H.E. NO. 2004-17

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

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent/Petitioner,

-and-

Docket Nos. CO-1999-295
CU-2000-011
CU-2003-025

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party/Petitioner.

SYNOPSIS

On a consolidated record involving unfair practice allegations and various representation matters, a hearing examiner makes the following recommendations.

As to the Middletown Education Association's unfair practice charge (docket no. CO-1999-295), the hearing examiner recommends finding that the Middletown Township Board of Education violated the New Jersey Employer-Employee Relations Act when it failed to provide the Association with a supervisor of technology operations (STO) job description but did not violate the Act with respect to a technology specialist job description. The hearing examiner also recommends finding that the Association's claim that the Board refused to negotiate regarding terms and conditions of employment of certain technology titles is not a justiciable case or controversy and a claim regarding transfer of unit work in the maintenance department is not supported by facts in the record.

The hearing examiner recommends that the Board's unit clarification petition (docket no. CU-2003-025) involving two titles be granted. The secretary to the business administrator performs confidential job functions and the payroll supervisor performs supervisory job functions.

The hearing examiner recommends that the Association's unit clarification petition (docket no. CU-2000-011), as amended, be dismissed as it was not timely filed. Even if the petition were considered timely filed as to certain technology titles, equitable considerations should preclude the Commission's administrative determination of the titles' unit placement(s)

absent validly filed and properly supported representation petition(s).

Alternatively, the hearing examiner recommends finding that the STO is a statutory supervisor, making its inclusion in the Association's non-supervisory unit inappropriate. Additionally, employees holding the technology specialists titles have unique access to the Board's confidential labor relations information stored on the Board's computer systems, making the titles' joint representation with employees holding other titles incompatible.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the RESPONDENT/PETITIONER,
Kenney Gross Kovats Campbell & Pruchnik, attorneys
(Malachi Kenney, of counsel)

For the CHARGING PARTY/PETITIONER,
Oxfeld Cohen, PC, attorneys
(Sanford Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

This is a consolidated unfair practice and representation matter.[1/] On March 10, 1999, the Middletown Township Education

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1/ Transcript references to hearing dates are as follows: 1T - June 18; 2T - July 18; 3T - September 15, 2003. Record exhibits are: C - Commission; Jt - Joint; Bd - Middletown Township Board of Education; and, A - Middletown Township Education Association. Jt-1 is a letter from the Board transmitting numerous documents in response to a subpoena; those documents were listed numerically in the letter. Many of those documents constitute the Board's separate exhibits submitted in this matter and therefore track the numbering sequence from the letter. Not all documents referred to in the letter, however, were submitted in this proceeding, therefore, the Board's separate exhibits in this proceeding are not sequential, skipping certain numbers (10, 11, 12, 18 (continued...)

Association (MTEA or Association) filed an unfair practice charge (docket no. CO-1999-295) with the New Jersey Public Employment Relations Commission against the Middletown Township Board of Education alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically, 5.4a(1) and (5)[2/], when it created but refused to negotiate over the terms and conditions of employment of the following new job titles:

1. supervisory office manager
2. hardware/software technician(s)
3. LAN technician(s)
4. technology specialist(s)
5. webmaster.

(C-1). The MTEA alleged that the Board refused to provide it with job descriptions and unlawfully excluded the titles from its unit. The MTEA also alleged that the Board unilaterally

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1/ (...continued)
and 19). Board exhibits in this proceeding are as follows: Bd-1, 2, 3, 4, 5, 6, 7, 7A, 8, 9, 9A, 13, 14, 15, 16, 17, 20, 21, 22 (3T52-3T56). The parties also entered into a joint stipulation of facts, Jt-4, which also included attachments referred to as JS-.

2/ These provisions 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."

transferred unit work (secretarial) and has refused to negotiate regarding the transfer of that work (C-1).

On September 11, 1999, and August 14, 2001, the MTEA filed a clarification of unit petition (docket no. CU-2000-011) and amendment[3/] with the Commission seeking to add the following fourteen titles to its negotiations unit:

1. supervisor of technology operations
2. technology manager
3. C-Print captionist
4. supervisory office manager
5. hardware/software technician(s)
6. LAN technician(s)
7. technology specialist(s)
8. webmaster
9. attendance officer
10. transportation coordinator
11. assistant transportation coordinator
12. administrative assistant to business administrator
13. confidential secretary
14. computer specialist.

(C-2). On December 23, 2002, the International Brotherhood of Teamsters, Local 11, (IBT) filed a representation petition (docket no. RO-2003-057) with the Commission seeking to represent a unit of all full and part-time computer specialists employed by the Board. The Board consented to the proposed unit, however, the MTEA opposed contending that the title was the subject of its pending clarification of unit petition. IBT's petition was

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3/ The August 14, 2001 amendment included a typed-in docket number of CU-2002-4. That designation was not made by the Commission but was apparently put on the document by the Association. Regardless, the filing was treated as an amendment to CU-2000-011 (1T12).

subsequently withdrawn prior to the first day of hearing in this matter (1T8, 2T114, C-4, Bd-21). The withdrawal is discussed more fully infra.

On January 16, 2003, the Board filed a clarification of unit petition (docket no. CU-2003-025). The Board asserted that two titles in the MTEA negotiations unit, secretary to the business administrator and payroll supervisor, are confidential as defined by N.J.S.A. 34:13A-3(g) and are, therefore, statutorily exempt from inclusion in any collective negotiations unit pursuant to N.J.S.A. 34:13A-5.3 (C-2).

On April 17, 2003, the Director of Unfair Practices and Representation issued a Complaint and Notice of Hearing on the MTEA's unfair practice charge (C-1), consolidated it for hearing with the representation petition and two clarification of unit petitions and assigned the consolidated matter to me for hearing (C-2). No Answer to the Complaint was submitted.

A pre-hearing conference was conducted May 1, 2003. During the conference the parties' agreed that the following titles are no longer in dispute because they were abolished and are no longer in use by the Board:

1. supervisory office manager
2. hardware/software technician(s)

3. LAN technician(s)
4. webmaster[4/]
5. technology manager.

(1T6-1T7). The parties also agreed that the C-print captionist title was no longer in dispute; it was included in the MTEA's negotiations unit (1T7).

Based on the foregoing, the MTEA withdrew its unfair practice charge (CO-1999-295) and clarification of unit petition (CU-2000-011) as amended, as related to those titles (1T7, 3T46-3T52). Accordingly, the only remaining allegations of the unfair practice charge (CO-1999-295) relate to the following:

1. Creation of, but refusal to negotiate regarding, the technology specialist title;

2. Refusal to provide a job description regarding the technology specialist title;

3. Unlawful exclusion of the technology specialist title from the MTEA unit; and,

4. Unilateral transfer of unit work performed by a secretary in the maintenance department.

The parties confirmed, following the Board's submission in response to a subpoena duces tecum, that the computer specialist title had never been approved or used by the Board (1T10; Jt-1, p.2, ¶10). On June 17, 2003, prior to the start of the hearing in this matter, the IBT withdrew its representation petition (RO-2003-057) regarding computer specialists (1T8, 2T6, 2T114, C-4;

4/ The parties subsequently stipulated that the webmaster title's duties were assigned to a technology specialist, Beverly Ross, and are now part of her duties (3T41).

Bd-21). The Board and Association, thereafter, agreed that the computer specialist title was no longer in dispute (1T10).

On July 18, 2003, during the second hearing day, the MTEA withdrew its clarification of unit petition and amendment (docket no. CU-2000-11) as to the confidential secretary title (2T5).

Based on the resolution of the foregoing titles, the parties stipulated that the remaining titles in dispute were as follows:

1. technology specialist
2. supervisor of technology operations
3. attendance officer
4. transportation coordinator
5. assistant transportation coordinator
6. secretary to business administrator
7. administrative assistant to business administrator
8. payroll supervisor.

(1T9-1T11, 2T3-2T5, 3T46-3T52).[5/]

On June 18, July 18 and September 15, 2003, hearings were conducted during which the parties examined witnesses and introduced exhibits. Following several extensions of time, on March 10, 2004, the parties submitted an additional joint exhibit regarding the chronology of collective negotiations history since 1996. Also following several extensions of time, the Association submitted it post-hearing brief on March 24, 2004 and the Board submitted its brief April 8, 2004. The record closed April 21, 2004. Based upon the entire record, I make the following:

5/ During the hearing the MTEA also withdrew its clarification of unit petition, CU-2000-011, as it relates to the administrative assistant to the business administrator title (3T49-3T50)(see Finding of Fact No. 10).

FINDINGS OF FACT

UNIT STRUCTURE AND COLLECTIVE NEGOTIATIONS HISTORY

1. The parties stipulated to the following facts regarding their negotiations history:

> 1. The Recognition Clause of the Collective Negotiations Agreements between the Middletown Township Board of Education (the Board) and the Middletown Township Education Association (the Association) has remained unchanged at least since 1993. See the attached Recognition Article from the 1993-1996 Agreement (Exhibit JS-1); the Recognition Article from the 1996-2001 Agreement (Exhibit JS-2); and the Recognition Article from the 2001-2005 Agreement (Exhibit JS-3).
>
> 2. On April 24, 1996, the Board and the Association exchanged proposals for a successor Agreement to the Collective Negotiations Agreement which was scheduled to expire on June 30, 1996. The Association's proposals, attached hereto and made a part hereof as Exhibit JS-4, included no proposals concerning the recognition status of any technology employees or confidential employees.
>
> 3. The Board's 1996 proposals, which are attached hereto and made a part hereof as Exhibit JS-5, similarly called for no changes in the recognition status of either technology or confidential employees.
>
> 4. Negotiations for a successor Agreement to the Collective Negotiations Agreement which expired on June 30, 1996 resulted in a Memorandum of Agreement entered into by the parties on December 10, 1998 [1998 MOA] which is attached hereto and made

a part hereof as Exhibit JS-6[6/]. That Memorandum of Agreement included no changes in the recognition status of either technology or confidential employees.

5. Disputes over the text of a new contract embodying the terms of the September 1998 Memorandum of Agreement delayed execution of a Collective Negotiations Agreement for the period from July 1, 1996 through June 30, 2001 until September 2001, that is, following the expiration of the term of that Agreement. That Collective Negotiations Agreement included no change in the recognition status of either technology or confidential employees. See Exhibit JS-3.

6. On March 19, 2001, representatives of the Board and the Association exchanged proposals for a successor Agreement to the Collective Negotiations Agreement scheduled to expire on June 30, 2001. The Association's proposals which are attached hereto and made a part hereof as Exhibit JS-7, included no proposals for the modification of the Recognition Article.

7. The proposals presented by the Board of Education on March 19, 2001, which are attached hereto and made a part hereof as Exhibit JS-8, included proposals for the exclusion of the secretary to the Business Administrator, the Payroll Supervisor and two secretarial positions in the Personnel and Labor Department from the Association's bargaining unit.

8. During the course of negotiations for the successor Agreement, the Association's Negotiations Committee consistently rejected the Board's proposals

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6/ JS-6 is dated September 10, 1998, not December 10, 1998 as suggested in the stipulation. By letter dated March 18, 2004, I requested the parties to clarify the discrepancy and was advised by both parties that the 1998 MOA was executed September 10, 1998.

for changes in the Recognition Article and took the position that if the Board believed that these positions should not be part of the bargaining unit, it should initiate proceedings with the Public Employment Relations Commission for a ruling to that effect.

9. On August 16, 2001, the Negotiations Committees of the Board and the Association met for the first time with a PERC-appointed Mediator. At that meeting, the Board withdrew its proposals concerning the Recognition Article and announced that it would, instead, file a Unit Clarification Petition with PERC to obtain resolution on the question.

10. Negotiations for a successor Agreement, which were marked by a seven-day strike in November and December 2001, were assigned to a court-appointed Mediator in December 2001 and continued through the auspices of that Mediator until August 2002 when the parties entered into a Memorandum of Agreement [2002 MOA], which is attached hereto and made a part hereof as Exhibit JS-9. That Memorandum of Agreement did not include any changes in the Recognition Article of the Collective Negotiations Agreement.

11. The Collective Negotiations Agreement ultimately executed by the parties pursuant to the terms of the August 2002 Memorandum of Agreement did not include any changes in the Recognition Article. As noted above, the Recognition Article in the 2001-2005 Collective Negotiations Agreement is identical to the ones which had been in place since at least 1993. See Exhibit JS-3.

(Jt-4, 1998 MOA and 2002 MOA short references added).

During negotiations for the 1996-2001 contract, on August 25, 1998, Association President Diane K. Swaim sent the following letter to Superintendent Dennis Jackson:

> The M.T.E.A. hereby demands negotiations over the terms and conditions of the following positions created by the board [sic] and advertised in the August 23, 1998 New York Times:
>
> . . .
>
> Technology Specialist(s)
>
> . . .
>
> We hereby demand the job descriptions for the above positions and the positions of Director of Technology and Supervisor of Technology Operations, as listed in the August 23 New York Times advertisement.

(C-1, para. 3(8) and exhibit C attached thereto).

Negotiations for the 1996-2001 contract resulted in the parties entering the 1998 MOA on September 10, 1998. On October 20, 1998, Swaim wrote Jackson again:

> Almost two (2) months have passed since I contacted you to demand negotiations over the terms and conditions of the following positions created by the board [sic] and advertised in the August 23, 1998 New York Times:
>
> . . .
>
> Technology Specialist(s)
>
> . . .
>
> Almost two (2) months have passed since I demanded the job descriptions for the above positions and the positions of Director of

> Technology and Supervisor of Technology Operations, as listed in the August 23 New York Times advertisement.
>
> You have failed to reply to both issues. Your continued failure to deal with the issues facing this district is intolerable.
>
> Unless I receive a reply to both issues by October 30, 1998, the M.T.E.A. will have to begin litigation.
>
> I trust our position is clear.

(C-1, para. 3(9) and exhibit D attached thereto).

On October 23, 1998, District Administrator William F. Hybbeneth, Jr. responded to Swaim writing,

> I am in receipt of your August 25, 1998 letter relative to certain positions advertised for in the New York Times. Please be advised of the following:
>
> (1) The positions of Director of Technology and Supervisor of Technology Operations are supervisory positions, both of which would be inappropriate for recognition within the MTEA.
>
> (2) The other positions noted have not had their job descriptions finalized by the Board of Education as yet. Subsequent to final approval of those job descriptions, I will forward them to you if they appear to be appropriately lodged within your recognition clause.

(C-1, para. 3(9) and exhibit E attached thereto). On October 26, 1998, Swaim replied, in relevant part, as follows:

> The Association rejects your assertion that the positions of Director of Technology and Supervisor of Technology Operations are "inappropriate for recognition with the

> MTEA." We'll be the judge of that and PERC will be the final arbiter.
>
> I demand that those job descriptions be forwarded to the M.T.E.A. immediately.
>
> . . .
>
> Your letter states that "the other positions noted have not had their job descriptions finalized by the Board of Education as yet." Precisely which of these positions have not had their job descriptions finalized yet?
>
> You make an alarming admission, especially considering that the positions were all advertised on August 25, [sic 23] 1998. Is this district's administration in the habit of advertising for positions before the Board has approved their job descriptions? It appears that would violated Board policy. What is your explanation?
>
> Unless I receive a reply to these issues by October 30, 1998, the M.T.E.A. will have no choice but to begin litigation.
>
> I trust our position is clear.

(C-1, para. 3(10) and exhibit F attached thereto). Despite the foregoing Fall 1998 exchange of correspondence, and despite the Association's attaching the correspondence to its unfair practice charge, Association President Swaim, who was involved in negotiations, testified that inclusion of the technology specialist title ". . . wasn't one of our demands and I don't recall the Board making it one of theirs. To the best of my recollection it was not discussed at all." (1T81). While I make no finding whether the topic was discussed, verbally, the record reflects there was a letter exchange between the parties on the

topic, both before and after the parties executed the 1998 MOA[7/].

The 1998 and 2002 MOAs contain similar provisions. The 1998 MOA provides that "All other issues tentatively agreed to are incorporated in this memo. Any issues not addressed by this memo shall be deemed withdrawn" (Jt-4, JS-6, p. 2 ¶7). The 2002 MOA provides that "All provisions of the 1996-2001 Agreement not specifically modified in this Memorandum shall carry forward unchanged into the successor Agreements; all proposals not specifically addressed in this Memorandum are deemed dropped" (Jt-4, JS-9, p. 7 ¶18).

2. In addition to the parties' stipulated facts regarding their collective negotiations history, I also take administrative notice of two published decisions involving these parties. The cited cases set forth additional, pertinent and contextual information regarding collective negotiations events and describe

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7/ The August 25, October 20, 23 and 26, 1998 letters attached to the charge as exhibits C, D, E and F would ordinarily have limited evidentiary value absent corroborative testimony. The Board, however, failed to file an Answer in this consolidated proceeding. Therefore, based on these letters, the charge's allegations that the Association demanded negotiations regarding certain job titles and requested certain job descriptions are deemed admitted. N.J.A.C. 19:14-3.1. Even if the allegations of the charge were not deemed admitted, given the investigative nature of the representation matters before me, I take administrative notice of the charge's allegations regarding the Fall 1998 negotiations demands regarding the titles, but more importantly, I take administrative notice of exhibits C, D, E and F for purposes of evaluating the timeliness of the Association's clarification of unit petition.

the extent of the Board's organized work-force. These cases are noted herein to supplement the testimony offered in this matter.

In Middletown Tp. Bd. of Ed., D.R. No. 95-31, 21 NJPER 253, 254 (¶26163 1995), the Director of Representation described the extent of the Board's organized work-force as follows:

> The Board has three separate negotiations units. The Middletown Township Administrators and Supervisors Association represents approximately 40 supervisors, assistant principals, and principals. Teamsters Local 11 represents 115 custodians, maintenance workers and groundskeepers and the Association represents approximately 925 employees in a combined unit of 850 professional staff and 75 secretarial and clerical support staff.

While the number of members in each unit may have changed since that decision issued, the unit structures and relative size remain the same.

In Middletown Bd. of Ed., H.E. No. 2003-17 29 NJPER 202 (¶60 2003)(adopted as a final Commission decision pursuant to N.J.A.C. 19:14-8.1) a hearing examiner found the following facts in granting the Board summary judgment on allegations that it unlawfully refused to engage in mid-contract negotiations regarding peer mediation stipends:

> A. The Board is a public employer within the meaning of the Act. The MTEA is a public employee representative of non-supervisory professional employees including teachers employed by the Board.
>
> B. The Board and MTEA were parties to a collective negotiations agreement for the term July 1, 1996 through June 30, 2001. Subsequently the parties negotiated two

successor contracts, the first for the term July 1,2001 through June 30, 2002, the second for the term July 1, 2002 through June, 30, 2005.

C. On February 7, 2002, during negotiations for the two successor contracts, the MTEA and Board met to discuss final details regarding the preparation of a Memorandum of Agreement (2002 MOA). The session was called a "Horse Trading" meeting to resolve pending litigation. There was no agreement reached regarding the withdrawal of any pending matter. (See also, 1T79-1T84; Bd-1, Bd-2, A-1, A-2).

TECHNOLOGY SPECIALIST

3. Both parties contend the evolution and interplay of two titles, computer assistant and technology specialist, are critical to determining the technology specialist title's current unit placement. Therefore, it is necessary to review the history of the computer assistant title before reviewing the current job responsibilities of the technology specialist title.

Computer Assistant

I take administrative notice that the computer assistant title was included in the Association's unit as the result of a clarification of unit petition in 1995. Middletown Tp. Bd. of Ed., D.R. No. 95-31, 21 NJPER 253 (¶26163 1995)(1T27-1T28, 1T33). In that case, the Director of Representation found, in relevant part, the following:

> . . . The unrepresented computer associate and the computer assistant are new full-time positions created by the Board in November 1994. The Board on November 29, 1994, approved the [. . .] promotion of Eileen Smythe from secretary to the position

of computer assistant. The duties of these newly-created positions may have been previously performed on a part-time basis by aides. The positions were created to increase the Board's commitment to the operation of its computer labs.

[. . .]

The Association is the majority representative for all professional and secretarial employees employed by the Board excluding administrators, supervisors, and confidential secretaries. The term of the contract covering this unit is from July 1, 1993 through June 30, 1996.

Sometime in the past, the Board created the position of computer programmer analyst/manager (or computer programmer/analyst). The position was included in the Association unit . . .

Under general supervision, this title: designs, codes and tests computer programs and assists in the supervision of the Data Processing Department; acts in a support role to administrators and other program users to solve programming needs and computer problems; prepares training materials and trains computer operators and program users; and gathers data and designs systems for analysis and performs back-up procedures. This position is associated with non-academic computer programming for the central and business offices. There is no student contact involved with these job duties. The position requires a high school degree with experience in computer programming, preferably three years of experience with two years in a school district. The position is held by either a 10 month or 12 month employee and receives benefits as provided in the contract.

[. . .]

The position of computer assistant, held by Eileen Smythe, was also created in November 1994. The computer assistant position was viewed as a secretarial promotional opportunity as listed on the November 29, 1994 Board agenda. The job description is identical to those listed in the associate position, except for the alleged supervisory duties.@ [sic] This employee has the following duties: maintains computer services and equipment in high schools, assists teachers in the effective use of computers as a learning resource to support the curriculum, catalogs all software and ancillary materials and coordinates scheduling in the labs and assists teachers and staff in selecting and maintaining software and other instructional materials.

The position requires successful experience with computers and the completion of related course work from a college or technical school. The job is a ten month position reporting to the Computer/BIS Education Supervisor for Educational Instruction and to the associate. Smythe's salary was arbitrarily calculated by her supervisor Pat Marascio at 187 days by eight hours at $10 per hour. It was not based on any guide. Smythe receives sick, vacation and personal leave days and is enrolled in the Public Employees Retirement System. Smythe works an eight hour day. She receives medical benefits, but she participates in a contributory plan.

In her affidavit, Association President Diane Swaim describes the duties of these employees as they discussed their work with her. Both employees assist teachers and other operators in using computers. Both conduct in-service training for teachers. Both install software, perform routine repairs and maintenance and set up networks. Both provide support materials for teachers to use while their classes work on computers. Both troubleshoot if computer labs are experiencing problems. Smythe handles

> Mackintosh Labs in the 12 elementary and middle schools. Martine handles IBM/DOS Labs in the two high schools.

Id. (footnotes omitted). Based on the foregoing facts, the Director concluded that

> . . . The computer associate and the computer assistant carry out support staff functions for the professional employees in the Association unit. Their direct contact is with the professional staff. Their duties are similar to those performed by the existing unit positions of computer programmer analyst/manager and the audio visual specialist. All four of these comparable positions maintain technical equipment. All of these positions maintain and catalog inventory. All of these employees directly train staff on how to operate the equipment and prepare training materials.
>
> Additionally, the computer associate and the computer assistant enjoy terms and conditions of employment comparable to those in the Association unit. They enjoy vacation, sick and personal leave and work an eight hour day. They belong to the Public Employee Retirement System. They receive annual salaries and health benefits, although they contribute to their medical plan.
>
> The computer associate and the computer assistant do not share a community of interest with the unrepresented aides. Significantly, the computer associate and computer assistant do not have direct student contact in the classroom like aides do. Additionally, their terms and conditions of employment differ because aides are part-time, are paid hourly and receive no benefits.
>
> Accordingly, since the computer associate and the computer assistant perform functions similar to titles within the

> definitional scope of the existing Association negotiations unit and share a community of interest with the unit, these positions are appropriately added to the Association negotiations unit immediately.

Id. (citations omitted).

Eileen Smyth and Martha Niekrash previously held computer assistant titles; Smyth[8/] served as a computer assistant from December 1, 1994 through July 1, 1999 and Niekrash served as a computer assistant from August 22, 1996 through July 1, 1999 (1T22-1T23, 1T33, 1T70, Bd-15-17).

Smyth and Niekrash's testimony in this hearing, with only minor deviations, was consistent with the Director's previous findings in Middletown Bd. of Ed. regarding computer assistants. Their overall job goals as computer assistants were to "maintain computer services and equipment in the high schools. To assist teachers in the effective use of computers as a learning resource to support the school's curriculum" (Bd-14). The 10-month computer assistant title reported to the computer/BSI education supervisor for education instruction and the computer associate (Bd-14). The qualifications and functions of the computer assistant were as follows:

> Successful experience with computers; including instructional and technical areas - programming and network administration.

8/ Smyth was employed by the Board as a teacher's aide for three years before she became a computer assistant (1T32).

Completed related course work from a college and/or technical school.

Demonstrated ability and knowledge of micro computer technology and software and their availability.

Strong leadership, problem-solving, human relations, and communication skills.

Such alternatives to the above qualifications as the Board may find appropriate and acceptable.

(Bd-14). There were eight (8) enumerated performance responsibilities:

1. Is responsible for the operation and maintenance of computers in the high schools/district.

2. Maintains a comprehensive and efficient system for cataloging all computer software and ancillary materials.

3. Coordinates scheduling in high school labs.

4. Assists teachers and staff in the selection and maintenance of software and other instructional materials as requested by the teacher.

5. Informs teachers and other staff of new acquisitions.

6. Conducts in-service for staff in the effective use of various types computer peripherals and computer software.

7. Performs the clerical activities necessary for the effective implementation of computer labs in the high schools.

8. Performs such other tasks and assumes such other responsibilities as assigned by the Superintendent.

(Bd-14).

Working from a computer lab, (Smyth was assigned to Middletown High School South), Smyth and Niekrash were primarily responsible for assisting teachers and students (despite the Director's finding to the contrary regarding student contact in Middletown Tp. Bd. of Ed., D.R. No. 95-31, 21 NJPER 253 (¶26163 1995)) with basic hardware and software issues (1T34, 1T56, 1T70). Teachers scheduled class time in the lab for their students and the computer assistants helped turn the computers on, showed users how to manipulate the mouse and open programs (1T34, 1T57, 1T70). Computer assistants assisted students in one-on-one settings and provided group in-service training to teachers (1T36-1T37, 1T57, 1T70). Software included Microsoft, Excel and various math, science and language arts programs (1T35, 1T70). The computer labs were comprised of IBM personal computer clones clustered in a 25-user local area network (LAN) connected to a printer. There was no internet connection or connection to other buildings in the district (1T35-1T36).

Computer assistants reported to the director of technology and were not generally responsible for hardware; that was maintained by Computer Associate Bob Martine[9/] (1T22, 1T37, 1T53, 1T70). Repair and maintenance matters were subject to a vendor contract (1T37).

9/ Bob Martine was hired as a computer associate effective November 1, 1994. That title is vacant and not a subject of these proceedings (1T22, 1T25; Bd-15).

Computer assistants' work schedules were consistent with the students' schedules. They were paid an hourly rate earning approximately $16,000 per year and received health benefits but were not required to work overtime (1T38-1T41, 1T70).

As of June 2003, no employee held the computer assistant or computer associate titles (1T25).

Technology Specialist

4. Former computer assistants Smyth and Niekrash were appointed by the Board as the first two technology specialists for the period July 1, 1999 through June 30, 2000 (1T23-1T24, 1T33, 1T70, Bd-17). The technology specialist job description was not approved by the Board until September 22, 1999 (1T24; Bd-3).

The Association was aware of the creation of the technology specialist title as of the August 23, 1998 New York Times advertisement. This is evident by the Association's August 25, 1998 demand to the Board for negotiations regarding terms and conditions of employment for the title (C-1, para. 3(8) and exhibit C attached thereto, see also Finding of Fact 1 and n. 7 supra).

Sixteen days after making its demand, the Association executed the 1998 MOA. Due to differences between the parties on the precise language of the contract, however, the parties continued to modify the language of the 1996-2001 contract until

it was executed by the Association sometime after June 30, 2001 (1T79-1T80; Jt-4).

Although the Association had demanded negotiations regarding various titles by its August 25, 1998 letter (C-1, para. 3(8) and exhibit C attached thereto), and despite the language of paragraph 7 of the 1998 MOA and the parties subsequent Fall 1998 letter exchange regarding various titles, inclusion of the technology specialist title was not agreed to by the parties for any of the three contract terms after the title was created; 1996-2001, 2001-2002 or 2002-2005 (1T81-1T82; Jt-4). Specifically, as to the 2001-2005 agreements, the Association did not seek to change the recognition clause to include any newly created titles (1T81, 3T45; A-2).

As of the third day of hearing in this matter, September 15, 2003, the Board employed eight technology specialists: Todd Reddingus, Craig Doscher, Brandon Kamienski, Albert Ng, Joe Malfa, Beverly Ross, Smyth, and Niekrash (1T24, 3T13, 3T25-3T26, 3T29)[10/].

The job goals for technology specialists are to perform "(1) the maintenance, installation, and security of computer hardware and peripherals; and (2) the operation of LANs and a WAN.

10/ It is unclear from the record but it appears that Malfa primarily works in the district's television studio. Ross is also assigned to perform webmaster duties. Both also perform regular technology specialist duties (3T25-3T26, 3T41). See n. 13 infra.

Installs updates to Web Page. Performs Programming." (Bd-3). The educational requirements are an associates degree and certifications or equivalent information systems experience (Bd-3). Job qualifications require:

> Proficiency and prior successful experience with Windows 95/98 platforms in technical areas including programming and network administration (Windows NTI, Ethernet, and Local Talk).
>
> Diversified technical knowledge of personal computers and software, including technical knowledge of hardware, software, cabling, servers and communications for Local Area Networks (LAN) and Wide Area Network (WAN).
>
> Comprehensive knowledge of hardware configuration, troubleshooting and repair management. Knowledge and experience installing and configuring switches, hubs, network operating systems. Working knowledge of TCP/IP and NETBIOS.
>
> Understanding in cabling design, e.g. (Fiber Optics, Category 5). Working knowledge of SMTP mail and SNMP management protocol.
>
> Strong problem solving, human relations, analytical, and verbal/written communication skills. Must be able to perform under limited supervision.

(Bd-3). There are fourteen (14) enumerated performance responsibilities:

1. Maintain and operate the administrative network and serve as a system technician.

2. Assume responsibility for the technical operation and maintenance of all administrative and educational computers in the district including the networks, their infrastructure, cabling, and topology as directed.

3. Perform routine backup procedures to secure highest level of protection against hardware, software failures as well as computer viruses.

4. Establish and maintain confidential records of individual and group rights of all LANs ensuring data security and integrity.

5. Assume responsibility for maintaining repair records for each piece of equipment and maintaining and distributing these records as needed to other administrators, as directed.

6. Maintain all LANs, coordinate, install hardware and software.

7. Ability to troubleshoot problems and to train school personnel on specific office management software packages such as Office 2000.

8. Assist teachers and staff in the selection, maintenance and installation of software and other instructional materials.

9. Ability to work on school publications, such as programs, brochures, certificates.

10. Direct and implement a disaster recovery operation in the event of a system failure.

11. Oversee operation of the email and Internet access network and all hardware and software applications.

12. Respond to needs of building staff, by way of reviewing help desk requests for assistance.

13. Maintain district web page as web master and work with school based personnel specific to individual school web pages.

14. Other school related or district duties, as may be assigned by the Director of Technology.

(Bd-3).

Technology specialists are 12-month employees working 8:00 a.m.-4:00 p.m. or 9:00 a.m.-5:00 p.m. schedules earning a salary of $30,000 per year. They may be required to work beyond 4:00 or 5:00 p.m. but are not paid overtime (1T38-1T41, 1T58). They have sick and personal leave days, are enrolled in the retirement system and receive health benefits (1T64).

During the first few years, technology specialists spent considerable time installing computer labs in the 17 district school buildings and Board offices. The main computer lab was in Middletown High School South from which Smyth worked (1T41, 1T42, 1T56, 1T76). She now works in a technology office near two business labs and a math lab. Niekrash is assigned to Middletown High School North (1T63, 1T76).

While computer assistants worked on basic 25-user local area networks, the district's 8 technology specialists are responsible for the district-wide WAN or wide area network [11/]. All 17 district buildings and computers are networked and have e-mail

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11/ Before the 25-user LANs, the district operated an AS400 computer system. It was administered by Computer Associate Bob Martine (See n. 9 supra) and performed student management information functions as well as some board office and accounting functions. It was a system that could be modified to produce various reports, i.e., class rank. That system has since been replaced and is used, if at all, to produce reports from the information stored on that system during the years in which it was operational. It is presently stored in the basement of the Bayshore School. Technology specialists do not work on the AS400 system (3T18-3T20).

and internet capability. Some technology specialists are assigned to multiple buildings. While computer assistants only had minor hardware repair responsibility, Smyth described her role as a technology specialists as follows:

> There are many components now for the wide area network, there are many parts of it that make it run, so there are many parts that can become disconnected.
>
> If a computer does not work because of hard drive failure or floppy drive failure or network failure I troubleshoot, I am also a Dell certified technician now so I troubleshoot the unit, decide what part is defective, remove the part and replace the part.
>
> If the network is down I have to troubleshoot and figure out why a group of computers is not working or why an office is not working and follow the network connection back to where our MBF room is which contains all of our racks with the switches.

(1T41-1T44). Additionally, technology specialists repair printers as needed. Previously, hardware repairs were done by outside contractors (1T41-1T44, 1T58-1T60, 1T76).

Smyth and Niekrash received "server installation training" and all 8 technology specialists perform server installations (1T45, 1T50, 1T61, 1T67-1T68, 1T76). Also, all 8 technology specialists are certified "Dell Maintenance Technicians" (1T60-1T61). They are also trained, as needed, on various software applications and network administration (3T17).

Technology specialists, unlike computer assistants, were trained and are also responsible for cabling. Previously, cabling was done by outside contractors but now technology specialists run network cables that connect network computers and are responsible for making cable connections and installing wall jacks (1T51, 1T70-1T71, 1T76). Technology specialists also received in-house training on how to create and administer user accounts on the network (1T71-1T76, 3T16-3T17).

While Smyth and Niekrash spent ninety percent of their time as computer assistants working with teachers and students, now, as technology specialists, that constitutes less than ten percent of their job responsibility (1T6, 1T68, 1T75). Eighty percent of their time is devoted to network administration (3T14).

Technology specialists operate as domain administrators. They have the top level of security clearance on the network and thereby have access to all information stored on the WAN, i.e. email and documents produced in various software packages including the district's budget information through its accounting programs (1T73-1T74, 3T9-3T11). As domain administrators, technology specialists are responsible for creating and deleting accounts, moving files and user profiles as needed, loading programs and adding computers and other hardware (3T9). A domain administrator has rights and access to the network regular users do not. These access rights are for the

purpose of performing various administrative functions. Regular users have access to their particular files; domain administrators have access to all files (3T9). There is no one on the network with more access rights then a domain administrator (3T10). Although regular users may put certain "security" on a particular file or folder, domain administrators have the right to change the security and therefore cannot be denied access to the files where data is stored (3T12, 3T21, 3T32-3T36).

Also, according to Supervisor of Technology Operations Jay Attiya, who oversees technology specialists, information stored on the district's computer system related to the Board's negotiations with its unions is accessible to the technology specialists (3T11). Board members have accounts on the system and may send and receive e-mail to staff and the public (3T11). Folders, files or e-mails marked "confidential" i.e., communication from the superintendent or business administrator to board members regarding collective negotiations proposals, although marked "confidential" are accessible to domain administrators (3T32-3T36). If domain administrator's accessed such files (i.e., marked "confidential") according to Attiya,

> It would be in violation of anyone's rights if it's marked that way. I don't know the legal ramifications of doing that. Morally if something was marked, same as you got an envelope at home that said don't open this and you did.

> Q. Would you consider it, as their supervisor, whatever that may be, to be a breach of the responsibilities to go into a document which was marked confidential, for the eyes of the Board of Education members only?
>
> A. I would think that they wouldn't do that, yes.

(3T36-3T37).

Theoretically, it may be possible to check a log file to determine whether technology specialists have accessed certain files, particularly "confidential" files. However, Attiya has never had a reason to check to see if domain administrators were accessing "confidential" files (3T38). Moreover, regardless of the technology specialist's unit placement, if any, the question concerning their theoretical and/or actual access to confidential communications through the Board's WAN still exists given their job responsibilities as domain administrators (3T39).

SUPERVISOR OF TECHNOLOGY OPERATIONS

5. The supervisor of technology operations (STO) title and job description were approved by the Board on June 24, 1998 (2T29, 3T3, 3T41; Bd-4). The title is not included in any negotiations unit (2T29). The Association demanded negotiations regarding terms and conditions of employment for the title by its August 25, 1998 correspondence to the Board (C-1, para. 3(8) and exhibit C attached thereto, see also, n. 7 supra), but then entered into the 1998 MOA on September 10, 1998.

In 2000, the Board hired Jay Attiya to fill the position (2T41, 3T3-3T4, 3T22-3T23). Attiya understood his job title was network administrator but the parties stipulated that he held the STO title (3T3, 3T22, 3T41). As STO he reports to Director of Technology Jerry Ganis (3T4-3T5).

Before being hired, Attiya worked for the Board for six months as a consultant.[12/] He was brought in to assist staff in fixing the network and to make it run more efficiently (3T5, 3T14). At that time, 1999-2000, the district did not have a comprehensive WAN. Each building maintained separate computer networks and systems, including Novell and Apple networks with approximately 1,200 computers in use. Each building's networks had its own autonomous set of accounts and capabilities (3T6-3T7).

As of 2003, the district had approximately 2200 computers in use, most incorporated into a Windows 2000-based WAN. Additional construction at the district's north high school will add to that total. All the buildings communicate through the same network and individual accounts can be accessed from any of the buildings in the district (3T7-3T8).

12/ It is not clear from the record whether anyone else held the STO title before Attiya, however, a technology employee named Mike Nappi was fired at the same Board meeting Attiya was hired as a consultant (3T23).

The STO's job goals are to oversee: "1. The maintenance, installation and security of computer hardware and peripherals; 2. The service function of the Technology Department; and 3. The operation of LANs and a WAN." (Bd-4).

The STO job description states that it supervises the "LAN, Hardware/Software Technicians and Programmer/Analysts"; it does not list technology specialists as a title to be supervised (Bd-4). When first hired, however, Attiya oversaw a staff of 2 or 3 technology specialists including Smyth, Niekrash and Ramone Villipiano (3T23-3T25).

As of 2003, Attiya oversaw a staff of eight technology specialists, including an employee responsible for the school television studio (Joe Malfa). He also supervises an employee who serves as district webmaster[13/] and as technology specialist for Bayshore school (Beverly Ross)(3T25-3T26; Bd-4). He is responsible for (1) making sure technology specialists carry out duties to keep the computer network functioning, (2) making sure they have the right resources, i.e., equipment, supplies, direction, instruction, training and (3) evaluating technology specialist's work performance annually (1T46, 1T72, 3T4).

Attiya is also involved in the interview process for hiring and filling technology titles, however, that process varies. He

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13/ Webmaster, a title which no longer exists, describes additional duties performed by a technology specialist administering the district's websites (3T41).

may conduct joint or single interviews or he may conduct pre-interviews over the telephone. He may meet with a candidate before or after Ganis meets with the candidate (3T27-3T28). The hiring decision, however, is a joint decision with Ganis and/or an assistant superintendent.

While the people involved in the hiring process may have differences of opinion, hiring determinations have been group decisions or joint conclusions (3T30-3T32). Attiya typically reviewed candidates for technical proficiency (3T31).

Attiya was involved in hiring four of the current technology specialists; Todd Reddingus, Craig Doscher, Brandon Kamienski and Albert Ng (3T29). Attiya has not fired, disciplined or recommended anyone on his staff be disciplined (3T30, 3T32).

ATTENDANCE OFFICER, TRANSPORTATION COORDINATOR, ASSISTANT TRANSPORTATION COORDINATOR

Attendance Officer

6. The attendance officer title was approved by the Board on December 7, 1977 and has not been amended since (2T26, 2T39; Bd-6). A Ms. Himmel filled the position from 1985 to 2000. The title was not included in any negotiations unit (2T26, 2T31, 2T38-2T39). The attendance officer job description provides as follows:

1. Maintain daily contact with all schools.
2. Investigate all absentee cases referred, including contact with parents, school personnel and social agencies.

3. Serve 5-day notices where necessary.

4. Handle all court matters pertaining to attendance, including preparation of necessary reports and attendance in court when cases are being heard.

5. Report back to appropriate school administrators on the results of all investigations.

6. Cooperate closely with the Child Study Team on all matters pertaining to the above duties.

7. Such other duties as may be assigned by the Assistant Superintendent of Pupil Services, such as investigation.

(Bd-6).

The attendance officer does not conduct staff evaluations nor is it involved in collective negotiations (2T39).

Transportation Coordinator

7. The transportation coordinator job description was approved by the Board on August 20, 1985 (2T13, 2T15-2T16, 2T32; Bd-7, Bd-7A). Although the title's job description and some job responsibilities changed in 1994 when the assistant transportation coordinator title (ATC) was created, neither title has ever been included in any of the district's negotiations units (2T14, 2T16).

As a twelve-month employee, the transportation coordinator is responsible for the operation of the district's transportation program. This includes but is not limited to preparing and monitoring bus routes and schedules, overseeing the departure and return of buses, coordinating special trips as needed,

recommending hiring and checking records of driver applicants, devising and implementing busing policies, maintaining and/or coordinating the repair of district-owned transportation equipment. The transportation coordinator also coordinates with district vendors, monitors accident reports and makes recommendations to the Board regarding transportation operations, including assisting in preparing the annual transportation budget and supervising its expenditure (2T96-2T98; Bd-7).

Additionally, the transportation coordinator evaluates the work performance of the ATC and the secretary assigned to the transportation office even though the transportation coordinator job description does not require it (2T17, 2T33; Bd-7). It is unclear from the record whether the transportation coordinator is responsible for imposing discipline on any staff (2T34).

Assistant Transportation Coordinator (ATC)

8. The ATC title job description was approved by the Board on June 14, 1994 (2T18-2T19; Bd-8; Bd-9, Bd-9A). Approximately three employees have held the ATC title since 1994 and the title has never been included in any of the district's negotiations units (2T21-2T22).

As the title implies, the ATC, also a twelve-month employee, reports to the transportation coordinator and assists the transportation coordinator in implementing the district's transportation policy. It is primarily responsible for the

special education transportation for the entire District, including input in evaluation regarding the bids that are received for special education. The ATC is involved with dealing with parental issues, including recommending changing drivers, altering routes where necessary and dealing with the contractors on a daily basis (2T97-2T98; Bd-9; Bd-9A). The assistant transportation coordinator does not perform staff evaluations (2T34).

SECRETARY TO BUSINESS ADMINISTRATOR, ADMINISTRATIVE ASSISTANT TO BUSINESS ADMINISTRATOR, CONFIDENTIAL SECRETARY AND PAYROLL SUPERVISOR

Secretary to Business Administrator

9. Anna Aversano has been the secretary to the business administrator/board secretary, a full-time permanent position, for 4 and one-Half years (2T69). The title is currently in the MTEA's negotiations unit and is classified as an administrative secretary level 6 position for salary purposes (2T28, 2T30, 2T40, 2T70).

Aversano is the only secretary to three professional staff: Business Administrator/Board Secretary William Doering; Administrative Assistant to the Business Administrator Maria Salus; and, Chief Accountant Steven Brennan (2T70). She also may assist the payroll supervisor as needed (2T71). Aversano is the only secretary in the business office (2T78).

William Doering has been the business administrator/board secretary since November 2001. Previously he was the assistant business administrator between April 1999 and October 2001 (2T84). As business administrator, Doering is on the Board's collective negotiations team and attended negotiation sessions involving the MTEA, IBT and administrator's units. As to the MTEA's most recent negotiations he only attended one session at the bargaining table but was present at most Board caucus meetings regarding negotiations (2T87-2T88, 2T103-2T104, 2T106). He is responsible for costing-out proposals and is directly responsible for matters affecting employees in the business office including: accounts payable, payroll, record analysts transportation department and buildings and grounds employees (2T86-2T87).

Doering's secretary, Aversano, is responsible for the flow of documents to him regarding, among other matters, collective negotiations. Those documents include communications to and/or from him about the Board's negotiations tactics and strategies. Those communications involve the negotiating committee, superintendent and/or Board attorney (2T91-2T92).

Doering's secretary, Aversano, is generally aware of financial components of the Board's negotiations strategy due to her support staff functions for him. Although she does not perform analytical functions, she does see negotiations cost-outs

and other similar information before presented, if at all, to the unions (2T73, 2T75-2T76). She does not type negotiations proposals but does file the business administrator's negotiations notes (2T77).

Aversano regularly handles correspondence to and from the business administrator and the Board's attorney marked "confidential". This material may be related to negotiations, grievances or other litigation and Aversano is responsible for routing it to the appropriate person. The materials include information regarding the Board's negotiations strategies (2T71-2T76, 2T79, 2T81-2T82, 2T91). She has been directed to gather information for the business administrator or the Board's attorney related to grievances as has been responsible for communicating to Board members regarding the status of collective negotiations (2T72, 2T82, 2T91).

In his capacity as board secretary, Doering has a second secretary, Judy Martin[14/]. Martin does not work in the business office where Aversano is located; she works from the superintendent's suite (2T93-2T94, 2T101). Doering described her responsibilities as follows:

> Mrs. Martin's primary responsibilities include items such as Board meeting minutes, including closed session minutes, any and all

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14/ Judy Martin's last name was, at some point, DeLassio and she was referred to by both names throughout the transcript (2T101).

> correspondence that goes to the Board of Education, arranging Board events, anything to do with elections. She maintains all contracts, all original contracts of the District, and a multitude of other tasks.
>
> And at the same time based on the nature of her functions and the relationship between the Superintendent and the Board of Education, a lot of her time is actually devoted toward actually working for the Superintendent or under the Superintendent's direction as far as Board correspondences and issues regarding the Board of Education.
>
> (2T93).

When asked whether it was possible to assign Martin Aversano's collective negotiations duties, Doering explained:

> It is a product of three different reasons. The first is the work load in an ideal world require a couple of more secretaries just for what it is that the existing ones do.
>
> As far as Mrs. Martin's current tasks, as I indicated, she spends a very substantial amount of time working under the direction of the Superintendent, and the close proximity to the Superintendent, which I think is entirely appropriate and necessary, gives rise to the issue of proximity.
>
> Obviously I need to have a secretary very close to me so I can act quickly if I am on the phone and I need to reference negotiations files, I need a secretary I can reach right out to while I am on the phone and have those files right out in front of me.
>
> So it is a product of proximity, it is a product of work load, but it is also a product of the intimate knowledge my secretary has of the Business Office specifically as opposed to Mrs. Martin being the secretary or the assistant to the Board

> Secretary. My secretary is the secretary for the Business Administrator and knows all of the functions and tasks that come through the Business Office.
>
> Even what would be appropriate for the individual, obviously for my secretary, she would be much more able to understand and know that health insurance comes from here, that we are costing out this which means to go to this person, so there is some Business Office specific knowledge involved.
>
> (2T94-2T95).

Administrative Assistant to Business Administrator

10. During the hearing in this matter, the MTEA withdrew its clarification of unit petition, as amended, (CU-2000-11) as to the administrative assistant to business administrator title (3T49-3T50). For record purposes, however, the administrative assistant to business administrator title was never previously included in any negotiations unit (2T37). The title was created in 1992 and its job duties were revised in 1997 and 1999 (Bd-20).

The title is presently vacant and it does not appear the Board has any intention to fill the position. It was previously held by Maria Salus. In January 2002, however, Salus was promoted to assistant business administrator due, in part, to her obtaining an appropriate certification (2T23, 2T25, 2T36-2T38, 2T98, 2T110-2T111; Bd-20).

Payroll Supervisor

11. The payroll supervisor-level 6 title was created in or about 1986 and has been included in the MTEA negotiations unit since 1986 (2T22, 2T35; Bd-13). The job description is as follows:

> 1. Supervises the payroll operations to include: the in-put of payroll records into the computer, the transmittal of information to the bank and the distribution of paychecks.
>
> 2. Maintains complex payroll operations.
>
> 3. Supervises and trains payroll staff as required.
>
> 4. Maintains non-certified employees personnel records.
>
> 5. Maintains liaison with State and Federal agencies, computer service and bank officials.
>
> 6. Performs other similar duties as assigned.

(Bd-13).

The current payroll supervisor is Carolyn Saladino. She has held the title for 1 and one-half years after previously working for the North Plainfield Board of Education as a payroll bookkeeper and the City of Rahway as a payroll clerk (2T46-2T47). In both prior positions Saladino was not a member of a negotiations unit (2T54).

Saladino oversees the work of three payroll clerks and is responsible for preparing written evaluations of the clerks. She signs the evaluations and forwards them to Business Administrator Bill Doering for his review and signature. Doering's review of

the evaluation, and entries he makes on the evaluation form, do not differ and any substantive way from Saladino's evaluation (2T47-2T48, 2T85). After Doering converts Saladino's evaluation to a form for the employees' personnel files, clerks may meet with him, not Saladino (2T48, 2T85-2T86, 2T102). The payroll clerks are included in the MTEA's unit (2T48).

Saladino is responsible for compiling information for use in processing grievances and pays grievants in resolution of various disputes. She is not, however, involved in the decision-making process of whether to settle any grievance (2T48-2T50, 2T54-2T55, 2T60).

Saladino has also compiled data for the business administrator such as salary, dates of hire, longevity, pension and stipend information. This data is used for accounting, budgeting and collective negotiations purposes (specifically for Teamsters negotiations)(2T51, 2T55-2T58, 2T88-2T89). She has not, however, been consulted by the Board regarding negotiations strategies and has not been told about the Board's negotiations strategy (2T55, 2T90). She was never directly involved in any negotiation sessions (2T56, 2T104). Saladino has not been responsible for costing-out collective negotiations demands or proposals (2T59).

The previous payroll supervisor was involved in assisting Rosie Shopp, a confidential secretary in the personnel

department, in preparing salary guides and scattergrams related to the Association's collective negotiations agreement (2T105-2T108). Additionally, Doering has delegated to, or had the payroll supervisor assist him in, costing-out anticipated Board proposals and Association proposals. The payroll supervisor, therefore, has been made aware of the Board's negotiations proposals before they were offered to the union. It was not clear from Doering's testimony, however, that the current payroll supervisor, Saladino, has been so involved; Doering's testimony referred to past payroll supervisors generally (2T109-2T110, 2T114).

Saladino's staff of three payroll clerks were already employed by the Board when she started her job. Only the Board has the authority to hire, however, she has the authority to recommend hiring an individual (2T65-2T66). Saladino has not recommended firing any employee but has informally disciplined staff through verbal reprimands for making payroll errors (2T66-2T68). Saladino has not had the opportunity to respond to a grievance initiated by any of the payroll clerks (2T68).

ANALYSIS

I. Issues

The preliminary procedural issues in this consolidated matter relate to the timing and chronology of certain events and filings. There are two timing issues. The first issue is

whether the unit clarification petitions (docket nos. CU-2003-025 and CU-2000-011) were appropriately filed and therefore properly before the Commission for consideration. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). The second, albeit interrelated issue, is whether the Association's March 1999 unfair practice charge (docket no. CO-1999-295), to the extent it alleges the Board refused to negotiate regarding terms and conditions of employment of technology specialists and the STO, raises a justiciable case or controversy. The substantive issues relate to unit placement of certain titles and the Association's remaining unfair practice allegations.

II. Summary Recommendations

The Board's unit clarification petition (docket no. CU-2003-025) regarding the secretary to the business administrator and payroll supervisor titles is appropriate for consideration, irrespective of timing factors, owing its statutory exemption claims. Clearview. The petition should be granted as to both titles; the secretary to the business administrator performs confidential job functions and the payroll supervisor performs supervisory job functions.

The Association's unit clarification petition (docket no. CU-2000-011), as amended, was not timely filed, does not seek the application of statutory exemptions and should therefore be dismissed. Even if the petition were considered timely filed as

to the technology titles (technology specialist and/or STO), equitable considerations should preclude the Commission's administrative determination of the titles' unit placement(s) absent validly filed and properly supported representation petition(s).

Additionally, even if the Association's petition were considered timely filed and the technology titles' unit placement were to be determined by the Commission at this time, the titles are inappropriate to include in the Association's broad-based unit. The STO is a statutory supervisor, making its inclusion in the Association's non-supervisory unit inappropriate. Employees holding the technology specialists titles have unique access to the Board's confidential labor relations information stored on the Board's computer systems, making the title's joint representation with employees holding other titles incompatible.

The Association's unfair practice charge (docket no. CO-1999-295) claim that the Board refused to negotiate regarding terms and conditions of employment of the technology titles is not a justiciable case or controversy and should, therefore, be dismissed. The Board did not violate the Act with respect to the technology specialist job description but did violate the Act when it failed to provide the Association with the STO job description. Under the circumstances of this case, however, as to the STO job description, no remedy seems necessary or

appropriate at this time. The Association's claim regarding transfer of unit work (secretarial) in the maintenance department is not supported by any facts in this record and, therefore, should be dismissed.

III. Timing Considerations for Clarification of Unit Petitions

In representation matters, it is irrelevant whether any party raises timeliness as a defense because the Act charges the Commission with determining appropriate negotiations units as well as effectuating the rights of public employees to choose their majority representatives. See generally, New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370 (¶30160 1999).

When employees have been excluded from negotiations units for too long, efforts to provide those employees with representation through unit inclusion necessarily raise questions concerning representation. Such questions are typically, and preferably, answered in the context of representation petitions. Valid representation petitions allow employees to exercise their statutory rights to vote on whether or not they wish to be represented by employee organizations. Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶1028 1980); Clearview.

Clarification of unit petitions, by contrast, are a method for adjusting the composition of a negotiations unit without an election. These petitions are more commonly used to resolve questions concerning the scope of a certified or recognized

negotiations unit or a unit described in a contractual recognition clause. It is usually considered appropriately filed when the majority representative identifies and petitions for personnel in newly-created or modified titles during the contract period in which the new title was established or an existing title's job duties is significantly modified, and prior to the execution of the next successor agreement. New Jersey Transit; Clearview; see also, Morris Cty. Voc. Tech. Bd. of Ed., D.R. No. 93-4, 18 NJPER 483 (¶23220 1992); Passaic City Bd. of Ed., D.R. No. 88-14, 14 NJPER 3 (¶19001 1987); Rutgers Univ., D.R. No. 84-19, 10 NJPER 284 (¶15140 1984); County of Bergen (Bergen Pines Hospital), D.R. No. 80-20, 6 NJPER 61 (¶11034 1980); Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977).

The Director of Representation explained in Clearview how the policy requiring timely filing of clarification petitions regarding newly created or modified titles - prior to the execution of successor agreements - is linked to the parties' negotiations and therefore effectuates the purposes of the Act:

> ... the contractual relationship and the negotiations relationship are inextricably intertwined. Therefore, the Commission's clarification of unit procedure should not be utilized in a manner disruptive of either contractual or negotiations responsibilities. Thus, a change in unit composition mandated by a clarification of unit determination should not be permitted to alter the parties' contractual commitments. If the parties have negotiated a contract that includes without reservation certain persons or titles, the

> Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. This agreement to include or exclude certain persons or titles in a contract may have involved concessions by both parties in the negotiation of the final terms and conditions of employment. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed. Thus, the clarification of unit procedure should be designed so as not to encourage avoidance of contractual responsibilities, or to change the benefits and burdens of the bargain.
>
> . . .
>
> Thus, a clarification of unit determination should be implemented in a manner which is consistent with the parties joint responsibility to be bound to an agreement until it has terminated. Where certain persons or titles are included or excluded from the contract by agreement of the parties, the status quo should remain in effect until the contract expires.

Id. at 251-252. Stated differently, when a new title is created or circumstances have changed, a majority representative should act promptly to seek clarification of its unit. In the absence of a specific preservation of the dispute over the title, the parties' completion of a successor contract will ordinarily constitute a waiver of the majority representative's right to seek unit clarification. Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984).

Based on the foregoing principles, in Rutgers University, the Director dismissed a petition to include titles created before execution of the existing collective negotiations agreement. The Director found that the majority representative waived its rights to seek clarification of the existing unit. The Director held that the majority representative had the responsibility to identify and petition for new titles during the contractual period in which they are established and before executing its next succeeding contract. See also New Jersey Transit; Vernon Tp., D.R. No. 2002-3, 27 NJPER 354 (¶32126 2001); and Lacey Tp. Bd. of Ed., D.R. No. 89-12, 15 NJPER 106 (¶20051 1989).

Alternatively, the parties could conclude negotiations for the successor contract but include a provision preserving the dispute for the Commission to decide. See Union Cty. Reg. H.S. District #1, D.R. No. 83-22, 9 NJPER 228 (¶14106 1983) (clarification granted where parties preserved issue in successor contract provision); compare, Atlantic Cty. College, P.E.R.C. No. 85-64, 11 NJPER 30 (¶16015 1984).

Additionally, title disputes may be raised and resolved by other procedural means, for example through an unfair practice charge, Union Cty. Reg. H.S. District #1, 9 NJPER at 231 n.3 citing Passaic Cty. Reg. H.S. Dist. #1 Bd. of Ed., P.E.R.C. No.

77-19, 3 NJPER 34 (1976), or through a grievance. New Jersey Transit, 25 NJPER at 371.

Given its balancing of various competing interests, however, Clearview sets the preferred standard for evaluating the timeliness and appropriateness of clarification of unit petitions. The filing of an unfair practice charge is generally not sufficient to preserve a title dispute. Even if an unfair practice charge is an appropriate mechanism to preserve title disputes, the policy considerations regarding the timing of its filing should be consistent with Clearview.

These timing considerations, however, typically are not implicated when a party seeks the application of the statutory exemptions to the right to form, join or assist employee organizations codified at N.J.S.A. 34:13A-5.3. The Director, in Clearview, explained this seemingly inconsistent standard:

> ... the statutory framework of the Act renders certain negotiations relationships improper. Persons identified as managerial executives and confidential employees are not employees under the Act. In addition, the Act provides that, unless certain exceptions are present, supervisors cannot be in units with non-supervisors [. . .] Therefore, clarification of unit petitions are appropriately utilized to seek the exclusion of classifications which may have been included in an existing unit contrary to statutory provisions.

Clearview at 251. Accordingly, a clarification of unit petition to remove statutorily exempt titles from an existing unit may be filed at any time.

IV. The Board's Clarification of Unit Petition - (CU-2003-025)

The Board's clarification of unit petition (docket no. CU-2003-025) as to the secretary to the business administrator and payroll supervisor titles is appropriate because the Board asserts N.J.S.A. 34:13A-5.3 statutory exemption claims. Clearview.

The Board contends the secretary to the business administrator and the payroll supervisor are confidential employees. The Board also contends the payroll supervisor is a statutory supervisor and therefore exempt from representational rights under the Act. Although both titles have been included in the MTEA unit for several contract cycles pre-dating the 1996-2001 contract, the Board sought exclusion of the titles during negotiations for the 2001-2002 and 2002-2005 contracts. The Association disputes the exempt status of the titles.

A. Standard of review

1. Confidential employees

N.J.S.A. 34:13A-3(g) defines confidential employees as:

> . . . employees whose functional responsibilities or knowledge in connection with issues involved in the collective negotiations process would make their

> membership in any appropriate negotiations unit incompatible with their official duties.

The policy of this Commission is to narrowly construe the foregoing definition. Ringwood Bd. of Ed. and Ringwood Ed. Office Personnel Ass'n, P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp.2d 186 (¶165 1988); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985).

In State of New Jersey, the Commission explained the approach taken in determining whether an employee is confidential. The Commission stated:

> We scrutinize the facts of each case to find for whom each employee works, what [the employee] does, and what [the employee] knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee [were] included in a negotiating unit.

Id. at 510. See also River Dell Reg. Bd. of Ed., D.R. No. 83-21, 9 NJPER 180 (¶14084 1983), req. for rev. den. P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984).

The key to confidential status is an employee's access to and knowledge of materials used in labor relations processes including contract negotiations, contract administration, grievance handling and the preparation for these processes. See State of New Jersey (Div. of State Police), D.R. No. 84-9, 9

NJPER 613 (¶14262 1983). Particular employees holding support staff positions are often deemed confidential due to their superior's role in the labor relations process and their own performance of administrative support duties which expose them to confidential matters. See Salem Comm. Coll., P.E.R.C. No. 88-71, 14 NJPER 136 (¶19054 1988); River Dell; W. Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971). An employee who performs such tasks will be determined to be confidential within the meaning of the Act.

In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court approved the standards articulated in State of New Jersey and explained:

> The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.').
>
> Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or

> implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis.

Id. at 358. The foregoing standard is typically referred to as the "access test."

2. Supervisory employees

N.J.S.A. 34:13A-5.3 provides that supervisors shall not be included in units with non-supervisory employees. The Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970). A determination of supervisory status requires more than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend these actions. An indication that the power claimed to be possessed is actually exercised is needed. See Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976) and City of Margate, P.E.R.C. No. 87-146, 13 NJPER 500 (¶18184 1987).

B. Secretary to the business administrator and payroll supervisor titles

Applying the foregoing standards to the facts in this matter, the secretary to the business administrator is a confidential employee and the payroll supervisor is a statutory supervisor.

Both positions report directly to the business administrator who is undisputedly involved in collective negotiations. In that context, however, it is the business administrator's secretary who is responsible for the flow of documents to him regarding, among other matters, collective negotiations. Those documents include communications to and/or from him about the Board's negotiations tactics and strategies. Those communications involve the negotiating committee, superintendent and/or Board attorney. The secretary to the business administrator is generally aware of financial components of the Board's negotiations strategy due to her support staff functions for the business administrator.

Although the secretary to the business administrator does not perform analytical functions, she does have access to, and is aware of, negotiations cost-outs and other similar information before presented, if at all, to the unions. She does not type negotiations proposals but does file the business administrator's negotiations notes and regularly handles correspondence to and from the business administrator and the Board's attorney marked

"confidential". This material may be related to negotiations, grievances or other litigation and the secretary is responsible for routing it appropriately. The materials include information regarding the Board's negotiations strategies. She has been directed to gather information for the business administrator or the Board's attorney related to grievances and has been responsible for communicating to Board members regarding the status of collective negotiations.

The secretary to the business administrator has functional responsibilities and knowledge concerning issues involved in the collective negotiations process. Accordingly, the secretary to the business administrator's continued inclusion in the MTEA unit compromises the Board's ability to maintain confidentiality with regard to the collective negotiations process. The title, therefore, should be removed from the MTEA unit immediately. Clearview.

The payroll supervisor title's duties, by contrast, are not so invested in the collective negotiations or grievance processes as to make them confidential but do sufficiently implicate the supervisory exemption.

The payroll supervisor is responsible for compiling information for use in processing grievances and does pay grievants in resolution of disputes. She is not, however, involved in the decision-making process of whether to settle any

grievance - she is not the decision-maker determining whom to pay.

The payroll supervisor does compile data for the business administrator regarding salary, dates of hire, longevity, pension and stipend information. The information is used for accounting, budgeting and collective negotiations purposes (most recently for the Teamsters negotiations), however, there was no evidence that the payroll supervisor was consulted by the Board regarding negotiations strategies. To the contrary, the payroll supervisor has not been told about the Board's negotiations strategy and was not involved in any negotiation sessions. The payroll supervisor is not responsible for costing-out collective negotiations demands or proposals.

The record reveals that a previous payroll supervisor was involved in assisting a confidential secretary in the personnel department, in preparing salary guides and scattergrams related to the Association's collective negotiations agreement. Additionally, the business administrator delegated to, or had the previous payroll supervisor assist him in, costing-out anticipated Board proposals and Association proposals. In the abstract, the payroll supervisor, therefore, has been made aware of the Board's negotiations proposals before they were offered to the union. On this record, however, it is not clear that the current payroll supervisor has been so involved and therefore

there is no basis to conclude the title should be exempt as confidential.

As to whether the payroll supervisor is a statutory supervisor, however, the current payroll supervisor oversees the work of three payroll clerks and is responsible for preparing written evaluations of the clerks. She signs the evaluations and forwards them to the business administrator for his review and signature; his review and signature do not differ in any substantive way from the initial evaluation. Thus, the payroll supervisor's input constitutes an effective recommendation as to any personnel action which may be based, in whole or in part, on the evaluation. This creates a potential, impermissible, conflict of interest. West Orange Bd. of Ed. v. Wilton, 57 N.J. 404 (1971).

Additionally, the staff of three payroll clerks was already in place when the current payroll supervisor was hired and while only the Board has the formal authority to hire, the payroll supervisor has the authority to make effective recommendations regarding hiring. The current payroll supervisor has not recommended firing any employee and has not had the opportunity/necessity to respond to a grievance initiated by any of the payroll clerks. The payroll supervisor has, however, informally disciplined her staff through verbal reprimands for making payroll errors.

The payroll supervisor's statutory supervisory status relative to the payroll clerks she oversees makes the title's continued inclusion in the Association's nonsupervisory unit inappropriate. The title, therefore, should be removed from the unit upon expiration of the parties' current collective negotiations agreement. Clearview.

C. Recommendation regarding CU-2003-025

Based on the foregoing, the Board's petition (CU-2003-025) should be granted as to both titles. The secretary to the business administrator is a confidential employee and the payroll supervisor is a statutory supervisor. The titles should be removed from the Association's unit; the secretary to the business administrator title should be removed immediately, the payroll supervisor title should be removed upon expiration of the parties current collective negotiations agreement. Clearview.

V. The Association's Clarification of Unit Petition and Amendment - (CU-2000-011)

A. Non-technology titles

The attendance officer title was created December 7, 1977 and was filled at least until 2000. The parties did not present evidence regarding the current status of the position, i.e., whether the position is occupied or vacant. The transportation coordinator title was created August 20, 1985 and modified in 1994. The assistant transportation coordinator title was created June 14, 1994.

These long-time titles have never previously been included in the Association's unit and have existed through numerous collective negotiations periods. The Association has not claimed the titles are newly created nor has it claimed any changed circumstances warrant the titles' current inclusion in its unit. Consistent with Clearview, the petition, as amended (docket no. CU-2000-011) should be dismissed as to these titles.

As to the attendance officer specifically, if the title is in fact presently vacant, the Commission's policy is not to determine the unit status of vacant positions. See generally, City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000)(Director declined to determine status of several vacant positions in City's law department) review denied PERC No. 2000-10, 26 NJPER 289 (¶31116 2000) aff'd 28 NJPER 128 (¶33039 2002); see also Trenton Bd. of Ed., D.R. 2001-9, 27 NJPER 197 (¶32066 2001).

Based on the foregoing, the Commission need not determine whether the transportation coordinator is a statutory supervisor. The Commission also need not make a unit placement determination for the attendance officer or ATC. Record evidence is inconclusive regarding whether the transportation coordinator is a statutory supervisor or whether the attendance officer or ATC should be statutorily exempt from representational rights under the Act. The exercise of representational rights by employees

holding these positions, however, may be subject to a timely and appropriately filed representation petition and election or voluntary recognition. Unit placement determinations should more appropriately be made at that time.

B. Technology titles

1. Appropriateness of the petition

The Association's factual contention in its post-hearing brief that the technology specialist title was created in 1999, and, therefore, its clarification of unit petition was timely filed, at least as to that title, is not supported by the record in this case.

The Association was aware of the creation of the technology specialist and STO titles as of August 25, 1998. Asserting that the titles properly belonged in its unit, the Association demanded job descriptions for the titles and demanded negotiations regarding terms and conditions of employment for employees holding the titles.

On September 10, 1998, however, sixteen days after making its demand, the Association entered into the 1998 MOA for the 1996-2001 collective negotiations agreement. Despite the Association's August letter demand to negotiate regarding the titles, the 1998 MOA did not include any changes to the agreement's recognition clause. Quite the opposite, the 1998 MOA reflected the parties' agreement that "[a]ny issues not addressed

by this memo shall be deemed withdrawn." (Jt-4 and JS-6 p. 2 ¶7 attached thereto). There were no reservations or preservations of the title disputes as of the execution of the 1998 MOA, therefore, by its terms, the 1998 MOA extinguished the Association's negotiations demand for the titles.

The 1998 MOA constituted the "execution of the parties' most recent contract" which, pursuant to Clearview, was the "last act which would formally bind both parties to a negotiations agreement." Id. at 252. Consistent with the dictates of Clearview, the parties negotiated an agreement that included, without reservation, certain persons or titles based on its continuation, without modification, the prior agreement's recognition clause.

Absent proof to the contrary, it must be assumed that the 1998 MOA, a written agreement between the parties, is the result of good faith negotiations in which the parties imparted finality to their give-and-take. The agreement to continue the prior contract's recognition clause, unchanged, may have involved concessions by both parties in the negotiation of the final terms and conditions of employment.

The Association should not now be permitted to gain additional profit by resort to the Commission's processes, ie. clarification of unit petition or unfair practice charge, after the agreement was executed. If either procedure were now invoked

it would sanction the avoidance of contractual responsibilities and change the benefits and burdens of the bargain reached in the 1998 MOA.

Following execution of the 1998 MOA, the Association, without reference to the MOA, sent the Board its October correspondence. None of the October 1998 correspondence, however, can fairly be read as constituting a renewal of negotiations regarding the titles. The correspondence makes no reference to the MOA's "deemed withdrawn" provision; it appears that the Association overlooked its September agreement that "[a]ny issues not addressed by this memo shall be deemed withdrawn."

The parties took until September 2001 to resolve language disputes in the 1996-2001 contract. During that period, on March 10, 1999, the Association filed its unfair practice charge alleging that the Board violated the Act by refusing to provide the Association with the technology specialist and STO job descriptions and by refusing to negotiate regarding the titles. Also during that period, various employees were appointed as technology specialists beginning in July 1, 1999 even though the Board did not approve a job description for the title until September 22, 1999. The record is unclear when the STO title was first filled (see n. 12 supra), however, the title existed and the Association was aware of it as of August 1998. The

Association did not file its clarification of unit petition and amendment (CU-2000-011) until September, 1999 and August, 2001 respectively, over a year after the titles were created, negotiations were demanded, then dropped.

Importantly, neither party presented evidence in this proceeding suggesting that any terms or conditions of employment, agreed-to and memorialized in the 1998 MOA, were modified or altered by their subsequent contract language dispute and ultimate resolution. Moreover, there is no evidence in the record that the Association's October 1998 letter demands, sent after the 1998 MOA was executed, were considered part of the then, on-going language disputes precluding final execution of the contract. There is no evidence of any intent by the parties to preserve unit composition issues for submission to the Commission after the parties executed the 1998 MOA. The 1998 MOA constituted the last act formally binding the parties to a negotiations agreement.

Granted, the Association identified new titles (technology specialist and STO) during the contractual period in which the titles were established (1998 - during negotiations for the 1996-2001 contract) and demanded negotiations before executing its next succeeding contract. The demand occurred before the technology specialist job description was approved and before either technology positions were filled.

The 1998 MOA, however, executed after the demand, makes plain that the Association itself deemed its demand to negotiate regarding the titles was withdrawn. The record offers no explanation for why sixteen days after the demand was made, before a job description was approved (for the technology specialist title) and before either title was filled, the Association abandoned its claim to obtain the titles via negotiations or administrative determination.

The deemed withdrawn provision was included in the MOA but the titles and/or the dispute were not otherwise memorialized or preserved. Regardless of whether parole evidence to this agreement would be admissible, none was offered and the plain and ordinary meaning of the deemed withdrawn provision applies.

A clarification of unit petition filed in September 1998 may have been dismissed as to the technology titles based on the Commission's vacant title doctrine, see Newark and Trenton Bd. of Ed. supra. Clearview, however, reconciles the vacant title doctrine with the preferred, negotiations-based, solution and provides additional guidance to parties in that circumstance. The parties could have included a provision in the 1998 MOA preserving the title disputes for the Commission to decide. While title disputes may be raised and resolved by other procedural means, good faith dealing should require that such filings precede the conclusion of negotiations or at least be

preserved in the agreement for consideration thereafter; they were not.

The Association's March 10, 1999 unfair practice charge also post-dates the parties' execution of the 1998 MOA. The allegations contained therein - even if deemed admitted due to the Board's failure to file an answer - are not evidence of a viable preservation of the title disputes. The charge relies on the August 25, 1998 letter demand for negotiations which was extinguished by the September 1998 MOA. The Association cannot, in good faith, withdraw its title demands, obtain the negotiated benefits of the 1998 MOA, then renew the title disputes by its October 1998 correspondence, or in the form of an unfair practice charge, or clarification petition, while the only matters left to resolve in the contract are language issues. Even if the Association's October 1998 correspondence were construed as a renewal of negotiations regarding the titles, while the parties were resolving language disputes in the 1996-2001 contract, that contract was executed with no change to the recognition clause and no preservation of the issues.

Subsequently, the 2001-2002 and 2002-2005 contracts were completed pursuant to the 2002 MOA. The 2002 MOA provides that "All provisions of the 1996-2001 Agreement not specifically modified in this Memorandum shall carry forward unchanged into

the successor Agreements; all proposals not specifically addressed in this Memorandum are deemed dropped."

The parties stipulated that notwithstanding its then pending unfair practice charge and clarification petition, the Association did not seek to modify the recognition clause of its contract. Simply put, the Association dropped its August 1998 demand to negotiate regarding the titles, obtained the benefits of the 1998 MOA and never preserved the title dispute in the MOA. The Association, thereafter, never sought to obtain the titles by negotiations in either of the two subsequent contract negotiations. The Association did not preserve the issues for Commission consideration upon completion of any of the three contracts it negotiated after titles were created; the 1996-2001, 2001-2002 or 2002-2005 contracts.

The Board, by contrast, consistent with Clearview, sought to modify the recognition clause during negotiations. The joint stipulation (Jt-4) refers to the Association rejecting Board proposals to remove certain titles from the unit during the 2001-2005 negotiations. It also notes that the Association advised the Board that it should initiate proceedings with the Commission to remove the titles from the unit. The joint stipulation also notes that the Board withdrew its proposals seeking to remove certain titles from the unit and filed a clarification of unit petition (CU-2003-25). Importantly, however, Clearview timing

and other policy considerations apply differently to petitions seeking to exclude titles based on statutory exemptions.

As to the technology specialist and STO titles, pursuant to Clearview, the Association had the responsibility to file its petition before completing negotiations which led to the 1998 MOA; it did not. As a result, in the absence of a provision in the parties' agreement preserving the title issues for Commission consideration, the unit clarification petition (CU-2000-011) and the unfair practice charge (CO-1999-295) are untimely and inappropriate to trigger administrative determinations of the titles' unit placement and should be dismissed as to the technology specialist and STO titles.

2. Equitable considerations preclude unit placement of the technology titles via administrative determination

Even if the Association's September, 1999 unit clarification petition, as amended, were considered timely filed, equitable considerations preclude an administrative determination placing the titles in the Association's unit in the absence of a properly filed representation petition meeting the requirements of N.J.A.C. 19:11-1.1 et seq. Granting the petition as to the technology titles would be inconsistent and incompatible with the parties' joint responsibility to be bound to their series of collectively negotiated agreements, particularly the 1998 MOA and the subsequent contracts.

Consistent with the Director's observation in Clearview, the Commission in this case should not allow the mechanical application of a clarification of unit determination in contravention of the parties' joint responsibility to be bound to an agreement until that agreement has terminated. The 1998 MOA triggered the 1996-2001 contract which subsequently led to the 2001-2002 and 2002-2005 contracts - none of which modified the recognition clause of the contract, and none of which reserved or preserved the title disputes. Where certain persons or titles are excluded from the contract by agreement of the parties, as was the case in the 1998 MOA when the Association dropped its title demands, sixteen days after it first raised the issues, the status quo - the titles' exclusion - should remain in effect until the contract expires. The 1996-2001 contract expired and the record in this matter demonstrates that the Association never again sought to negotiate either titles' inclusion.

Additional considerations support the proposition that the Association should not be allowed to obtain the technology specialist and STO titles by administrative determination through a clarification petition.

The Association filed its petition in September 1999, then left the matter on the Commission's docket open, but apparently inactive for almost four years. During the subsequent negotiations for the 2001-2002 and 2002-2005 contracts, the

Association never sought to negotiate regarding the titles. Allowing four years to elapse without resolving the title disputes, either through negotiations or by administrative investigation, the Association sent conflicting messages to the employees holding the titles, and any other employee organization interested in representing the titles. One message was that the Association believed the titles belonged in its unit, the other message appears to be that the title issues were not significant enough to include in successor contract negotiations; the employees, in the meantime, went unrepresented.

While the Association had, and has, the right to claim a representational interest in the titles, it has a coordinate responsibility to the employees holding the disputed titles to resolve the dispute in a timely manner, contemporaneously with on-going negotiations. Such is the spirit, intent and guidelines of Clearview and the Act. Protracting litigation or an administrative investigation pending multiple negotiations, but never raising the underlying issues in any of the negotiations, should not be sanctioned by a subsequent administrative determination on unit placement.

By allowing three contract periods to pass without resolving unit placement issues through negotiations, the Association effectively precluded employees holding the disputed titles from negotiating directly with the Board regarding terms and

conditions of employment. It also created an impediment for other employee organizations to seek to represent the disputed titles given the uncertain unit status. Although the IBT eventually filed its representation petition in late 2002, by then, the titles had existed, been defined in job descriptions and been filled far too long a period of time for the Association to legitimately claim a representational right without having that claim tested in self-determination election.

The IBT representation petition (docket no. RO-2003-057), also highlights an additional factor. Although the title IBT petitioned for (computer specialist) did not formally exist, it is evident that the parties understood that IBT intended to represent employees holding the technology specialist title. The Board consented to the proposed unit, however, the MTEA opposed, contending that the title was the subject of its pending clarification of unit petition. Despite the imprecise terminology by the parties regarding the title, I take administrative notice that IBT's petition would not have been consolidated for processing in this matter - before IBT withdrew it - absent a sufficient showing of interest pursuant to N.J.A.C. 19:11-1.2(a)9.

In other words, there was at least a 30-percent showing of interest by technology specialists supporting a unit separate from the Association, represented by IBT. The resolution of this

proceeding - the Association's unfair practice charge and unit clarification petition - should not foreclose those employees' rights under the Act to select their majority representative.

The Association, IBT or any other employee organizations should not be prevented from filing timely representation petitions seeking to add any of the petitioned-for titles (attendance officer, transportation coordinator, assistant transportation coordinator, technology specialist and STO), to its unit(s) or to form a separate unit(s). In the absence of an agreement for an election, the Commission would then consider the appropriateness of the petition(s) and proposed unit structure(s) at that time. Such determinations may depend on the nature of the proposed unit(s).

Based on the foregoing, the petition, as amended (docket no. CU-2000-011) is inappropriate and therefore should be dismissed.

3. Unit placement determinations

Even if the Association's clarification of unit petition (docket no. CU-2000-011) were timely filed as to the technology titles, the STO is a statutory supervisor and technology specialists should be represented, if at all, in a separate negotiations unit.

i. The STO is a statutory supervisor

The STO job description states that it supervises the "LAN, Hardware/Software Technicians and Programmer/Analysts." Although it does not list technology specialists as a title to be supervised, that is precisely what the STO does. When first hired, STO Attiya supervised a staff of two or three technology specialists and that has since grown to eight. Attiya is responsible for making sure technology specialists carry out duties to keep the computer network functioning and making sure they have the right resources, i.e., equipment, supplies, direction, instruction, training. Attiya is also annually responsible for evaluating technology specialist's work performance.

Attiya is involved in the interview process for hiring and filling technology titles, however, that process varies. He may conduct joint or single interviews or may conduct pre-interviews over the telephone. Attiya may meet with a candidate before or after the candidate meets with Director of Technology Ganis. The hiring decision, however, is a joint decision with Ganis and/or an assistant superintendent.

While the people involved in the hiring process may have differences of opinion, hiring determinations have been group decisions or joint conclusions. Attiya's role has typically been to review candidates for technical proficiency.

Attiya was involved in hiring four of the eight technology specialists. He has not fired, disciplined or recommended anyone on his staff be disciplined.

Based on all the foregoing, the STO's statutory supervisory status makes the title's proposed inclusion in the Association's nonsupervisory unit inappropriate. The Association's petition (CU-2000-011) should be denied as to this title.

ii. The technology specialists' unique access to the Board's computer systems require separate representation

The Board's technology specialists are more colloquially known as network administrators or domain administrators in the technology trades. All of these terms basically refer to computer specialists who are responsible for the operation and maintenance of networked computer systems. They have unfettered access to all areas of computer networks.

There does not appear to be any consensus regarding whether technology employees, functioning as network or domain administrators, are confidential employees or otherwise exempt from representational rights under collective bargaining statutes. AFSCME Co. No. 54 v. City of Plymouth, 563 N.W.2d 79 (Minn. 1997)(technology employees who had access to labor relations information but no job responsibilities to utilize the information found to be confidential employees); Lake Cty. Area Voc. Syst. v. AFT, IFT Loc. 504, 19 PERI 61 (IELRB

2003)(executive director found that senior technician/network administrators were responsible for operation and maintenance of employer's computer network, had authority to override security safeguards granting access to confidential labor relations information were confidential employees) reversed by Lake Cty. Area Voc. Syst. v. AFT, IFT Loc. 504, 20 PERI 5 (IELRB 2003)(finding that senior technician/network administrators access to confidential information was merely incidental to primary responsibilities); see also Rhode Island Dept. Of Corr. V. Rhode Island State Labor Relations Board et al., 1999 R.I. Super. LEXIS 104 (RI Superior Ct. 1999)(technology titles' access but no functional responsibility for confidential labor relations information stored on computer system were found not be confidential employees).

The Director's determination regarding computer assistants, essentially the predecessor title to technology specialists, in Middletown Tp. Bd. of Ed., D.R. No. 95-31, 21 NJPER 253 (¶26163 1995) granted the computer assistants inclusion in the MTEA unit. That determination occurred, however, at a time when, based on the decentralized technology then used by the Board, computer assistants did not have the type of access to confidential labor relations material technology specialists now have access to on the Board's WAN. Moreover, technology specialists' job duties

are significantly different than their computer assistant predecessors.

In this case, the Board's expansion of its computer capabilities, not only to draft and analyze labor relations matters but also to communicate regarding such matters, inherently triggers concerns regarding security and integrity of the computer systems. This is particularly true as it relates to the employees charged with maintaining the system.

There is no evidence in this record, however, that technology specialists have accessed, or are required in the regular course of their job duties to access, confidential labor relations material stored on the Board's computer system. There is no evidence that the technology specialists have covertly monitored communications on the system by management employees or Board members regarding confidential labor relations matters. Therefore, on this record, technology specialist are not statutorily excluded from representation under that Act as confidential employees based on the traditional access test.

Finding that technology specialists are not confidential employees under the standard "access test" does not, however, mean that placing such titles in the Association's unit is the most appropriate unit placement or even necessarily good for labor relations. The purpose of the statutory exclusion is to maintain the status quo in labor negotiations by precluding or

removing from a unit employees who have the potential for obtaining advance knowledge of confidential labor relations information, thereby upsetting the normal balance of the negotiations process. Technology specialists clearly have the potential for obtaining advance knowledge of confidential labor relations information.

Given the declaration of policy forming the basis of the Act, that it is in the best interest of the people of the State to prevent labor disputes, placing employees who have unfettered access to labor relations materials in negotiations units with employees who do not have such access is untenable. In addition to tipping the playing field of negotiations in the unit's favor, the possible abuses of employees in such positions by labor leaders seeking to gain tactical advantages in negotiations may be chilling. Additionally, the logistics for the Board to alter the way in which it drafts, analyzes and communicates about labor relations matters may be significant.

In this large school district with multiple negotiations units, it is not simply a matter of taking labor relations information off the network and saving it to floppy or compact disk. Even if the Board could protect its labor relations materials stored on the network from the very people it hired to operate and maintain the network, the Board is not unwilling to deal with the technology specialists as a negotiations unit - it

simply notes that adding them to the MTEA's existing professional unit creates problems that could be avoided or mitigated by a separate unit structure.

As noted above, nothing in this report and recommendation suggests that the MTEA cannot properly represent technology specialists; the MTEA, should, however, represent the title, if at all, in a unit separate from other employees (provided it wins in a representation election).

Succinctly, although technology specialists' functional responsibilities do not make them confidential employees within the meaning of the Act, their membership in the MTEA unit would be inappropriate due to their unique knowledge and access to the Board's computer systems. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985).

While technology specialists' mere access to labor relations information, without any accompanying insight about its significance or functional responsibility for its development or implementation, is insufficient to warrant exclusion from all representational rights, it is sufficient to warrant exclusion from representational rights with employees who do not have similar access. See generally AFSCME Co. No. 54 v. City of Plymouth, 563 N.W.2d 79.

In the totality of the circumstances of this case, technology specialists' access to information from the Board's

computer system, particularly as it relates to the negotiations process, make technology specialists incompatible for inclusion in the MTEA unit and the petition, (CU-2000-011) should therefore be dismissed as to this title.

VI. The Association's Unfair Practice Charge - (CO-1999-295)

The MTEA alleges in its March 10, 1999 unfair practice charge inter alia, that the Board created but refused to negotiate regarding the technology specialist title, refused to provide a job description regarding the technology specialist title, unlawfully excluded the technology specialist title from the MTEA unit, and unilaterally transferred unit work performed by a secretary in the maintenance department.

A. Refusal to Negotiate Claim

The Board's failure to file an Answer as required by N.J.A.C. 19:14-3.1 has no impact on the claims involving exclusion and refusal to negotiate regarding the technology specialist title. As discussed supra., the succinct facts in this case are that the Association demanded negotiations regarding the title then withdrew its demand pursuant to the 1998 MOA. Following execution of the 1998 MOA, the Board had no duty to negotiate regarding the title, accordingly, it did not violate 5.4a(5) of the Act by refusing to negotiate over the title.

B. Refusal to Provide Job Descriptions

The Association's claims that the Board failed to provide the technology titles' job descriptions are valid as to the STO title but not as to the technology specialist title.

In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981), the Commission, relying on federal precedent, held that an employer must supply information to a majority representative if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its representational duties and contract administration. Moreover, in State of New Jersey (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶18284 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988), the Commission further explained that relevance is liberally construed - the information need only be related to the union's function as the collective negotiations representative and appear reasonably necessary for the performance of this function. Relevance is determined through a discovery-type standard; therefore, a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. See generally, Hardin and Higgins, The Developing Labor Law at 856, 859 (4th ed. 2001); NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); J.I. Case Co. v. NLRB, 253 F.2d 149, 41 LRRM 2679 (7th Cir. 1958). A

refusal to supply relevant information constitutes a refusal to negotiate in good faith and violates N.J.S.A. 34:13A-5.4a(5).

Various types of information are presumptively relevant. See University of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); UMDNJ (School of Osteopathic Medicine), P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993); NJ Transit Bus Operations, Inc., P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989).

A union's right to receive information from an employer is not absolute. The employer is not required to produce information clearly irrelevant, confidential or information it does not posses. See generally, Union Tp., H.E. No. 2004-8, __ NJPER ___ (¶_____ 2003)(hearing examiner found Township made a good faith effort to respond to unions' requests on health benefits and change in carrier by providing information it possessed in a timely manner, seeking information from the carrier which it did not have and providing the unions with information as soon as it obtained it.)

In this case, the Association requested the technology specialist and STO job descriptions by its Fall 1998 correspondence. It is not clear from this record whether any job descriptions were ever provided until they were submitted as exhibits in this proceeding. Regardless, to the extent the STO job description existed at the time the request was made and at

the time the charge was filed, the Board violated the Act by not providing it to the Association.

As to the technology specialist, however, that job description was not formally approved until the Fall of 1999. The Board could not provide the Association with a job description in October 1998, or even March 1999 (when the charge was filed) that did not exist until September 1999.

District Administrator Hybbeneth's October 23, 1998 response to the Association's request for the job descriptions simply misstates the Board's obligations to provide information that is potentially relevant and that will be of use to the union in carrying out its representational duties and contract administration. Even if he was correct that the "positions of . . . Supervisor of Technology Operations are supervisory positions, . . . which would be inappropriate for recognition within the MTEA", providing the STO job description to the Association, at a minimum, allows the Association to draw its own conclusions and provides a basis for it to respond to possible membership inquiries about the status of the title. Succinctly, the Board had no valid reason to deny the Association a copy of the STO job description - even if that job was statutorily exempt.

As to the technology specialist job description, Hybbeneth noted that the job description was not yet finalized by the

Board. His offer to forward them to the Association ". . . if they appear to be appropriately lodged within your recognition clause" was inappropriately conditional. Again, the Board had no valid reason to deny the Association a copy of the job description once it was established. As of the time of the Fall 1998 correspondence, however, and as of the time the charge was filed, the technology specialist job description had not been finalized. Therefore, despite Hybbeneth's conditional offer to forward the job description once approved, the Board had no duty as of October 1998 or March 1999 to provide a job description that did not exist.

The Board violated 5.4a(1) and (5) of the Act by failing to provide the Association with the STO job description. This violation, however, should be viewed in proper context; the allegation of the Board's refusal to provide the job description occurred after the parties' executed the 1998 MOA. That MOA extinguished the technology title disputes. The Association's allegation of refusal to provide the technology specialist job description also pre-dates the Board's formal approval of that job description in September 1999. Against that backdrop, it would have been more reasonable for the Association to have simply renewed its request for the job description some time after the title was approved at a public meeting of the Board.

Based on all the circumstances of this case, other than finding, reporting and admonishing the Board, through this report and recommendation, for violating the Act by not providing the Association with the STO job description, no further remedy seems appropriate or warranted.

C. Transfer of unit work

The Association's claim regarding the transfer of unit work performed by a secretary in the maintenance department may meet the Commission's complaint issuance standard, N.J.A.C. 19:14-2.1(a). This allegation, however, fails to meet the burden of proof standard set-forth in N.J.A.C. 19:14-6.8.

No facts were presented to explain or substantiate this claim and therefore it should be dismissed. Even if the allegation is deemed admitted due to the Board's failure to file an answer, there is insufficient information in the record to support the claim or fashion a remedy.

RECOMMENDED ORDER

I recommend that the Commission grant the Board's clarification of unit petition, docket no. CU-2003-025, and order the immediate removal of the secretary to the business administrator and the prospective removal of the payroll supervisor upon expiration of the parties current collective negotiations agreement, from the MTEA's negotiations unit.

I recommend that the Commission order dismissal of the Association's clarification of unit petition, docket no. CU-2000-011, as amended, as to all titles remaining in dispute: attendance officer, transportation coordinator, assistant transportation coordinator, technology specialist and supervisor of technology operations.

I recommend that the Commission find that the Board committed a violation of 5.4a(1) and (5) of the Act when it failed to provide the Association with the supervisor of technology operations job description in October 1998 but under the circumstances of this case recommend that no further remedial action be ordered.

I recommend that the Commission dismiss the Association's unfair practice claim, docket no. CO-1999-295, regarding the Board's refusal to provide the technology specialist job description, refusal to negotiate regarding technology titles and regarding the transfer of unit work performed by a secretary in the maintenance department.

Kevin M. St.Onge
Hearing Examiner

Dated: May 17, 2004
Trenton, New Jersey