom teacher worked together on lesson plans: the regular teacher setting forth coverage; Ms. Schwartzburg setting forth implementation. Ms. Schwartzburg testified that the school principal supervised her work, and would occasionally sit in. Ms. Schwartzburg had access to and used all teacher facilities. She did not participate in parent-teacher conferences.

^{2/} T. 3/22/76: 49, 50, 63, 70, 94-97; T. 3/31/76: 113-130, 163-165, 182-186, 198-201; T. 4/23/76: 74.

In 1975-1976, Ms. Schwartzburg taught 18 students in the subjects of language arts and drug abuse. These students were assigned to her directly by the school principal according to their reading level. The principal explained Ms. Schwartzburg's precise assignment. Ms. Schwartzburg orders her own supplies, prepares her own lesson plans, gives tests, and records marks on the report cards. Her plan book is checked by the principal. If her pupils are to attend assemblies, she accompanies them. She also participated in class night. Ms. Schwartzburg doesn't know if she is formally evaluated.^{10/}

DISCUSSION

Based upon the above facts, I conclude that the support teachers are regular part-time professional employees who are entitled to the rights of public employees as set forth in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. I also conclude that, not unlike many situations involving part-time and full-time employees, the support teachers share a community of interest with the full-time teachers represented by FLEA. The interaction among classroom teachers and support teachers does not arise to a supervisory - non-supervisory relationship as contemplated by the Act. The regular classroom teachers do not hire, discharge, or discipline support teachers nor do they effectively perform the same.

The Board however, asserts that a conflict of interest exists between support teachers and regular classroom teachers, stating in its brief that "the fact is that FLEA has nurtured a paranoid apprehension that support teachers will erode the total number of classroom teachers employed." The Board further states that its concern "is that the entire

support teacher program that has proven so salutary as to educational aims and goals may now be completely eradicated."

There is no evidence in the record to support the Board's fears. First, the testimony of John Farah, FLEA vice-president, as to the reason why FLEA desires to represent the support teachers and the manner in which it intends to represent them fails to give substance to the Board's claim.^{11/} Secondly, the record evidence demonstrates, and the Board agrees, that the advent of the support teacher program, has not led to a reduction of regular classroom personnel. The "conflict of interest" as the Board sees it, is not the kind of conflict described by the Supreme Court in Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971), in which the loyalties and obligations of certain personnel to the employer vis-a-vis other employees warrant against the mixture of certain titles in the same negotiations unit. Rather, the "conflict" argued by the Board is the anticipation of an ill motive on the part of FLEA resulting in the failure of FLEA to provide fair representation to the support teachers. Without an evidentiary basis, the undersigned cannot recommend that the Commission presume ill motive on the part of FLEA and that FLEA will not effectuate its statutory obligation to fairly represent the interests of its constituency. Ultimately, the Board's concerns for the aims of its support teacher program and the continuation of that program reside within itself. These concerns will no doubt be reflected in the manner in which the Board approaches negotiations over terms and conditions of employment with FLEA, regardless of whether FLEA represents support teachers or not.

11/ T. 3/31/76: 65-83.

The Board also attributes the prospect of ill motive to FLEA by stating that the support teachers do not wish to be represented by FLEA. The Board gleans this position from letters sent to the Commission from the support teachers after they had been advised by FLEA that it had filed an unfair practice charge with the Commission seeking the extension of the FLEA contractual benefits to support teachers and that their names were included on the papers filed. These letters generally indicate no support among the support teachers for FLEA's action. However, the undersigned cannot completely deduce from these letters that the support teachers do not wish to be represented in FLEA's negotiating unit. One support teacher, Ms. Rowena Stecker, has indicated that her letter was sent after she became aware that her name was being submitted on a particular petition, and that her letter stated that this was being done without her knowledge. Ms. Stecker testified that she did not at that time give any thought to her opinion as to being included in the FLEA unit. (T. 4/23/76: 66-71) Ms. Stecker's letter, Exhibit PE-5 and annexed hereto as Attachment C, is contradictory to her testimonial evidence. However, the other letters in evidence, PE-1 through PE-6, generally reflect the support teachers' disapproval of the use of their names without their knowledge and consent. With the exception of Ms. Stecker's letter, there is no mention in the support teacher letters as to whether the support teachers considered themselves represented or desired to be represented by FLEA.

Having concluded and recommended that support teachers are public employees who share a community of interest with the employees in FLEA's negotiating unit, the undersigned next must consider whether the support teachers should be included in the FLEA unit without an election.

It is clear that support teachers were not initially included in FLEA's unit. Support teachers were non-existent at the time of the unit formation. Shortly thereafter, in November 1969, two "teacher assistants", which title might be considered the progenitor of the support teacher title and educational concept, were hired. The undersigned concludes from the record that the support teacher title was inchoate until the support teacher program mushroomed in 1974-1975.

FLEA strenuously argues that, if support teachers are found not to be already in its unit, the Commission's responsibility to determine the "most appropriate unit" would warrant the inclusion of support teachers in its unit. FLEA also draws attention, in its brief, to the experience of the National Labor Relations Board, which has on occasion ordered that new employee classifications be included, without an election, in established bargaining units.

The undersigned has carefully considered FLEA's arguments, and has investigated the experience of the National Labor Relations Board in analagous situations.

The Commission's responsibility to determine the "most appropriate unit" in disputed matters, In re State of New Jersey and Professional Association of New Jersey Department of Education, 64 N.J. 231 (1974), arose within the context of numerous representation petitions brought before the Commission seeking the certification of various units of professional employees employed by the State. At the time of the petitions, the representation of State professional employees was an unchartered area. The Supreme Court stated that the Commission's responsibility in light of the various circumstances involved, was to fashion "the most appropriate unit" and "the unit it deemed best."

This standard is not automatically transferable to clarification of unit proceedings. In a clarification of unit proceeding, the petitioner seeks a clarification of the description or composition of an already fashioned negotiating unit. The proceeding is not sanctioned for the purpose of reshaping the unit because it might most appropriately consist of something else. To the extent that it is applicable, the "most appropriate unit" standard is helpful in determining whether the general descriptive language already contained in a contractual recognition clause or unit certification is applicable to the employment title in question. In this regard, it is relevant to note that while the Commission has been directed to employ the "most appropriate unit" standard in disputed unit certification proceedings, the Act permits a public employer to voluntarily recognize a representative for an "appropriate unit." Thus, a unit may be recognized on the basis of its appropriateness, although it may not be the most appropriate unit that could have been fashioned. Where this is so, the parties have voluntarily consented to this arrangement. The scope of the unit should not be disturbed without compelling reason.

A petitioner seeking to enlarge the scope of an otherwise appropriate negotiating unit is best directed to the Commission's unit certification procedures, where the "most appropriate unit" standard is properly applied. The filing of a certification petition raises a question concerning representation. In such cases, the Act embodies a clear directive to the Commission "to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees."

(N.J.S.A. 34:13A-6(d)) (To date, the Commission has relied exclusively

upon the secret ballot election mechanism to resolve questions concerning representation.) However, not all additions of personnel to units raise questions concerning representation. For example, in some cases the employment of personnel in newly created job titles raises issues which are best resolved through a clarification of unit proceeding. A Commission determination that the description of the negotiating unit properly warrants the inclusion of the personnel in the newly created titles in the existing negotiating unit would result in a direction that these personnel be represented by the employee representative without their being granted the opportunity to exercise a free choice as to their negotiating agent.

An example wherein an "accretion"^{12/} by unit clarification is appropriate is found where an employee representative represents a large unit of all blue collar municipal employees. Subsequent to the formation of the unit, the employer creates a new employment operation and title, and hires a small number of employees in that title. After a hearing, it is determined that the title is a blue collar title and that the employees in the title without doubt would have been included in the unit when it was created if the title had then existed. Such circumstances would warrant the inclusion of those employees in the unit notwithstanding the fact that they would not be given the opportunity to exercise a free choice. The exercise of free choice would be incompatible with the earlier choice of a majority of blue collar employees to establish a blue collar unit. It would provide an opportunity to a minority group of employees to "opt out" of a unit into which they naturally belong - a privilege, which due to the compelling policy reasons that a majority determine the representational status of the unit, is not available to other minority groups of employees without extenuating reasons. Analogously, the employees in newly created titles are entitled to no greater free choice rights than

^{12/} The term "accretion" as used by the National Labor Relations Board refers to an acquisition or construction of a new operation or facility by the employer, and the union's attempt to have the employees of the new operation or facility included in the existing unit. The term is applicable to new operations at a new location or at the existing location. The term is particularly suited to the new program involved herein.

new employees in titles originally placed in the unit. The public interest in preserving stable employment relationships would, in view of the potential disruption to the existing negotiating relationship, mandate that these employees be included in the unit.^{13/}

Great care must be taken by an administrative agency to insure that a matter placed before it as a clarification of unit petition does not result in the illegitimate disenfranchisement of unrepresented employees. Insofar as the process culminates with the possible inclusion of employees in a unit without an election, an accretion should be permitted only in appropriate situations. Those cases in which the National Labor Relations Board have considered accretions reflect this concern.

The Board has most recently stated in Fairleigh Dickenson University and Fairleigh Dickenson Council of American Association of University Professors Chapters, 227 NLRB No. 40 (1976), that "in each case the total circumstances are necessarily considered." The undersigned agrees. After considering the total circumstances, key factors may be identified and be accorded appropriate weight as warranted by the facts. Some factors in a case might support an accretion while others might not. For example, in Bradford-Robinson Printing Company and Lithographers and Photoengravers Int'l Union, 193 NLRB No. 139, 78 LRRM 1406 (1971), the union sought clarification to include lithographic production employees working in a separate location for a newly established subsidiary. The Board identified (1) the functional integration of the two operations, and (2) language sufficiently broad in the contract to embrace the second facility's operation and employee classification, as factors militating towards accretion. However, the Board denied

^{13/} In this hypothetical, clarification is appropriate inasmuch as the employees fall within the scope of the originally intended unit. However, the same policy considerations that underlie the need for accretion without an election may be applicable to unusual circumstances where the new employee title falls outside of the scope of the unit originally intended.

clarification because of numerous considerations weighing in favor of finding the second facility a new operation that would constitute a separate appropriate unit. In this regard the Board has further distinguished among cases in which the new employees were hired to do work that had previously been performed by unit members, and new types of work. Compare National Cash Register Company and Federation of Business Machine Technicians and Engineers Association, 170 NLRB No. 118, 67 LRRM 1541 (1968), and Worthington Corporation and Local 212, Office Employees Int'l Union, AFL-CIO, 155 NLRB No. 18, 60 LRRM 1267 (1965).

Additional factors commonly identified as militating in favor or against clarification include an analysis of similarities and differences in job functions, responsibilities, work location and hours, use of facilities, supervision, benefits, interchange of ideas and mutual problems, and use of initiative and judgement. See, for example, Massey-Ferguson, Inc. and Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), 202 NLRB No. 20, 82 LRRM 1532 (1973); Worthington Corporation, supra; and Bradford-Robinson Printing Co., supra. These factors would normally constitute community of interest considerations applicable to questions concerning representation. This would necessarily be so, inasmuch as employees must share a community of interest to be in the same unit. However, the Board cases indicate that in order to support an accretion, the community of interest among the employees must be substantial and not that of a casual nature.

Other factors relevant to an accretion determination include whether the petitioner may have abandoned its claim to the employees either by negotiation, or a waiver by inaction. See Massey-Ferguson, supra, and Remington Rand Division of Sperry Rand Corporation and Local

212, Office Employees Int'l Union, AFL-CIO, 132 NLRB No. 92, 48 LRRM 1478 (1961). The failure of the parties to include an existing title in the unit at its formation may be mitigated by the inchoateness of the title. See National Cash Register Company, supra.

Considering the entire circumstances in the instant matter, the undersigned concludes that this is an appropriate situation for accretion. There is a substantial community of interest among regular teachers and support teachers. While their fringe benefits differ, not in small part due to the support teachers part-time nature, they share the same facilities, have common supervision, have common responsibilities, perform virtually identical job functions, utilize identical initiative and judgment, and engage in a professional interchange of ideas and mutual problems. If the Commission were presented herein with a certification petition in which a dispute arose as to the appropriate unit, there is no doubt in the undersigned's mind that a professional unit of all instructional personnel would appropriately include the support teachers. The Commission has clearly favored the creation of broad-based negotiations units where such units are appropriate, without discrimination among full time and regular part-time employees. (This policy of avoiding potential fragmentation is not the exclusive determinant of what constitutes the most appropriate unit. Other circumstances and considerations might warrant that separate units of all part-time personnel and full-time personnel be found most appropriate. However, this would not be the case herein.)

The evidence reveals that FLEA abandoned any claim to represent employees in those part-time classifications in existence at the time of

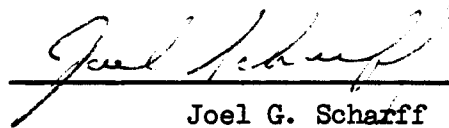
the formation of the negotiating unit. It appears that at that time, FLEA had knowledge of various groups of part-time personnel in the district, it considered the appropriateness of including these groups in the unit and had even asked the supplemental teachers to be part of the unit sought to be recognized, but acceded to their desire not to be included. The Board and FLEA entered into a recognition agreement under these circumstances. The Board thereafter created a new category of part-time personnel; however, while the educational format is non-traditional, the duties of support teachers are substantially the same duties traditionally performed by the regular full time personnel. In effect, work performed by FLEA unit personnel when the unit was formed is now also being performed by part-time employees, who are sometimes doing the work physically beside the unit personnel. Surely, if the Board had chosen to employ full time personnel to perform support teacher tasks, there would be no doubt that these specialists - similar to art teachers, music teachers, and other specialists - would fall within the scope of the unit originally intended. Support teachers who are employed on a regular part-time basis should share similar representation. FLEA's limitation of its unit to regular certificated employees on the salary guide, excluding thereby substitute, bedside and supplemental personnel, cannot be interpreted as an abandonment of any right to represent part-time personnel who are hired to perform regular teacher functions.

Where an employer is entitled to hire personnel in a new employment title to perform the work of represented employees, and is entitled to treat those personnel as outside of the unit, the stability of employer-employee relationship is jeopardized and the purpose of the Act is frustrated. The educational decision to hire support teachers is a managerial decision,

permissively negotiable at the employer's option. So too, is the decision of how many employees, and in what categories, the employer desires to employ. The undersigned has no reason to doubt the educational commitment of the Board in having a support teacher program, lauds that program, and finds from the record no malicious intent on the part of the Board. However, if, as the Board claims here, the employee representative's concern is for the protection of its constituency, that is not an illegitimate concern. If FLEA does not perform pursuant to its statutory responsibilities, appropriate procedures before the Commission are available.

I therefore conclude and recommend, for all the reasons aforementioned, that the circumstances herein warrant that the unit represented by FLEA be forthwith clarified to include those personnel employed as support teachers by the Fair Lawn Board of Education.^{114/}

RESPECTFULLY SUBMITTED



Joel G. Scharff
Hearing Officer

DATED: February 9, 1977
Trenton, New Jersey

^{114/} The inclusion of support teachers in FLEA's unit would require FLEA and the Board to negotiate their terms and conditions of employment ab initio. The contractual benefits of FLEA's current Agreement with the Board are not automatically extended to support teachers.