

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF EAST ORANGE  
IN THE COUNTY OF ESSEX

Public Employer

and

Docket No. CU-53

EAST ORANGE EDUCATION ASSOCIATION  
Petitioner

DECISION

Pursuant to a Notice of Hearing to resolve the unit status of Principals, Assistant Principals, Administrative Assistants, Directors, Assistant Directors, Department Heads, Coordinators, and Supervisors, hearings were held on March 11 and 12, 1971 and April 5, 1971 before Hearing Officer Ronald L. Tobia at which all parties were given an opportunity to examine and cross-examine witnesses, present evidence, to argue orally and to file briefs. Thereafter, on May 28, 1971, the Hearing Officer issued a Report and Recommendations. Neither party filed exceptions to the Hearing Officer's Report and Recommendations.

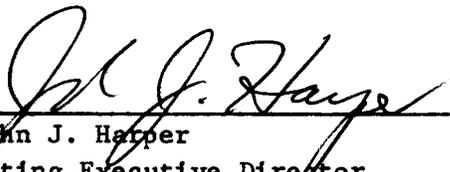
The Executive Director has considered the record and the Hearing Officer's Report and Recommendations and finds:

1. The Board of Education of East Orange is a public employer within the meaning of the Act and is subject to the provisions thereof.
2. The East Orange Education Association is an employee representative within the meaning of the Act.
3. The Association seeks clarification of an existing negotiating unit concerning the status of certain administrative positions in the East Orange School System. In contract negotiations a dispute arose as to the continued inclusion of these administrators within the existing negotiations unit 1/ which resulted in the Association filing a clarification of unit petition. Therefore, a question exists concerning the composition of the unit and the matter is appropriately before the Executive Director for determination.

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1/ The existing unit is: "...all professional staff members whose positions require certification by the New Jersey State Department of Education, whether under contract or on leave, employed by the Board, including: Classroom Teachers, Nurses, Guidance Counselors, Librarians, Social Workers, Helping Teachers, Vocational Counselors, Psychologists, Speech Correctionists, Learning Disability Specialists, Department Heads, Administrative Assistants, Assistant Principals, Principals, Directors, Supervisors and Coordinators; but excluding: Superintendent of Schools, Secretary-Business Manager, Assistant Superintendents and Assistant to Secretary-Business Manager."

4. In the absence of exceptions to the Report and Recommendations of the Hearing Officer, attached hereto and made a part hereof, the undersigned adopts the findings and recommendations of the Hearing Officer pro forma. Accordingly, Principals, Assistant Principals, Directors and Assistant Directors are excluded from the unit and Administrative Assistants, Department Heads, Coordinators and Supervisors shall remain in the existing negotiating unit.

  
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John J. Harper  
Acting Executive Director

DATED: July 26, 1971  
Trenton, New Jersey

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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EAST ORANGE EDUCATION ASSOCIATION  
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Docket No. CU-53

APPEARANCES:

Stanley C. Gerard, Esq.  
for the Public Employer

Cassel R. Ruhlman, Esq.  
for the Petitioner

REPORT AND RECOMMENDATION OF HEARING OFFICER

A petition was duly filed with the Public Employment Relations Commission on March 5, 1971 by the East Orange Education Association requesting a clarification of an existing negotiating unit. Pursuant to a Notice of Hearing dated March 8, 1971, and an Order Scheduling Hearing, dated March 30, 1971, hearings were held before the undersigned Hearing Officer on March 11 and 12, 1971 and April 5, 1971 in Newark, New Jersey. All parties were given an opportunity at these hearings to call, examine and cross-examine witnesses, to present evidence, and to argue orally. Both parties through their respective attorneys filed briefs herein on April 20, 1971,

Upon a careful consideration of the entire record, the exhibits and the briefs in this proceeding, the Hearing Officer makes the following findings of fact and recommendations.

BACKGROUND:

The Board of Education of East Orange in the County of Essex, hereinafter the Board, was stipulated to be a public employer within the

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1/ The original case caption was amended by stipulation at the hearing to correctly reflect the name of the public employer.

meaning of the New Jersey Employer-Employee Relations Act, hereinafter Chapter 303. The East Orange Education Association, hereinafter the Association, was stipulated to be an employee representative within the meaning of Chapter 303. The East Orange school system is the second largest in Essex County with approximately 12,000 pupils, 600 to 750 professional employees, and 15 administrative units. The operating budget is \$12.6 million.

The existing negotiating unit, as described in the recognition clause of the 1970-1971 agreement, is as follows:

...all professional staff members whose positions require certification by the New Jersey State Department of Education, whether under contract or on leave, employed by the Board, including:

Classroom Teachers, Nurses, Guidance Counselors, Librarians, Social Workers, Helping Teachers, Vocational Counselors, Psychologists, Speech Correctionists, Learning Disability Specialists, Department Heads, Administrative Assistants, Assistant Principals, Principals, Directors, Supervisors and Coordinators.

but excluding:

Superintendent of Schools, Secretary-Business Manager, Assistant Superintendents and Assistant to Secretary-Business Manager. 2/

At a negotiating session on January 7, 1971 concerning the 1971-1972 agreement, the Chairman of Board's negotiating team proposed changes in the above recognition clause to exclude not only the Superintendent of Schools, Secretary-Business Manager, Assistant Superintendents and Assistant to the Secretary-Business Manager but also Principals, Assistant Principals, Administrative Assistants, Directors, Assistant Directors, Department Heads, Coordinators and Supervisors.

The Association's position as stated by its negotiating team was that it represented everyone in the unit and that recognition was not negotiable. It was suggested that the Board petition the Commission for clarification of the existing negotiating unit. Notwithstanding the representation that the administrators in question unanimously voted to remain part of the existing unit in the new 1971-1972 agreement, the Board refused to negotiate for a unit composed of administrators and teachers. Thereupon, at a meeting, the administrators, sought to be excluded by the Board, voted unanimously by roll call vote to remain part of the unit.

The Board's team agreed to negotiate with the Association if administrators would not speak at the sessions. The Association had a seven member team consisting of three administrators and four teachers.

The Chairman of the Association's team relinquished his post in favor of a teacher in order to allow the negotiating to continue. However, the Board would not negotiate any item in the 1971-1972 agreement that affected administrators. Whereupon on March 5, 1971 the Association through its attorney filed a petition with the Commission seeking clarification of the negotiating unit.

Let us now consider the issues presented by this request for Commission action.

LEGAL ISSUES:

The legal issues presented to the undersigned Hearing Officer can be summarized as follows:

I. Whether the facts presented brings the categories of administrators in dispute within the statutory exceptions of established practice and prior agreement in order to permit supervisors to be included in the same negotiating unit with non-supervisors.

II. If either of these statutory exceptions are established, what effect does any actual or potential conflicts of interest have on this existing negotiating unit.

Let us now consider these issues in light of the testimony presented.

ESTABLISHED PRACTICE AND PRIOR AGREEMENT:

Concerning the statutory exceptions which must be interpreted, Chapter 303 provides in part:

...nor, except where established practice, prior agreement, or special circumstances, dictate to the contrary, shall any supervisor... have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership...3/

The Statute also provides:

...The division (Commission) shall decide in each instance which unit of employees is appropriate for collective negotiation,

provided that, except where dictated by established practice, prior agreement or special circumstances, no unit shall be appropriate which includes (1) both supervisors and non-supervisors. 4/

Inasmuch as the Board and the Association have stipulated at the hearing that the administrative categories in dispute are supervisors within the meaning of Chapter 303, there is no dispute concerning their supervisory status. The testimony presented on whether the statutory exceptions were met focused on established practice prior to the enactment of Chapter 303 and two prior collective negotiating agreements for 1969-1970 and 1970-1971.

Prior to the enactment of Chapter 303 in the fall of 1968, there were two sets of "negotiations" or discussions between the Board and the Association. The problem presented for the undersigned is whether these constituted the statutory exception of established practice. During this period from 1966 to 1968, the Board as a whole dealt only with the Association's Salary Committee, which consisted of three administrators and four teachers. The Salary Committee "negotiated in a sense" 5/ with the Board concerning salary guide and other monetary issues. Prior to Chapter 303 grievances were processed under a procedure that had been previously negotiated. Let us now examine the facts surrounding each set of negotiations.

The 1966 negotiations began in the spring with an Association proposal for increases on the salary guide to include intermediate levels and for Board paid health insurance. 6/ The increases in benefits were sought by the Association for the entire professional staff. Meetings and discussions concerning these proposals were held during the summer and into the fall of 1968. Concerning the Association's health insurance proposal, Mr. Harris, Board President, who was also president of an insurance company, undertook research for the Board concerning the type of insurance benefits and the carrier thereof. The results of his survey was submitted to the Salary Committee and it was accepted. Pursuant to this agreement, the Board assumed health insurance coverage. The Association's proposed salary guide modifications were not realized due to concession made to gain the health benefits.

In addition to the foregoing, the Planning Committee of the Association set up a procedure for the processing of grievances. This tentative proposal for its establishment was proposed to the Board in the spring of 1966. The Board considered it and made recommendations for its ~~improvement~~. The Association acted upon the Board's suggestion and an agreement on grievance procedure was reached.

The 1967 negotiations began with a well documented Association written proposal concerning modification in the teacher's salary guide. 7/ In addition, it was suggested that a ratio guide be established for

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4/ Ibid, -6(d).

5/ Tr. 33.

6/ Exhibit C-2, dated June 21, 1966.

7/ Exhibit C-3.

Principals and Assistant Principals. Formal meetings took place between the Board as a whole and the Salary Committee. Before Chapter 303, types of "proposals and counter-proposals" were made by each party to the negotiations. 8/ The Association and the Board discussed their different positions, reacted thereto and ultimately a mutual agreement was reached which was embodied in a letter to staff members dated February 9, 1967. 9/ The discussions concerning this new guide centered on its cost and its relation to surrounding communities. Ideas were exchanged and initial proposals were revised.

Concerning the ratio guide for Principals and Assistant Principals, at first informal discussions between individuals on both sides took place and the general concensus was that a ratio guide would be advantageous since salaries of teachers would be tied to administrators. As a result of the foregoing, the Board adopted a 1.5 ratio guide for Principals in the spring of 1968 and a 1.25 ratio guide for Assistant Principals in September, 1968.

Based on the foregoing facts, the Hearing Officer respectfully recommends a finding that the statutory exception of established practice has been demonstrated by the testimony and the exhibits. In a recent decision, the Commission has stated:

...Established practice includes the joint determination of terms and conditions of employment through negotiations on a bilateral basis. There must be the give and take of negotiation as contrasted with the unilateral determination of terms and conditions of employment following discussions with public employees or their representatives. 10/

The Hearing Officer finds that the economic issues of health insurance, improved salary guide and ratio guide were negotiated on a bilateral basis. Exhibits C-2 through C-6 are written evidence of the exchange of proposals during both the 1966 and 1967 negotiations. In addition, a grievance procedure was realized through mutual discussion. The give and take necessary are to be found in the pre-Chapter 303 meetings. Let us now examine the statutory exception of prior agreement.

After the enactment of Chapter 303, the Association presented to the Board authorization cards designating it as the sole and exclusive negotiating agent. The cards were signed by 98% of all the professional staff including administrators. On November 19, 1968, the Board by resolution recognized the Association as the negotiating agent. 11/ Thereafter, formal negotiations began between a team from each party.

8/ Exhibit C-4, dated January 19, 1967 and Exhibit C-5.

9/ Exhibit C-6.

10/ P.E.R.C. No. 53, p. 3.

11/ Exhibit P-3.

The Association's initial proposal presented to the Board was comprehensive and encompassed many areas of professional employment. Both parties understood at the outset that other Association salary proposals concerning certain groups would be presented as they were developed. During the 1969-1970 negotiations no issue was ever raised as to the fact that the negotiating unit included administrators. The testimony revealed that it never occurred to anyone to question problems created by Chapter 303.

After consultation with the administrative personnel, the Association's negotiating team presented in May, 1969 an administrative salary proposal 12/ to the Board which suggested modification in the ratio framework for Principals and Assistant Principals. In addition thereto, proposals covering length of work year and summer overtime compensation were presented. The administrators made suggestions indicating a concensus of opinion to the negotiating team who reviewed them and prepared the proposals to be submitted to the Board. This same process was employed by the Association's team concerning guidance counselors, nurses, department chairmen, social workers and other groups. The Board proposed that administrators be taken off the ratio guide and that a separate salary guide be established for them.

The long and difficult collective negotiations in the fall of 1968 and spring of 1969 resulted in the adoption of an agreement on June 17, 1969 covering the period September 1, 1969 to August 31, 1970. 13/ In order not to delay the execution of the foregoing agreement, the Association established a committee to fact-find with regard to the administrators pay ratio and to deal with this problem in the fall of 1969. In the 1969-1970 agreement, the only two professional employees of the Board excluded from the negotiating unit were the Superintendent and the Secretary-Business Manager. 14/

A second agreement covering the period of September 1, 1970 to August 31, 1971 was entered into between the Board and the Association after a period of extended negotiations similar to those of the 1969-1970 agreement. 15/ The ratio guide was maintained for administrators with modifications in the work year and with a maximum annual increase. On December 15, 1969 by separate written requests the two Assistant Superintendents requested that the Association not negotiate on their behalf. 16/ The Association determined that it was in the best interest of all parties to exclude Assistant Superintendents from their negotiating

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12/ Exhibit P-4.

13/ Exhibit P-1.

14/ Ibid, p. 4.

15/ Exhibit P-2.

16/ Exhibits P-5 and P-6. The third Assistant Superintendent was not returning to the district so he took no initiative concerning this decision.

unit since the Board raised no objection thereto. Consequently, both the Association and the Board mutually agreed to exclude not only Assistant Superintendents but also the Assistant to the Secretary-Business Manager. 17/

Based on the foregoing, it is respectfully recommended that the statutory exception of prior agreement be found to have been established. The Hearing Officer finds that the two agreements, Exhibits P-1 and P-2, contain terms and conditions of employment. The Commission has stated the following in a recent decision:

...The statutory exception of prior agreement contemplates in this context a written agreement executed by both parties resulting from the process of collective negotiations and relating to a unit involving supervisors and non-supervisors... 18/

If the 1969-1970 and 1970-1971 agreements negotiated herein are measured against the aforementioned criteria, the only reasonable conclusion is that the prior agreement exception in Chapter 303 has been established. In addition to established practice, two prior collective negotiating agreements have included supervisors, i.e. administrators, in a unit of non-supervisors, i.e. teachers.

Notwithstanding the recommended findings and conclusions of established practice and prior agreement, the Hearing Officer must consider the impact, if any, of West Orange Board of Education v. Wilton, 57 N.J. 404 (1971), on the foregoing analysis.

#### ACTUAL OR POTENTIAL CONFLICTS OF INTEREST

The attorney for the Association in his brief has argued that the Wilton case is not pertinent to the matter before the undersigned. He argues that the court in Wilton had no proof of established practice or prior agreement and the issue was one of appropriateness of a unit of supervisors. Further counsel argues that there is clear legislative policy and direction to continue units of supervisors and non-supervisors. 19/

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17/ Exhibit P-2, p. 4.

18/ P.E.R.C. 53, p. 4.

19/ The Association's brief on page 7 cites the following language from Wilton, supra:

"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. The extent to which supervisors should be permitted in units of rank-and-file employees, or of other supervisors, is essentially a matter of legislative policy. To the extent reasonably possible the question whether supervisory personnel should be included or excluded ought to be dealt with forthrightly and not vaguely or by silence. See ACIR report, supra, at 95-95. Although Sections 5.3 and 6(d) of N.J.S.A. (continued p. 8.)

The Hearing Officer has carefully considered the Supreme Court's reasoning in the Wilton case. The undersigned concludes that even though Section 5.3 and 6(d) of Chapter 303 gives legislative policy direction by means of the statutory exceptions of established and prior agreement, Section 5.3 also contains a statement of the general rule that "the negotiating unit shall be defined with due regard to community of interest." These two parts of the same statute must be read in para materia and the statutory exceptions must be construed strictly. Therefore, notwithstanding that the facts establish both established practice and prior agreement, these exceptions must be squared with the legislative criteria of community of interest. Any consideration of community of interest after the Wilton decision must determine whether there exists substantial actual or potential conflicts of interest among the employees concerned so as to destroy any community of interest either presumed by statutory exception or proved by the testimony. Let us now consider whether there exists Wilton conflicts in the duties and responsibilities of each category of administrators in the East Orange school system to prohibit them from being part of the same negotiating unit with teachers.

Concerning Principals, Dr. Russell Jackson, Superintendent of Schools testified that the 13 Principals have a special responsibility concerning the management of a school facility including the directing and dividing of human resources. The Superintendent relies heavily upon Principals to manage the schools due to the size of the East Orange school system. In a real management sense, Principals are responsible for the efficiency of the teaching being done and for the evaluation of the performance of teachers in his building. Principals enforce discipline and counsel teachers concerning work performance. If a teacher performs unsatisfactorily Principals can recommend discharge. In performance evaluation, the recommendation of a Principal determines whether or not a non-tenured teacher will be rehired or a tenured teacher will be considered for a higher position. These unsatisfactory recommendations are reviewed personally by the Superintendent but considerable weight is accorded thereto. The satisfactory recommendations are adopted by the Superintendent in toto. Furthermore,

19/ (continued) 34:13A are somewhat less explicit than statutes of other states, our statute in its totality is ambiguous as to whether all grades of supervisors in a local school system, except the superintendent of schools, or his equivalent, may be included in the same unit. But is not wholly without direction. Except where established practice, prior agreement or special circumstances dictate the contrary, including of nonsupervisory personnel in the same unit as supervisors who have the 'power to hire, discharge, discipline, or effectively recommend the same' is prohibited. Aside from these specifications, the nature of the negotiating unit is to be determined generally 'with due regard for the community of interest among the employees concerned\*\*\*.' " (Underlining supplied.)

Principals are the first level in the grievance procedure and are responsible for attempting to resolve the problem informally.

There are three Directors in East Orange, to wit: the Director of Pupil Services and Special Education who has an Assistant Director under him; the Director of Grants Management; and the Director of Vocational, Adult and Continuing Education. The testimony reveals that Directors have the same basic status as building Principals with the same kind of management responsibilities. Each Director recommends the employment or discharge of personnel. They are responsible for making recommendations regarding tenure and salary increase or adjustment of the professional employees in their departments and the Superintendent follows their recommendations. Directors work out of the Superintendent's office but they provide services and assistance for Principals from their respective departments. A Director is an extension of the Superintendent's office and each is directly responsible to either the Superintendent or his Assistants.

The Director of Pupil Services and Special Education has an Assistant Director who is responsible for the entire Special Education department. This Director and his Assistant Director are delegated responsibility for making recommendations concerning recruitment, transfer, and supervision. In this department, there are social workers, psychologists, a learning disabilities specialist, speech therapists, nurses, doctors, home-school visitors and truant officers. Some employees therein are employed on an hourly basis.

The Director of Grants Management has the responsibility for administering a specially funded project such as Title I. This Director has only a small secretarial staff and an Assistant Director. But he has the responsibility for recommending hiring and discharge and evaluation of personnel in his department which include secretaries, teachers aides and tutors.

The Director of Vocational Adult and Continuing Education is responsible for the employment and retention of approximately 150 to 200 hourly paid employees. His duties and responsibilities are similar to the other two Directors.

Concerning Assistant Principals, in the absence of their Principal, an Assistant Principal assumes and succeeds to the duties and responsibilities including the right to discipline in the proper case. The Assistant Principals are directly involved in the evaluation of teachers by means of conferences with their Principal. There are not many cases where the evaluation of a teacher by an Assistant Principal and a Principal differs. The Superintendent testified of a specific incident where an Assistant Principal suspended a teacher and was supported in his judgment.

There are approximately ten Administrative Assistants in the East Orange school system who are involved in a general way with giving assistance to Principals and who do not teach. They are concentrated on the secondary school level and function with general, delegated responsibilities according to a Principal's needs. For example, in East Orange High School, one Administrative Assistant meets with parents and another enforces pupil discipline. The assistance is diverse but very little staff evaluation, if any, is delegated to an Administrative Assistant.

With regard to the 22 Department Heads, they fit in the administrative hierarchy between the teachers and a building Principal. A Department Head is essentially a teacher with some minor administrative responsibility in an instructional area. They have loose evaluation duties for their Principals who have the final determination in all cases.

There are seven Coordinators in East Orange who assist Directors in areas like Mathematics, Science, Language Arts, Psychology, and Social Work. Coordinators are on a call basis to provide service and assistance to a school Principal or teacher in their area of expertise. No approval is needed for a teacher to seek assistance from a Coordinator. For example a Coordinator might perform classroom demonstration when requested. Coordinators are not involved directly in hiring, evaluation or discharge procedures.

The Supervisor of Art is the only person in the Board's administrative classification of a Supervisor. General assistance is given by the Supervisor to a Principal who has an art teacher in his building. There is no direct responsibility for the Supervisor of Art and her assistance is more general and indirect by providing classroom demonstration work and other aid to teachers in the system.

In response to the foregoing facts, counsel for the Association argues that there are no substantial actual or potential conflicts of interest concerning administrators being included in a unit with teachers. Mrs. Mildred Barry, a former Board member and past President, testified that there were no actual conflicts of interest in East Orange between administrators and teachers. She further testified that a very definite evaluation procedure is included in the present 1970-1971 agreement and prior thereto there was an established method of evaluation both of which removed the process from the Principal's domain. Her testimony is corroborated by many other administrators and teachers in the school system. Based on the foregoing testimony the undersigned finds that there were no actual conflicts of interest in the past in the East Orange School system. However, the undersigned must determine also whether there are substantial potential conflicts of interest to prohibit certain administrators from being included in a unit with non-administrators.

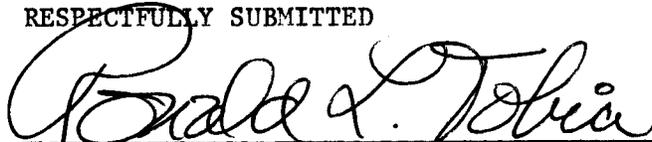
Based on the foregoing specific findings of fact the Hearing Officer concludes that substantial potential conflicts of interest exist only with Principals, Directors, the Assistant Director, and Assistant Principals. It is these administrators who are more closely allied to the management function. These individuals meet the conflict of interest criteria of Wilton in the areas of evaluation of performance, of effective recommendations concerning hiring, discharge and discipline and of administration of the grievance procedure. When these conflicts of interest vis-a-vis the statutory criteria of community of interest are balanced against the statutory exceptions, the determinative factor should be whether their continued inclusion in the existing unit would serve and not subvert the purpose of Chapter 303 i.e. the establishment and promotion of fair and harmonious employer-employee relations in the public service. Wilton, supra, p. 416. The balance must weigh in favor of the Wilton conflicts which would prohibit the continued inclusion of Principals, Directors, the Assistant Director and Assistant Principals in the unit with teachers regardless of their desire to be included therein.

With regard to the remaining administrative categories, i.e., Administrative Assistants, Department Heads, Coordinators and Supervisors, the Hearing Officer concludes that there is no substantial actual or potential conflicts of interest demonstrated by the testimony which would outweigh the statutory exceptions of established practice and prior agreement. These individuals are lower echelon administrators and are not involved in a substantial way in recommendations for hiring, discharge or discipline nor evaluation of teacher performance. Therefore, the Wilton conflict criteria are absent and these administrators should be allowed to continue to be represented by the Association in a negotiating unit with teachers based on the established practice and prior agreement.

It is respectfully recommended that Administrative Assistants, Department Heads, Coordinators and Supervisors be permitted to remain in the existing negotiating unit.

In summary, the undersigned Hearing Officer would recommend clarification of the existing negotiating unit to exclude Principals, Assistant Principals, Directors and Assistant Directors. 20/

RESPECTFULLY SUBMITTED



Ronald L. Tobia  
Hearing Officer

DATED: May 28, 1971  
Trenton, New Jersey

20/ Although the issue of whether Principals, Assistant Principals, Directors and Assistant Directors would constitute an appropriate unit for purposes of collective negotiations is not before the Hearing Officer, the testimony in this matter is dispositive of that issue.

The record is clear that there exists a community of interest without the conflicts of interest among these administrators and they would constitute an appropriate unit of supervisory professional employees.