

D.R. NO. 80-37

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

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Public Employer,

-and-

DOCKET NO. CU-79-55

AFSCME, COUNCIL 52, LOCAL 2282,

Petitioner.

SYNOPSIS

The Director of Representation, in agreement with the findings and recommendations of the Hearing Officer, determines that the Vydec Operater/Word Processor and Principal Clerk/Vydec Relief Operator are clerical employees who are excluded from the Petitioner's negotiations unit and that the Printing Production Coordinator, a recently created position, may be accreted to the Petitioner's unit. The record reveals that the Printing Production Coordinator is not a supervisor within the meaning of the New Jersey Employer-Employee Relations Act and does not have a conflict of interest with other unit members.

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Petitioner.

Appearances:

For the Public Employer
Bruce J. Solomon, attorney

For the Petitioner
Rothbard, Harris & Oxfeld, attorneys
(Nancy Iris Oxfeld of counsel)

DECISION

On June 6, 1979, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") by AFSCME, Council 52, Local 2282 ("AFSCME") raising a question concerning the composition of a collective negotiations unit comprised of operations, maintenance, technical and Special Service employees of the New Jersey Institute of Technology (the "Institute"). AFSCME seeks to add to its unit individuals employed in three titles which were created after the formation of its negotiations unit: Printing Production Coordinator, Vydec

Operator/Word Processor and Principal Clerk/Vydec Relief Operator. The Institute asserts that the Printing Production Coordinator is a supervisor and that the Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator are clerical employees. Supervisors and clerical employees are excluded from AFSCME's unit.

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer Dennis J. Alessi on October 31, 1979, at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. The Institute and AFSCME filed timely briefs on January 18, 1980 and February 13, 1980, respectively. Neither party submitted reply briefs. The Hearing Officer issued his Report and Recommendations on April 7, 1980, a copy of which is attached hereto and made a part hereof. Neither party has filed exceptions to the Hearing Officer's Report and Recommendations.

The undersigned has reviewed the record, including the transcripts and the Hearing Officer's Report. The Hearing Officer found, and the record supports this finding, that the individuals in the titles of Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator, although employed in the Special Services Department, are clerical employees. Clerical employees are specifically excluded from AFSCME's unit. Accordingly, the undersigned adopts the Hearing Officer's findings and conclusions with respect to the above classifications. 1/

1/ In light of this finding, the undersigned need not determine whether the classifications, which had been in existence for three and a half years and two years, respectively, before the filing of the Petition, could properly be accreted to the unit.

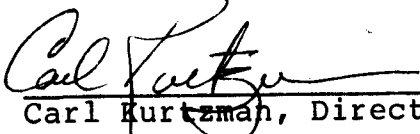
The Hearing Officer further found that the Printing Production Coordinator was responsible for the work of one individual, a Printing Production Specialist, but that the Coordinator, had not exercised the supervisory criteria of hire, fire, discipline, or effective recommendation of the same, with the exception of one isolated incident. In this incident the Printing Production Coordinator recommended to the Director of the Special Services Department that the Specialist be retained after his probationary period. The Hearing Officer noted that the Coordinator was not otherwise involved in employee evaluation and that it was unlikely that the Coordinator would be involved in a grievance disposition.

The undersigned agrees with the Hearing Officer that the Printing Production Coordinator does not exercise supervisory responsibilities as defined in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The record does not reveal any incident of actual conflict between the Coordinator and unit members, and the undersigned concludes that the potential for a conflict of interest arising with respect to fellow unit members is remote.

The undersigned, having reviewed the record including the transcripts and the Hearing Officer Report, and noting the absence of exceptions, adopts the findings of the Hearing Officer and in agreement with his recommendations, determines that the Vydec Operator/Word Processor and Principal Clerk/Vydec Relief

Operator are excluded from the AFSCME represented unit as clerical employees. Further, the classification of the Printing Production Coordinator is accreted to the negotiations unit effectively immediately. ^{2/}

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: May 21, 1980
Trenton, New Jersey

^{2/} The title, Printing Production Coordinator, was created seven months prior to the filing of the Petition. The Petition was filed prior to the expiration of the existing negotiations agreement. Therefore, accretion is appropriate in accordance with In re Clearview Regional High School Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977); In re Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977); and In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶ 11034 1980).

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

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Public Employer,

-and-

Docket No. CU-79-55

AFSCME, COUNCIL 52, LOCAL 2282,

Petitioner.

SYNOPSIS

AFSCME, Council 52, Local 2282 filed a Clarification of Unit Petition which seeks to clarify the titles of Printing Production Coordinator, Vydec Operator/Word Processor, and Principal Clerk/Vydec Relief Operator at the Special Services Department into the existing unit of operations, maintenance, technical and Special Service employees which AFSCME currently represents. The Institute objected to this clarification on the basis that the titles of Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator are clerical titles, specifically excluded from the definition of the unit, and that the title of Printing Production Coordinator is a supervisory title which, under the dictates of N.J.S.A. 34:13A-5.3, must be excluded from this nonsupervisory unit.

The Hearing Officer, having found that the titles of Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator at the Special Services Department are clerical titles, recommends that these titles not be included in the unit represented by AFSCME. Further, the Hearing Officer finds that the title of Printing Production Coordinator at the Special Services Department is not a supervisory title, within the meaning of the Act; nor is there any actual or potential substantial conflict of interest which would justify the exclusion of this title from the unit. Accordingly, the Hearing Officer recommends that the title of Printing Production Coordinator be clarified into the unit represented by AFSCME, effective immediately.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject, or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Public Employer,

-and-

Docket No. CU-79-55

AFSCME, COUNCIL 52, LOCAL 2282,

Petitioner.

Appearances:

For the Respondent
Bruce J. Solomon, Esq.

For the Petitioner
Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

On June 6, 1979, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission (the "Commission") by AFSCME, Council 52, Local 2282 ("AFSCME") which sought to clarify the titles of Printing Production Coordinator, Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator at the Special Services Department into the existing unit of operations, maintenance, technical and Special Service employees which AFSCME currently represents at the New Jersey Institute of Technology (the "Institute"). The Institute objected to this clarification on the basis that the titles of Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator are clerical titles, specifically excluded from the definition of the unit, and that the title of Printing Production Coordinator is a supervisory title which, under the dictates of N.J.S.A. 34:13A-5.3, must be excluded from this nonsupervisory unit. ^{1/}

^{1/} The unit definition specifically excludes supervisors within the meaning of the Act. (See Stipulation #3)

As a result of the Institute's objection to this petition, substantial and material factual issues exist which the Director of Representation, pursuant to N.J.A.C. 19:11-2.6, determined should be resolved at a hearing. Accordingly, the matter is properly before the Hearing Officer for his Report and Recommendations.

Pursuant to a Notice of Hearing, a hearing was held at the Institute before the undersigned Hearing Officer on October 31, 1979, at which all parties had an opportunity to examine witnesses, present evidence, and argue orally. In accordance with mutually agreed upon extensions of time for the filing of post-hearing briefs, the Institute and AFSCME filed briefs on January 18, 1980 and February 13, 1980, respectively. Despite several extensions of time, the Institute has not, to date, complied with its own request to file a reply brief. AFSCME declined to file a reply brief.

Stipulations

At the hearing the parties agreed on the following stipulations which were read into the record:

1. The New Jersey Institute of Technology is a public employer, is the employer of the employees in question and is subject to the provisions of the Act (N.J.S.A. 34:13A-1 et seq.).

2. AFSCME, Council 52, Local 2282 is an employee organization, is the Petitioner in this matter, and is subject to the provisions of the Act.

3. Council 52, Local 2282 represents a unit consisting of all Operations and Maintenance, Departmental Technical Staff and Special Service employees employed by the New Jersey Institute of Technology, but excluding Food Service employees, Teaching Staff, Administrative Staff, Office and Clerical Employees, Guards, Part-time Employees working normally 20 hours or less per week, Student Employees,

employees assigned to the Council of Higher Education in Newark, and all others and supervisors within the meaning of the Act.

4. The titles in question are new titles created subsequent to the initial contract between Council 52 and New Jersey Institute of Technology.

5. There is no employee organization currently representing clerical workers at the Institute and no employee organization representing supervisors at the Institute.

The parties have also agreed to the following issues in dispute.

(1) Are the new titles of Principal Clerk/Vydec Relief Operator and Vydec Operator/Word Processor technical titles or Special Service employees appropriately includable in the unit represented by AFSCME, Council 52, or are they clerical titles excluded from the unit's definition?

(2) Is the Printing Production Coordinator a supervisor as that term is defined by the Act, excluded from the unit represented by AFSCME?

Findings of Fact

Upon the entire record, the exhibits submitted into evidence and the briefs in the instant proceeding, the Hearing Officer finds as follows:

1. The Special Services Department performs the following functions for the entire Institute: duplicating, printing, daily mail service, production of direct mailings, switchboard operations, purchasing and distributing stationery and office supplies, purchasing and repairing office machines, management of all Xerox copiers at the Institute, management of coin-operated typewriters at the library (T, pp. 22 and 29). Every department at the Institute sends material to the Special Services Department for typing on the Vydec Word Processor and eventual printing. ^{2/} (T, p. 22)

^{2/} There was some slight testimony to the effect that the Special Services Department does typing of labor contracts, other materials relating to collective negotiations, personnel manuals, and other similar labor relations materials

2. The Special Services Department includes the following personnel: the Director, the Printing Production Coordinator, Printing Production Specialist, Switchboard Operator, Switchboard Relief Operator, Production Manager, two Principal Offset Machine Operators, an Office Machine Repairman, Mailroom Supervisor, four Mailroom Production Workers, a Head Clerk, a Vydec Operator/Word Processor, and a Principal Clerk/Vydec Relief Operator.^{3/} (See Exhibit R5 and T, p. 12).

3. A Vydec Word Processor is nothing more than an electric typewriter which is incorporated into a tape recording machine that stores the typed material on a tape disc for later retrieval. The keyboard is the same as that on an electric typewriter with ten to fifteen additional function buttons for performing

^{2/} (continued) (T, p. 7). Similarly, there was a brief remark to the effect that the Vydec Operator did some typing for committees which were going through the bureaucratic process of composing a Personnel Manual (T, p. 24-25). However these facts were not fully litigated due to the Institute's failure to raise as an affirmative defense that the Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator are confidential employees who, under the Act, are not entitled to the organizational and negotiations rights granted other public employees. In view of this fact, and the Hearing Officer's recommendations, infra, it is not necessary to consider the issue of possible confidential status for these two titles.

^{3/} At the time of the filing of this petition, the titles of Vydec Operator/Word Processor, Principal Clerk/Vydec Relief Operator and Printing Production Coordinator at the Special Services Department had been in existence for approximately three and a half years, two years, and seven months, respectively. The Institute has not raised, as an affirmative defense, that this petition should be dismissed because AFSCME slept on its rights to represent these titles by waiting until June 6, 1979, to attempt their clarification into its unit. In view of the Hearing Officer's recommendation, infra, it is not necessary to consider this issue as it relates to the Vydec Operator/Word Processor and the Principal Clerk/Vydec Relief Operator. Under the principles established in In re Fair Lawn Board of Education, D.R. No. 78-22, 3 NJPER 389 (1977), a Clarification of Unit Petition does appear appropriate as it relates to the title of Printing Production Coordinator, which is a new title created only about seven months prior to the filing of this petition. Moreover, since this affirmative defense was not raised by the Institute, the Hearing Officer recommends that any doubt as to the appropriateness of a clarification petition should be decided in favor of AFSCME.

editing, rewriting and correcting. The Processor also has a type of television screen on which the typed material is played back from the tape disc so that it can be edited, rewritten or corrected. The Processor is used for long reports which will later be revised, and for form material which will be mailed in bulk. The principal difference between a Vydec Word Processor and an ordinary electric typewriter is that the Processor allows for revisions without the necessity of retyping the whole page (T, pp. 7 and 8). Training on the use of the Word Processor consists of listening to cassette tapes for a two-day period which describe how to operate the machine. Without this special training a secretary with ordinary typing skills could at least type on the Word Processor (T, pp. 8, 9, 10).

4. The Head Clerk, Special Services Department, in addition to doing all of the general typing for the office, billing, filing and regular secretarial work, also directs the work of the Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator (T, p. 6).

5. The basic duty and responsibility of the Vydec Operator is typing materials on the electric typewriter keyboard of the Vydec Word Processor (T, pp. 6 and 7). The job description states that the Vydec Operator/Word Processor handles input and clerical functions relative to the operation of the Word Processor. Specifically, the operator: (1) arranges and types material into the system in accordance with the format specified by the author; (2) maintains the magnetic discs and updates the disc filing system; (3) proofreads copy and makes any necessary corrections; (4) produces typed copies and personalized letters from pre-recorded address lists. The Vydec operator also occasionally relieves on the switchboard. The qualifications for the position are proficiency in typing and spelling and some experience on text-editing equipment (see Exhibit R-1 and T, p. 8).

6. The Principal Clerk/Vydec Relief Operator does filing, typing of purchase orders, typing of memos and other related material, some bookkeeping relating

to the requisition and ordering of office supplies and stationery, and relieving the Vydec Operator when she is out on vacation, sick leave or on lunch break (T, pp. 9 and 12). The Principal Clerk/Vydec Relief Operator spends less than 10% of her time working with the Vydec Word Processor (T, p. 12). The job description states that the Principal Clerk/Vydec Relief Operator handles secretarial and clerical duties relative to the operation of the Special Services Department, and performs non-routine, varied, and complex secretarial and clerical duties. Specifically, the Principal Clerk's duties and responsibilities are to: (1) contact vendors concerning pricing of stationery and office supplies; (2) prepare billings for the various services provided by the Department; (3) type from complicated draft to final form; (4) prepare the "Change Sheet Report" which reports to the Finance Department appropriate department and billing actions; (5) maintain files; (6) prepare reports from existing records as directed; (7) operate duplicating, Xerox and ditto machines and other office machines as required; (8) screen and route incoming mail; (9) modify form letters to fit varying situations; (10) receive requests for various services; and (11) act in a relief capacity on the Vydec system and telephone switchboard during absences or heavy workload periods. The qualifications for the job are general clerical skills -- i.e. proficiency in working with numbers, spelling, typing, operating a calculator, and possibly secretarial training in either business school or college (see Exhibit R2 and T, p. 12).

7. In view of the testimony of the Institute's witnesses, Head Clerk Karen Cetrulo (see T, pp. 11 and 13), and the lack of contradictory testimony by witnesses for AFSCME, the Hearing Officer finds that the job descriptions for the titles Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator are an accurate description of the job functions performed by the employees holding these two titles.

8. The entire clerical staff of the Special Services Department consists

of the Head Clerk, Vydec Operator/Word Processor and the Principal Clerk/Vydec Relief Operator (T, pp. 15, 18, 19).

9. The job description states that the Printing Production Coordinator controls the coordination, planning and management of all printing and duplicating jobs received by the Special Services Department from other departments in the Institute. Specifically, the Printing Production Coordinator has the following duties and responsibilities: (1) estimates, plans and coordinates all printing and duplicating jobs received by the Special Services Department for in-house production; (2) supervision of Printing Production Specialists in the preparation of offset mechanicals, paste-ups, and negative flats; (3) responsible for making metal plates necessary for printing jobs; (4) responsible for all duties and responsibilities required of the Printing Production Specialists for possible fill in during absences or heavy workloads; (5) contacts outside vendors involving the purchase of paper, inks and other offset supplies related to each printing job, as well as working with outside typographic, bindery and other specialized services; (6) pricing completed jobs and maintaining all production records and related art work, negatives, and plate files necessary for reprinting and/or revision; (7) assisting in coordinating other services of the department as may be required due to absences or heavy workloads; (8) checks the work of print shop employees; (9) other related work as required (see Exhibit R4 and T, pp. 30-31).

The Printing Production Coordinator is concerned primarily with the preparation of material for printing, such as composing the offset plates. Once the coordinator has completed this preparation, the plates are turned over to the production manager who directs the actual printing of the material on the offset press (T, pp. 31-32).

10. In view of the testimony of the Institute's witness Mortimer R. Temes, Director of Special Services (see T, pp. 30-31), and the lack of contradictory testimony by witnesses for AFSCME, the Hearing Officer finds that the job

description for the Printing Production Coordinator accurately describes the job functions performed by the employee in this title.

11. On the table of organization the Printing Production Coordinator, Production Manager, and Head Clerk hold positions immediately below the Director. The employees in these three titles report directly to the Director, who is their immediate superior (Exhibit R5 and T, pp. 32 and 40). The Printing Production Coordinator is only responsible for the Printing Production Specialist. This Printing Production Specialist is the only person on the table of organization who is beneath and who reports to the Printing Production Coordinator. The Production Manager is responsible for the two Principal Offset Machine Operators and the Office Machine Repairman. These three titles are beneath the Production Manager on the table of organization and report to him. However, there is a line of approval running from the Printing Production Coordinator to one Principal Offset Machine Operator. Accordingly, while this Offset Machine Operator does not report to the Printing Production Coordinator, and while the Coordinator is not generally responsible for this employee, this Offset Machine Operator must obtain quality control approval for his offset printing work from the Printing Production Coordinator (see Exhibit R5, T, pp.35-36).

12. The Printing Production Coordinator "supervises" -- i.e. directs and oversees -- the Printing Production Specialist in the preparation of offset mechanicals, paste-ups, and negative flats. The Coordinator is responsible for directly the work of only the Production Specialist (Exhibit R5 and T, p. 38).

13. Due to the uncontroverted testimony of Director Temes, the Hearing Officer finds that the Printing Production Coordinator does, in the abstract, have the authority to evaluate and effectively recommend the hiring, firing, or discipline of one employee, the Printing Production Specialist (T, pp.37-38).

However, the current Printing Production Specialist was hired approximately thirteen months prior to the date of the hearing in this matter and approxi-

mately two weeks prior to the creation of the title Printing Production Coordinator (T, pp. 40-41, 43-44). Therefore, the Printing Production Coordinator has never actually participated, nor exercised any authority, in the hiring of a Printing Production Specialist (T, pp.44-45).

Hypothetically, if any disciplinary problem arose the Printing Production Coordinator would discuss the problem with the Director and someone from the Personnel Department. They would then jointly decide on a course of action. If they decided that a verbal reprimand was required, the Printing Production Coordinator would execute this disciplinary action (T, p 47-48). However, in reality the Printing Production Coordinator during the past year has never actually disciplined or recommended any discipline of the Printing Production Specialist (T, pp. 41, 47-48). The Production Specialist has, in fact, done "a fine job." (T, p. 41)

In theory, the Printing Production Coordinator, being the immediate superior, is the first step in the grievance procedure for the Printing Production Specialist. However, the Printing Production Specialist has never filed a grievance. Moreover, there is a practice in the department that employees routinely bypass the first step of the grievance procedure and proceed directly to the second step (T, pp.45-47).

When he was first hired, the Printing Production Specialist was placed on a 90-day probationary period. At the end of this period the Printing Production Coordinator evaluated the performance of the Production Specialist and recommended his retention. The Director relied on this recommendation. If the Printing Production Coordinator had recommended dismissal, the Director would not have personally observed the performance of the Printing Production Specialist before deciding to dismiss him. Rather, the Director would have relied on the recommendation of the Printing Production Coordinator (T, pp.43-44). However, since no other employee reports to the Printing Production Coordinator, the Coordinator has not evaluated

any other employees at the end of their probationary period (T, p. 48). Except for this initial probationary period evaluation, the Institute does not have a procedure for continuing evaluations. Therefore, the Printing Production Coordinator will not again evaluate the Printing Production Specialist (T, p. 48).

Conclusions of Law

It is clear from Finding of Fact #3 that a Vydec Word Processor is simply an advanced form of electrical typewriter which transfers typed material to a disc that can later be retrieved on a television screen for editing, corrections and revisions, without the necessity of retyping the entire page. Typing is the primary skill necessary to operate a Vydec Word Processor. The primary duties of the Vydec Operator/Word Processor are to arrange, type, proofread and correct material on the electric typewriter keyboard of the Word Processor, and perform clerical duties relating to operating the Word Processor, maintaining the disc filing system and retrieving typed material from it. (See Finding of Fact #5 and Exhibit R-1.) These functions are clearly secretarial and clerical in nature.

A Clarification of Unit Petition cannot be used to enlarge the scope of a negotiations unit. It can only be used to determine whether a particular title, created by the employer after the establishment of the unit, is contemplated within the scope of the unit's definition and, therefore, is appropriate for inclusion. The issue relates primarily to identification of the title. In re Clearview Regional High School, D.R. No. 78-2, 3 NJPER 248 (1977); In re Board of Education of Fair Lawn, D.R. No. 78-22, 3 NJPER 389 (1977).

Since the definition of the unit represented by AFSCME specifically excludes clerical employees (see Stipulation #3) and the Hearing Officer has identified the title Vydec Operator/Word Processor as being clerical in nature, the Hearing Officer recommends that this title not be clarified into AFSCME's unit.

Similarly, it is clear from Finding of Fact #6 and Exhibit R2 that the Principal Clerk/Vydec Relief Operator primarily performs ordinary typing, filing, billing and other secretarial and clerical functions, along with a relatively small amount of relief work on the Vydef Word Processor. Accordingly, this title is also clerical in nature. Therefore, for the same reasons stated above, the Hearing Officer recommends that the title Principal Clerk/Vydec Relief Operator not be clarified into AFSCME's unit.

Initially it should be noted that, apart from the Institute's allegations of supervisor status and conflict of interest, the Printing Production Coordinator is a nonclerical Special Services employee appropriate for inclusion in AFSCME's unit.

N.J.S.A. 34:13A-5.3 defines a supervisor as having the authority to hire, discharge, discipline or effectively recommend the same. However, the Commission has consistently held that: "the bare assertion that an employee possesses supervisory authority, in the absence of any supporting evidence that the employee has exercised such authority, is not sufficient to establish an employee as a supervisor within the meaning of the Act. Where the record contains no indication that the authorities claimed have ever been exercised, the employees in question will not be considered supervisors. In the absence of some indication in the record that the power claimed possessed is exercised with some regulatory by the employees in question, the mere 'possession' of the authority is a sterile attribute unable to sustain a claim of supervisory status." In re Somerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976). In re Cherry Hill Twp. Dept. of Public Works, P.E.R.C. No. 30 (1970); In re Brookdale Community College, D.R. No. 78-10, 5 NJPER 32 (¶4018, 1977).

Based on the uncontroverted testimony of Director Temes, the Hearing Officer does find that the Printing Production Coordinator, in the abstract, possesses

the authority to effectively recommend hiring, firing and discipline of the one Printing Production Specialist (see Finding of Fact #13). However, it is equally clear from the record that since creation of the title and the hiring of a Printing Production Coordinator approximately one year prior to the date of the hearing, he has never exercised his statutory supervisory authority in the hiring, firing, or disciplining of the Printing Production Specialist (see Finding of Fact #13). Therefore, based on the principles discussed above, the Hearing Officer concludes that the Printing Production Coordinator is not a supervisor, as that term is defined by the Act.

Although an employee is not a supervisor within the meaning of the Act, his inclusion in a unit may still be inappropriate where, due to his duties and responsibilities, the employee has obligations and loyalties to his employer which are, or would be, in serious conflict with his interests as a member of the unit. Such an actual or potential, substantial conflict of interest will negate any community of interest that this employee shares with the other members of the unit. In determining whether such a conflict exists the Hearing Officer must consider the employee's function in: (1) hiring, (2) firing, (3) disciplining, and (4) evaluating employees in the unit; (5) his position in the grievance procedure for unit members; and (6) his authority and responsibility to direct the work of unit members. In re County of Middlesex, D.R. No. 79-8, 4 NJPER 396 (¶14178, 1978); In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977); In re Jersey City Board of Education, D.R. No. 80-15, 5 NJPER 533 (¶10273, 1979); In re Somerset County Guidance Center, supra; In re Brookdale Community College, supra.

While a substantial, potential for conflicts of interest is sufficient, the Commission has noted that:

"...we attach great weight to the history of the parties relationship and little weight to the possibility that at some future time an actual conflict of interest may develop."

The Commission went on to note:

"future contingencies are an acceptable and, in fact, generally controlling consideration in most determinations concerning supervisors because, in the absence of a history, there is only expectation and probability that the interests of supervisors and those supervised will clash, to the detriment of some right entitled to protection. But where past experience exists, such can obviously be a more accurate gauge of probabilities than mere speculation not benefited by hindsight."

In re West Paterson Board of Education, P.E.R.C. No. 77, at p. 15-16 (1973); as cited in In re Somerset County Guidance Center, supra, at p. 361.

The capacity for a potential conflict of interest must be substantial -- i.e. significant and imminent, or presently foreseeable. Where the capacity for potential conflict is remote or speculative, it is too insignificant to justify exclusion of an individual from a unit. In re Somerset County Guidance Center, supra; In re Brookdale Community College, supra.

By its very nature, any inquiry into the capacity for a potential, substantial conflict is concerned with probabilities -- i.e. a greater likelihood, than not, that a conflict will develop in the future. Therefore, it is reasonable to conclude that the capacity for a potential conflict must exist with regard to at least a significant percentage of the employees in the unit, for it to be considered substantial. ^{u/} Where an individual's responsibilities and obligations to protect management's interests exist only in relation to a small percentage of the unit members, this fact, in itself, is usually sufficient to reduce to an insignificant level the capacity for a potential conflict.

From the record it is clear that since creation of the title and the hiring of a Printing Production Coordinator, approximately one year prior to the

^{u/} In those cases where the Commission has excluded employees from a unit, there was a pervading potential for conflict with other unit members. See for example, In re Borough of South Plainfield, D.R. No. 78-18, 3 NJPER 349 (1977); In re Jersey City Board of Education, D.R. No. 80-15, 5 NJPER 533 (10273, 1979).

hearing, no actual conflict of interest has arisen with the Printing Production Specialist (see Finding of Fact #13). The Printing Production Coordinator's capacity for any potential conflict exists only in his working relationship with the Printing Production Specialist and, in one very limited aspect, his relationship with the Offset Machine Operator (see Findings of Fact #11 and 12). AFSCME represents an Institute-wide unit of all operations, maintenance, departmental technical staff and Special Service employees. Considering the wide scope of AFSCME's unit, and the minimal number of unit members with whom the Production Coordinator has any capacity at all for a potential conflict, the Hearing Officer concludes that this fact, by itself, reduces to an insignificant level the likelihood for a potential conflict. There is then no justification for excluding the Production Coordinator from AFSCME's unit.

This conclusion alone does resolve the issue. However, the Hearing Officer is compelled to also note that whatever capacity for potential conflict the Production Coordinator does have with the Production Specialist and Offset Machine Operator is, in itself, remote and improbable.

Based on the testimony of the Institute's own witness, the Hearing Officer has found that there is no procedure for periodic evaluation of employees in the Special Services Department (see Finding of Fact #13). Further, the employees have a practice of bypassing the first step in the grievance procedure and proceeding directly to the second step (see Finding of Fact #13). Accordingly, in these two areas there is no potential at all for a conflict of interest between the Printing Production Coordinator and the Printing Production Specialist.

Hypothetically, the Production Coordinator is required to initiate any discipline of the Production Specialist. However, during his first year of employment the Production Specialist has never been disciplined (see Finding of Fact #13).

This past experience, being a more accurate gauge of the probabilities for a potential conflict, is accorded great weight by the Hearing Officer. In re West Paterson Board of Education, supra; and In re Somerset County Guidance Center, supra. Moreover, it is clear from the record that the Printing Production Coordinator has no independent authority to administer even the mildest form of verbal discipline to the Production Specialist. Rather, the Production Coordinator must discuss all disciplinary matters with Director Temes and the Personnel Department. They would then jointly decide on what course of action to take. Based on the employment history of the Printing Production Specialist, and the limited role the Printing Production Coordinator would play if any discipline might become necessary, the Hearing Officer concludes that any potential conflict in this regard is remote, merely speculative and insignificant.

The Printing Production Coordinator's authority to effectively recommend the hiring of a Printing Production Specialist and effectively evaluate him at the end of his probationary period would only be exercised in those few instances when the Institute is required to fill this position with a new employee. This is a remote possibility which will only rarely occur. Therefore, it does not constitute a substantial, potential conflict.

Finally, the Printing Production Coordinator is responsible for directing and overseeing the work of only the Printing Production Specialist (see Finding of Fact #12). The Hearing Officer accords great weight to the fact that the Production Specialist has done "a fine job" during his approximately one year of employment prior to the hearing (see Finding of Fact #13). The Production Coordinator also approves, for quality control, the work of one Principal Offset Machine Operator. But this Operator reports to an immediate superior, the Production Manager, who is generally responsible for both Offset Machine Operators (see Finding of Fact #11). It is clear that the Production Coordinator is obligated to protect the In-

stitute s interests in the work quality of the Machine Operator, and the efficiency and productivity of the Production Specialist. As previously discussed, what constitutes a substantial capacity for potential conflict is a matter of degree. Considering the Production Specialist's employment record and the Offset Machine Operator's position vis-a-vis the Production Manager, the Hearing Officer concludes that it is highly improbable and merely speculative that in the foreseeable future the Printing Production Coordinator's management responsibilities in regard to these two employees will cause a substantial conflict with his loyalties and interests as a member of AFSCME's unit.

The Printing Production Coordinator's potential for a conflict exists only with regard to two members of AFSCME's unit and, as found above, the capacity for this potential is, itself, of no moment. Accordingly, the Hearing Officer concludes that there is no substantial, potential conflict of interest which justifies excluding the title Printing Production Coordinator from the unit represented by AFSCME at the Institute. ^{5/}

Recommendations

For the reasons stated herein, the Hearing Officer makes the following recommendations:

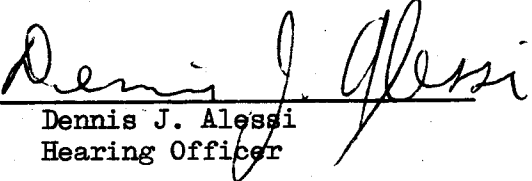
^{5/} Since the primary purpose of the Act is to grant public employees the right to organize and negotiate, the Commission has strictly construed those provisions which exclude employees from these rights. In re Township of Dover, D.R. No. 79-19, 5 NJPER 61 (¶10040, 1979). In re Borough of Montvale, D.R. No. 80-32, 5 NJPER ____ (¶____, 1980).

Similarly, in some situations the exclusion of a title from a unit will have the effect of denying an employee his rights under the Act. Such action should only be taken where the interests of the employer are compelling, and any doubt should be decided in favor of inclusion. There is no supervisors' unit into which the Printing Production Coordinator could be placed. This factor, when considered in conjunction with the Institute's less than compelling reasons for exclusion, mitigates in favor of inclusion.

1. The titles Vydec Operator/Word Processor and Principal Clerk/Vydec Relief Operator in the Special Services Department should not be clarified into the unit represented by AFSCME because they are clerical titles specifically excluded from the definition of the unit.

2. The title Printing Production Coordinator in the Special Services Department should be clarified into the unit represented by AFSCME because this title is not supervisory, within the meaning of the Act; nor is there any actual or potential, substantial conflict of interest which would justify the exclusion of the title from the unit.

3. Under the principles established in In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), clarification of the title Printing Production Coordinator into the unit represented by AFSCME should be effective immediately.


Dennis J. Alessi
Hearing Officer

DATED: April 17, 1980
Trenton, New Jersey