

H.O. No. 86-2

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

In the Matter of  
COUNTY OF WARREN,

Public Employer,

-and-

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
COUNCIL 73, AFL-CIO,

Docket No. RO-85-37

Petitioner.

-and-

WARREN COUNCIL NO. 17  
NEW JERSEY CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

A Petition for Certification of Public Employee Representative was filed seeking to represent a portion of the employees currently included in the county-wide unit in Warren County.

The current unit includes supervisors and non-supervisors. The petitioned-for unit sought to represent only the non-supervisory, blue and white collar, professional and non-professional employees. The Hearing Officer found that supervisory employees should continue to be included in the county-wide unit on the basis that an "established practice" within the meaning of the Act exists. Accordingly, the Hearing Officer recommended that the Petition be dismissed in its entirety.

With regard to other issues raised in this case, the Hearing Officer found that the Head Nurses at Warren Haven Nursing Home are supervisors; an employee organization (here the Petitioner) has standing to raise the issue of whether an employee is confidential within the meaning of the Act; the secretary to the Warden of the County Jail is not confidential because her level of involvement in the collective negotiations process is insufficient to render her membership in the unit incompatible with her duties; and the County of Warren is the employer of employees working in the County Library and not the County Library Commission.

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Appearances:

For the Public Employer  
Harper & Hansbury  
(John Harper of counsel)

For the Petitioner  
A.F.S.C.M.E., AFL-CIO  
(Carlton Steger, Council Representative)

For the Intervenor  
Fox & Fox  
(Fredric Knapp of counsel)

HEARING OFFICER'S REPORT  
AND RECOMMENDATION

On September 18, 1984, the American Federation of State,  
County and Municipal Employees, Council 73, AFL-CIO (hereinafter  
"AFSCME" or "Petitioner") filed a timely Petition for Certification

of Public Employee Representative, accompanied by an adequate showing of interest, with the Public Employment Relations Commission (hereinafter "Commission"). AFSCME seeks to represent all blue and white collar, professional and non-professionals employees employed by the County of Warren. In its Petition, AFSCME seeks to exclude Managerial Executives, employees represented in other negotiating units and Supervisors within the meaning of the New Jersey Employer-Employee Relations Act (hereinafter "Act"). During the course of the prehearing conferences conducted in regard to this matter, AFSCME indicated that employees of the Warren County Library were, in fact, employed by the Warren County Library Commission and not the County of Warren. Consequently, AFSCME contends that Warren County Library employees are not part of its petitioned-for unit.

Presently, all blue and white collar, professional and non-professional, supervisory and non-supervisory County employees are included in the county-wide unit represented by Warren Council No. 17, New Jersey Civil Service Association (hereinafter "Council No. 17" or "Intervenor"). Pursuant to N.J.A.C. 19:11-2.7(a), Council No. 17 has been granted intervenor status in the instant matter on the basis of its collective negotiations Agreement with the County of Warren (hereinafter "County") which expired on December 31, 1984. Council No. 17 takes the position that the existing county-wide unit, inclusive of supervisors, constitutes the appropriate unit. Consequently, Council No. 17 argues that AFSCME's petitioned-for unit, which excludes supervisors, is inappropriate and must be dismissed. Council No. 17 asserts that supervisors

should continue to be included in the unit on the grounds that there exists a pre-1968 collective negotiations relationship which permits the continued inclusion of supervisors. Council No. 17 further argues that employees working in the Warren County Library are employed by the County of Warren and not the Warren County Library Commission.

The County takes the position that the petitioned-for unit is inappropriate in that it seeks to exclude supervisors within the meaning of the Act. The County takes the position that there exists an "established practice" within the meaning of section 5.3 of the Act, which permits the inclusion of supervisory and non-supervisory employees within the same collective negotiations unit. The County also takes the position that it is the County of Warren and not the Warren County Library Commission, which is the employer of employees working in the County Library. Finally, the County argues that certain titles presently included in the county-wide unit should be excluded on the grounds that employees serving in such titles are managerial executive or confidential employees within the meaning of the Act.

During the course of prehearing conferences, the parties made significant progress in the identification of employees serving as supervisors, confidentials, and managerial executives. Subsequent to such prehearing conferences, no dispute remained concerning the identification of employees serving as managerial executives; an agreement was achieved in terms of their exclusion from the unit. The issues which remain are the following:

(1) Whether employees serving in the title of Head Nurse are supervisors within the meaning of the Act;

(2) Whether Kathleen Murphy is a confidential employee within the meaning of the Act;

(3) Whether employees working in the Warren County Library are employed by the Warren County Library Commission or the County of Warren; and

(4) Whether supervisory employees within the meaning of the Act should be included in a negotiations unit which will also contain non-supervisory employees on the grounds that a pre-1968 negotiations relationship existed bringing into play the exception to the statutory prohibition against the commingling of supervisory and non-supervisory employees.

Pursuant to a Notice of Hearing dated February 4, 1985, hearings were conducted before me on May 21, 22, 23, 24, June 24 and June 28, 1985, in Newark and in Belvidere, New Jersey, at which time the parties were given an opportunity to examine and cross-examine witnesses, to present evidence, and to make oral arguments. The parties filed post-hearing briefs.

#### FINDING OF FACTS

Upon the entire record, I find the following facts:

1. The County of Warren is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq., and is subject to its provisions. (1T6-7).<sup>1/</sup>

2. Council 73, American Federation of State, County, and Municipal Employees, AFL-CIO and Warren Council No. 17, New Jersey Civil Service Association, are employee organizations within the meaning of the New Jersey Employer-Employee Relations Act and are subject to its provisions. (1T7).

Issue I:            Whether Employees Serving in the Title of Head Nurse are Supervisors Within the Meaning of the Act.

#### FINDINGS OF FACT

The petitioner has taken the position that employees serving in the position of Head Nurse are not supervisors within the meaning of the Act. Consequently, the petitioner concludes that such employees should be included in the petitioned-for unit (which excludes supervisory employees) and eligible to vote in the event an election is conducted. The County and the Intervenor take the position that employees serving in the position of Head Nurse are supervisors within the meaning of the Act.

The first witness called to testify concerning the Head Nurse issue was Gloria Leopardi. Ms. Leopardi began her employment at Warren Haven Nursing Home in July, 1980, as a Graduate Nurse. (2T2). Since 1981 or 1982, Ms. Leopardi has been serving in the

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<sup>1/</sup> Transcript designations are as follows: "1T1" refers to the transcript dated May 21, 1985, page 1; "2T1" refers to the transcript dated May 22, 1985, page 1; "3T1" refers to the transcript dated May 23, 1985; and so forth.

title of Head Nurse. (2T3). Ms. Leopardi described her major job responsibilities as including patient care, administering medication, supervising treatments, assisting doctors, making job assignments to subordinate staff, (2T4; 2T13; 2T50) and preparing work schedules. (2T18).

Ms. Leopardi was questioned regarding her role in the administration of discipline. Ms Leopardi testified that she has never been told that she has the authority to discipline employees. (2T9). However, in response to a question posed during direct examination concerning what she would do if she observed an employee doing something wrong, she stated, "I could discipline the employee and bring to their [the employee's] attention that they're doing something wrong. If they insist on doing it any further, you could write up an Awareness Notice to them." (2T9). The witness defines the Employee Awareness Slip as a form used to advise an employee that he/she is doing something wrong. (2T9-10; 2T19). While Ms. Leopardi said on direct examination that she never recommended disciplinary action be taken against any employee, (2T8), she admitted during cross-examination that in conversation, management at Warren Haven solicits her "opinion" regarding the manner in which a matter involving one of her subordinates should be handled, and whether certain measures should be taken in order to help an employee improve his/her performance. (2T20-21; 2T68). While her comments are not in writing, Ms. Leopardi stated that she gives management her opinion on such matters. (2T21; 2T25).

Ms. Leopardi was questioned regarding several Awareness Slips which she authored. Exhibit E-2<sup>2/</sup> is an example of an Employee Awareness Slip which Ms. Leopardi prepared and served on a subordinate employee.<sup>3/</sup> The witness stated that she met with the involved employee in order to discuss the contents of the Awareness Slip. (2T24). After the meeting Ms. Leopardi submitted the Awareness Slip to management for follow-up action. Ms. Leopardi stated that management's follow-up of the incident included the solicitation of her opinion regarding the matter. (2T25).

Exhibit E-3 is an Employee Awareness Slip which Ms. Leopardi prepared for the same subordinate employee referred to in E-2. The Awareness Slip stated that the employee was "demonstrating extremely poor attitude at times she is just down right defiant with nursing staff." (E-3). Prior to or simultaneous with the issuance of E-3, Ms. Leopardi met with the employee for the purpose of discussing the problems indicated in the Awareness Slip. (2T28). Again, the Awareness Slip was submitted to management for follow-up which included the solicitation of the witness' opinion regarding the matter. (2T28). In fact, in regard to E-3, the witness recalls Director of Nurses McPhillips soliciting her suggestions and recommendations concerning the means in which to achieve improvement in the employee's performance. Director McPhillips also asked for

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<sup>2/</sup> "C" refers to Commission exhibits; "E" refers to the County's exhibits; "P" refers to AFSCME's exhibits and "I" refers to Council No. 17's exhibits.

<sup>3/</sup> E-2 was also signed by Head Nurse Smith. (2T23).



and received from Ms. Leopardi, suggestions regarding whether further disciplinary action should be taken in the case of this employee. (2T30).

Exhibit E-5 is an Employee Awareness Slip signed by Ms. Leopardi and Head Nurse Smith. The Awareness Slip was issued to the involved employee due to excessive absenteeism. The Awareness Slip indicates that the Head Nurse had a previous oral discussion with the employee about the absenteeism problem.

Ms. Leopardi testified that after the Awareness Slip was submitted to management she was neither involved in the follow-up procedure (2T56), nor asked to recommend the specific penalty to be imposed on an employee (2T63). However, in subsequent questioning Ms. Leopardi admitted that management does ask her for her opinion regarding anticipated disciplinary actions that could be taken against an employee. (2T68; 2T70). This admission, coupled with her testimony regarding her involvement in the several specific situations in which she authored Awareness Slips, clearly indicates that Ms. Leopardi is an active participant in the administration of discipline on the ward. Thus, I find that the distinction Ms. Leopardi draws between making a "recommendation" and "giving her opinion" with regard to matters calling for disciplinary actions is more of a semantical difference than one of substance.

Ms. Leopardi was also questioned concerning her role in the employee evaluation process. New employees are evaluated once each month for the first three months; thereafter, employees are

evaluated annually. (2T7). Ms. Leopardi has filled out evaluation forms on both new and seasoned employees. (2T7; 2T39-40). The witness has prepared evaluation reports which have indicated both good and poor levels of work performance. (2T8). While the witness' testimony indicates that she never made a recommendation explicitly calling for the retention or dismissal of an employee during the probationary period (2T8), Ms. Leopardi does indicate her opinion regarding an employees' overall level of performance on the evaluation form. (2T40-41). As an evaluator, Ms. Leopardi has been asked to comment upon an employee's leadership ability (2T41), degree of improvement since the last evaluation (2T42), and the manner by which the employee's performance might improve. (2T42). The witness stated that during the course of the evaluation process, she discusses the evaluation of the employee with both the employee and the Director of Nurses. (2T42; 2T53). In those circumstances where the evaluation is poor, management will meet with the evaluator in order to discuss the problem. (2T54).

The Petitioner next called Joanne Semmel, a Head Nurse working the 7 a.m. to 3 p.m. shift. (2T78). Ms. Semmel testified that her job duties consist of assigning job duties to subordinates (2T92; 2T94), developing work methods and schedules (2T92) and evaluating the work performance of employees serving in the Institutional Attendant, Licensed Practical Nurse (hereinafter "LPN") and Graduate Nurse titles. (2T92-2T94). Ms. Semmel said she was responsible for all nursing activity on the ward. (2T92).

Ms. Semmel testified that on the large wards, the Head Nurse normally acts as the charge nurse. (2T97). However, in light of present staffing levels, when the Head Nurse is unavailable a Graduate Nurse or even an LPN may fill in for the Head Nurse as charge nurse. (2T82; 2T97-98). A Graduate Nurse or even an LPN acting as charge nurse on one of the smaller wards, may be required to evaluate their subordinate employees on that ward (2T82), however, the performance of the evaluation function properly belongs to the Head Nurse (2T98).

Ms. Semmel testified that she has evaluated both senior and probationary employees. While she has never given an employee a poor evaluation with regard to overall performance, where necessary, the witness has indicated specific areas of weakness in the employee's evaluation. (2T85; 2T23). In response to questioning concerning a particular subordinate, probationary employee, Ms. Semmel stated that such employee was retained as the result of a satisfactory evaluation which she submitted. (2T121-122). The witness stated that the Supervisor of Nurses made the final determination regarding whether a probationary employee would be retained or dismissed. (2T124).

With respect to discipline, Ms. Semmel testified that while she never had occasion to fill out an Employee Awareness Slip, she was aware of the fact that she had the authority to use the slip if the situation warranted. (2T80-81). Similar to the testimony of Ms. Leopardi, Ms. Semmel stated that she never recommended that

disciplinary action be taken against an employee. However, also similar to Ms. Leopardi's testimony, Ms. Semmel stated that she did have informal conferences with management regarding an employee's conduct or attitude and would suggest measures which might be taken in order to help improve the employee's performance. (2T101).

The Petitioner next called Jean Colson, a Licensed Practical Nurse working the 3 p.m. to 11 p.m. shift. (2T132). Ms. Colson has been assigned to function in the capacity of charge nurse on several wards at Warren Haven. (2T137).

As a charge nurse, Ms. Colson is responsible for the ward and acts as a Head Nurse. (2T137). She has authority to write Employee Awareness Slips (2T133; 2T139-40) but has never seen fit to do so. (2T133; 2T142). The witness stated that Awareness Slips are used in more serious situation where an oral conversation has been unsuccessful in resolving the problem. Awareness Slips are permanently retained in the employee's personnel file and constitute written documentation that an employee has been apprised of a problem with their behavior. (2T140-41).

In Ms. Colson's capacity as charge nurse, she has also had occasion to prepare evaluations on both probationary and non-probationary Institutional Attendants (2T134; 2T138-39; 2T144; 2T145). The witness stated that she would receive the evaluation form for the employee to be evaluated from management. (2T134). She would complete the evaluation form, discuss it with the employee and forward the form to the Director of Nurses. (2T136). Ms.

Colson testified that management never discussed the evaluation with her. (2T136).

The Intervenor called Florence Rymon. During the course of her employment at Warren Haven, Ms. Rymon served as Head Nurse and Assistant Supervisor of Nurses. Ms. Rymon resigned in late 1982. (3T25-17).

As Assistant Supervisor of Nurses, Ms. Rymon was responsible for hiring the Head Nurses at Warren Haven. (3T33). During the interview process, the witness told the prospective Head Nurse that the job duties would encompass disciplining and evaluating subordinate employees. (3T36). Additionally, the Head Nurse would be given information on discipline during job orientation. (3T41). Ms. Rymon testified that as Supervisor of Nurses she conducted her own investigation into incidents brought to her attention by the Head Nurses. The Head Nurses would be involved in the discipline and follow-up processes throughout the entire investigation, however. (3T39; 3T41-42; 3T53). Ms. Rymon testified that Head Nurses did make recommendations in terms of specific disciplinary actions (such as suspensions, transfers and terminations) to be considered. (3T38). While Ms. Rymon had to get approval from her supervisors before any disciplinary action was imposed (3T49-50), her recommendations were usually followed (3T58), and she was always guided by the recommendations of the Head Nurse. (3T39; 3T45). The witness stated that the Employee Awareness Slip

was the means used by management to document an incident (3T72-73) and constitutes a form of discipline. (3T90).

Ms. Rymon testified regarding the disciplinary procedure she and other Head Nurses followed during the period that she served as a Head Nurse. She stated that in the circumstance where she perceived a problem with an employee, she would first counsel that employee orally. If oral counselling proved unsuccessful, she would prepare an Employee Awareness Slip. If the problem persisted, Ms. Rymon would issue another Awareness Slip which included a specific recommendation of disciplinary action. (3T28-30; 3T55).

Ms. Rymon also testified regarding performance evaluation. The witness stated that the annual evaluation would determine whether an employee would receive a merit wage increase. (3T30). Since the evaluation form is self-explanatory, Ms. Rymon said it was unnecessary to state whether an employee should receive a merit increase. (3T30-31). Ms. Rymon testified that during the period she was Head Nurse, her superiors would consult with her regarding her evaluation of a subordinate employee. (3T31).

Jean Sickles, Administrator of Warren Haven since August 1978, was called to testify by the County. (4T2). The Warren Haven Personnel Policy Manual (Exhibit E-9) was admitted into evidence through Ms. Sickles. Among other things, the Policy Manual indicates that Warren Haven uses Employee Awareness Slips as a mechanism to notify employees of unsatisfactory work. The Manual

states "Repeated awareness slips may be an indication of the employee's inability to perform the duties required, and may result in termination of employment." (E-9, page 15). All employees at Warren Haven receive a copy of the Personnel Policy Manual at the time of initial hire. (4T6). Although an employee served with an Employee Awareness Slip suffers no loss of pay (4T54), Ms. Sickles still views the Awareness Slip as a form of discipline. (4T29).

Ms. Sickles testified concerning the organizational structure within the Nursing Department. The Head Nurse reports to the Supervisor of Nurses. The Graduate Nurses report to the Head Nurse. The LPN's and Institutional Attendants report to a charge nurse which could be either a Graduate Nurse or Head Nurse, depending upon staffing. The witness explained that a charge nurse is a professional nurse who assumes the duties of the Head Nurse in his/her absence. (4T25). Under certain circumstances, an Institutional Attendant could report to an LPN serving in the capacity of charge nurse. (4T14-16; E-10). Ms. Sickles considers Head Nurses to be first-line supervisors. (4T10).

Ms. Sickles was also questioned on the role of the Head Nurse in terms of discipline. The witness stated that while all employees can file complaints and report misconduct, only supervisors or employees serving as charge nurse can make out an Employee Awareness Slip. (4T50). While it is the Director of Nurses, and not the Head Nurse, who has the actual authority to

suspend and/or terminate employees, such disciplinary actions are carried out upon the recommendation of the Head Nurse. (4T29-30).

Ms. Sickles also testified regarding the job duties and responsibilities of the Head Nurse. The witness testified that Head Nurses are responsible for the management of the nursing unit, direction and supervision of staff, regular assignment of duties to subordinate personnel, development of work methods, planning of work on the ward, and evaluation of subordinate employees. (4T23-26).

In order to punctuate its position regarding the Head Nurse's role in evaluation and supervision, the County introduced Exhibits E-23, E-24 and E-25. Each of the Exhibits are evaluation reports completed by Head Nurses Leopardi and Smith. The reports indicate an analysis of the employees' job performance problems and attempts on the part of the Head Nurse to bring about improvements.

The County next called Carmine McPhillips to testify regarding the Head Nurse issue. Ms. McPhillips is Director of Nursing at Warren Haven (4T87-88). Ms. McPhillips testified that the Head Nurse is generally responsible for planning the work on a ward. The Head Nurse makes staff assignments in terms of patient care and ensures that the doctor's orders are effectuated. The Head Nurse is responsible for administering medications and treatments. (4T92-93).

Ms. McPhillips stated that Head Nurses are responsible for evaluating Graduate Nurses, Licensed Practical Nurses and Institutional Attendants. (4T93). Ms. McPhillips also indicated



that on occasion a Graduate or Licensed Practical Nurse may serve as charge nurse and evaluate employees serving only in titles subordinate to their own. (4T95; 4T98). The witness testified that in terms of lines of authority, the Head Nurse is superior to the Graduate and Licensed Practical Nurses. (4T96-97).

Ms. McPhillips testified concerning the role that two Head Nurses played in the evaluation process specifically concerning two employees who had problems during their probationary period. With respect to employee Barr, an Institutional Attendant, the witness stated that problems were brought to her attention as the result of poor evaluations submitted by Head Nurses Duckworth and Malizewski. Ms. McPhillips then coordinated with the Head Nurses in an attempt to improve Barr's performance. (4T122-4T125). Ultimately, the Head Nurses and Ms. McPhillips concurred in the decision that the employee should be terminated prior to the completion of her probationary period due to poor performance. With respect to the other employee, an Institutional Attendant named Mexisel, Ms. McPhillips testified that this employee also received a poor evaluation from Head Nurse Duckworth during the probationary period. The employee was subsequently terminated on the basis of Ms. Duckworth's poor evaluation. (4T125-126). Ms. McPhillips stated that while she makes the ultimate decision on whether an employee is retained or terminated (4T159-160), she relies heavily upon the recommendations of the Head Nurses. (4T125; 4T160).

Ms. McPhillips also testified in regard to the Head Nurses

role in the disciplinary process. The witness said that Warren Haven is committed to the concept of progressive discipline for employees. (4T101). Thus, an oral warning constitutes the first step in the disciplinary process, the issuance of an Employee Awareness Slip is the second step, and suspension, fine or possibly termination constitutes the third step in the process. (4T100-101).

The witness testified concerning the circumstance in which an Awareness Slip was issued to an employee by Head Nurses Leopardi and Smith. She indicated that the Head Nurses initially gave the employee an oral warning. Subsequently, when the employee failed to correct her actions, they issued an Awareness Slip. (4T102-4T103). This resulted in a meeting between the employee and Ms. McPhillips in which the witness, supportive of the Head Nurses' actions, advised the employee that further disciplinary action would result if the improper behavior continued. (4T106). Ms. McPhillips stated that there is a good deal of communication between her and the Head Nurses regarding employee problems, (4T107) and that while the Head Nurses don't write their disciplinary recommendation on the Awareness Slips, they do indicate such recommendations orally. (4T127).

#### ANALYSIS

N.J.S.A. 34:13A provides in relevant part:

5.3...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be

represented in a collective negotiations unit by an employee organization that admits non-supervisory personnel to membership.

The above-quoted provision has been interpreted to contain the statutory definition of supervisor; that being an employee having the authority to hire, discharge, discipline, or effectively recommend. In re Cherry Hill Department of Public Works, P.E.R.C. No. 30 (1970). However, it must be noted that a determination of supervisory status requires more than a job title or description or oral assertions that an employee may have supervisory authority. In In re Sommerset County Guidance Center, D.R. No. 77-4, 2 NJPER 358 (1976) the Director of Representation said the following:

...the bare possession of supervisory authority without more is insufficient to sustain a claim of status as a supervisor within the meaning of the Act. In the absence of some indication in the record that the power claimed possessed is exercised with some regularity by the employees in question, the mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status. Id. at 360.

Thus, it is clear that the paramount consideration in determining whether the Head Nurses are supervisors is their actual exercise of supervisory authority.

The Head Nurses are integrally involved in the disciplinary process at Warren Haven. An "indicator of supervisory status is whether or not the employees in question discipline employees or effectively recommend the same. Actual discipline is typically manifested by prompt action at the work site. [Citation omitted]. Effective recommendation of discipline can be demonstrated by the

employee who has 'primary responsibility for evaluating ...' employees '... where the evaluations are instrumental ... in effectuating various personnel action. In re Emerson Board of Education, D.R. No. 82-13, 7 NJPER 571 (¶ 12255 1981); see also, In re State of New Jersey, D.R. No. 83-11, 8 NJPER 586 (¶ 13271 1982)." In re Borough of Avalon, H.O. No. 84-11, 10 NJPER 149, 152 (¶ 15075 1984), aff'd P.E.R.C. No. 84-108, 10 NJPER 207 (¶ 15102 1984).

It is clear from the testimony that Head Nurses have the authority to unilaterally issue Employee Awareness Slips. While I do not hold that every written communication between employer and employee which contains criticism of that employee constitutes discipline, I do find that the facts in this case unequivocally indicate that an Awareness Slip is the same as what might be more commonly known as a written warning. The Director of Nursing, Assistant Supervisor of Nurses and the Nursing Home Administrator all testified that they view the Employee Awareness Slip as a form of discipline. The Director of Nurses stated that the Awareness Slip is the second step in the process of progressive discipline. The Awareness Slip is permanently retained in the employees' personnel file and is used as documentary justification for possible further disciplinary action which might carry a more severe penalty. For example, Head Nurse Leopardi stated that if an employee persisted in doing something wrong she could discipline such employee by issuing an Awareness Slip. (2T9). Placed in evidence were three Awareness

Slips (E-2, E-3 and E-5) that Head Nurse Leopardi issued for such problems as poor attitude and excessive absenteeism; a typical situation in which disciplinary action is taken. Thus, the weight of the testimony clearly indicates that the Head Nurses' ability to unilaterally issue an Employee Awareness Slip constitutes the exercise of authority to impose actual discipline upon subordinate employees.

The testimony also clearly indicates that Head Nurses are expected to routinely evaluate the subordinate employees within their span of control. The Head Nurses prepare both annual and probationary evaluations. These evaluations are submitted to and reviewed by management. Where the evaluation indicates a problem exists, management consults with and relies upon the input from the Head Nurse(s) involved. The testimony of Carmine McPhillips cited examples of circumstances where two employees were terminated as the result of poor performance evaluations written by Head Nurses. Thus, in accordance with the Borough of Avalon standard establishing "effective recommendation of discipline", it is clear that the Head Nurses' evaluations were and are instrumental in effectuating personnel actions.

Additionally, there is an abundance of testimony from all of the witnesses establishing the fact that there is substantial communication between the Head Nurses and management personnel pertaining to the nature of discipline and type of disciplinary penalty to be imposed. The mere fact that such discussions are not in writing, does not reduce the effectiveness of disciplinary

recommendations made by Head Nurses, nor does it reduce management's reliance upon their input.

Thus, taken together with the facts that the Head Nurses are in a superior line relationship to Graduate Nurses, LPN's and Institutional Attendants, assign duties, and plan work schedules, I find that Head Nurses have the authority to impose actual discipline and have authority to effectively recommend discipline. I further find that the Head Nurses regularly exercise their disciplinary authority. Accordingly, I find the Head Nurses at Warren Haven to be supervisors within the meaning of the Act and recommend such finding to the Commission.

Issue II: Whether Kathleen Murphy is a Confidential Employee Within the Meaning of the Act

FINDINGS OF FACTS

AFSCME contends that Kathleen Murphy is a confidential employee within the meaning of the Act and, consequently, must be excluded from the unit. During the course of the hearing, the County and Council No. 17 objected to AFSCME's assertion arguing that the petitioner in a representation proceeding has no standing to raise this issue. The County and Council No. 17 contend that only the employer has standing to raise the issue of an employee's confidential status. (3T2-3T3). The County took no position with respect to whether Ms. Murphy is a confidential employee; Council No. 17 takes the position that she is not. None of the parties briefed the issue of standing.

Ms. Murphy presently serves in the title Administrative Secretary and works for Robert Sharr, Warden of the Warren County Jail. (6T155; 3T7). Ms. Murphy is the only clerical employee working for the Warden. (6T158). Warden Sharr testified that Correction Officers at the jail are represented by the Policemen's Benevolent Association ("PBA") and that the secretaries, cooks and maintenance employees are represented by Council No. 17. (3T8).

The Warden stated that while he is involved in the negotiations process for the Corrections Officers, he does not sit at the negotiating table. (3T9). His role in the PBA negotiations is limited to receipt and review of proposals presented by the PBA and the preparation of counter-proposals and position statements on behalf of the County. (3T10). Ms. Murphy does not have access to any PBA negotiations materials or documents (3T11), nor does the Warden ever discuss negotiations with her. (6T157). The Warden keeps materials pertaining to negotiations, grievance and disciplinary matters in a locked file in his office. Only the Warden has access to the file. Documents pertaining to negotiations are delivered directly to the Warden and do not go through Ms. Murphy. (3T11; 6T156-6T157).

The Warden conducts grievance and disciplinary hearings (3T12). During the eight years that Ms. Murphy has worked for the Warden, he has conducted approximately 12 disciplinary hearings. (3T17). He responds to grievances with handwritten decisions; Ms. Murphy neither attends the grievance hearings (3T15) nor types

grievance decisions. (6T161). She has no other contact with the PBA grievance process. (6T156; 6T161). While Ms. Murphy does not attend disciplinary hearings (3T15), she does type the Warden's disciplinary decisions and Civil Service forms pertaining to such disciplinary actions prior to the time such decisions are issued. (6T157). The decisions constitute the Warden's recommendation of disciplinary action, including penalties, to the Board of Chosen Freeholders. (6T163-6T166).

#### ANALYSIS

A. Whether AFSCME has Standing to Raise the Issue Concerning Kathleen Murphy's Status as a Confidential Employee?

In In re City of Orange Township, D.R. No. 85-23, 11 NJPER 317 (¶ 16115 1985), the Director of Representation was confronted with a situation in a representation matter in which the incumbent employee organization challenged the vote of several employees on the basis that they were confidential employees. In that case the Director said:

It is noteworthy that OMEBA/Council 1, the incumbent, raises the contention that [the employee] is an administrative secretary (confidential employee) and thus excluded from the unit. It is our experience that such contentions -- that an employee is (or should be) excluded from a negotiations unit because that employee is a confidential employee -- are usually raised by the employer. In re City of Orange Twp., 11 NJPER at 323.

However, the Director went on to state the following:

While an employee organization is not technically precluded from arguing such an



exclusion, actions to exclude confidential employees from a bargaining unit almost always originate with the employer, as it is the employer's interest which may be compromised by having a confidential employee included in the negotiations unit. The employer is in the best position to determine if it is disadvantaged by having a confidential employee in a negotiations unit and if the Union may otherwise gain access to confidential labor relations information of the employer to which it would not otherwise have access. Id. at 325, n.6.

Similar to City of Orange Township, it is an employee organization, and not the employer, which is raising the issue of whether an employee is confidential. While typically the employer asserts the claim that a particular employee should be excluded from the unit on the basis of confidentiality, the Director recognized in City of Orange Township that an employee organization may also have reason to exclude a confidential employee. For example, due to the nature of their work, confidential employees often feel a greater allegiance to management than non-confidential employees in similar job classifications. Consequently, it is understandable that an employee organization may have strong feelings that such employees, perceived as management, should not be involved in internal union matters, discussions, votes, plans, etc. For this reason alone, AFSCME should have standing to raise the issue of the confidential status of an employee.

Additionally, the forum in which the instant Petition is being resolved is a representation proceeding. Representation proceedings are fact finding in nature and not adversarial. See

N.J.A.C. 19:11-6.2(c) and N.J.A.C. 19:11-6.3(a) and (b)(11). It is the Hearing Officer's responsibility to develop a full record upon which the Commission may act. "The Hearing Officer's duties are not confined to resolving the conflicting factual contentions raised by the parties and his recommendations are not delimited by the proposed findings and legal theories expounded by the parties." In In re River Dell Board of Education, P.E.R.C. No. 78-85, 4 NJPER 252, 253 (¶ 4128 1978). Thus, the Hearing Officer is charged with the responsibility of addressing all issues on the basis of his/her own initiative in order to fulfill his/her function pursuant to the Commission Rules, notwithstanding the question of whether one or more of the parties has standing to do so.

Accordingly, for the reasons set forth above, I find that AFSCME has standing to raise the issue of whether Kathleen Murphy is a confidential employee within the meaning of the Act and recommend such finding to the Commission.

B. Whether Kathleen Murphy is Presently Functioning as a Confidential Employee Within the Meaning of the Act?

N.J.S.A. 34:13A-3(d) defines public employee in the following manner:

...any person holding a position; by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

N.J.S.A. 34:13A-3(g) states the following:

Confidential employees of a public employer

mean employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate unit incompatible with their official duties.

In In re City of Orange Township, supra, the Director set forth the basic analysis used in order to determine whether an employee was confidential.

Underlying all of the Commission's confidential employee status determinations is the requirement that the alleged confidential employee be linked in some manner -- directly or indirectly -- to management's workings vis-a-vis the collective negotiations process. See, In re State of New Jersey, D.R. No. 84-9, 9 NJPER 613 (¶ 14262 1983). The person for whom the alleged confidential employee works must be clearly involved in the collective negotiations process on behalf of the employer and the alleged confidential employee must, in the normal course of his/her duties, have access to and knowledge of confidential labor relations materials. What is required for a finding of confidentiality is an involvement with the collective negotiations process to such an extent so as to render the confidential's membership in any collective negotiations unit incompatible with his/her job duties. Id. at 321.

Applying the above analysis to the instant matter, it is clear that Warden Sharr, "the person for whom the alleged confidential employee works", is involved in the collective negotiations process. The Warden receives and reviews negotiations proposals presented by the PBA and prepares counterproposals and position statements with respect to them. Additionally, the Warden conducts grievances and disciplinary hearings.

However, by further application of the above-quoted analysis, the contention that Murphy is a confidential employee begins to fall apart. Ms. Murphy does not have access to any materials related to the PBA negotiations. All of this material is kept in a locked cabinet to which only the Warden has the key. The Warden never discusses PBA negotiations with Murphy. Further, Murphy has no involvement whatsoever in the administration of the PBA grievance process. The Warden handwrites his grievance decisions.

The only work Murphy performs for the Warden relating to the collective negotiations process is that she types disciplinary decisions prior to the time such decisions are formally adopted and issued by the Board of Chosen Freeholders. Previous cases have held that access to disciplinary decisions prior to its publication is an element to be evaluated in the determination of whether or not an employee is confidential. See, e.g., In re New Jersey State Police, H.O. No. 84-3, 7 NJPER 514 (¶ 14210 1983), aff'd, D.R. No. 84-9, 9 NJPER 613 (¶ 14262 1983); In re Twp. of Scotch Plains, D.R. No. 84-11, 9 NJPER 632 (¶ 14270 1983); In re Jersey City Bd/Ed, H.O. No. 80-1, 5 NJPER 319 (¶ 10172 1979), aff'd D.R. No. 80-15, 5 NJPER 533 (¶ 10273 1979); In re Rahway Bd/Ed, H.O. No. 80-2, 5 NJPER 323 (¶ 10173 1979), aff'd D.R. No. 80-12, 5 NJPER 506 (¶ 10261 1979); and In re Passaic County Reg. H.S., H.O. 77-3, 2 NJPER 268 (1976), aff'd P.E.R.C. No. 77-19, 3 NJPER 34 (1976). However, I have found no case which finds an employee to be confidential solely on the ground

that the employee occasionally types a disciplinary decision prior to its adoption and publication. In this case, Murphy has been the Warden's secretary for eight years, yet he has never seen fit to assert that she is a confidential employee. See, In re City of Orange Twp., 11 NJPER at 317. During her eight years as Sharr's secretary, there have only been approximately twelve disciplinary decisions for Murphy to type; that averages out to only one and a half times each year that she is required to handle any work which may be considered confidential in nature. I do not consider the typing of a disciplinary decision perhaps once or twice each year to reach the level of "involvement with the collective negotiations process to such an extent so as to render the [alleged] confidential's membership in any collective negotiations unit incompatible with his/her job duties." See, generally, In re City of Orange Twp. at 321; In re Brookdale Community College, H.O. No. 77-7, 3 NJPER 108 (1977), aff'd in rel. part D.R. No. 78-40, 4 NJPER 32 (¶ 4018 1977); In re Springfield Bd/Ed, E.D. No. 52 (1972); In re Plainfield Bd/Ed, E.D. No. 1 (1970). Accordingly, I find that Kathleen Murphy is not a confidential employee within the meaning of the Act and recommend such finding to the Commission.

Issue III:      Whether Employees Working in the Warren County Library are Employed by the Warren County Library Commission or the County of Warren?

#### FINDINGS OF FACTS

The Petition for Certification of Public Employee

Representative (C-1) filed by AFSCME describes the unit as "all County employees, blue and white collar, road department, bridge department, Warren Haven and Warren Acreas, JINS and professionals." AFSCME takes the position that employees working at the Warren County Library ("Library") are employed by the Warren County Library Commission ("Library Commission") and not the County of Warren. Thus, AFSCME argues that such employees should not be included in the petitioned-for unit, because they are not County employees. Council No. 17 and the County contend that the County is the employer of the Library employees, and that such employees should be included in the petitioned-for unit pursuant to the petition's unit description language calling for "[a]ll County employees...." to be included. It is this dispute which raises the issue of identification of the employer of employees working in the Library.

The only witness called to testify regarding this issue was Nancy Harding, Director of the Warren County Library since 1964. (6T79). Harding testified that her job duties included implementation of the policies and regulations of the Library Commission. (6T79-80). The Library Commission's policies and regulations pertained to the use of the Library by the public and did not concern the employees. (6T120). Harding directs the activities of the Library and its expenditure of funds. Harding supervises the Library personnel. (6T80). The witness establishes and approves the vacation and work schedules and does not present

such schedules to either the Library Commission<sup>4/</sup> or the Board of Chosen Freeholders (the County) for review. (6T135-36). As Director, Ms. Harding reports to the Board of Chosen Freeholders. (6T149).

Ms. Harding testified concerning the hiring process for Library employees. Each potential employee is initially interviewed by Ms. Harding. She then makes her recommendation to the Library Commission which, in turn, makes a recommendation to the Freeholders. The Board of Chosen Freeholders is the appointing authority under Civil Service law, and, as such, approves or disapproves the Library Commission's recommendation. (6T80-81). The witness stated that the Freeholders always hire the individual recommended by the Library Commission (E-31, E-32, E-33) but does not always approve the salary level. (6T83-86; 6T121).

A similar process is followed in terms of the employee resignation/termination process. The employee gives his/her letter of resignation to Ms. Harding, who forwards it to the Library Commission which, in turn, forwards the letter to the Freeholders for approval and final action. (6T94; E-35 A&B). The same process is followed in the case of retirements. (6T98-99; E-36 A&B).

Ms. Harding testified with respect to the promotion process. The promotion process is similar to the hiring and termination processes. Harding makes an initial recommendation to

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<sup>4/</sup> The Library Commission contains five members appointed by the Board of Chosen Freeholders, usually for a five year term. (6T128; N.J.S.A. 40:33-7).

the Library Commission which then makes its recommendation to the Freeholders. The Freeholders take final action to approve the Library Commission's promotional recommendation. (6T100). No personnel action is effectuated until after the Freeholders have approved it. (6T108; 6T128).

No disciplinary actions have ever been taken against any Library employee. (6T106; 6T134). With respect to job classification matters, desk audits are conducted by the Department of Civil Service. Civil Service issues its determinations to the Board of Chosen Freeholders for final approval and action. (6T107).

Employees working in the Library are included in the collective negotiations unit represented by Council No. 17. The collective agreement is negotiated by the County and Council No. 17. The Agreement covers County employees serving in various job classifications as well as employees working in the Library. (6T108). Neither Ms. Harding nor the Library Commission participates in contract negotiations. (6T109; 6T118).

Approval of the Library's budget requires a four step process. The Finance Committee of the Library Commission prepares an initial budget proposal. The proposal is then submitted to the full Library Commission for review and modification. Next, the budget is transmitted to the County Treasurer for further modification. Finally, the Library's budget is submitted to the Board of Chosen Freeholders for final review and possible adoption by Resolution. (6T109-110; 6T137-138). The Board of Chosen



Freeholders has returned the Library's budget proposal to the Library Commission for amendment. (6T110-111). For calendar year 1985, a salary increase of 8% for Library employees submitted by the Library Commission to the Freeholders was stricken from the proposed budget by the Freeholders. (6T124; E-39-A and E-39-B).

#### ANALYSIS

The Act at N.J.S.A. 34:13A-3(c) defines "employer" and "public employer" as follows:

(c) the term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

In In re County of Morris, the Hearing Officer said:

In undertaking an analysis of which entity is the employer, it is evident that such determination must appropriately be made in the context of collective negotiations.

The Commission has had numerous opportunities to consider the issue of identification of the employer, or who is the public employer, and has had occasion to rely upon the rationale developed by the National Labor Relations Board and the Federal Courts. Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970). The private sector approach is to determine which entity, in fact, exercises substantial

control over the labor relations and personnel determinations affecting involved employees. See, Howard University, 224 NLRB No. 44, 92 LRRM 1249 (1976); We Transport and Town Bus Corp., 214 NLRB No. 91, 87 LRRM 1745 (1974); Herbert Harvey, Inc. v. NLRB, 424 F.2d 777, 72 LRRM 2213 (1969). Thus, in order to ascertain employer status, one must focus upon who generally controls the hiring, firing, work schedules, promotions, discipline, performance evaluations, vacation, hours of work, scheduling, wages, benefits, funding and expenditures. The Commission has adopted and applied the above-listed indicia of employer status in public sector cases in the State. In re County of Morris, H.O. No. 85-12, 11 N.J. P.E.R.C. 418, 421 (¶ 16146 1985), aff'd P.E.R.C. No. 86-15, 11 NJPER 491 (¶ 16175 1985).

See also, In re Ocean County Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶ 13024 1981); In re Bonnie Bray Child Care Counselors Assn., D.U.P. No. 80-7, 5 NJPER 457 (¶ 10231 1979); Newark Housing Development and Rehabilitation, D.R. No. 78-34, 4 NJPER 328 (¶ 10175 1979); In re Bergen County Freeholders Bd. v. Bergen County Prosecutor, D.R. No. 78-34, 4 NJPER 104 (¶ 4047 1978), P.E.R.C. No. 78-77, 4 NJPER 220 (¶ 4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980); In re Mercer Freeholder Bd. and Mercer County Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶ 4110 1978), aff'd 172 N.J. Super 411 (App. Div. 1980); In re Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶ 4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶ 4111 1978); In re Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶ 4006 1977); In re Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977); and In re ARA Services, Inc., E.D. No. 76-31, 2

NJPER 112 (1976).

Applying the "control of labor relations test" to the facts present in the instant matter, it is readily apparent that the responsibility for the effectuation of the labor relations and personnel programs lies with the County, through the Board of Chosen Freeholders. The facts clearly indicate that it is the Board of Chosen Freeholders as the Civil Service Appointing Authority, which approves all personnel actions related to hiring, salary level, termination, retirement, and promotion of library employees. The Library Director is responsible to the Freeholders. It is also noteworthy that the Freeholders exercise control over the budget. This exercise of control over budgetary matters is again exhibited during the collective negotiations process. The Freeholders conduct collective negotiations with the majority representative without the presence of any representative from the Library Commission. As the Hearing Officer noted in Morris County, supra, "...control of the 'purse-strings' is a very significant matter in the context of collective negotiations and is highly relevant in the identification of the employer." Id. at 423. The budget approval process provides the Board of Chosen Freeholders with control of the "purse-strings" and the Freeholders establish other terms and conditions for employment of Library employees through contract negotiations. Clearly, the Board of Chosen Freeholders meets the test of controlling labor relations and must be considered the employer of the employees serving in the County Library.

AFSCME argues that the Library Commission is the employer pursuant to N.J.S.A. 40:33-8. (P-3). The statute, in relevant part, reads as follows:

The County library commission shall organize by the election of a Chairman, and shall adopt rules and regulations for the establishment and maintenance of the county library. It shall employ a librarian, and such professional library assistants, if any, as may be required, who shall hold appropriate certificates issued by the State Board of Examiners and such other employees as it shall deem necessary for the performance of its functions.

In In re Morris County, supra, the Commission was asked to decide whether the County of Morris or the Morris County Board of Social Services was the employer of employees working at the Morris View Nursing Home. The petitioner in that case argued that employees at Morris View should be removed from the County-wide unit on the basis that the Board of Social Services is the employer. The petitioner cited a statute, and other reasons, in support of its contention. The statute stated that the Board of Social Services "shall have charge of all matters relating to the government, discipline, contracts and fiscal concerns of [Morris View Nursing Home]. N.J.S.A. 44:4-26.26. The Board of Social Services was the Civil Service Appointing Authority. In Morris County, the Commission found that the Board of Social Services met the "control of labor relations test."

In this matter, I have already found that the County not

the Library Commission passes muster under the control of labor relations test. It is also clear that the statute relied upon by AFSCME in this matter does not convey the same degree of breadth of authority conveyed to the Board of Social Services in the Morris County case. These factors combined, lead me to the conclusion that the County is the employer of employees working in the County Library, and recommend such a finding to the Commission.

Issue IV:        Whether Supervisory Employees Within the Meaning of the Act Should be Included in a Negotiations Unit Which Also Includes Non-Supervisory Employees?

FINDINGS OF FACTS

AFSCME takes the position that supervisory employees presently in the county-wide collective negotiations unit should not continue to be included in that unit<sup>5/</sup> In support of its position, AFSCME relies upon certain provisions of the Act which preclude the commingling of supervisory and non-supervisory employees in the same unit, unless one or more of the express exceptions stated in the Act is applicable.

N.J.S.A. 34:13A-5.3 states in relevant part:

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<sup>5/</sup> During prehearing conferences conducted in regard to this matter, the parties have agreed that numerous employees serving in various titles presently included in the unit are supervisors within the meaning of the Act. The parties have also stipulated that any supervisory title agreed to during the prehearing conference should also be considered a supervisory title during the period of 1964 through 1969. (5T15-16).

...nor except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline or effectively recommend the same have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership.

N.J.S.A. 34:13A-6(d) provides in relevent part 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....

AFSCME contends that no established practice, prior agreement or special circumstance exists in terms of the county-wide unit in Warren which would justify the existance of a unit comprised of supervisors and non-supervisors in this matter.

Contrary to AFSCME's position, the County and Council No. 17 contend that a unit comprised of supervisors and non-supervisors is warranted in this matter, since an established practice of such unit composition has existed since prior to 1968, the date of passage Chapter 303 of the Act. Thus, the County and Council No. 17 conclude that since one of the statutory exceptions is applicable in this matter, AFSCME's petition seeking a unit of only non-supervisory employees is inappropriate. Accordingly, the County and Council No. 17 urge the dismissal of the Petition filed by AFSCME.

#### FINDINGS OF FACTS

The first witness called to testify concerning the issue of negotiations history was Morris R. Wilson, Clerk for the Board of

Chosen Freeholders of Warren County since 1961. (3T91-92). As Clerk, it was Mr. Wilson's responsibility to carry out the directions of the Board of Chosen Freeholders and maintain minutes. Wilson sat in during the negotiations sessions between the County and Council No. 17 since at least 1964, (3T92; 3T96-97); however, his role was limited to that of advisor to the Freeholders on Civil Service Rules and Regulations. Wilson was not actually part of the County's negotiations team. (5T57).

Wilson stated that Council No. 17 sent the County its first written negotiations proposals in November 1964. (3T97; 5T20; E-12). Prior to 1964 Council No. 17 made demands orally. (5T20). The witness said that the negotiations procedure would consist of a series of meetings between the Freeholders and a committee established from the membership of Council No. 17. (3T97; 5T28-29). The meetings would consist of discussions regarding the demands, or portions thereof, to which the Freeholders would be willing to agree. (3T97-98). Once an overall agreement was reached between the parties, the Freeholders formally adopted a motion memorializing such understandings. A written and signed document incorporating the agreements reached as the result of such meetings was not developed. (3T99; 5T72-74). Indeed, it was not until 1975 that a written Agreement incorporating grievance and promotions procedures and other terms and conditions of employment was executed by the County and Council No. 17, (5T19; 5T34; E-30). However, the negotiations procedure used in 1964 was maintained through 1975 when

the first written contract was negotiated (5T18-19; 5T79).

Wilson testified that the County granted recognition to Council No. 17 as the exclusive representative in January 1969. (3T119; I-11; E-19). Wilson stated that at the time recognition was granted, he understood the unit to be comprised of all classified supervisory and non-supervisory Civil Service employees of Warren County, excluding appointed or elected officials and unclassified employees. (3T101; 3T109). However, there was never a specific delineation of the titles included in the unit until the 1975 written Agreement. (5T36; E-30).

In both pre- and post-recognition negotiations, Council No. 17 made proposals concerning a variety of terms and conditions of employment. Wilson testified that demands were made for salary improvements, premium pay for overtime, sick leave benefits, bi-weekly paycheck distribution, paid time off, safety committee, and health benefits improvements. (3T100; 3T105; 3T111-114; 5T49; E-12; I-2-I-5 and I-7-I-9).

Wilson cited the minutes of various Freeholders meetings which indicate the Freeholders' Resolutions passed in order to effectuate the negotiated salary improvements. (E-13 through E-18; E-20). Wilson pointed out that while the Resolutions include salary increases for appointed and elected officials as well as classified County employees, the salary increases for the classified employees were the result of the negotiations between the County and Council No. 17. (3T109).



The next witness to testify concerning this issue was Charles Eagan. Mr. Eagan, retired since 1980, was the former Superintendent of the Sewage Treatment Plant and a past President of Warren Council No. 17. (5T83). Mr. Eagan served as President from 1967 until 1972 (5T830), thereafter, he served as one of Council No. 17's State Trustees until approximately 1976. (5T83).

During his term as President, Eagan attended negotiations meetings with the County. (5T84). Council No. 17's negotiations committee was comprised of both supervisory and non-supervisory employees. (5T86).

Mr. Eagan testified regarding the negotiations procedure. He stated that Council No. 17's negotiating committee would initially meet with the membership in order to develop the demands. (5T91). Approximately one month prior to the first joint meeting, the committee would present the demands to the County. (5T92). Thereafter, Council No. 17's negotiating committee would meet alternatively with the Freeholders and the membership. The committee would advise the membership of the Freeholder's positions with respect to the negotiations proposals and receive further instructions from the membership to take back into negotiations. The negotiations sessions would then proceed in a given-and-take manner; the committee gaining additional concessions from the Freeholders in return for an agreement to drop certain demands of its own. The Freeholders would provide the committee with an explanation as to why it could not agree to a particular proposal, but did not make proposals of its own. (5T91; 5T97). Finally, the

Freeholders gave Council No. 17 its final position regarding the demands. (5T91). The committee would bring that position back to the membership for a vote. (5T91). Ultimately a majority of the membership would approve the negotiated package and the Freeholders would pass a resolution effectuating same. (5T94-95). During Mr. Eagan's years with Council No. 17, the Freeholders never passed a resolution implementing changes in wages or benefits until after an agreement on such changes was reached with Council No. 17. (5T117; 5T130-134).

Mr. Eagan testified regarding unit composition. He stated that Council No. 17 represented all Civil Service employees employed by the County, irrespective of title. The witness said that employee representation was afforded to all County Civil Service employees and not limited to just members of Council No. 17. (5T104; 5T109). Mr. Eagan was questioned concerning the "Recognition and Negotiating Unit" article in the 1975 Agreement. That Article stated that "[t]he appropriate negotiating unit shall consist of all employees of the County of Warren in the classified service in any permanent position, whether such employees are of provisional or permanent status except as otherwise set forth herein." Mr. Eagan said that the Recognition and Negotiating Unit Article was designed to reflect the unit as it was comprised at the time Council No. 17 asked the County for recognition as employees' exclusive representative in late 1968. (5T116).

The next witness called was Homer T. Bryan. Mr. Bryan

worked for Warren County from 1949 until 1978. (6T5). Bryan was active in Council No. 17 from about 1960 until the passage of Chapter 303 in 1968. He served as a State Trustee and on the negotiating committee for Council No. 17. (6T5; 6T12-12).

Mr. Bryan's testimony generally corroborated the testimony of Charles Eagan with respect to the negotiations procedure followed by the County and Council No. 17 in the 1960's. (6T6-10). The witness stated that Council No. 17 would prepare for negotiations by developing numerous demands, some essential others non-essential, for presentation to the County. Negotiation strategies were also discussed and prepared. (6T8; 6T11; 6T17-18). The witness stated that in addition to demands on salary, proposals were made regarding grievance procedure, vacation and sick leave. (6T14-15). Mr. Bryan remembers that in 1964, Council No. 17 was successful in negotiating the County's agreement to adopt of the higher State employee salary ranges for unit employees. However, this salary improvement was achieved in return for Council No. 17's agreement to a longer work week. (6T10; 6T17-18; 6T29). Mr. Bryan said that only after the County and Council No. 17 reached agreement on the issues raised in negotiations, would the Freeholders pass a resolution implementing the agreed-upon elements. (6T15; 6T27). Mr. Bryan pointed out that both supervisory and non-supervisory employees served on Council No. 17 negotiating committee. (6T7).

Gladys Rowe was called to testify regarding negotiations history. Ms. Rowe has been employed by the Warren County Welfare Board since January 1958. (6T32). Ms. Rowe was sworn into

membership of Council No. 17 in October 1967 and subsequently served on its grievance and negotiating Committees<sup>6/</sup> (6T33; 6T60; I-10).

Ms. Rowe testified concerning the procedure by which negotiations were conducted between 1967 and 1975. Ms. Rowe stated that between 1967 and 1975 the negotiating committee would prepare a variety of proposals, including "throw-away" demands, which would be placed before the general membership for its review and approval. Upon approval by the membership, the proposals would be forwarded to the County. (6T33-34; I-9). The committee would prioritize the demands in order to be in a position to negotiate away the less important demands and attempt to secure concessions from the Freeholders on the more important proposals. (6T50). Ms. Rowe said that Council No. 17 and the County would meet in October, November and December. (6T34-35). The Freeholders would simply advise Council No. 17 during its December meeting of what it would agree to and implement such changes by Resolution in January. (6T35-37; 6T40). Ms. Rowe testified that after 1975, the Resolution adopting the negotiated Agreement was not acted upon in January because negotiations were never concluded by that time. (6T40). Ms. Rowe conceded that she had no knowledge of the negotiations procedure prior to the time she became a member of Council No. 17. (6T60).

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<sup>6/</sup> In Ms. Rowe's testimony she referred to the negotiating committee as the salary committee. In fact, the committees are one in the same. (6T44). I have used the terms negotiating committee in the body of this report for purposes of consistency.

ANAYSIS

As a general rule, the Act provides that supervisors shall not be included in units with non-supervisors. See N.J.S.A. 34:13A-5.3 and 6(d), supra. However, the Act also provides for certain exceptions which may allow the continuation of a mixed unit structure. In In re West Paterson Bd. of Ed., P.E.R.C. No. 79 (1973), the Commission held that the statutory exception of "established practice" applies solely to pre-Act<sup>7/</sup> employer-employee relationships. Further, the Commission has determined that evidence in support of this exception must be clear and convincing. In In re Twp. of Teaneck, E.D. No. 23 (1971); see also, In re Delaware Valley Regional H.S., H.O. No. 81-12, 7 NJPER 229 (¶ 12133 1981); aff'd D.R. No. 82-11, 7 NJPER 530 (¶ 1112234 1981). In setting forth the standard of review in which a pre-Act relationship would be found, the Commission requires the following:

An organization regularly speaking on behalf of a reasonably well defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with the intent to reach agreement. In re West Paterson Bd. of Ed., P.E.R.C. No. 77, slip op. p. 10, (1973).

The facts present in West Paterson Bd. of Ed., supra, are very similar to those extant in this case. In West Paterson, the Commission found that prior to 1968, negotiations were conducted

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<sup>7/</sup> Chapter 303 of the Act became effective on July 1, 1968.

annually. Id. at 2. The negotiations focused primarily on salaries for the various categories of employees included in the unit. Id. at 3, n.3. Indeed, not until after the passage of the Act did the parties negotiate an Agreement "...which in form and content had the characteristics of a conventional labor agreement,... [containing] a well defined recognition clause setting forth a negotiating unit similar in scope to that of prior years and specifically including [supervisors]; a detailed description of the grievance procedure;... and a variety of clauses regarding salaries, hours of work and other terms and conditions of employment." Id. at 4. Nonetheless, the Commission found an established practice of supervisory and non-supervisory employees in the same unit, notwithstanding the fact that by today's standards the scope of the early negotiations was limited. None of the agreements in West Paterson Bd. of Ed. prior to 1968 was reduced to writing. Id. at 10.

However, the Commission noted that not just any joint meeting between employer and employee representative in which terms and conditions of employment were discussed would constitute negotiations. The Commission pointed out that

[b]ased on [its] experience, it appeared that many, perhaps most, employer-employee relationships prior to 1968 were characterized by an organization's request for improvement of a particular condition or resolution of a particular grievance. Upon submission the matter was considered privately by the employer and his decision was later announced. There was seldom evidenced a sense of a mutual undertaking for the resolution of differences or an intent to achieve common agreement. The Commission was reluctant to equate this pattern

of behavior with "established practice .... Id.  
at 9.

By applying the facts in the instant matter, it is clear that the relationship between the County and Council No. 17 prior to the effective date of Chapter 303 may only be described as evidencing an "established practice" as defined by the Act. Each of the witnesses called to testify regarding this issue, stated that there were negotiations between the County and Council No. 17 prior to the passage of Chapter 303. Mr. Bryan testified that at least as early as 1964, and annually thereafter, proposals were developed by the membership and the negotiating committee and presented to the Board of Chosen Freeholders. The proposals dealt with a variety of economic and non-economic terms and conditions of employment. Numerous joint sessions were conducted during which time the genuine give-and-take of negotiations took place. Even Gladys Rowe, who took the position that the parties did not engage in real negotiations, stated that the County and Council No. 17 met three times in an effort to reach an agreement on a variety of demands sought by Council No. 17 during the single pre-1968 round of negotiations in which she was involved.

I further find that Council No. 17 represented a reasonably well defined group of Warren County employees. Wilson and Eagan gave uncontradicted testimony that Council No. 17 represented all Civil Service employees employed by the County. The stipulation entered into by the parties establishes that the pre-1968 unit

represented by Council No. 17 included supervisory and non-supervisory employees. The testimony indicates that supervisors and non-supervisors served together on the negotiating committee. The County Resolutions (E-13 through E19; E-20) clearly show the titles in the classified service of Civil Service and, consequently, which titles were in the unit. As noted above, the recognition clause setting forth the unit composition in West Paterson Bd. of Ed. was not well defined until after the passage of Chapter 303, and was only "similar in scope to that of prior years...." (emphasis added) West Paterson Bd. of Ed., at 4. Consequently, I find the pre-1968 unit described by the County and Council No. 17 to be reasonably well defined in terms of the standard set forth in West Paterson Bd. of Ed.

The final element of the West Paterson Bd. of Ed. standard requiring discussion here is whether the County has engaged in the negotiations process with the intent to reach agreement. Gladys Rowe has testified that after a few negotiating sessions, the County would simply advise Council No. 17 of its decision regarding its demands. The other witnesses made similar statements that ultimately, the County would set forth its final position which was always adopted by the membership. However, the facts are clear that the County's final position on Council No. 17 demands was not merely the result of private consideration by the employer and subsequent announcement of its determination. The testimony shows that there was give-and-take on both sides of the table. For example, Council



No. 17 was successful in achieving the higher State salary ranges for County employees but at the cost of an increase in the work week. Further, a salary resolution was never passed by the Freeholders until after the parties achieved a mutually satisfactory agreement. Prior to 1968, there was no statute providing a mechanism by which impasses in negotiations could be addressed. In pre-1968 negotiations, an employer could state that a particular response is final and not be obligated to participate in any dispute resolution process. However, the finality of an employer's position should not be confused with the quality of the negotiations process which led up to the employer's final position. I find that under all the circumstances present in this particular case, the parties evidenced a sense of mutual undertaking for the resolution of differences and an intent to achieve common agreement. West Paterson Bd. of Ed., supra, at 9. See also, City of Camden, P.E.R.C. No. 52 (1971); Middlesex County College Board of Trustees, P.E.R.C. No. 29 (1969).


It is noted in passing, that the record is devoid of any showing of actual or potential conflict of interest between the supervisors and non-supervisors, nor is there any showing of instability within the unit or inadequate representation on the part of Council No. 17. See, Board of Education of West Orange v. Wilton, 57 N.J. 404 (1971); In re Jefferson Twp. Bd. of Ed., P.E.R.C. No. 61 (1971). None was alleged. Accordingly, I find that an "established practice" within the meaning of the Act exists with

respect to the inclusion of supervisors in the county-wide unit, and on that basis the present unit structure should remain unchanged.

RECOMMENDATIONS

1. Employees serving in the title Head Nurse at Warren Haven Nursing Home are supervisors within the meaning of the Act.
2. Kathleen Murphy is not a confidential employee within the meaning of the Act and should remain in the unit.
3. Employees working in the Warren County Library are employed by the County of Warren and not the Warren County Library Commission. Consequently, such employees should remain in the county-wide unit.
4. Supervisory employees should continue to be included in the county-wide collective negotiations unit which also includes non-supervisory employees on the basis that an "established practice" exists so as to allow such unit configuration.
5. The petitioned-for unit which includes only non-supervisory employees is inappropriate and the Petition should be dismissed in its entirety.

Respectfully Submitted

  
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Stuart Reichman  
Hearing Officer

Dated: December 13, 1985  
Trenton, New Jersey