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P.E.R.C. NO. 83-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-368-107

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SAYREVILLE BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CU-82-9

SAYREVILLE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission holds that the Sayreville Board of Education violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused to negotiate the salary, hours, and other terms and conditions of employment for two teachers who during the summer developed plans for students who needed remedial instruction in mathematics and reading and who would be taught by those teachers in the upcoming school year.

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Petitioner.

Appearances:
For the Respondent-Public Employer,
Boehm and Campbell, Esqs.
(Casper P. Boehm, Jr., of Counsel)

For the Charging Party-Petitioner,
Rothbard, Harris and Oxfeld, Esqs.
(Arnold S. Cohen, of Counsel)

DECISION AND ORDER

On June 8, 1981, the Sayreville Education Association ("Association") filed an unfair practice charge against the Sayreville Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged, in part, that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections

5.4(a)(1) and (5),[1/] when it refused to negotiate the salary, hours, and other terms and conditions of employment for two teachers who during the summer developed Individual Student Improvement Plans ("ISIPs") for students in the Sayreville Junior High School who needed remedial instruction in mathemathics and reading.[2/]

On September 9, 1981, the Association filed a Petition for Clarification of Unit. It asked that its unit be clarified to include teachers developing ISIPs during the summer.

On April 21, 1982, the Director of Unfair Practices and Representation issued an order consolidating cases and a Complaint and Notice of Hearing. The Board then filed an Answer. It asserted that the summer ISIP positions were not included in the Association's negotiations unit.

On June 18, 1982, Commission Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and presented exhibits. They later filed post-hearing briefs.

On August 27, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-6, 8 NJPER 528 (¶13243

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The Association also alleged that the Board violated the Act by failing to post the ISIP work. However, the Association later abandoned that allegation.

1982) (copy attached). He concluded that the Board had not committed an unfair practice by its refusal to negotiate the terms and conditions of employment for the summer ISIP work because the parties had not intended to include such work in the recognition clause of their collective negotiations agreement. He essentially reasoned that the ISIP work did not exist prior to the execution of that agreement and that it was clerical in nature. He concluded, however, that the unit should be clarified to include the ISIP positions since a community of interest existed between the teachers developing ISIPs and the teachers in the unit.

On August 31, 1982, the Association filed Exceptions to the Hearing Examiner's report and recommendations. The Association asserts that the Hearing Examiner erred in not finding that the recognition clause included the ISIP work. It argues that this work is merely an extension of and preparation for the compensatory education courses taught during the regular school year; thus, the teachers who prepare the State-mandated ISIPs for students needing remedial instruction in mathematics and reading and who meet with the students' parents to discuss these plans are the same teachers who teach these students in their compensatory education classes during the regular school year. The Association agrees with the Hearing Examiner's recommendation concerning its unit clarification petition.

The Board has not filed any Exceptions.

The Commission has reviewed the record. We adopt and incorporate all of the Hearing Examiner's factual findings except his finding (paragraph 6) that the preparation of the plans is strictly of a clerical nature and does not involve teaching in a traditional sense. However, under all the circumstances of this case, we hold that the Board violated the Act when it refused to negotiate concerning the terms and conditions of employment relating to the ISIP work which the compensatory education instructors performed.

The Board has recognized the Association as the majority representative for various professional, non-supervisory Board employees. Unit employees perform a variety of functions which include classroom teaching, supplemental (reading) teaching, speech therapy, compensatory education, home instruction, and supplementary instruction.

Virginia Dossena and Cathleen Bauer are full-time junior high school teachers who teach remedial compensatory education courses during the regular school year. In this capacity, they are indisputably members of the Association's unit.

The State of New Jersey requires local boards of education to provide a compensatory education program. N.J.S.A. 18A:7A-7. The compensatory education courses taught by Dossena and Bauer are part of this program. The State has further mandated that ISIPs must be prepared prior to the commencement of the school year for any students in the compensatory education

program. N.J.A.C. 6:8-3.8(a). Following the recommendation of the Junior High School principal, the Board, in Spring, 1981, assigned Dossena and Bauer to prepare these plans. The principal recommended Dossena and Bauer because they would teach the same students in the approaching school year and because preparation of the plans would require them to meet parents to discuss their children's test results and educational plans. The principal supervises Dossena and Bauer in both their classroom teaching and the preparation of ISIPs.

Given these facts, we are persuaded by the Association's argument that the work of Dossena and Bauer as compensatory education teachers includes their assignment to prepare ISIPs. The Board selected Dossena and Bauer to prepare the ISIPs precisely because the performance of this duty was instrinsically related to the educational process for compensatory education students. Preparation of the ISIPs prepared these employees to teach in the fall the students whose problems they reviewed in the summer and allowed them to establish a relationship with the parents of these students. While the ISIP work may have involved clerical duties, it had a direct connection with enhancing the professional skills which these teachers would use in the fall.[3/] Accordingly,

3/ We do not believe that meeting with parents to discuss improvement plans concerning their children can be described as clerical. Further, we note that teachers, like any professional employees, may perform a variety of "clerical" functions in the course of their duties and that the performance of these functions does not automatically transform their status from professional to clerical employees. Cf. In re Linden Bd. of Ed., P.E.R.C. No. 80-47, 5 NJPER 483 (¶10244 1979), aff'd App. Div. Docket No. A-1054-79 (9/30/80). In the instant case, the important element (continued)

we hold, under the circumstances of this case, that the Board wrongfully refused to negotiate over the terms and conditions of employment of compensatory education teachers relating to their assignment to prepare ISIPs in the summer.[4/]

Based upon the foregoing analysis, we need not address the unit clarification issue. There is no dispute that compensatory education teachers are unit employees. The issue before us relates solely to the Board's refusal to negotiate with respect to the summer assignments of these teachers.[5/]

3/ (Continued)
is not the mainly clerical nature of the ISIP work when viewed in isolation, but rather its interrelationship with the teachers' professional duties. Similarly, the fact that the ISIP work was assigned after the execution of the collective negotiations agreement is not especially significant since the clause covers Dossena and Bauer as teachers and the ISIP work is interrelated with their teaching responsibilities.

4/ The Board's formalization of this assignment as an "appointment" to a summer position is irrelevant. We premise our decision upon the extension, whether voluntary or involuntary, of the compensatory education function into the summer. Compare, In re Burlington City Bd. of Ed., P.E.R.C. No. 77-4, 2 NJPER 257 (1976). Further, the issue here does not concern the Board's right to make assignments, but rather its obligation to negotiate concerning compensation and other terms and conditions of employment. Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980).

5/ See, In re Montville Twp. Bd. of Ed., E.D. No. 76-43 (1976). There, the Hearing Officer, considering whether the negotiations unit included teachers performing additional services on a per diem basis, stated:

> It would appear then that a clarification as to which personnel are represented within the MTEA unit is not being presented to the Commission. Rather, the questions presented is actually whether the M.T.E.A. may negotiate the terms and conditions of employment of unit personnel while they are engaged by the Board to perform these "other services." The Commission is not without jurisdiction to hear and determine such questions; however, such questions are not the subject of a representation proceeding.

ORDER

A. The Sayreville Board of Education is ordered to cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed by the Act by refusing to negotiate with the Association over the terms and conditions of employment of compensatory education teachers developing ISIPs during the summer, and

2. Refusing to negotiate in good faith with the Association over the terms and conditions of employment of teachers developing ISIPs during the summer.

B. The Sayreville Board of Education is ordered to take the following affirmative action:

1. Upon demand, negotiate in good faith with the Association over the terms and conditions of employment of teachers developing ISIPs during each summer such work has been performed since 1981,

2. Post the attached notice marked as Appendix "A" in all places where notices to employees are customarily posted. Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Board's authorized representative, shall be maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Board to assure that such notices are not altered, defaced or covered by other materials, and

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Board has taken to comply herewith.

C. The unit clarification petition is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
December 15, 1982
ISSUED: December 16, 1982

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed by the Act by refusing to negotiate with the Association over the terms and conditions of employment of teachers developing Individual Student Improvement Plans during the summer.

WE WILL negotiate in good faith with the Association over the terms and conditions of employment of teachers developing Individual Student Improvement Plans during the summer.

SAYREVILLE BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 83-6

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

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-and- Docket No. CO-81-368-107

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SAYREVILLE BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CU-82-9

SAYREVILLE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Sayreville Board of Education did not violate the New Jersey Employer-Employee Relations Act. The Charging Party failed to prove by a preponderance of the evidence that the title of preparing Individual Student Improvement Plans was included in its negotiations unit. However, the Hearing Examiner in the CU matter recommends that the Commission clarify the Petitioner's negotiations unit to immediately include the ISIP title and to negotiate upon demand with the Petitioner concerning terms and conditions of employment for that title.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 83-6

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Appearances:

For the Respondent-Public Employer
Boehm and Campbell, Esqs.
(Casper P. Boehm, Jr., Esq.)

For the Charging Party-Petitioner
Rothbard, Harris and Oxfeld, Esqs.
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 8, 1981, by the Sayreville Education Association (the "Charging Party" or "Petitioner") alleging in part that the Sayreville Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1

et seq. (the "Act"). The Charging Party alleged that the Board failed and refused to negotiate the salary for the individuals who performed the summer function of developing Individual Student Improvement Plans ("ISIP's") [1/] all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). [2/]

Thereafter, on September 9, 1981, the Charging Party/Petitioner filed a Petition for Clarification of Unit ("CU") with the Commission and argued that its negotiations unit should be clarified to include the summer positions of developing Individual Student Improvement Plans.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, and it appearing that the Petition raised factual issues that could not be decided without a hearing, the Director of Unfair Practices and Representation consolidated the Charge and Petition and on April 21, 1982, issued a Consolidated Complaint and Notice of Hearing pursuant to which a hearing was conducted on June 18, 1982. At the hearing both parties had the opportunity to examine and cross-examine witnesses, present evidence, and argue orally. Both parties filed post-hearing briefs the last of which was received on August 9, 1982.

1/ The Charging Party originally had also alleged that the Board violated the Act by failing to post the ISIP positions. However, the Charging Party abandoned that allegation during the hearing.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The Unfair Practice Charge and the Clarification of Unit Petition having been filed with the Commission, a question concerning alleged violations of the Act and a question concerning the composition of a negotiations unit exists, and after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Findings of Fact

1. The Sayreville Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Sayreville Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. The Charging Party is the majority representative of a unit of employees employed by the Board, and the Charging Party and the Board are parties to a collective agreement covering the unit in question, which is set forth in the recognition clause of the agreement dated July 1, 1980-June 30, 1982 (Exhibit J-1) as follows: 3/

> A. The Board hereby recognizes the Association as the majority representative for collective negotiation for the personnel listed below:
>
> 1. Classroom Teachers
> 2. Nurses
> 3. Athletic Trainer
> 4. Guidance Counselors
> 5. Librarians
> 6. Social Workers

3/ Although the recognition clause only lists High School Summer School Teachers, Exhibit CP-7 indicates that if elementary summer school programs are created then those summer school teachers would be included in the unit.

7. Full-time Supplemental Teachers (Formerly called Reading Specialists)
8. Learning Disability Specialists
9. Speech Therapists
10. Special Education Teachers
11. Co-Curricular Advisors and Coaches
12. Replacement Teachers
13. School Psychologists
14. Home Instruction Teachers
15. High School Summer School Teachers
16. Supplementary Instruction Teachers

B. Unless otherwise indicated, the term "teachers," when used hereinafter in this Agreement, shall refer to all employees represented by the Association in the negotiating unit as above defined, and references to male teachers shall include female teachers.

4. In 1981, the New Jersey State Board of Education mandated for the first time that local boards of education develop individual student improvement plans for students who needed remedial instruction in mathematics and reading. Pursuant to that directive the Board, on May 19, 1981, appointed two of its regular full-time teachers, Virginia Dossena and Cathleen Bauer, to work on a weekly basis during the summer of 1981 at $250 per week to develop the ISIP's for junior high school students (see Exhibits CP-1 and CP-2). By letters dated May 20, 1981 (Exhibit CP-3) and May 28, 1981 (Exhibit CP-4), the Charging Party alleged that it represented the individuals hired to prepare the ISIP's and it demanded negotiations with the Board concerning that work.

By letter dated June 1, 1981 (Exhibit CP-5), the Board denied the Charging Party's request for negotiations and argued that the two ISIP positions were not covered by the parties' recognition clause.

5. By resolution of June 15, 1982 (Exhibit CP-6) the Board appointed four regular full-time teachers to perform ISIP work for the summer of 1982 to be employed for ten (10) days in August at $50 per day. Virginia Dossena and Barbara Posunko were hired for the junior high school and Florence Lasko and Carol McCormack were hired for the senior high school. The Board again did not negotiate with the Charging Party concerning terms and conditions of employment for these positions.

6. All of the individuals hired to perform the ISIP work were regular full-time certificated teachers who would, in the Fall, teach the students whose ISIP plans they were developing. 4/ The ISIP work consists of compiling certain information from tests taken by the students. The preparation of the plans is of a clerical nature and does not require a State teachers certification, does not require any student contact, and, does not involve teaching in the traditional sense. 5/ In fact, the Superintendent testified that the people employed to develop the plans are not being employed as summer school teachers. 6/ The individuals selected to develop the plans were hired by the principal of the junior and senior high school respectively.

7. In the summer of 1981 the ISIP work was performed in the junior high school by Dossena and Bauer who worked two weeks (10 days) from 9:00 a.m.-3:00 p.m. with one hour for lunch. 7/ They were supervised by the Junior High School Principal. In the summer of 1982 the Superintendent expects the Junior and Senior

4/ Transcript ("T"), pp. 32, 56.

5/ T pp. 32-33, 54.

6/ T p. 61.

7/ T pp. 26, 30.

High School Principals respectively to evaluate the ISIP work. [8/]

8. In contrast to the individuals who perform the ISIP work, summer school teachers perform regular and traditional teaching duties which involve student contact. [9/] In addition, they work six weeks and may teach either or both the 8:00 a.m.-10:00 a.m. class and the 10:10 a.m.-12:10 p.m. class. All summer school classes are conducted in the Senior High School and are supervised by the High School Vice Principal. [10/] However, the summer school teachers are not formally evaluated.

9. Two other positions performed in the summer which are not in the unit are the Coperative Industrial Experience program and the Distributive Education program. Both of these programs are curriculum programs which involve students seeking employment. The teachers appointed to do this work receive $250 per week for four weeks. [11/]

10. The Charging Party has argued in part that since the ISIP work is being performed by teachers in the summer that it is part of the summer school teachers' work and is therefore included in its negotiations unit and must therefore be negotiated. In the alternative, the Charging Party-Petitioner argues in its Petition that if the ISIP duties are not or have not been included in its unit that the unit should be clarified to include those duties because of a community of interest with the other employees in the unit. The Board, however, argued that the recognition clause does

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8/ T p. 65.

9/ T pp. 44-45.

10/ T pp. 65-66.

11/ T pp. 58-60.

not include the instant duties and that there is no community of interest between the given title and the existing negotiations unit.

Analysis Law and Facts

Unfair Practice Charge

The only issue to be decided concerning the Charge is whether the parties' recognition clause in J-1 includes the ISIP work. If the work is included then the Board violated the Act by not negotiating. If the work is not included in the recognition clause then no obligation to negotiate existed and no violation was committed.

Upon review of the entire record it is apparent that the ISIP work was not included in the parties' recognition agreement. First, the ISIP program is a new program and did not exist prior to 1981, and since the duties were not in existence when J-1 was executed, the title could not have been included in the existing collective agreement. Second, the recognition clause includes summer school teachers, but the individuals who prepare the ISIP's, although they are teachers during the regular school year, are not functioning as or performing as teachers while preparing the ISIP's, and certainly are not functioning as summer school teachers. In that regard the record shows that the ISIP work is of a clerical and not a professional (teacher) nature, and can be performed by individuals without certification. Consequently, the undersigned does not believe that the current recognition clause when first agreed upon contemplated the existence of such a title or duties and did not intend to include such duties in the unit.

In support of its position that the ISIP's were included in the unit, and in addition to their argument that the ISIP work was part of the summer school teachers' work, the Charging Party also argued that the ISIP program is merely an extension of the remedial compensatory education course because compensatory education teachers, who are included in the unit, must prepare Individual Student Improvement Plans for their students. In this regard the Charging Party relied upon In re Wayne Bd/Ed, D.R. No. 80-6, 5 NJPER 422 (¶10221 1979), request for review P.E.R.C. No. 80-94, 6 NJPER 54 (¶11029 1980), wherein the Commission held that:

> Inasmuch as certain extra, educationally related activities are integrally a part of the regular classroom students' educational process and the potential for disruptive fragmentation exists if we allow employees instructing or supervising such activities to gain separate representational status because of possible abandonment, we believe the Director's standard for clarification in extracurricular duties should be expanded to encompass those situations where: (a) the extra, educationally related activity has been performed or is being performed by a regular classroom teacher or by statute or regulation is required to be performed by a certificated teacher and (b) the extra, educationally related activity can be performed by a regular classroom teacher in addition to his/her regular classroom teaching assignment and (c) the extra, educationally related activity is performed during the regular ten month school year, on regular school days, either during or after normal school hours. 6 NJPER at 55-56.

In footnote 2 of the Wayne decision, the Commission continued:

> This standard would provide for the inclusion of those [extra-curricular] personnel whose course of instruction or supervision begins during the regular school year and extends into the summer or begins in the summer and extends into the regular school year. Conversely, it would not include extracurricular personnel whose course of instruction or supervision is limited to those months outside the regular ten-month school year. 6 NJPER at 56.

The Commission in Wayne held that the driver education teachers and the bedside teachers were extra educationally related activities that were included in the overall teacher function. The Charging Party herein presumably argues that the ISIP work is an extra educationally related activity and is therefore already included in the unit.

The undersigned disagrees. Wayne is distinguishable from the instant matter. First, although the ISIP's are educationally related, there is no requirement that the work may only be performed by certificated teachers, in fact, the work in question is merely a clerical function. The clerical nature of the ISIP work is a further indication that the parties had not contemplated the existence of the work in the unit. Second, the titles that were included in the unit in Wayne involved regular teachers performing regular teaching functions, whereas the teachers involved in the ISIP work are not teaching, i.e., they have no student contact. Third, the ISIP work is not performed during any part of the regular ten (10) month school year or as part of regular teacher duties. Consequently, pursuant to Wayne note 2, such extracurricular work would not be automatically included in the teaching function.

Since the ISIP work is newly created, and since the work is not performed as part of the regular school year, then Wayne cannot be relied upon to establish that the ISIP work has been included in the Charging Party's unit.

The Charging Party also relied upon In re Freehold Borough Bd/Ed, P.E.R.C. No. 82-38, 7 NJPER 604 (¶12269 1981), and argued

that said case held that the preparation of individual student improvement plans were part of the negotiations unit. A review of that case, however, indicates that the plans in question were actually called individual instruction plans and the Commission in Freehold dismissed the complaint and did not make any specific finding with respect to the inclusion of the instruction plan work in the unit. However, the Board in Freehold did assign the instruction plan work specifically to teachers and there is every reason to believe that the Board therein considered that work teacher unit work. Nevertheless, Freehold actually only concerned the issue of whether the assignment of the work itself was negotiable and whether there was an increase in workload. The Commission found that on the basis of that record that the assignment was not negotiable.

That case is easily distinguishable from the instant matter for a variety of reasons. One important reason is that Freehold concerned the assignment of the duties and the negobiability of increased workload whereas the instant matter did not. Although the Board in its brief herein argues that the Board has the right to assign the ISIP duties, that right of assignment is not challenged by the Charging Party and need not be considered herein. Since Freehold is distinguishable from the instant matter it cannot be relied upon to support the Charging Party's case.

Finally, the Charging Party argues that if it is determined in the CU Petition that the ISIP work is included in the unit, that such a result automatically means that the Board committed an unfair practice by failing to negotiate with the Charging Party.

That argument suggests a result which is incorrect for the following reasons. First, a CU Petition is the proper method to follow in seeking a determination as to whether a newly created title is in the unit. But the CU Petition herein only needs to be processed if it is determined in the Charge that the ISIP work is not currently included in the unit. If it were determined in the Charge that the title was in the unit, then the Board would have violated the Act and there would be no need to process the CU Petition. As a result, the processing of the CU herein requires some acquiescence by the Charging Party that the ISIP work has not been or at least has been found not to be in the unit. The undersigned has already determined in the Charge that the ISIP work was not in the unit when the Charging Party demanded negotiations, thus, the Board was under no obligation to negotiate concerning the ISIP's.

Second, decisions in CU petitions are not implemented retroactively, they are either implemented immediately or prospectively. In In re Clearview Reg. H.S. Bd/Ed, D.R. No. 78-2, 3 NJPER 248 (1977), the Director on behalf of the Commission determined that where a CU involves a newly created title a determination to include the title in the unit will be effective immediately. Therefore, even if the ISIP work is included in the unit immediately, that inclusion does not help the Charging Party to establish that the title was included in the unit in the past.

Third, the Charging Party's successful processing of the CU herein would not establish a violation of the Act. CU petitions cannot function as unfair practice charges. Therefore, even if the CU determines that the ISIP work was - or should have been - included

in the unit there is no unfair practice remedy in such petitions. The only result in the petition is to order that the title be clarified into the unit immediately and then the employer must negotiate with the labor organization upon demand. In the instant Charge the Charging Party could not prove a violation of the Act for the reasons stated above, nevertheless, the Charging Party may, in the CU, be successful in proving that the title should be included in the unit by clarification. Such results are not inconsistent with one another.

Finally, in In re Passaic Cty. Reg. H.S. Dist. Bd/Ed, P.E.R.C. No. 77-19, 3 NJPER 34 (1976), the Commission in an unfair practice case indicated clearly that in disputes concerning unit placement it preferred the filing of CU petitions rather than unfair practice charges as the best method to resolve such disputes. In Passaic, the employer unilaterally removed an employee from the unit alleging that said employee was a confidential employee within the meaning of the Act and therefore not entitled to organize. The union in Passaic demanded to negotiate with respect to that employee but the employer refused and a charge was filed. The Commission found that the employee was a confidential employee and therefore the employer did not violate the Act. The Commission however indicated that the employer took a chance in not negotiating over the title because had it been wrong on the confidential question it would have violated the Act. The Commission therefore indicated that in such circumstances it preferred the filing of a CU petition rather than an unfair practice charge to resolve the unit placement

issue. However, the Commission did not actually require the employer to file the CU petition in such matters. 12/

In analyzing Passaic in relation to the instant matter it is apparent that the CU petition filed herein is the preferred method to resolve the placement of the ISIP's. Unlike Passaic, however, this case concerns the placement of a new title, not the removal of an existing title from its appropriate unit. Consequently, where there may be a preference for an employer to file a CU when it wishes to remove a title from a unit, the undersigned believes there is a preference for a labor organization to file a CU and not a CO when it raises a question over unit placement of a newly created title or duty.

Accordingly, for the above-stated reasons the Charging Party has failed to prove a violation of the Act, and therefore the undersigned recommends that the Charge and Complaint be dismissed in their entirety.

The CU Petition

As previously stated herein, the CU Petition was the proper method to utilize in seeking the inclusion of a newly created title in the unit. See, In re Clearview, supra, and In re Passaic, supra.

Despite having found that the ISIP title is not currently included in the unit, the undersigned believes that said title shares a community of interest with the unit and should be immediately clarified therein. The Commission's longstanding policy with respect to unit composition is to favor the broad-based unit. See State v.

12/ In New York, a public employer cannot unilaterally remove an employee from a negotiations unit even if he/she is a confidential or managerial employee. The employer must first seek a determination in a CU context which finds the employee to be a confidential or managerial employee. In re City of New York, 8 PERB 3041 (¶3025 1975).

Professional Assoc. N.J. Dept. of Ed, 64 N.J. 231 (1974); In re Bergen County, P.E.R.C. No. 69 (1972); In re Jefferson Twp. Bd/Ed, P.E.R.C. No. 61 (1971); and, In re West Milford Twp. Bd/Ed, P.E.R.C. No. 56 (1971). The Commission has since continued to favor the establishment of broad-based functional units and rejected claims for units based on specific occupational distinctions. See In re N.J. College of Medicine and Dentistry, D.R. No. 77-17, 3 NJPER 178 (1977); In re Transport of N.J., D.R. No. 82-38, 8 NJPER 154 (¶13067 1982).

In applying that policy the Commission requires a finding that the titles share a community of interest with one another, and in the education field the Commission has held that professional and non-professional titles such as teachers and secretaries and custodians share a sufficient community of interest to justify their placement in a single unit. See In re Jefferson Twp, supra; In re West Milford Twp, supra; In re Pequannock Twp Bd/Ed, D.R. No. 82-59, 8 NJPER (¶ 1982); In re Lacey Twp Bd/Ed, D.R. No. 82-48, 8 NJPER 269 (¶13116 1982); In re Burlington Co. Voc. & Tech. H.S. Bd/Ed, D.R. No. 82-43, 8 NJPER 204 (¶13085 1982); and, In re Moonachie Bd/Ed, D.R. No. 82-28, 8 NJPER 58 (¶13023 1981).

In applying that rationale to the instant matter the ISIP title/duties clearly shares a community of interest with the other titles and duties in the Petitioner's unit. First, the only employees who have actually performed the ISIP work are regular teachers who, although they did not specifically function as teachers while performing the ISIP work, were nevertheless the employees preferred by the Board to perform this work because of their contact with the affected students in the Fall. This preference should not be mini-

mized. The Board has had the opportunity to assign the ISIP work to non-certificated individuals but has chosen to assign the work to teachers because they must use the plans in teaching the affected students. The assignment of the ISIP work to teachers is an indication of the close relationship of that work to regular teaching functions. Moreover, the assignment of that work to teachers and the placement of that work in the teachers unit would not be inconsistent with In re Freehold, supra. Second, the ISIP work is an educationally related and teacher related function. The ISIP work reviews the students' capabilities in certain subjects, and the teachers who teach those subjects must rely on and use the ISIP's in teaching the affected students. Third, the people performing the ISIP work are hired and evaluated by the same principals who have a role in the hiring and evaluation of regular teachers.

The fact that the ISIP work need not be performed by someone with a certification is not a legitimate basis upon which to exclude the title from the unit for three reasons: First, the Board has only assigned the ISIP work to regular teachers and there was no indication on the record that the Board contemplated a change in that policy. Second, even if some of the work were performed by clerical employees the work would still be educationally and teacher related for the reasons set forth above, and further it would not be inappropriate to mix professionals with non-professionals. Finally, if the Board actually assigned ISIP work to non-certificated employees in the future the Board, the Petitioner, or any other labor organization could file a new CU petition to reconsider the unit placement

question based upon new circumstances. In addition, the argument that the ISIP work should not be included in the unit because of its casual or part-time nature is without merit. The facts show that the ISIP work must now be performed on a regular yearly basis and will be expanded to cover more students in the future which will necessitate more individuals to perform the work. The work therefore, is far more than casual, rather, it has become a regular part-time function with every indication of continuity. In fact, one ISIP employee, Virginia Dossena, has been hired to perform the work two years in a row which is a clear indication of the likelihood of continued employment in this area for similarly situated employees, particularly teachers.

The Commission has held on several occasions that regular part-time work which has a continuity of employment is appropriate for representation and may be mixed with full-time employees. See In re Ridgewood Bd/Ed, D.R. No. 81-41, 7 NJPER 296 (¶12134 1981); In re Atlantic City Parking Authority, D.R. No. 80-28, 6 NJPER 119 (¶11064 1980); In re Monmouth Co. Vocational Reg. Bd/Ed, D.R. No. 79-31, 5 NJPER 179 (¶10097 1979); In re Jersey City Medical Center, D.R. No. 78-33, 4 NJPER 98 (¶4044 1978).

Finally, the Board's argument that the ISIP title is inappropriate for inclusion in the Petitioner's unit because the Distributive Education work and the Cooperative Industrial Experience work are still unrepresented is also without merit. The facts concerning the ISIP title are sufficient to justi y its inclusion in the unit regardless of the current status of the other positions.

In addition, the Petitioner has not petitioned for those titles, thus there is no need to issue a decision with respect to their unit placement.

Conclusions of Law

1. The Sayreville Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by refusing to negotiate with the Charging Party over terms and conditions of employment for employees performing ISIP work.

2. The Charging Party/Petitioner's negotiations unit should be clarified to include the ISIP title.

Recommended Order

1. The Hearing Examiner recommends that the Commission ORDER that the Unfair Practice Charge and Complaint be dismissed in their entirety.

2. The Hearing Examiner further recommends that the Commission ORDER that the Petitioner's negotiations unit be clarified to immediately include the ISIP title and that the Board negotiate upon demand with the Petitioner concerning the ISIP terms and conditions of employment.

Arnold H. Zudick
Hearing Examiner

Dated: August 27, 1982
Trenton, New Jersey