

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY TECHNICAL AND
VOCATIONAL HIGH SCHOOL BOARD
OF EDUCATION,

Public Employer,

-and-

PASSAIC COUNTY TECHNICAL AND
VOCATIONAL HIGH SCHOOL
SHOP TEACHERS ASSOCIATION,

Docket No. RO-84-37

Petitioner,

-and-

PASSAIC COUNTY TECHNICAL AND
VOCATIONAL EDUCATIONAL
ASSOCIATION, INC.,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses the Passaic County Technical and Vocational Shop Teachers Association's Petition for Certification of Public Employee Representative. The Shop Teachers Association sought to represent all shop teachers including non-academic teachers of technical and vocational high school subjects employed by the Passiac County Technical and Vocational High School Board of Education. The Commission, however, in agreement with a Hearing Examiner, finds that these employees should continue to be represented by the Passiac County Technical and Vocational Education Association in a negotiations unit consisting of both non-academic and academic teachers and other professional employees. The Commission finds that the Education Association has not irresponsibly represented the shop teachers or that the existing relationship is unstable.

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ASSOCIATION, INC.,

Intervenor.

Appearances:

For the Petitioner, Hoffman & Fiorello, Esqs.
(John Fiorello, of counsel)

For the Intervenor, Klausner & Hunter, Esqs.
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On October 13, 1983, the Passaic County Technical and Vocational High School Shop Teachers Association ("Shop Teachers Association") filed a Petition for Certification of Public Employee Representative. The Shop Teachers Association seeks to represent "all shop teachers including non-academic teachers of technical and vocational high school subjects" employed by the Passaic County

Technical and Vocational High School Board of Education ("Board"). These employees are currently represented by the Passaic County Technical and Vocational Education Association ("Education Association") in a negotiations unit consisting of both non-academic and academic teachers and other professional employees.

The Education Association has intervened in these proceedings, pursuant to N.J.A.C. 19:11-2.7. It opposes the petition.

The Board takes no position and has declined to participate.

On April 17, 1984, Chairman Mastriani, acting pursuant to authority delegated to him by the full Commission, denied the Education Association's motion for summary judgment.

On August 20, 22 and 24, September 10 and 12, October 15, 17, 19 and 24, 1984, January 8, 11, 15, 21, 25, February 12, 18 and 20 and March 15 and July 23, 1985, Hearing Officer Marc F. Stuart conducted hearings. The parties examined witnesses, introduced evidence and argued orally. They also filed post-hearing briefs.

On May 14, 1986, the Hearing Officer recommended dismissal of the petition. H.O. No. 86-7, 12 NJPER ____ (¶ ____ 1986) (copy attached). Applying Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971), he found severance inappropriate because there was no showing of irresponsible representation or an unstable relationship. However, he did criticize certain actions of the Education Association, stating that in several instances it acted "arbitrarily" and in a "clandestine manner to further its own purposes to the detriment of the Shop Teachers."

After receiving extensions of times, both parties filed numerous exceptions.

On June 27, 1986, the Education Association filed its exceptions. It excepts to certain factual findings made by the Hearing Officer; his reliance on settlement discussions which occurred during the course of the proceedings as evidence to show instability; and his conclusion that the record was well documented with evidence that the Association often acted clandestinely.

On July 2, 1986, the Shop Teachers Association filed its exceptions. It does not except to the factual findings made by the Hearing Examiner but contends that certain additional findings should have been made. Its primary exception, however, is to the Hearing Officer's conclusion of law that the petition be dismissed. It contends that severance is appropriate because the existing relationship is unstable and the incumbent organization has not responsibly represented the shop teachers.

We have reviewed the record. The Hearing Officer's findings of fact are generally accurate. They are, however, incomplete because they concern solely allegations of unfair representation. But this is not an unfair practice case. It is a representation proceeding in which this Commission has the obligation to determine whether the petitioned-for unit is appropriate. We therefore add these facts.

The Education Association is and has been for several years the majority representative of these employees:

[T]eachers, teacher/nurses, teacher/librarians, counselors, department heads, CIE coordinators, shop coordinators, learning disability teacher consultants, social workers, speech therapists, coaches, evening school teachers, and resource teachers and others whose major percentage of salary is computed on the teachers' salary guide regardless of source of funding except for teachers hired on a per diem basis.

The recognition clause defines teachers as "all professional employees represented by the Passaic County Technical and Vocational Education Association in the negotiating unit as above defined."

The Association has had a collective negotiations relationship with the Board since at least early 1970. Two contracts were admitted into evidence: the 1980-1982 and 1982-1984 agreements. A review of these contracts reveals that both shop and academic teachers are treated similarly. In fact, for the most part, both positions are treated identically and are classified as simply "teachers." The only differences are in Teaching Hours and in lateral movement on the salary guide. For the 1982-1984 contract, the school day for academic teachers is:

- 5 teaching periods
- 1 lunch period
- 2 unassigned periods
- 1 assigned (non-teaching) period

The school day for shop teachers is:

- 7 teaching periods
- 1 lunch period
- 1 unassigned period

For the 1980-1982 contract, shop teachers worked eight periods, but also received a differential of \$900 in 1980-1981 and \$1,000 in 1981-1982. The Board unilaterally eliminated this differential in 1981 after it reduced the shop teachers workload pursuant to a state regulation, but the Education Association grieved this action and an arbitrator restored the differential.

Under both the 1980-1982 and 1982-1984 contracts, shop teachers may progress laterally on the salary schedule from guides A through C without a college degree. A degree, however, is required for academic teachers. Both shop and academic teachers have the same salary guide.

This is a representation case in which we must determine whether the petitioned for unit is appropriate under all the circumstances. We have recognized that one of the most critical tasks the Legislature has assigned us is the jurisdiction to determine how negotiations affecting public sector employees should be structured so that negotiations can proceed smoothly and peaceably throughout New Jersey. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984). This is in accord with our Supreme Court's view that "the nature of the appropriate negotiating unit is a most significant factor in the production and maintenance of harmony and peace in public employment relations." Bd. of Ed. of the Town of West Orange v. Wilton, 57 N.J. 404, 424 (1971). Our policy has been, and experience has confirmed, that under most circumstances broad-based units best serve the statutory goal of promoting permanent public employer-employee peace and the

health, welfare, comfort, and safety of the people of New Jersey, N.J.S.A. 34:13A-2, and that undue fragmentation of units is to be avoided. Thus, in one of our earliest cases, State v. Prof. Ass'n of N.J. Dept. of Ed., P.E.R.C. No. 68 (1972), we dismissed a representation petition seeking to exclude registered nurses from a state-wide unit of professional employees. The Supreme Court affirmed this determination. 64 N.J. 231 (1974). See also Hudson Cty., P.E.R.C. No. 84-85, 10 NJPER 114 (¶15059 1984).

The Shop Teachers Association claims, nevertheless, that it is entitled to its own negotiations unit because of the Education Association's conduct during the 1982-1984 negotiations and settlement discussions of the instant case. In Jefferson, we said:

The question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

Thus, assuming that a community of interest exists for the unit sought,^{1/} we must decide whether the existing relationship is

1/ While we assume that for purposes of this decision, it is highly unlikely that a unit consisting solely of shop teachers to the exclusion of all other teachers could ever be appropriate given all relevant representation caselaw.

unstable or that the Education Association has not provided responsible representation. To answer that question it is not sufficient to merely examine one aspect of the parties' relationship; nor does a finding that the incumbent organization has breached its duty of fair representation on one occasion necessarily mean that employees must be severed from the existing unit. If this were the case, units would be constantly subject to redefinition and labor instability would inevitably result. Rather, determining whether an incumbent organization has provided responsible representation entails a review of the parties' entire relationship, not just isolated occurrences.

We conclude that the shop teachers' petition should be dismissed. We believe the existing unit continues to be the appropriate unit for collective negotiations. We simply cannot ignore that the Board and the Education Association have had a long and successful history of collective negotiations. We cannot find, based on the record as a whole, that the Education Association has irresponsibly represented the shop teachers. The basic premise of the shop teachers' claim is that they are continually discriminated against by the academic teachers' faction which controls the Association. But the facts simply do not support that premise. A review of the two contracts reveals that, for the most part, there is no differentiation between shop and academic teachers. Nor does the record demonstrate that shop teachers have been discriminated against in the filing of grievances. To the contrary, the Education Association successfully pursued a grievance to arbitration that

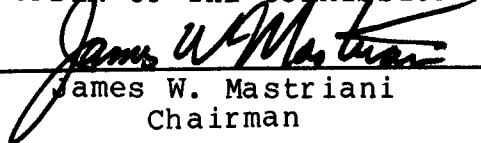
resulted in the restoration of the shop teachers differential for the 1981 school year. Nor, under the circumstances, does the loss of the shop teachers' salary differential in the 1982-1984 contract negotiations following a workload reduction establish irresponsible representation or an unstable relationship. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983).

There was conflicting testimony concerning the Education Association's procedural actions taken during negotiations. The Hearing Officer accepted the Shop Teacher Association's version. These findings were excepted to, but we will not disturb them. These findings are disturbing, but the Education Association's actions are isolated given the history of negotiations between the Board and the Education Association and do not demonstrate that the Education Association has irresponsibly represented the shop teachers, that the relationship is unstable, or that the petitioned for unit is inappropriate.

ORDER

The petition for certification of public employee representative is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
December 22, 1986
ISSUED: December 23, 1986

H.O. NO. 86-7

STATE OF NEW JERSEY
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Appearances:

For the Petitioner
Hoffman & Fiorello, Esquires
(John Fiorello of counsel)

For the Intervenor
Klausner & Hunter, Esquires
(Stephen B. Hunter of counsel)

HEARING OFFICER'S
RECOMMENDATIONS PROCEDURAL HISTORY

The Passaic County Technical and Vocational High School
Shop Teachers Association filed a Petition for Certification of
Public Employee Representative with the Public Employment Relations

Commission on October 13, 1983, seeking to sever all Shop Teachers, including non-academic teachers of Technical and Vocational High School subjects, from a unit consisting of academic and non-academic teachers represented by the Passaic County Technical and Vocational Educational Association, Inc. In support of its position, the Shop Teachers Association alleged an inadequate community of interest between the Shop Teachers and the Academic Teachers. Additionally, the Shop Teachers Association alleged that the existing relationship was unstable and that the incumbent organization was not providing responsible representation to the Shop Teachers.

The Education Association intervened in these proceedings pursuant to N.J.A.C. 19:11-2.7, by letter dated October 26, 1983. The Education Association opposed the Shop Teachers petition and denied the allegations supporting it. The Passaic County Technical and Vocational High School Board of Education took no position with respect to the Shop Teachers Association's petition, and declined to participate in these proceedings.

It appearing that the Petition and Letter of Intervention raised substantial material facts in dispute, on December 23, 1983, the Director of Representation issued a Notice of Hearing.

On March 12, 1984, the Education Association filed a motion for Summary Judgment asserting that the facts alleged in the Petition did not establish that the existing relationship was unstable or that the Education Association failed to provide responsible representation to Shop Teachers. On April 2, 1984, the

Shop Teachers' Association filed a memorandum and affidavits opposing the motion. In a decision dated April 17, 1984, the Chairman of the Public Employment Relations Commission, pursuant to N.J.S.A. 34:13A-6(f), denied the Education Association's motion for summary judgment, concluding that there was a substantial dispute over material facts, requiring an evidentiary hearing.

An evidentiary hearing at which the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally, was held on August 20, 1984; August 22, 1984; August 24, 1984; September 10, 1984; September 12, 1984; October 15, 1984; October 17, 1984; October 19, 1984; and October 24, 1984. On November 30, 1984, a date set for hearing, the parties engaged in settlement discussions and requested a delay in the proceedings in order to take the proposed settlement back to their respective constituents for approval. However, in January, 1985, the proposed settlement broke down and the hearing was reconvened on January 8, 1985; January 11, 1985; January 15, 1985; January 21, 1985; January 25, 1985; February 12, 1985; February 18, 1985; February 20, 1985; and March 15, 1985, whereupon the hearing was closed pending the Intervenor's obtaining certain documentation pertaining to an arbitration proceeding involving a prescription plan dispute. Ultimately, I was advised by the Intervenor of its inability to obtain the documentation it sought. By mutual consent the hearing was reconvened on July 23, 1985, in order to give the parties an opportunity to present witness testimony concerning the

issues relating to the aforementioned arbitration proceeding, after which, the record was closed.

Following two joint requests for postponement, the Shop Teachers Association filed a proposed Findings of Fact and Memorandum of Law on October 7, 1985. The Education Association filed a post-hearing brief on October 8, 1985. The parties waived reply briefs.

FINDINGS OF FACT^{1/}

Upon the entire record the Hearing Officer makes the following Findings of Fact:

1. The Passaic County Technical and Vocational High School Board of Education is a public employer within the meaning of the Act, and is the employer of the employees who are the subject of this representation petition (TA 6).^{2/}

^{1/} Because of the length of these proceedings it was necessary to be selective in the development of these factual findings. It was not possible to address every aspect of the testimony; however, I have attempted to base these findings on what I consider to be the most significant of the evidence presented, and I have also attempted to select evidence which I feel is representative of the bulk of the evidence in the record.

^{2/} Transcript sites are as follows: 'TA' refers to the hearing transcript dated August 20, 1984. 'TB'/August 22, 1984. 'TC'/August 24, 1984. 'TD'/September 10, 1984. 'TE'/September 12, 1984. 'TF'/October 15, 1984. 'TG'/October 17, 1984. 'TH'/October 19, 1984. 'TI'/October 24, 1984. 'TJ'/November 30, 1984. 'TK'/January 8, 1985. 'TL' Volume I of January 11, 1985. 'TM' Volume II of January 11, 1985. 'TN'/January 15, 1985. 'TO' Volume I of January 21, 1985. 'TP' Volume II of January 21, 1985. 'TQ'/January 25, 1985. 'TR' Volume I of February 12, 1985. 'TS' Volume II of February 12, 1985. 'TT'/February 18, 1985. 'TU'/February 20, 1985. 'TV'/March 15, 1985. 'TW'/July 23, 1985.

2. The Passaic County Technical and Vocational High School Shop Teachers Association and the Passaic County Technical and Vocational Education Association, Inc., NJEA, are public employee representatives within the meaning of the Act, and are the litigants in this representation proceeding (TA 6-7).

3(a) The Passaic County Technical and Vocational High School was formerly based in Wayne (TA 87). While there, Shop Teachers outnumbered Academic Teachers within the Union (TA 88). After 1970, Academic Teachers began to outnumber Shop Teachers due to a change in curriculum and the admission of girls (TA 89). Throughout this time, and to the present, Shop and Academic Teachers have belonged to the same Union (TA 89). Prior to the 1980-82 contract, Academic Teachers taught five periods a day and Shop Teachers taught seven or eight periods on an alternating basis (TA 32-33). In the 1980-1982 contract negotiations, the Shop Teachers obtained a pay differential of \$900 for the 1980-1981 year and \$1000 for the 1981-1982 year (TA 35). The differential was granted to compensate the Shop Teachers because they had a higher course load than academic teachers (TA 32-33). The 1980-1982 term marked the first time the Shop Teachers received a differential (TA 90). Other personnel, however, with schedules similar to Shop Teachers (Guidance Counselors and Nurses) did not receive a differential (TA 92-93).

(b) In the 1981-1982 academic year, new State standards required the reduction of Shop Teacher's course loads from alternate

seven and eight period days to seven period days only (TA 44; TG 45). The Board responded to the course load reduction with a request to the Education Association to reopen negotiations on the differential issue (TA 45; TG 47). The Education Association refused the request and the Board subsequently withheld the full differential amount unilaterally (TA 47-48; TC 24-25; TG 48). The Education Association filed a grievance and the differential was reinstated in full for the duration of the 1980-1982 contract (TC 28; CP 1)^{3/}.

4. Prior to the 1982-1984 negotiations, the Education Association established a bargaining committee and a bargaining team (TA 49). The committee was to formulate the teacher's proposals and objectives, and then pursue these goals at the negotiations table (TA 49-50). Membership on the committee was open to any interested Association member (TA 122). The team consisted of Joseph DiGise, an Academic Teacher; Len Cerisano, the Association President; Bob Brown, a Physical Education Teacher; Michael Adams, a Shop Teacher; and William Flynn, a Representative of the New Jersey Education Association (TA 50). There was an informal ground rule between the committee and the team that the committee was to be kept informed of negotiations developments (TB 120; TC 91-92; TF 27). On May 19,

3/ Exhibit designations are as follows; "CP" refers to Charing Party's Exhibits. "I" refers to Intervenor's Exhibits; "J" refers to Joint Exhibits; and "C" refers to Commission Exhibits.

1982, a resolution was also passed at a general membership meeting that the team should not give back any benefits without the endorsement of the membership (TA 53; TF 73; TH 88; TL 25). The Education Association's witnesses denied that the team was to report either to the committee or the membership about the progress of negotiations (TI 36; TQ 75; TQ 31, TR 35-36). However, the weight of the evidence indicates that the team was to report back periodically, and failed to do so. I credit the witness testimony establishing that the negotiations team was to report back to the membership because I believe it to be the more logical scenario under all the attendant circumstances, and also because secret negotiations in the past had been a major concern within the Education Association (TB 22; TC 12-13; TC 89).

5. The Shop Teachers differential was a major point of contention during negotiations for the 1982-84 contract (TA 61, 63; TC 101, 145). The proofs indicate that initially the Board did not favor continuation of the differential because of the reduced Shop Teacher course load, and it had regarded as unfavorable, the arbitration ruling in which the Arbitrator held that under the contract the Board was obligated to pay the Shop Teachers' differential even though their teaching load was reduced.^{4/} In

^{4/} It appears that the Board's position was that the Shop Teachers receipt of a \$900 differential for 1980-81 was warranted by virtue of their alternating seven and eight period per day schedule; but in 1981-82, when their teaching load was reduced, the \$1000 differential (see 1980-82 contract

his award, the Arbitrator stated, "The agreement is clear, the obligation is clear in that document, unilateral change(s) is a violation thereof" (P 1; TC 28; TG 52-53, 115-116). It seems apparent, however, that the \$38,000 referred to repeatedly by hearing witnesses, represented \$500 each for the 76 Shop Teachers to maintain their differential during the 1983-84 school year only (TC 101; TG 63, 190-191). The parties differ, as to whether the Board offered the \$38,000 to maintain a \$500 differential in the second year of the contract or not (TA 61-63; TC 101; TG 115-116). Both the Board of Education and the Shop Teachers assert that the Board ultimately offered \$38,000 (\$500 for each shop teacher) to maintain the Shop Teachers differential during the 1983-84 school year (TG 60, 190-191; TU 56; P-6). The Education Association, however, maintains that the Board offered the differential, but only momentarily; and, that it was taken off the table before the Education Association could act (TR 56). The Board of Education and the Shop Teachers contend that the Education Association refused to

4/ Footnote Continued From Previous Page

(J 4)) should not have had to have been paid. This seems to have been the Board's position at the start of the 1982-84 negotiations. Because of this position the Board asserted that no differential should be paid to Shop Teachers for the 1982-84 school years. However, as negotiations progressed the Board retreated somewhat from this stance and offered a \$500 differential for the second year of the 1982-84 contract only (TG 60); apparently, to compensate the Shop Teachers for teaching seven periods per day in contrast to an academic teacher's five teaching periods per day.

accept the \$38,000 for a shop teacher differential, and a caucus ensued between Flynn and the Board of Education so that Flynn could explain the Association's position (TG 191; TT 51). At this caucus, Flynn suggested that the Board offer the \$38,000 to all teachers for lump sum distribution (TE 85A-85B;^{5/} TG 147-148; TG 191).

Ultimately, the Education Association decided to use the money for health benefit improvements in the second year of the contract (1983-84) (J 2 (Exhibit E); TG 181; TH 20-21). The Education Association's version of these events defies logic. Besides asserting that the \$500 differential was offered but immediately withdrawn, the Education Association maintains that the caucus between Flynn and the Board produced a \$500 offer by the Board to settle an unrelated prescription plan dispute (TR 45-46),^{6/} and not the \$500 differential for shop teachers. The Education Association also claims to have no idea where the \$38,000 figure, written in at the bottom of the salary guide (TO (Volume I) 91-93), came from. I credit the Board of Education and the Shop Teachers Association's explanation of these events. I find that as of June 21, 1982, the Board offered \$38,000 to maintain the Shop Teachers'

5/ Two transcript pages in the Volume designated TE have been numbered page 85. Hence, A and B have been used to differentiate between the two pages.

6/ Record evidence of this prescription plan dispute can be found at TW 3-13. I do not find any relationship between this dispute and funds earmarked by the Board of Education for continuation of the Shop Teachers' differential.

differential for the 1983-84 school year; but, the Education Association refused to accept it for this purpose. I further find that the Education Association endeavored to conceal from the membership that \$38,000 was offered to maintain the Shop Teachers' differential, but not accepted.

6. Prior to the Summer of 1982, DiGise stated to the general membership that he would not continue negotiations over the summer and that talks would resume in September (TA 55; TB 123-124; TO (Vol. I) 45). However, despite these assertions DeGise and Cerisano met with Board representatives to negotiate at at least one luncheon meeting (TC 58-59; TG 69; TO (Vol. I) 45; I 15; I 16). The Education Association denied such a meeting occurred. (TL 50-51). Although the Education Association also denied that a salary guide was finalized over the summer (TL 51; TO 75; TO 79-81), the weight of the evidence indicates that these summer negotiations produced a tentative contract and salary guide (TA 55; TB 130; TG 72; TG 175; TL 51; TO 79-81). The guide produced (J 2) was identical to the one presented to the membership in September in every respect except that the \$38,000 in the tentative guide which was to be distributed to all teachers in a lump sum, was now allocated as a \$38,000 increase in fringe benefits in the second year of the contract (J 2 (Exhibit D and E); TA 56-57; TA 59-60). A letter dated September 9, 1982, written by Edward O'Byrne, the Board's attorney, confirms that a tentative agreement was reached over the summer (I 4). The letter refers to such agreement and recommends language to be used to

effectuate the contract (TG 175). Another letter (I 22) from DeGise to Flynn in response to O'Byrne's letter also acknowledges that a contract was reached over the summer, despite the Education Association's denials. This letter suggested that the \$38,000 not be distributed to all teachers because in DeGise's own words he stated "this will do damage" (I 4; TO 52). Apparently, as a result of this, the \$38,000 was reallocated to fringe benefits in the second year of the contract (TG 181; TH 20-21). This revised contract was referred to at the Executive meeting of the Education Association on September 10, 1982 (TO 78-81; P 9). I conclude from its somewhat illogical explanation that the Education Association's real concern was that if the Shop Teachers knew that this lump sum distribution was made instead of giving them their differential, this would do damage to the Association's stability. At hearing, DeGise's explanation of what he meant by "this will do damage" lacked both credibility and logic. He stated that when he said "this will do damage" he meant he did not know where the \$38,000 came from or why the Board inserted it into the guide (TO (Vol. I) 55, 91-93). I conclude from the above that the Association did not want the membership aware of the fact that meetings occurred over the summer and that the \$38,000 allocated first for lump sum distribution, then health benefit increases, represented money earmarked by the Board to maintain the shop teacher differential.

7(a) As a result of the above incidents, considerable animosity developed between the Shop Teachers and the Academic

Teachers (TA 86). The Education Association made an effort to reconcile with the Shop Teachers by proposing constitutional changes (TB 65-66);^{7/} however, these negotiations broke down and no settlement was reached (TB 64,149). At the February, 1983, Education Association meeting a resolution was passed by the membership that approved the severance of the Shop Teachers from the Education Association (TB 137-139; J 2 (Exhibit G)). However, Cerisano, as Association President, objected to this resolution on the grounds that it violated the Association Constitution and/or Robert's Rules of Order (TB 80-82, 137). The vote was held despite these objections. Thereafter, a second vote was taken to resolve the contractual constitution issue raised by Cerisano by permitting the severance to take effect at the expiration of the contract (TA 83; J 2, Exhibit H). Upon cross examination, Cerisano, was unable to demonstrate how the vote violated Roberts Rules of Order as alleged (TN 18).

(b) The minutes from this meeting do not accurately chronicle this series of events (J 2 (Exhibit G and H); TB 138-140; TC 109; TH 148). Moreover, the meeting's minutes do not reflect that a second vote was taken, whereby the membership, in order to cure the alleged constitutional violation, voted to sever the shop teachers at the contract's expiration (TH 148; J 2 (Exhibit G); TC 109); and, this alleged void in the minutes was noted by the Shop

^{7/} See also footnote 13, infra.

Teachers in a petition (J 2 (Exhibit H)). In any event, the Executive Committee did not permit the vote to stand and instead, formally intervened in this severance proceeding on October 26, 1983. The Shop Teachers' filing of the instant severance petition was a direct result of the above series of events.

8(a) On September 10, 1984, the parties requested that the hearing in this matter be adjourned in order that they could meet to attempt to settle the entire matter (TV 71-72). Leonard Basilio and Leonard Cerisano, as Presidents of their respective organizations, agreed to a series of settlement proposals on October 22, 1984 (TV 75, 104). These proposals were to be presented to union members on an "as is" basis with a recommendation of acceptance (TU 107; TV 104-105). On October 23, 1984, the Shop Teachers accepted the proposals (TU 83, 115).

(b) Cerisano, however, did not endorse the proposals as agreed (TV 105, 116). In fact, he took measures which appear to have been intended to insure their rejection (TV 78, 117). He did this by advising his Executive Committee not to endorse the proposals, and by abstaining from the membership vote (TQ 26, 60-63; TV 80, 116). As a result, the Executive Committee did not endorse the proposals to the membership (TQ 26; TT 81-82), and Cerisano did not go on the record as having voted against the proposals. Cerisano also mischaracterized the proposals to the Association, stating that they were "P.E.R.C. proposals" rather than proposals negotiated between Basillio and himself (TU 19, 22, 29, 107, 124; P

19; I 27). Cerisano stated that he decided not to recommend the proposals as originally agreed because he changed his mind about the first two proposals, and felt that the Shop Teachers had violated the tenth proposal (TV 78-79).^{8/} In the absence of an offer of proof from the Shop Teachers Association rejecting Cerisano's allegation with respect to the tenth proposal (TV 78), I do not discredit his testimony in this regard; however, under all the circumstances here, including his stated rejection of numbers one and two after agreeing to recommend them, and in light of my findings that the Cerisano testimony is not credible in many other respects, I reject the Education Association's proffer in this area as well, and I find that the Education Association, by way of its leadership, endeavored to insure, in a clandestine manner, that the settlement proposals not be ratified.

9(a) Ultimately the Association held three votes on whether to accept the proposals (TK 10-15; TU 29). The first vote resulted in the rejection of the proposals (TU 6-7). A motion was made by Michael McCormick, a Physical Education teacher, and passed by the membership, that provided that the Education Association

^{8/} I believe it improper to inquire into the substance of settlement discussions and proposals; hence, I shall not discuss the tenth proposal. However, I believe that procedurally, the series of events which occurred during the pendency of the parties' settlement discussions, are germane to the issues raised by this severance petition, and are admissible during the course of this investigatory proceeding (See pages 16-19, infra).

should continue a dialogue with the Shop Teachers (TV 81). On November 5, 1984, there was a meeting between the respective executive committees (TV 82). At this meeting the Education Association's Executive Committee discovered how the settlement proposals actually were developed (TU 19-25). As a result of this meeting a second vote was held, and the proposals were accepted (TU 275; TV 124). However, Cerisano invalidated the second vote because a person, who was not a dues-paying-union-member, had voted; and, because approximately 13 other members complained about short notice of the meeting (TU 28; TV 91-92, 125-127). Cerisano had known that the non-member was present at the vote but took no action to avoid an irregularity in the proceedings (TV 125). The lack of notice was also known prior to the meeting, as representatives of those affected had complained about the fact that they received notice only shortly before the meeting.^{9/}

(b) Finally, on December 7, 1984, a third vote was conducted (TU 97; 151). No formal meeting was held and no presentation was made to the membership (TQ 26). The vote was by secret ballot; and, the proposals were defeated.^{10/}

^{9/} This instance of multiple votes and the Executive Committee's eventual declaratory action nullifying the vote is comparable to the severance vote taken by the entire membership in which they voted twice to permit the Shop Teachers to sever themselves from the group; but, which vote the Executive Committee subsequently invalidated (P 11; TB 137-140).

^{10/} The record does not appear to contain any direct evidence of this; however, it is clear from the entire proceedings that the proposals were ultimately defeated in the third vote, and this fact is not in dispute.

Motion to Introduce Evidence of Education
Association's Instability Taken From Events
Related to Settlement Attempts

During the hearings in this matter and following the breakdown of the settlement discussions, the petitioner attempted to reopen its direct case in order to introduce evidence of certain events, occurring during the pendency of the settlement attempts, to support its assertion of lack of responsible representation. The Education Association objected to the introduction of this evidence and I considered the parties arguments in the form of a motion. I determined that the evidence should be admitted (TL 4-11), and granted the Petitioner's request to introduce the proffered evidence, based on my understanding of a representation proceeding as continuing and investigatory in nature, with the burden of establishing a complete record on the hearing officer. Furthermore, the movant's proffer was germane to these proceedings in that it was attempting to introduce evidence of the unit's instability at a time following the issuance of a notice of hearing, but prior to the issuance of a hearing officer's recommendation. In support of my decision on this motion I can cite various sources tending to establish a basis for the admission of evidence that bears a relationship to settlement discussions, but which is not direct, substantive evidence of settlement proposals in the context of the settlement efforts.

Federal Rule of Evidence 408, provides in pertinent part:

Evidence of conduct or statements made in compromise negotiations is ... not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as providing bias or prejudice of a witness, negating a contention of undue delay, or providing an effort to obstruct a criminal investigation or prosecution. [Emphasis added].

In Langland v. Vanderbilt University, 36 FEP 200, 219 (M.D. Tenn. 1984), the Court held that evidence of non-compliance with a conciliation agreement was admissible on the issue of discriminatory intent in a later Title VII action.

The Court in Winfield v. St. Joe Paper Co., 20 FEP 1094 (N.D. Fla. 1977), recognized another exception. The Court held that the EEOC privilege against discovery of information obtained "during" or "as a part of" conciliation attempts did not apply to discussions prior or subsequent to the conciliation effort. Id. at 1095. Winfield involved Sec. 706(a) of the Civil Rights Act, rather than FRE 408. Here, the evidence admitted occurred subsequent to the settlement negotiations; and, thus, did not directly impact upon them.

A third "other purpose" exception was found in E.E.O.C. V. King's Daughter Hospital, 12 FEP 484 (S.D. Miss. 1976). The Court in Kings held that evidence of negotiations was admissible where the evidence was offered to prove that settlement negotiations occurred. The Court held "[We] hereby overrule the EEOC's objection to this affidavit [regarding negotiations] since it relates not to

the content of the settlement negotiations but to the existence of such negotiations, which is an entirely legitimate subject of inquiry for this Court." Id. at 487. This decision supports the general proposition that recognition of "other purpose" exceptions under FRE 408 is a proper exercise of judicial discretion.

In Drukker Communication v. NLRB, 1116 LRRM 2077 (D.C. Cir. 1983) the Court held an NLRB rule against testimony by Board officers inapplicable based upon equity considerations alone. Drukker involved a dispute over what the parties to a settlement intended by the use of a certain term. The only parties with first hand knowledge of this intent were the two attorneys and a Board Officer. The NLRB quashed a subpoena ordering the officer to testify about the term based upon the policy of FRE 408 and, a desire to avoid Board entanglement in labor disputes. The employer requesting the officer's testimony challenged the Board's action. The Court held for the employer based upon several considerations that outweighed the policy goals of the Board. Id. at 2081-2082. Some of these considerations are relevant to the present case.

1. In Drukker, the issue on which the testimony was sought was central to the case. Here, testimony concerning the Association President's breach of the settlement agreement is of substantial importance to a determination of whether the bargaining unit is unstable.

2. The issue in Drukker was quite specific. Here, it is merely directed at whether the Association president did or did not

breach the settlement agreement. The terms of the settlement agreement are not in issue.

3. The moving parties' version of the events, which were allegedly sustained here, and by the Court in Drukker, is highly plausible. The shop teachers' position in this matter is also highly probable. They contend that the Association President breached the agreement. The evidence showed that the Association generally followed the President and the Executive Committee's recommendation. The President agreed to recommend the settlement; however, the membership rejected the settlement. Without evidence concerning the circumstances of this rejection, the shop teachers cannot show the Association President's continuing bad faith.

4. The evidence that the moving parties sought to introduce was of a unique value with regard to the issue here. In Drukker only three parties were privy to the negotiations, two interested attorneys and a Board officer. Although the present situation is not directly analagous, the two are similar in that the shop teachers have no other means to prove that the Education Association President acted in bad faith and breached the agreement, than through testimony about circumstances subsequent to the parties' settlement negotiations.

Finally, although the Petitioner placed the parties' settlement proposals on the record without objection from the Intervenor (see TK 3-9), in my decision on the motion to permit the additional evidence, I limited my affirmative ruling to

non-substantive aspects of the settlement ratification procedure, and I declined to consider any substantive evidence of the parties settlement proposals in this recommended decision.

Legal Analysis

The Petition in this matter requires a determination of whether Shop Teachers should be "severed" from an existing unit consisting of academic and non-academic teachers. In furtherance of its positions, the petitioner asserts both a lack of a proper community of interest between shop teachers and academic teachers, and the failure of the Education Association to provide responsible representation to Shop Teachers. With regard to the first of these two issues, the petitioner has not adequately established the lack of a community of interest between shop teachers and academic teachers. The Commission has specifically held in this regard that "many different types of school district unit structures are appropriate for certification: some containing teachers alone, some containing one or more groups of supportive staff alone, and some containing a mixture of teachers and one or more groups of supportive staff." In re Piscataway Twp. Board of Education, P.E.R.C. No. 84-124, 10 NJPER 272 (¶ 15134 1984). Here the distinction between academic and non-academic teachers is less significant than some of the other combinations approved by the Commission in Piscataway, supra.

Petitioners second assertion is that the Education Association has failed to provide responsible representation to Shop Teachers. This is, by far, the more difficult question to resolve.

Generally, and without exception in the absence of extraordinary circumstances, the Commission's policy has been to favor broadly-based units of employees sharing an adequate community of interest. In re County of Somerset, D.R. No. 78-42, 4 NJPER 198 (¶ 4099 1978). In re Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971), the Commission established a standard for severance of employees from an appropriate collective negotiations unit. The Commission stated:

The question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to redefinition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

In re West Milford Bd. of Ed., P.E.R.C. No. 56 (1971), the Commission explained:

The measure of fair representation is ultimately found at the negotiating table, in the administration of the negotiated agreement and in the processing of grievances.

In In re County of Camden, D.R. No. 81-3, 6 NJPER 415 (¶ 11209 1980), the Director of Representation affirmed the hearing officer's recommendation by severing a group of registered nurses from an existing county-wide unit. The facts in Camden established

that the incumbent organization failed to adequately process grievances filed by two nurses; that it failed to adequately negotiate on behalf of the nurses that it represented and, in fact, attempted to conceal its actions from them; that the manner of the initial inclusion of the nurses in this county-wide unit was somewhat questionable; and, that the employer consented to a separate unit of nurses. In reaching the decision to sever, the Director stated, with regard to the issue of inadequate grievance processing:

An organization which fails to advise employees that formal grievances, wherein requests have been made for binding arbitration, will not be submitted to arbitration and fails to advise employees of the reasons for its refusing to submit grievances to arbitration is acting in an arbitrary manner and is not affording responsible representation. Considering that one of the grievances was presented by the chief negotiator for the RPNU and the rejection of the further processing of the grievance occurred at the same time the parties were engaged in difficult negotiations, lead the undersigned to the reasonable presumption that the individual was being targeted for invidious representation because of the active disagreement that ensued between Council 10 and the RPNU. This circumstance is evidence of the degree of instability in the relationship existing between the RPNU, Council 10 and the County. [6 NJPER at 417].

With regard to the issue of inadequate representation of this subgroup, the Director held:

...Council 10 did not provide responsible representation when it changed the agreement reached between RPNU and the County without advising the RPNU of the changes and without responding to the RPNU's request to meet with Council 10. The fact that the County and RPNU

representatives later succeeded in resolving the dispute in the absence of Council 10 participation reflects as well upon the instability of a relationship which includes Council 10, the RPNU and the County. [6 NJPER at 417].

Here, the argument in favor of severance is not as strong as in Camden, supra. There is no evidence of the Education Association's failure to adequately process grievances from Shop Teachers, and the Shop Teacher's manner of initial inclusion in this unit is not in question. However, based on its decision to take no position with regard to the issues presented by this matter, the employer has in effect, consented to a separate unit of shop teachers in the event such is determined to be appropriate. Moreover, the facts of this case bear similarity to the facts in Camden, supra, with regard to the issue of the Education Association's representation of Shop Teachers, both at the negotiations table and, to a lesser extent, during the course of its administration of the parties negotiated agreement. See, In re West Milford Bd. of Ed., supra. On the issue of the Shop Teachers' differential, the facts show a clear pattern of actions by the Education Association leadership to divert the \$38,000 sum offered by the Board to continue the Shop Teachers' differential to other uses, and to conceal this from the Shop Teachers.^{11/} Granted, in

^{11/} The record also establishes, to the Education Association's credit, that it actively pursued a grievance through arbitration to restore the differential to the Shop Teachers during the term of the 1980-82 contract; however, the

an unfair practice (duty of fair representation) context the Commission has held that an employee organization does not breach its duty of fair representation when it secures a benefit for one sub-category of employees over another. See ex., Belen v. Woodbridge Twp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976); In re PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶ 15023 1983). However, where an employee organization's actions are taken in a clandestine manner, and attempts are made to conceal these actions, the character of the situation changes. Here, the Education Association's lack of candor with the Shop Teachers is apparent from the evidence contained in the record. It agreed not to conduct negotiations over the summer, but did so, and attempted to conceal the fact. It arranged for the disbursement to other uses of the funds earmarked by the Board of Education for the Shop Teacher's differential, and attempted to conceal the fact.

The record also contains several incidences where the Education Association acted arbitrarily and also frequently in a clandestine manner, to further its own purposes to the detriment of the Shop Teachers, and to deny to the Shop Teachers and in some instances to its entire membership, with the intention of limiting the shop teachers' options, the right to take concerted action to

11/ Footnote Continued From Previous Page

petitioner's primary allegations in this matter deal instead with the events occurring following that period and revolving around the negotiations for the 1982-84 contract.

achieve its goals. It agreed in 1982 not to give back any benefits without the endorsement of the membership, but then violated its own resolution in order to further its own interests to the detriment of the Shop Teachers. It failed to report back periodically either to the negotiations committee or the membership about the progress of negotiations for the 1982-84 contract. When the membership voted to permit the Shop Teachers to sever themselves at the end of the 1980-82 contract, the Education Association's President nullified the vote on the ground that the vote violated Roberts Rules of Order and the Association Constitution without establishing the validity of either claim and despite that a second vote was taken to cure any possible constitutional violation by voting to sever at the contract's termination.^{12/} And by the Association's President's and to a lesser extent the Executive Committee's endorsement of settlement proposals in this matter, and then the attempts to sabotage the parties' own negotiated settlement proposals by

^{12/} Compare, In re Newark Building Trades Council, D.U.P. No. 82-34, 8 NJPER 333 (¶ 13151 1982), where the Director of Unfair Practices held in a duty of fair representation context, that an employee organization's internal procedures are not a proper subject of inquiry in an unfair practice setting in the absence of a claim that the employee organization acted arbitrarily, capriciously or in bad faith. See also, In re New Jersey Turnpike Authority, P.E.R.C. No. 80-35, 5 NJPER 412 (¶ 10215 1979), in which the Commission in a duty of fair representation case, in an unfair practice context, held that absent a claim of interference with protected activities, it is necessary to allege arbitrary, discriminatory or bad faith conduct on the part of the employee organization.

mischaracterizing them to the membership, by failing to endorse them after having agreed to do so, by invalidating a second membership vote, for reasons which could have been addressed prior to the vote at which the proposals were approved, and by the clandestine manner in which all these actions were taken. I believe that all these events chronicle an employee organization which borders upon instability in its representation of all of its constituents.^{13/}

CONCLUSIONS

Based upon the above findings and conclusions and under the applicable case law, I cannot recommend that the Shop Teachers be severed from the Education Association's unit. I have reached this conclusion by balancing the Shop Teacher's need for responsible representation and stability against the Commission's long-standing and deeply-routed policies of favoring broad-based units and discouraging unit fragmentation. The record establishes that the Education Association did successfully negotiate on behalf of Shop Teachers in many instances, did administer the negotiated agreement fairly in many instances, and did process grievances for Shop Teachers in a satisfactory manner. On the other hand, the record is also well-documented with evidence that the Education Association acted arbitrarily, and also frequently in a clandestine manner, to

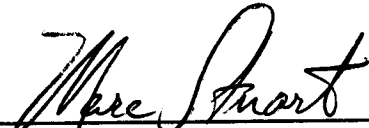
^{13/} See Geiger testimony (TT 28-29) in which he stated he made attempts to resolve the serious differences between the shop and academic teachers through changes in the internal structure of the unit.

further its own purposes to the detriment of the Shop Teachers. I conclude, however, that these actions are insufficient evidence of the Education Association's lack of responsible representation within the meaning of In re Jefferson Twp. Bd. of Ed., supra and In re County of Camden, supra. However, I would be remiss if I didn't stress the fact that I think that the units' recent course has bordered upon instability, and that many of the Education Association's actions have been taken in an arbitrary, discriminatory, capricious and clandestine manner to the detriment of the Shop Teachers.^{14/} This being a representation proceeding, it is investigatory and continuing in nature, and although I have concluded that the proofs, at this juncture, do not merit severance; in the event the Shop Teachers assertions of lack of responsible representation and instability continue with a proper factual basis therefor, I would be inclined to recommend, to the Commission, the possibility of a future severance of Shop Teachers from the Education Association's unit. The need for labor harmony would, then, outweigh the strength of the policies opposing severance.

^{14/} I note that the Education Association's leadership, which has been instrumental in discriminating against the Shop Teachers, has changed since the time of the hearings in this matter. Based upon this change, I am hopeful that the prospective treatment of Shop Teachers within the Education Association's unit will improve.

RECOMMENDATION

I recommend dismissal of the Shop Teacher's petition in this matter, with the provision that in the event the Shop Teachers seek to pursue the same remedy in the future, these findings of fact be considered background findings for future claims.



Marc F. Stuart
Hearing Officer

DATED: May 14, 1986
Trenton, New Jersey