P.E.R.C. NO. 99-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PEQUANNOCK TOWNSHIP BOARD
OF EDUCATION,

Public Employer-Respondent,

-and- Docket No. CU-H-89-31

PEQUANNOCK TOWNSHIP
EDUCATION ASSOCIATION,

SYNOPSIS

The Public Employment Relations Commission clarifies a unit of employees of the Pequannock Township Board of Education represented by the Pequannock Township Education Association to include the secretary to the health and safety officer. The Commission determines that the secretary is an employee of the Board and is not a confidential employee.

P.E.R.C. NO. 90-103

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PEQUANNOCK TOWNSHIP BOARD
OF EDUCATION,

Public Employer-Respondent,

-and- Docket No. CU-H-89-31

PEQUANNOCK TOWNSHIP
EDUCATION ASSOCIATION,

Employee Organization-Petitioner.

Appearances:

For the Public Employer, Feldman, Feldman, Hoffman & Fiorello, attorneys (John Fiorello, of counsel)

For the Employee Organization, Zazzali, Zazzali, Fagella & Nowak, attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On January 27, 1989, the Pequannock Township Education Association filed a clarification of unit petition. It seeks to include the secretary to the health and safety officer in a negotiations unit of secretaries and other employees of the Pequannock Township Board of Education. The Board opposes the secretary's inclusion, arguing that she is employed by a consortium of school districts and that even if the Board is her employer, she is a confidential employee under the N.J.S.A. 34:13A-3(g).

On May 19, 1989, a Notice of Hearing issued.

On July 17, 1989, Hearing Officer Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They submitted post-hearing briefs by November 1, 1989.

On March 5, 1990, the Hearing Officer recommended dismissing the petition. H.O. No. 90-4, ___ NJPER (¶___ 1990). She concluded that although the secretary was not a confidential employee, the consortium, rather than the Board, was the secretary's employer.

On April 5, 1990, the Association filed exceptions. It asserts that the Hearing Officer erred in finding that a personnel committee existed; omitting certain findings of fact, and concluding that the Board was not the secretary's employer.

On April 9, 1990, the Board filed a reply. It incorporates its post-hearing brief and supports the Hearing Officer's determination that the consortium is the employer.

We have reviewed the Hearing Officer's findings of fact (H.O. at 2-8).[1/] They are generally accurate. We incorporate them with these additions and modifications.

We add to finding no. 5 these paragraphs from the Health and Safety Officer Agreement (R-1):

> 9. The parties agree that the position of Health and Safety Officer and clerk-secretary thereto need not be advertised for bids and that Pequannock, after consultation with the Business Administrators of the Other School Districts, may retain the persons for the positions of Health and Safety Officer and clerk-secretary thereto. After filling the positions of the Health and Safety Officer and clerk-secretary, Pequannock shall advise the Other School Districts of the identity thereof, the qualifications, salary and benefits for each person retained and said notice shall be in writing and mailed to the Business Administrator of the Other School Districts.

1/ This matter was transferred to us pursuant to N.J.A.C. 19:11-88.

> 11. Each Other School District shall indemnify Pequannock and hold it harmless for any services or actions performed by the Health and Safety Officer and clerk-secretary for or on behalf of each Other School District and for any negligence in connection therewith, as well as for any claims for damages or liability arising out of or from the actions, performance or negligence of the Health and Safety Officer or clerk-secretary performed for or on behalf of each district.

We add to finding no. 9 that Pequannock donates office space, but the consortium shares any expenses (T18-T19).

The only evidence of the personnel committee described in finding no. 10 is the testimony of the Pequannock business administrator (T22). The health and safety officer testified about a group of administrators who interviewed him and who "more or less acted as advisors," but he did not refer to a formal personnel committee (T105). No minutes, notes or correspondence verify the committee's existence (T45; 10/5/89 stipulation).

We further add to finding no. 10 that on June 13, 1988, the Board's business administrator wrote Frank Makein a letter (R-10) offering him "the Health & Safety Officer position with the Pequannock Board of Education...." The letter further states: "As you were informed at your interview on June 6, 1988, while you will be an employee of the Pequannock Township School District, in your role as Health & Safety Officer you will be serving 9 or possibly 10 school districts in the area. You will have an office in our Administration Building and a full-time secretary will be employed for your program." The letter also sets forth the benefits the

district would provide Makein, including days off given the district's 12 month employees by virtue of union contracts and short term absences granted the district's administrators.

Consistent with this letter, Makein and the Board entered the employment contract described in finding no. 11. Makein receives the same benefits as employees represented by the Principals and Supervisors Association in Pequannock (T123-T124).

We correct the last sentence of finding no. 11. While the first secretary (Lacey) was not appointed by a Board resolution, the incumbent secretary (Barrett) was (R-13). No other district passed a resolution approving that hiring or was asked to approve the hiring (T37, T77-T78, T124). Barrett receives the same benefits as the Board's other secretaries (T55) and works hours similar to those worked by the secretaries in the superintendent's office (T122) and the business administrator's office (T57, T122). Barrett completes the same absence forms as other Board secretaries (T68). Makein and Barrett receive Board paychecks (T104).

We add to finding no. 12 that Lacey notified only the Pequannock business administrator when she resigned (T49). A notice of the vacancy was posted in the Pequannock district and a Pequannock employee was appointed (T56, T78). The administrator did not know whether the notice was posted in other districts (T56).

A public employer includes a school district. N.J.S.A. 34:13A-3(c). A public employee is "any person holding a position, by appointment or contract, or employment in the service of a public

employer, except...confidential employees." N.J.S.A. 34:13A-3(d). Confidential employees are those "employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties." N.J.S.A. 34:13A-3(g).

On this record, the secretary to the health and safety officer is an employee of the Board and is not a confidential employee. We therefore clarify the Association's unit to include this position.

The agreement between Pequannock and the other districts specifies that the Board is to employ the health and safety officer and related personnel. The Board is responsible for administering the salary payments and benefits of these employees and has "the sole right to determine and fix the salary and benefits of the officer and secretary." While it must consult with other districts, that obligation does not diminish the Board's ultimate power to fix salaries and benefits. Compare Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 31-32 (1973) (encouraging board to consult with union, even though no obligation to negotiate before exercising prerogatives). Subject only to consulting other districts, the Board retains the persons for the positions of health and safety officer and clerk-secretary. Other districts may advise the Board of complaints, but the Board has the "exclusive right to reprimand or otherwise discipline the health and safety officer and clerk secretary." The agreement thus empowers the Board to determine the

most important terms and conditions of the secretary's employment--salaries, benefits and discipline. It confers the powers as well as status of an employer upon the Board.

In addition, Barrett was appointed by Board resolution and therefore falls within the literal definition of employee under section 3(d). The person--Makein--who supervises her is a Board employee by virtue of the consortium's agreement, the business administrator's letter offering him a job, and his employment contract. Makein and Barrett are paid by the Board and given the same benefits as their district counterparts. Barrett also works hours similar to other district secretaries and her attendance is monitored the same way.

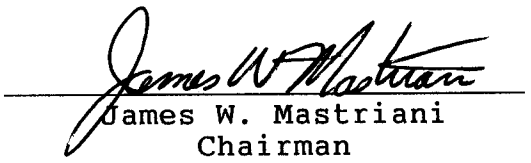
Under all these circumstances, we conclude that the Board has substantial control over Barrett's terms and conditions of employment and is her employer. See Bergen Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978); Mercer Cty. Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978). Compare Community Transit Services, 290 NLRB No. 154, 129 LRRM 1185 (1988) and Long Stretch Youth Home, 280 NLRB No. 79, 122 LRRM 1272 (1988) (respondents retain sufficient control over employment conditions to warrant employer status, even though other entities must approve salaries beyond certain amounts and salary ranges). The business administrator's unsupported testimony about an informal personnel committee is outweighed by all the evidence establishing the employer-employee relationship between the Board and Barrett.

We agree with the Hearing Officer that Barrett is not a confidential employee under N.J.S.A. 34:13A-3(g). We adopt her analysis (H.O. at 14-16). See also Sayreville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd App. Div. Dkt. No. A-4297-87T1 (4/21/89); Morris School Dist. Bd. of Ed., P.E.R.C. No. 89-42, 14 NJPER 681 (¶19287 1988), aff'd App Div. Dkt. No. A-2191-88T2 (11/16/89).

ORDER

The secretary to the health and safety officer is included in the collective negotiations unit of secretarial and other personnel represented by the Pequannock Township Education Association.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
May 14, 1990
ISSUED: May 15, 1990

H.O. NO. 90-4

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

In the Matter of

PEQUANNOCK BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CU-H-89-31

PEQUANNOCK TOWNSHIP EDUCATION ASSOCIATION,

Employee Organization.

SYNOPSIS

A Hearing Officer of the Public Employment Relations Commission recommends that the Commission dismiss a Clarification of Unit petition filed by the Pequannock Township Education Association ("Associaiton") seeking to add to its existing broad-based unit of employees employed by Pequannock Township Board of Education ("Board") the Secretary to the Health and Safety Officer. The Hearing Officer found that the Pequannock Board was not the secretary's employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34A-1 et seq. ("Act") and relevant case law. The Board did not control the labor relations of the secretary. Rather, it was concluded that a ten-district consortium was the secretary's employer. Thus, the addition of the secretary to the Association's unit was inappropriate. The Hearing Officer also found that the secretary was not a confidential employee within the meaning of the Act.

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

H.O. NO. 90-4

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

In the Matter of

PEQUANNOCK BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CU-H-89-31

PEQUANNOCK TOWNSHIP EDUCATION ASSOCIATION,

Employee Organization.

Appearances:

For the Public Employer
Feldman, Feldman, Hoffman & Fiorello
(John Fiorello, Esq.)

For the Employee Organization
Zazzali, Zazzali, Fagella & Nowak,
(Paul L. Kleinbaum, Esq)

HEARING OFFICER'S RECOMMENDED
REPORT AND DECISION

On January 27, 1989 the Pequannock Township Education Association ("Association") filed a Clarification of Unit Petition with the Public Employment Relations Commission ("Commission") seeking to include the Secretary to the Health and Safety Supervisor ("Secretary") in its existing collective negotiations unit, employed by the Pequannock Township Board of Education ("Board" or "Pequannock"). The Board objected to the petition on the basis that it is not the secretary's employer and that the secretary is a confidential employee within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

A Notice of Hearing issued on May 19, 1989. At a hearing on July 17, 1989 the parties examined witnesses and presented documentary evidence.[1/]. Both parties submitted post-hearing briefs by November 1, 1989.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Board and Association are parties to a collective negotiations agreement effective from July 1, 1986 through June 30, 1989.(J-1)

2. The Association's unit is comprised of teachers and other professional employees, para-professionals, secretarial, clerical, custodial and food service employees, and bus drivers. (J-1)

3. The Board formed a health and safety consortium with nine other school districts in northern New Jersey in the spring of 1988. The group's purpose was to share the services of a health and safety expert in order to comply with recently enacted health and safety statutes. (T10, T13, R-1)[2/]

1/ The transcript is referred to as "T- _; the Association's exhibits will be referred to as "P- "; the Board's exhibits will be referred to as"R- "; and jointly submitted exhibits will be referred to as"J- ".

2/ These include the Asbestos Hazardous Emergency Response Act (AHERA); the state and federal Right-to-Know laws; and the Public Employees Occupational Health and Safety Act (PEOSHA).(T10-T12)

4. The consortium entered into a written agreement, "Health and Safety Officer Agreement" effective July 1, 1988.(R-1)

5. The consortium agreement contains, in relevant part:

> 1. Pequannock and the Other School Districts require the services of a person designated herein as a Health and Safety Officer ["HSO"] to perform services in each school district...none of [the school districts] requires an HSO on a full time basis to perform the above set forth services and that it would be more economical, cost effective and efficient if they jointly obtained the services of an HSO and clerk-secretary thereto on a shared cost and expense basis. Said shared costs and expenses to be on a pro rata basis in accordance with the formula...set forth. (R-1, p. 1-2)
>
> 3. The school district parties desire that Pequannock employ the HSO and related personnel and provide administrative and office facilities . . . and that the Other school districts acquire the services thereof and pay to Pequannock their respective pro rata shares of the costs and expenses.(R-1, p. 2)
>
> 1. Pequannock agrees to employ a person with the qualifications set forth below as an HSO . . . together with a clerk-secretary and to provide appropriate administrative facilities. . . The employment of the HSO, supporting personnel, and the furnishing of administrative facilities by Pequannock shall be for and on behalf of Pequannock and the Other school districts.(R-1, p.2-3)
>
> 4. Pequannock shall be responsible for administering the payment of salary and benefits for the HSO and his clerk-secretary and shall have the sole right to determine and fix the salary and benefits of the HSO and clerk-secretary in consultation with the Other School Districts. (R-1, p.3-4)
>
> 5. Each of the Other School Districts shall pay to Pequannock, on a yearly basis as hereinafter set forth, a share of the salary, benefits, costs and expenses for the employment by Pequannock of

> the HSO and clerk-secretary, including a share of the costs and expenses of the administrative officer and facilities of Pequannock set aside and used by the HSO. (R-1, p.4)
>
> 10. Pequannock shall have the exclusive right to reprimand or otherwise discipline the HSO and clerk-secretary. Any Other School District may advise Pequannock of complaints, including deficiencies, problems and the like in the performance of the HSO and clerk-secretary. (R-1, p.7-8)
>
> 13. In the event any Other School District fails or refuses to pay its pro rata share...and the default continues for 15 days, Pequannock in its sole discretion, may terminate this agreement as to the defaulting school district by sending notice...(R-1, p.8)

6. The Agreement further provides that any district may withdraw; if it does not withdraw by April 30, it is obligated under the agreement for the next year; if Pequannock withdraws, the agreement is terminated as to all the other districts; and, if less than five districts remain Pequannock can terminate with 30 days notice to the others. (R-1, p.5-6)

7. The agreement states that Pequannock, after consulting with the business administrators of the other school districts, may retain the persons for the positions of HSO and clerk-secretary, and Pequannock shall notify the others of the name, qualifications, salary and benefits. (R-1, p.7)

8. All the other boards voted to approve the consortium agreement. (T14,T15)

9. The agreement provides that the pro rata shares are determined by reference to a formula based upon the number of

buildings and students. The percentages paid by the districts vary from 2 to 18 percent. Pequannock's share of the salary, benefits and administrative costs is 13.75 percent or the third highest amount. ((R-1, pp.2,4,5; T14,T15; R-5)

10. Frank Makein was hired as HSO on July 11, 1988. The consortium formed a personnel committee composed of three business administrators, one each from Pequannock, Kinnelon, and Butler. These three screened and interviewed candidates and recommended Makein to the entire cooperative. 3/ The personnel committee served as Makein's advisors/supervisors as to personnel and other matters. (T105)

11. In accordance with the terms of the consortium agreement, Pequannock and Makein executed an employment contract. This document reflects that Makein would perform his duties in accordance with, inter alia, the policies and rules established by the Pequannock Board. It also states that he would receive the same fringe benefits as employees in Pequannock. (R-11; T74) The Board passed a resolution approving the hiring of Makein. (T23) No similar resolution was passed by the Board with respect to the Secretary. (T24,T25)

3/ The Board did not produce any minutes, notes or correspondence between or to members of this committee. (T23, T72,T73,T74) The Board was requested to produce such correspondence at the hearing and the parties stipulated that a search for the same was made and nothing found.(T104, Post-hearing Stipulation, October 5, 1989))

12. Makein screened and interviewed candidates for the Secretary position. In August 1988 he recommended hiring Ann Lacey and this choice was ratified without further review by the consortium. Mrs. Lacey began work in September, 1988. (T75,T76,T77,T78, T55,T56) Makein hired Joan Barrett as a replacement for Mrs. Lacey in summer 1989. (T78,T79) Mrs. Lacey resigned on June 30, 1989 and the Board passed a motion accepting her resignation, effective on that date, at its May 15, 1989 meeting. (R-12)

13. Makein's responsibilities include assisting the consortium districts in complying with various federal and state health and safety laws and regulations. (R-3, T99) Makein determines the priority of requests for services from the school districts and has sole discretion to do so. (R-1,p.3) In the 1988-89 school year there were about 30 "right-to-know" requests, or, requests from employees about the particular contents of potentially hazardous substances. In response to these Makein personally researched, or directed his secretary to locate information, and then give it and any recommended action to the business administrator or designated contact person. Neither Makein nor Lacey communicated directly with employees on these matters. (T81,T82,T83,T84,T85,T86,T87) Makein coordinated and conducted various workshops throughout the consortium. Lacey assisted him in this effort. (T80)

14. Lacey performed secretarial duties such as typing, handling telephone calls, maintaining files and preparing reports for Makein. She also gathered information and relayed it by telephone to Makein and, at his direction, to consortium contact persons. Such information included the presence of asbestos and other toxic, hazardous or dangerous materials and substances. (T83,T86,T87,T89) Lacey also attended monthly buildings and grounds supervisors' meetings where she distributed materials, took attendance and prepared minutes. (T89,T90)

15. Neither Makein nor Lacey have a formal role in the Pequannock district's grievance procedure. (T38; J-1; T54) Individuals may make complaints directly to the labor or health departments under the AHERA, PEOSHA and Right-To-Know laws. (T99-100) Employees employed by consortium school districts made inquiries or complaints about health and safety matters about 40 times during 1988-89. Only one of these came through the Association's contractual grievance procedure. That was filed by a Pequannock art teacher, Eileen Skula. (T103)

16. The Skula grievance concerned storage of custodial supplies in the art storage area in the North Boulevard School. The grievance was filed with the principal, Mrs. Justesen, who contacted Ms. Lampert, Pequannock's business administrator and consortium contact person. Ms. Lampert contacted Makein who obtained information which was then forwarded by Lampert to Skula. Makein met with Skula and explained the material packaging and safety. The

grievance did not proceed any further; it was settled at that first step. (T31,T32,T33,T94,T102,T103) The clerk-secretary was involved in the correspondence that went between Makein and Lampert, including Makein's recommendations to the Board about the chemicals that gave rise to the grievance.(T94,T95)[4/]

ANALYSIS

The Board objects to the petition here upon two grounds: it claims that it is not the clerk-secretary's employer, and that even if it were, the position is confidential within the meaning of the Act and therefore not appropriate for inclusion in any unit for collective negotiations. I find that the secretary is not employed by Pequannock and is therefore not appropriate for inclusion in the Association's unit. Although this decision obviates the need to answer whether the position is confidential, I conclude that it is not a confidential position within the meaning of the Act.

The standard for determining who is the public employer of proposed unit employees is set forth in both the Act and caselaw. N.J.S.A. 34:13A-3(c) defines "employer" and "public employer" as:

> (c) the term employer" includes an employer and any person acting directly or indirectly, or on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent

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4/ The Association requested copies of correspondence or reports Lacey prepared concerning the Skula grievance; the Board searched for these documents and none were found.(T108,T109; Stipulation, October 5, 1989)

> thereof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

In making determinations about who is the public employer of certain employees, the Commission has followed the private sector approach [5/] of determining who controls the hiring, firing, work schedules, promotion, discipline, performance evaluations, vacations, hours of work, scheduling, wages and benefits of employees and the funding of employees' compensation and benefits.[6/]

Applying the policies developed in the private sector, the Commission has held in Newark Housing Corporation; Cape May Guidance

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5/ See, Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970)

6/ See, Township of Neptune, D.R. No. 87-26, 13 NJPER 386 (¶18155 1987); Ocean County Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981); Newark Housing Development and Rehabilitation Corporation, D.R. 80-2, 5 NJPER 328 (¶10175 1979); Bergen County Freeholders Bd. v. Bergen County Prosecutor, P.E.R.C. No. 78-72, 4 NJPER 104, (¶4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980); Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978); Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); and Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977). See also, Howard University, 224 NLRB No. 44, 92 LRRM 1249 (1976); We Transport and Town Bus Corp., 214 NLRB No. 91, 87 LRRM 1745 (1974); and Herbert Harvey, Inc. v. N.L.R.B. 424 F 2nd 777, 72 LRRM 2213 (1969).

Center, and ARA Services, Inc., E.D. 76-31, 2 NJPER 112 (1976), that, despite some involvement and relationship with a public entity, the labor relations of the affected employees was controlled by a private, not a public employer. Critical to the decisions in Newark Housing and Cape May was a finding that although a public entity contributed funds to the respective employers, the public entity did not retain primary control over the use of those funds. Here, all of the ten consortium districts exercise some control over the program by using the HSO's expertise, as needed. Makein controls work priorities subject only to occasional review with the consortium's agent, the personnel committee. Makein controls the secretary's work and "labor relations" as agent of the consortium. There was no evidence that Pequannock exercised any unilateral control over the secretary.

In further application of the "control of labor relations test," the Commission, its designees and the state courts have chosen the public employer from among different competing entities. In Township of Neptune, D.R. 87-26, 13 NJPER 386 (¶18155 1987), the Director of Representation determined the Board of Health and not the Township of Neptune to be the public employer of the Secretary to the Board of Health. In Bergen County Sheriff, PERC No. 84-98, 10 NJPER 168 (¶15083 1984), the Commission held that the County of Bergen and the Bergen County Sheriff were joint public employers of all sheriffs and corrections officers. In Bergen and Mercer County Prosecutor D.R. 78-34 4 NJPER 105 (¶4047), aff'd P.E.R.C. 78-77, 4

NJPER 220 (¶4110 1978), aff'd 178 N.J. Super 363, 411 (App. Div. 1980), the Commission and the Appellate Division held that the Prosecutor, and not the respective counties, was the public employer of employees in the Prosecutor's office.

In Mercer County Superintendent of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978), the Commission held, and the Appellate Division affirmed, 172 N.J. Super. 406 (App. Div. 1980) that the Superintendent, not the County, was the public employer despite the County's responsibility to pay salaries. The Court held:

> We attach no importance to the fact that the county maintains the personnel records of the employees, nor is the fact that the county pays the salaries determinative of the identity of the employer. Id. at 410.

The Superintendent controlled the labor relations of his employees, and although his funding was provided by the County, the statute requiring County funds did not give the County the discretion to deny the Superintendent's requests.

Applying the control of labor relations concept to this situation, it appears that the consortium is the employer of both the HSO and secretary and Pequannock is the consortium's agent. Because of the substantial control Makein exercises over the labor relations of the secretary, it is necessary to focus on who his employer is, for that will be the secretary's employer, derivatively.

Here, the funding for the two positions comes from the ten consortium districts; Pequannock only contributes 13.75 percent. Acting as the agent of the Consortium, it provides the space and

administrative costs, for which it is reimbursed proportionately. The consortium agreement appears to give Pequannock the sole right to employ and discipline the HSO and secretary, but the facts of Makein's hiring demonstrate that he was hired by a consortium committee of business administrators from Pequannock, Kinnelon, and Butler. There have been no instances of formal discipline, but it appears the intent is to have Makein discipline the secretary, if necessary. Further, the agreement provides that Pequannock agrees to employ and provide administrative facilities "for and on behalf of" itself and the other districts. (R-1, PP. 2-4) While it is true that Pequannock has some control over the agreement; it has the power to terminate it by withdrawing, or to terminate it with respect to defaulting schools, this does not satisfy the control of labor relations test.

Makein determines his and the secretary's work schedule. He has sole discretion to determine work priorities. This and his responsibilities to the nine other districts belie any predominant control by Pequannock. I conclude that Makein could not be fired by Pequannock, nor could his salary be reduced by Pequannock unilaterally. Even the terms of the agreement state that Pequannock sets salary terms in consultation with the other districts. Because of the funding arrangement, it is hard to see how Pequannock could unilaterally decide to give Makein a raise, for it would have to assess the increase against the other districts. I find that Pequannock is limited by the terms of the agreement over hiring,

salary, and termination of the HSO and secretary. Further, if disciplinary action were necessary it could originate from any of the districts and it is difficult to see how Pequannock could refuse to respond.

Makein controls the hiring, firing, effective disciplinary recommendations, evaluation, and work assignment of the secretary. He clearly exercises greater control over her than does the Pequannock school board. Both Makein and Lacey received the same benefits as other Pequannock employees, but in providing these benefits, Pequannock acted as consortium agent, and this was most likely done for administrative convenience.

Generally the entity controlling labor relations is the employer; however, where control of those factors is split between two or more entities, a joint employer relationship may be found to exist. The National Labor Relations Board has held that where control over wages and control over work assignments is divided, a joint employer relationship exists. See, Groundhound Corporation and Floors, Inc. 153 NLRB 1488, 59 LRRM 1665 (1965); Manpower Inc and Armour Grocery Products Company, 164 NLRB 287, 65 LRRM 1059 (1967); Jewel Smokeless Coal et. al., 170 NLRB 392, 67 LRRM 1417 (1968). See also, Bergen County Sheriff. These cases are distinct from the facts here. Joint employer standards are met where substantial control over the means and manner of accomplishing the work, determination of wages, hiring, firing and assigning work is shared by two entities. Here, wages, hiring and firing are jointly

determined by all the consortium districts. Makein controls the priorities, means, manner and assignment of the work, without reference to Pequannock's management or the consortium personnel committee.

CONFIDENTIAL STATUS

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

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees....

N.J.S.A. 34:13A-3(d) provides the following:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise.... This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

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

> [E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The Legislature rejected a broader definition requiring mere access to confidential materials. Hearings on S-1087 before Senate

Conference and Coordinating Committee, at 17, 68-69, 118-119A (5/7/74).

In State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), the Commission explained how it determines whether an employee is confidential:

> We scrutinize the facts of each case to find for whom each employee works, what he does, and what he 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 was included in a negotiating unit. [Id. at 510]

Applying the above definitions and cited case law, I find the secretary position here not to be a confidential one. The secretary has no role in collective negotiations, nor is she involved in the processing of grievances. The only grievance which arose during the year was the Skula grievance. The Board did not establish that Lacey had any role in the processing of this grievance which was settled informally at the first step. Makein's testimony established that Lacey's primary duties were assisting him in routine and non-routine secretarial tasks. She maintained some "confidential" files, but these were not confidential in the labor relations sense. For example, Lacey had no advance knowledge as to how a school district would handle any particular health and safety issue or grievance based on her maintenance of the information in these files. There is no evidence that she typed anything involving confidential labor relations information.

It is well established that mere access even to personnel files does not make an employee confidential. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd. App. Div. No. A-4740-86T7 (2/18/88); West Milford Bd. of Ed., P.E.R.C. No. 56 (1971). Further, knowledge of raw data, even if collected for use in negotiations, will not deem the employee confidential. See State of New Jersey, supra. Accordingly, I conclude that the secretary to the Health and Safety Officer is not confidential.

Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

(1) The Secretary to the Health and Safety Officer is an employee of the ten district consortium and not an employee of Pequannock Township Board of Education. As such, the position cannot be added to the Pequannock Township Education Association's negotiations unit.

(2) The Secretary is not a confidential employee within the meaning of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Petition for Unit Clarification be dismissed. 7/

Elizabeth J. McGoldrick,
Hearing Officer

DATED: March 5, 1990
Trenton, New Jersey

7/ I note that at the time of the hearing these positions had only been in existence for about one year. If in the future the facts change, any party may re-file an appropriate petition.