D.R. NO. 80-6

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

In the Matter of

WAYNE BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. CU-187

WAYNE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation dismisses a Petition for Clarification of Unit filed by an employee representative seeking clarification of several titles. The Director explains that a Petition for Clarification of Unit is inappropriate when a question concerning representation exists involving the titles sought to be clarified.

The Director established criteria to utilize in a clarification proceeding where the disputed titles existed prior to the formation of the unit, to determine whether a question concerning representation exists regarding such titles. First, it must be determined whether there was a mutual intent by the parties to include the classification(s) in question; second, where an intent to include was initially present it must then be determined whether the subsequent conduct of the parties demonstrates a mutual agreement to exclude the title(s) in question; and third, it must finally be determined whether subsequent conduct of the majority representative constitutes an abandonment or waiver of the claim that the titles in issue are represented in the unit in question.

After establishing the above criteria the Director applied the same to the titles included in the instant matter. The Director found in accordance with the Hearing Officer that there was no evidence of a mutual intent by the parties to include the titles of Supplemental Teachers and High School Equivalency Instructors within the recognition clause of their agreement.

Regarding Substitute Teachers, the Director found that there may have been a mutual intent to include, but that the WEA had waived or abandoned its interest in the title of all per diem substitutes. The Director found that this title was in existence at the time of the formation of the unit but that the WEA had waived its representation rights, thereby establishing a question concerning representation.

The Director also determined that insufficient evidence existed to establish that the parties mutually intended to include Bedside Teachers in the collective negotiations unit, but the evidence did establish that even if a mutual intent to include the title existed, that the WEA had waived its representation rights regarding this title.

Regarding Driver Training Instructors, the Director determined that initially the parties had mutually agreed to include the title, but subsequently the WEA waived its representation rights by failing, over a considerable period of time, to negotiate terms and conditions of employment on their behalf.

Finally, regarding Summer School Teachers, the Director determined that even if a mutual intent to include said title within the parties' recognition clause existed, the WEA failed to establish that it sought to represent the unit of all summer school teachers and therefore waived its right to represent this title.

After concluding that none of the titles in question could be clarified as being included in the WEA's unit the Director ordered that the entire Petition be dismissed.

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WAYNE EDUCATION ASSOCIATION,

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Appearances:

For the Public Employer
Greenwood, Weiss & Shain, Esqs.
(Stephen G. Weiss, Of Counsel)

For the Petitioner
Goldberg and Simon, Esqs.
(Theodore M. Simon, Of Counsel)

DECISION AND ORDER

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a negotiating unit of public employees, a hearing was held on April 28, 1976, June 17, 1976, September 13, 1976, January 18, 1977, January 27, 1977 and February 15, 1977 before Hearing Officer Joel G. Scharff, at which all parties were afforded an opportunity to present evidence, to examine and cross-examine witnesses and to argue orally. A post-hearing brief was filed by the Petitioner on November 28, 1977.

Thereafter, on February 15, 1979, the Hearing Officer issued his Report and Recommendations (H.O. No. 79-5) a copy of which is attached hereto and made a part hereof. On February 27, 1979 the Commission received a request from the Public Employer for an extension of time to file exceptions to the Hearing Officer's Report and Recommendations. On March 1, 1979, the Director of Representation extended the time to file

exceptions in this matter to March 14, 1979 and subsequently granted a further extension to March 19, 1979. The exceptions subsequently filed by the Public Employer were received by the Director of Representation on March 19, 1979. On March 28, 1979, the Director of Representation received an addendum to the exceptions previously filed by the Public Employer and on April 5, 1979 the Director of Representation received a response to the addendum from the Petitioner.

The undersigned has carefully considered the entire record in this proceeding including the Hearing Officer's Report and Recommendations, the briefs and the exceptions, and on the facts in this case finds and determines as follows:

1. The Wayne Board of Education (the "Board") is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") and is the employer of the employees in question.

2. The Wayne Education Association (the "WEA") is an employee representative within the meaning of the Act and is subject to its provisions.

3. A Petition for Clarification of Unit was filed with the Commission on April 22, 1975 seeking a determination in favor of the inclusion of six groups of employees in the existing collective negotiations unit of all contractual certificated personnel. The Petitioner desires the inclusion of the following groups:

Regular summer school teachers

All driver education teachers

All substitutes

All bedside teachers

All high school equivalency diploma teachers

All supplemental teachers

The Board takes the position that none of the above six groups of employees are presently included in the WEA collective negotiations unit and should not be included in the negotiating unit by means of this petition. Therefore, there is a question concerning the composition of a negotiations unit of public employees and the matter is properly before the undersigned for determination.

4. The Hearing Officer recommended that the WEA unit be clarified as including summer school teachers, driver training instructors, bedside teachers and certain substitute teachers in its existing collective negotiations unit and that said clarification be immediately effective. The Hearing Officer recommended that the WEA does not represent high school equivalency instructors and supplementary teachers.

5. The Hearing Officer based his recommendations for inclusion of the above-listed four classifications on the following findings:

1) The Board and WEA agreed to include summer school teachers, driver education instructors, bedside teachers and substitute teachers in the WEA unit in their first agreement and did not subsequently agree to exclude these classifications from the unit.

2) The Board granted an additional recognition to the WEA on behalf of driver education instructors.

3) Bedside instruction and driver education instruction are extracurricular assignments performed by regular Wayne teachers and the personnel performing these assignments are unit members.

4) There is a community of interest between each of the four groups recommended for inclusion and current WEA unit personnel.

6. The Hearing Officer based his recommendations for exclusion of the high school equivalency instructors and supplementary teachers on the following findings:

1) The Board and WEA did not intend the inclusions of supplementary and high school equivalency instructors in the WEA unit.

2) There is no community of interest between the high school equivalency instructors and WEA unit personnel.

7. The Exceptions filed by the Board argued that:

1) The Hearing Officer's findings and conclusions as to summer school, driver education, bedside and substitute teachers were contrary to the clear weight of the evidence which, the Board claims, established that the WEA knowingly waived and abandoned any right it may have had to represent these categories.

2) The Hearing Officer was in error when he determined that the challenged categories were intended to be recognized by the parties under the language of the recognition clause of the several contracts.

3) The Hearing Officer's conclusion that WEA waived the right to negotiate on behalf of supplemental teachers should apply to summer school, driver training, bedside and substitute instructors because these latter groups also existed prior to the 1968-69 agreement and the waiver and abandonment by WEA to negotiate regarding these groups compels the conclusion that these groups are excluded from the collective negotiations unit.

The undersigned, having carefully considered the Hearing Officer's recommendations and the exceptions filed by the Board, now turns to a determination concerning each of the classifications at issue herein.

In evaluating clarification petitions brought pursuant to this Act and its attendant rules, the Commission is guided by the long experience and the adjudications under the National Labor Relations Act, (the "NLRA"). 1/

The NLRB has established a precedent which precludes the utilization of a clarification of unit petition in order to include a classification of employees which were in existence at the time the negotiations unit was formed 2/ or where a union had, for a considerable period of time, "slept on its rights" concerning the unrepresented titles. 3/ In both cases the NLRB found that under these circumstances a question concerning representation exists and the unit clarification petition should be dismissed.

1/ The Supreme Court of N.J. has sanctioned reliance on the experience and adjudications of the NLRA in representation questions under the N.J. Act, see Lullo v. Firefighters Local 1066, 55 N.J. 409 (1970).

2/ In Gould Nat'l Batteries Inc., 157 NLRB 679, 61 LRRM 1436 (1966), the Board found that it was inappropriate to accrete two divisions of employees to an existing division through a petition for clarification of unit. The Board found that one division existed at the time the unit was certified, and the other division came into existence during negotiations for a successor agreement. Since the union did not seek to represent either of the two unrepresented divisions at the appropriate time, then the Board found that the union could not accrete these divisions through a clarification proceeding. A question concerning representation was found to exist, and the clarification petition was dismissed.

3/ In Remington Rand Div. of Sperry Rand, 132 NLRB 1093, 48 LRRM 1478 (1961), the Board found that since coding titles existed at the time clerical titles were certified but no effort was made by the union to represent the coding titles, that those titles could not be accreted to the existing unit by a clarification petition. However, the Board found that data processing titles, which came into existence subsequent to the certification, performed the same functions as clerical titles and were a segment of the existing unit and could therefore be accreted through a clarification petition.

Since, in the matter herein, all of the disputed classifications of employees were in existence at the time the negotiations unit was formed, the initial determination to be made with regard to each classification is whether there was a mutual intent on the part of the parties to include the classification within the recognition clause of their agreement. In the absence of a finding of a mutual intent to include the classification, it follows that the petition raises a question concerning representation.

Where it is found that the parties intended the inclusion of the title, an examination will be made to determine whether the subsequent conduct of the parties either demonstrates a mutual agreement to exclude the classification or the later conduct of the majority representative constitutes an abandonment or waiver of the claim that such employees are represented by the majority representative in the collective negotiations unit. In those cases where it is found that there has been an agreement to exclude or evidence of a waiver on the part of the majority representative it will result in the conclusion that this Petition raises a question concerning representation. If it is found with regard to any classification that a question concerning representation exists, that portion of the Clarification Petition relating to such classification will be dismissed. Where it is determined that the instant Petition is a proper attempt to clarify employees as being included in an existing negotiations unit, the question of community of interest will then be considered by the undersigned.

Supplemental Teachers

The record indicates that supplementary teachers existed prior to the formation of the WEA unit and that the WEA knew of their existence. There is no reference in the initial agreement to supplementary teachers nor has any evidence been advanced to demonstrate an agreement by the parties to include supplementary teachers in the WEA unit. The record contains no evidence of a request by WEA for recognition on behalf of supplementary teachers. In its negotiations for an initial agreement, the WEA did not present demands on behalf of supplementary teachers. In the instant matter the undersigned finds that supplementary teachers were in existence at the time the negotiations unit was formed, and there is no evidence of a mutual intent by the parties to include this classification in the recognition clause of their agreement.

No exceptions have been filed to the Hearing Officer's recommendations concerning the supplementary teachers. Accordingly, based upon these facts, the undersigned finds in accordance with the Hearing Officer and for the reasons cited above, that a question concerning representation exists concerning the supplementary teachers and that portion of the Clarification Petition relating to this classification will be dismissed.

High School Equivalency Instructors

The record indicates that high school equivalency instructors ("G.E.D.") existed prior to the formation of the WEA unit and that the

WEA knew of their existence. In the initial 1968-69 negotiations agreement between the parties Article XIA indicates that "The subject of negotiation may include.....evening school programs". The WEA maintains that this established the intent of the parties to include this classification within the recognition clause of their first agreement. However, in Article XIB of the initial 1968-69 negotiations agreement the parties recognized the complexity of the subject matter of the first written agreement between them and stated that "they understand that the application of the terms and provisions of the agreement and their operation is experimental....." The record reveals that the WEA did not present a proposal on behalf of this classification in 1968 and the first economic agreement between the parties did not contain any provisions spelling out the salary or any other terms and conditions of employment of high school equivalency instructors. In light of the stipulated experimental nature of the application of Article XIA of the 1968-69 Agreement, the concession by WEA President Ziccardi that the pre-agreement negotiations did not involve "real discussions" as to the actual makeup of the negotiations unit, and the evidence that this classification was totally ignored in the parties' initial negotiations, the undersigned cannot find sufficient evidence establishing a mutual intent to include all high school equivalency instructors in the unit. Moreover, even if the mutual intent to include this classification had been established, the record reveals that the WEA did not subsequently present any proposals on behalf of this classification at any time prior to the filing of this

petition, thus waiving its representational rights concerning this title.

Noting that no exceptions have been filed to the Hearing Officer's recommendations concerning G.E.D.'s, and based upon the facts and the above discussion, the undersigned finds, in accordance with the Hearing Officer, that a question concerning representation exists regarding G.E.D.'s and that the portion of this Petition relating to that title will therefore be dismissed.

Substitute Teachers

The record indicates that substitute teachers were in existence at the time the unit was formed. In Article XIA of the initial agreement the parties indicated that "the subject of negotiation may include" substitute teacher. Furthermore the evidence shows that the WEA submitted a proposal to increase the salary for all per-diem substitutes as part of its proposals for the initial 1968-69 agreement. However the initial agreement contained no salary schedule for substitute teachers. The record indicates that the Wayne Board of Education unilaterally increased substitute pay at a later date. In light of the stipulated experimental nature of the application of Article XIA of the 1968-69 Agreement and the evidence cited above, the undersigned cannot find sufficient evidence establishing a definitive mutual intent to include all substitute teachers in the unit. However, the evidence is sufficient to raise a reasonable inference that the

parties, contending with each other in the early stages of their collective negotiations relationship and operating during a period shortly before and after the enactment of the N.J. Employer-Employee Relations Act, may have intended the inclusion of this classification in the negotiations unit. Accordingly, the undersigned will examine the subsequent conduct of the parties. An examination of the record does not reveal at any time a mutual agreement to exclude the classification. However, in examining the conduct of the majority representative subsequent to the first agreement, an analysis of the total record reveals that the 1968 proposal on behalf of the substitute teachers by the WEA was the first and last proposal concerning this classification directly. Although the WEA raised concerns relating to substitute coverage by regular Wayne teachers in negotiations covering the 1970-72, 1972-73 and 1973-75 agreements, no proposals were made concerning the terms and conditions of substitute teachers. Significantly, in the negotiations toward the 1970-72 agreement the WEA, in expressing its concern over the extensive use of regular teachers to provide substitute coverage caused by the scarcity of substitute personnel, noted the low pay of substitute teachers. However, in these same negotiations the WEA made no demand for increased pay for substitute teachers. The WEA's conduct in the 1970-72 negotiations is further confirmed in the subsequent negotiations where it appears that the thrust of the WEA's position on substitutes was related to its concern over the use of regular Wayne teachers as

substitutes. [4/] The record therefore established that, but for its initial proposal in 1968, the WEA made no further efforts to represent the classification of substitute teachers.

As the undersigned has previously stated above, when a majority representative has been aware of a classification of employees which was in existence at the time of the formation of a unit and has, for a considerable period of time subsequent to the initial agreement, waived or abandoned its rights to represent those titles, then a question concerning representation exists, and those titles cannot be included in the unit through a clarification of unit petition. In the instant matter, the WEA was aware of the existence of per diem substitutes in 1968, presented a proposal in 1968 concerning all per diem employees, and thereafter waived or abandoned its interest in all per diem substitutes and apparently concentrated its negotiations efforts toward seeking contractual language pertaining only to regular Wayne teachers acting as substitutes.

Accordingly, based upon the facts and for the reasons cited above, the undersigned finds that the WEA has waived its representation rights concerning this title, and therefore a question concerning representation exists with regard to substitute teachers, and that portion of the instant petition relating to that classification will be dismissed. [5/]

4/ Since the Wayne Education Association represented regular Wayne teachers, its proposals concerning the use of teachers as substitutes related to the workload of unit members. However, these workload concerns of unit teachers do not demonstrate a representational interest in the classification of substitute teachers.

5/ The undersigned has previously determined that per diem substitutes who meet a regularity and continuity of employment test are appropriate for representation in a negotiations unit. See In re Bridgewater-Raritan Regional Bd. of Ed., D.R. No. 79-12, 4 NJPER 444 (Para. 4021 1978).

Bedside Teachers

The record indicates that bedside teachers were in existence at the time the unit was formed and that the WEA knew of their existence. There is no reference in the initial agreement to bedside teachers. No evidence has been advanced to demonstrate an agreement by the parties to include bedside teachers in the WEA unit. In its negotiations for an initial agreement the evidence shows that the WEA submitted a proposal to increase the hourly rate of pay of bedside teachers from $5.00 to $8.00. However the initial agreement contained no salary schedule for bedside teachers. The record indicates that the Wayne Board of Education unilaterally increased the hourly rate of pay for bedside teachers at a subsequent time. Based on the facts cited above the undersigned cannot find sufficient evidence establishing a mutual intent to include all bedside teachers in the unit. Moreover, even if the mutual intent to include this classification had been established, the record reveals that the WEA did not present any proposals on behalf of this classification for the school year 1969-70 and all subsequent years until the time of the hearing. None of the parties' negotiations agreements contain any reference to bedside teachers. The record evidences a failure of the WEA to present proposals on behalf of this classification over a span of six years during which time it consistently requested improvements in salaries and other terms on behalf of all other classifications which it undisputedly represented. The record further evidences the failure of the WEA to even insist on the inclusion

in the various agreements of the classification of bedside teachers at the rate of pay which had previously been fixed unilaterally by the Board so as to insure that this rate of pay would not unilaterally be lowered during the term of each agreement. Therefore the undersigned concludes that, even if the mutual intent to include this classification has been established, the record reveals that, but for its initial proposal in 1968, the WEA made no further efforts to represent the classification of bedside teachers, thus waiving its representational rights concerning this title.

Accordingly, based upon the facts and for the reasons cited above, the undersigned finds that a question concerning representation exists with regard to bedside teachers, and that portion of the instant petition relating to that classification will be dismissed.

Driver Training Instructors

The record indicates that driver training instructors were in existence at the time the unit was formed. During the negotiations for the initial agreement, behind-the-wheel driver instruction was provided by regular Wayne teachers during the regular school day. Regular Wayne teachers were assigned to instruct driver training classes instead of other class assignments. During this period driver instruction was a part of a teacher's duty and driver instructors received the same compensation as other Wayne teachers similarly situated on the salary guide. There is agreement among the parties that during this period driver training instructors were represented by WEA and therefore there

is sufficient evidence to establish a mutual intent to include the driver training instructors in the unit at the time the unit was formed. Accordingly, the undersigned will examine the subsequent conduct of the parties.

In the Fall of 1968, shortly after the parties entered into their initial contractual relationship on July 29, 1968, the behind-the-wheel program was extended to after school hours and week-ends. The Board unilaterally established the rate of pay for this after-school instruction at $5.00 per hour. There is no evidence that WEA made any proposals at this time in regard to the hourly rate of compensation or any other terms or conditions of employment relating to this new form of behind-the-wheel instruction. In 1969 the behind-the-wheel program was placed entirely outside of school hours and was conducted by regular Wayne teachers only. There is no evidence that WEA made any proposals regarding the driver training instructors at the time that the entire behind-the-wheel program was moved after school hours. Likewise the record reveals that in the negotiations leading to the next two collective negotiations agreements, WEA did not raise any proposals seeking to improve the terms and conditions of driver training instructors nor did it, in the alternative, seek to include in the contract the hourly rate previously fixed unilaterally by the Board to protect against its diminution during the term of the agreement. A review of the contracts covering school years 1968 through 1972 reveals that there is no specific reference in any way to behind-the-wheel instruction. In the negotiations for the 1973-1975 contract, at a time when the behind-the-wheel program was now staffed by both regular Wayne teachers and non-Wayne teachers, the WEA made its first specific proposals concerning driver training instructors' compensation and they related to compensation

during the summer sessions. The contract which resulted from these negotiations likewise did not contain a driver training compensation provision.

On the basis of these facts the undersigned concludes that in the initial agreement there was an intent by the parties to include driver training instructors as part of the WEA unit. However, shortly after the formation of the unit, the performance of such services during the regular school day was discontinued and the program became an after-school-hours program. The WEA did not, over a considerable period of time, negotiate or seek to establish terms and conditions of employment for the driver training instructors functioning in the after-school-hours program. This conduct constituted a waiver of its representational rights to this title and had the effect of creating a question concerning the representation of these employees prior to the summer of 1974. The events of the summer of 1974 serve to confirm the conclusions reached above. In the summer of 1974, the behind-the-wheel instructors expressed dissatisfaction with their rate of pay which, as noted above, had not been negotiated and remained the same for approximately six years. The behind-the-wheel instructors initially acted on their own by directly communicating with the Board and expressing a desire for increased remuneration. This would appear to support the conclusion reached above that these instructors were unrepresented and therefore attempted to deal directly with the Board concerning their wage rate. When rebuffed by the Board, these instructors solicited the assistance of WEA. WEA requested an immediate meeting with the Board on behalf of Driver Education teachers and stated that "The Association has authorization to represent these teachers." It seems clear to the undersigned that

an organization which had consistently represented the interests of these instructors in the past would not find it necessary to re-assert its representational status. It seems more reasonable to conclude that WEA was asserting that it now had authorization to represent these teachers and was requesting a meeting on their behalf. In a letter dated July 22, 1974 the Board president acknowledged receipt of the WEA letter and stated that "a proposal for any adjustment in this area (driver teachers) would be a proper item for submission for the 1975-76 contract negotiations". However, a Board spokesman, approximately two months later, in the presence of a majority of the Board members, stated that a proposal regarding the rate of pay for behind-the-wheel instructors "was not appropriate for negotiations".

In light of the entirety of the conduct of the parties with regard to this title and taking into account the unrebutted testimony of the Board president that she was not authorized by the Board to write the letter of July 22 and noting the repudiation of the content of the letter by the majority of the Board shortly thereafter, the undersigned cannot attribute compelling evidentiary weight to this one letter as representing an intent on the part of the Board to join with WEA in establishing a mutual intent to include this classification within the recognition clause of their agreement.

The Hearing Officer recommended that the majority representative of teaching personnel represent personnel in their performance of any after hour work which is tantamount to extra-curricular activity supervision and, citing In re Long Branch Board of Education, D.R. No. 78-24 (1977), recommended that the failure to negotiate a rate of compensation

for such employment not be considered an abandonment of the representative status of the majority representative for employees engaged in such activities. The undersigned cannot adopt this recommendation inasmuch as the holding in Long Branch is limited to those school district situations where the after-hour extra-curricular activity supervision may be imposed involuntarily on employees by the public employer and where the complement of personnel performing the extra-curricular activity consists exclusively of regular ten-month teachers. The facts herein do not establish that this activity is or could be imposed involuntarily on the employees and the record reveals that the complement of behind-the-wheel instructors consists of both regular Wayne teachers and non-Wayne teachers. 6/

Accordingly, based upon the facts and for the reasons cited above, the undersigned finds that the WEA has waived its representation rights concerning this title and therefore a question concerning representation exists with regard to driver training instructors and that portion of the instant petition relating to that classification is dismissed.

6/ In a unit clarification proceeding, a determination of per se inclusion may be made where both essential elements are present. The fact that the assignment may be imposed upon regular school teachers as part of their responsibilities merely presents the employee representative with the opportunity to negotiate the terms and conditions of employment of teachers performing unit work. However, where the evidence indicates that the "unit work" is exclusively performed by unit members, and where performance of the duty may be imposed upon unit members as a matter of policy or law, the position associated with the work function is inherently part of the unit recognition.

Summer School Teachers

The record indicates that summer school teachers were in existence at the time the unit was formed. In Article XIA of the initial agreement the parties noted that "the subject of negotiation may include" summer school programs. In addition the WEA submitted a proposal to increase the remuneration of certain summer school teachers as part of its proposals for the initial 1968-69 agreement. However the initial agreement does not contain a salary schedule pertaining to Summer School Teachers. After evaluating the evidence cited above and considering the stipulated experimental nature of the application of Article XIA of the 1968-69 Agreement and the concession by WEA President Ziccardi that the pre-agreement negotiations did not involve "real discussions" as to the actual make-up of the negotiations unit, the undersigned reaches the conclusion that there is insufficient evidence to establish a definitive mutual intent to include all summer school teachers in the unit at its formation. However, as in the case of substitute teachers, the evidence is sufficient to raise a reasonable inference that the parties, contending with each other in the early stages of their collective negotiations relationship and operating during a period shortly before and after the enactment of the New Jersey Employer-Employee Relations Act, may have intended the inclusion of this classification in the negotiations unit. Accordingly, the undersigned will examine the subsequent conduct of the parties and other relevant criteria.

The Commission has in In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976) considered the matter of summer school teachers. In that case the employee representative sought to

negotiate the salaries and fringe benefits of unit members employed during the summer to teach in the University's summer session. The employee representative represented 10 month faculty and 12 month faculty. The 12 month faculty at Rutgers do not teach in the summer session. The employer argued that it was obliged to negotiate only regarding the faculty's employment as 10 or 12 month faculty. The employer pointed out that the summer session is staffed by both 10 month faculty members and by faculty members from other colleges. Under these circumstances the Commission found that there was not a mandatory obligation on the part of the employer to negotiate the terms and conditions of unit members functioning as teachers in the summer school. The Commission pointed out that the employee representative could clarify the situation by either seeking recognition from the employer or certification from the Commission as the representative of summer school teachers or, if it already claims to represent these employees, by filing a unit clarification petition with the Commission. This alternative would require a claim by the employee representative that it represents summer session employees. The Commission concluded by saying that until the representational status of summer school employees was established, the employer was not required but could permissively negotiate the pay and benefits of unit members who teach in the summer session and the parties could permissively negotiate the expansion of the negotiations unit to include summer session work. 7/

7/ The Supreme Court in Ridgefield Park Education Assn. v. Ridgefield Park Bd. of Ed., A138, Sept. term 1977, decided Aug. 2, 1978, 78 N.J. 144, (1978) has rejected the permissive category of negotiations and determined that there are but two categories of subjects in public employment negotiation - mandatorily negotiable terms and conditions of employment and non-negotiable matters of governmental policy.

The undersigned is guided by the above-cited decision in making the determination in this matter. In the clarification of unit petition filed herein, the WEA must claim and show that it already represents all summer school teachers. In support of its claim the WEA argues that Article XI of the first agreement between the parties evidences an intent by the parties to include summer school within the contract and its' continuous presentation of negotiations demands in this area shows a consistent interest and claim in the representation of these employees. On the other hand, the Board disputes the propriety of utilizing Article XI to establish the initial intent of the parties and claims that, notwithstanding the WEA's repeated demands, it has consistantly refused to negotiate concerning summer school employees.

The undersigned, after carefully studying the record herein, finds that the record fails to establish that the WEA has in fact been the representative of all summer school employees.

Though it is clear that the WEA continued in its attempts to present proposals related to summer school employment, it is equally clear that the Board consistently held the position as articulated by its Superintendent that "summer school was independent of the WEA and that they would not recognize them as negotiating for summer school teachers". The record establishes that over a considerable period of time the parties maintained their respective positions. This situation is confirmed by the reports of two different fact-finders who found that the WEA was making demands regarding summer school employment and the Board had refused to negotiate in this area. The above facts are sufficient to establish an ongoing dispute as to the claimed representational status of the WEA vis a vis summer school.

The undersigned has carefully examined the proposals made by the WEA relating to summer school and finds, as in Rutgers, that the WEA's interest was in negotiating the salaries of unit members employed during the summer. WEA's summer school proposals consistently proposed a summer school salary which was based upon a percentage of the teacher's annual salary. In its proposals for the 1968-69 Agreement, WEA included a proposal that "the Board of Education increase the current summer school salary from 10% of a teacher's annual salary, up to a maximum of $650, to a flat 10% of a teacher's annual salary". WEA presented the same summer school proposal for the 1969-70 Agreement. In its proposals for the 1970-72 Agreement, WEA included the following summer school proposal: "Teachers employed in summer school shall be paid 10% of their annual contractual salary." The 1970-72 negotiations culminated in fact-finding. The Fact-Finder stated in part: "An overwhelming number of the teachers in the Wayne summer school are teachers within the system. The Board does pay these persons in accord with a percentage based upon their annual salary not to exceed $650". Based on the common usage of this language in the labor relations context as confirmed by the fact-finder's identical terminology, the undersigned finds that the WEA was consistently attempting to negotiate a flat 10% of the unit member's 10 month salary as the compensation for that person's employment in the summer school program. Therefore it follows that these proposals were not intended to encompass all summer school teachers, some of whom might be non-Wayne teachers, first time teachers,

part-time teachers, substitutes etc. who do not have a cognizable annual contractual salary.

Accordingly, if negotiations concerning summer school actually took place, they were the "permissive" negotiations envisioned by Rutgers concerning the pay and benefits of unit members who teach in the summer session. However, since the WEA proposals did not encompass all summer school teachers, the resulting negotiations, if any, are not proof of continuous representation by WEA of all summer school teachers. Instead it must lead to the conclusion that WEA has at no time represented all summer school teachers and thereby has waived its representational interest in this title. 8/

Accordingly, based upon the facts and for the reasons cited above, the undersigned finds that the WEA has waived its representation rights concerning this title, and therefore a question concerning representation exists with regard to summer school teachers and that portion of the instant petition relating to that classification will be dismissed.

8/ Significantly, in the instant Petition, the WEA has requested a determination by PERC in favor of the inclusion of regular summer school teachers while at the same time requesting the inclusion of all driver education teachers, all substitutes, all bedside teachers, all graduate equivalency diploma teachers and all supplemental teachers.

Accordingly, the undersigned, having found for the reasons stated above, that each portion of the instant petition must be dismissed, hereby dismisses the petition in its entirety. 9/

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Carl Kurtzman, Director

DATED: August 30, 1979
Trenton, New Jersey

9/ If WEA, or any other organization, desires to represent any or all of the classifications included in this petition, it must file an appropriate petition for certification of public employee representative.

H.O. No. 79-5

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

In the Matter of

WAYNE BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. CU-187

WAYNE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

A Commission Hearing Officer, in a Clarification of Unit proceeding, recommends that the Commission find that summer school teachers, driver education instructors, bedside teachers, and substitute teachers are included with regular teaching personnel in a negotiations unit represented by the Wayne Education Association. The Hearing Officer recommends that high school equivalency instructors and supplementary instructors not be found to be in the Wayne Education Association unit.

The Hearing Officer bases his recommendations on the conclusion that both the Wayne Board of Education and Wayne Education Association agreed to include summer school teachers, driver education instructors, bedside teachers and substitute teachers in the Wayne Education Association unit at the inception of their negotiations relationship and did not, thereafter, agree to exclude any of these personnel from the unit. Additionally, the Hearing Officer finds evidence of a second recognition of Wayne Education Association as the representative of driver instructors. Further, the Hearing Officer finds that bedside instruction and driver education instruction are essentially extracurricular assignments performed by regular Wayne teachers, and that the personnel performing these assignments are unit members. The Hearing Officer concludes, however, that the parties did not intend the inclusion of supplementary and high school equivalency personnel in the Wayne Education Association unit. The Hearing Officer also finds that there is no community of interest between the high school equivalency instructors, who are part of the adult school program, and WEA unit personnel.

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

H.O. No. 79-5

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

In the Matter of

WAYNE BOARD OF EDUCATION,

Public Employer,

-and- DOCKET NO. CU-187

WAYNE EDUCATION ASSOCIATION,

Petitioner.

Appearances:

For the Public Employer
Greenwood, Weiss & Shain, Esqs.
(Stephen G. Weiss, of Counsel)

For the Petitioner
Goldberg & Simon, Esqs.
(Theodore M. Simon, of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

Pursuant to a Notice of Hearing to resolve a question concerning the composition of a collective negotiations unit represented by the Wayne Education Association ("WEA"), hearings were held before the undersigned Hearing Officer on April 28, 1976, June 17, 1976, September 13, 1976, January 18, 1977, January 27, 1977, and February 15, 1977. (Transcripts taken on these dates are hereinafter labelled T 1 - T 6, respectively.) At the hearings, the parties were provided an opportunity to examine and to cross-examine witnesses, to present documentary evidence, and to argue orally. WEA provided a post-hearing brief on November 28, 1977. The Public Employer, Wayne Board of Education (the "Board"), has not filed a brief.

WEA is the recognized collective negotiations representative of employees in a unit which may generally be described as including contracted certificated professional personnel employed by the Board. [1/] The Board

1/ More specifically:

> The Board recognizes the WEA as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all contracted certificated personnel employed by the Board, including persons on leave of absence, nurses and department chairmen, but excluding assistant superintendents, directors of elementary and secondary education, directors of personnel, guidance directors, coordinators, principals, vice principals, athletic directors and director of special services. [Exhibit JE-16, 1975-1977 Agreement, Article I, Recognition Clause]

recognized WEA as representative of these employees prior to the 1968 Amendment of the New Jersey Employer-Employee Relations Act (the "Act"), which granted public employees the statutory right to negotiate terms and conditions of employment with public employers through certified or recognized majority representatives. 2/

WEA filed the instant Clarification of Unit Petition in order to obtain resolution of a dispute with the Board concerning the following classifications of personnel:

Summer school teachers
High school equivalency instructors
Driver training instructors
Bedside teachers
Substitute teachers
Supplementary teachers

WEA claims that these employee classifications are included in its negotiations unit. WEA bases its claim primarily upon the alleged factual premise that the parties intended that these classifications be included in WEA's unit when the parties entered into their first collective negotiations agreement, and that the parties have not subsequently agreed to exclude these employee classifications from the WEA unit. The Board asserts that it has never recognized WEA as the representative of any of the above-classified employees. The Board further states that the above-classified employees do not share a community of interest 3/ with the full-time professional teaching personnel represented by WEA, and, therefore, that a unit in which all employees would be commingled would not be an appropriate collective negotiations unit as required by the Act. WEA's response to the Board's assertion is that the employees involved not only share a community of interest which would embellish its unit with appropriateness, but that the commingling of all employees represents the "most appropriate unit" that can be established. 4/

2/ C. 303, L. 1968, N.J.S.A. 34:13A-1 et seq.

3/ See N.J.S.A. 34:13A-5.3 and 6(d).

4/ For reasons expressed by the undersigned in In re Fair Lawn Board of Education, H.O. No. 77-6, 3 NJPER 44 (1977), the "most appropriate unit" standard used in resolving questions concerning representation is largely inapplicable in resolving questions concerning the composition of a unit that has already been established. cf. In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977). The undersigned agrees, however, that if a community of interest does not exist among employees, their commingling is prohibited by statute, and the fact of a previous commingling becomes irrelevant.

Because of the framing of the issues by the parties in the above manner, an extensive evidentiary record was developed concerning the duties and employment of the personnel involved in this proceeding, as well as the negotiations history of the unit. The undersigned has determined that the clearest method of presenting the facts, issues, and recommendations in this matter is to first set forth the overall negotiations history of the parties, and, thereafter, to examine in detail the duties and employment aspects of each employee classification together with details concerning the specific negotiations history between the parties relevant to each employee classification.

I

OVERALL NEGOTIATIONS HISTORY

The parties entered into their contractual relationship on July 29, 1968, with the execution of "professional negotiations agreement." 5/ Thomas Ziccardi, President of WEA from 1968 through 1971, testified that the pre-agreement negotiations between he and Mr. Salvatore Ruggiero, the Board attorney, did not involve "real discussions" as to the actual makeup of the negotiations unit.

This first negotiations agreement was effective for school year 1968-1969. The Agreement provided a procedure for the commencement of salary negotiations which would cover the period July 1, 1968 to June 30, 1970. Article X of the Agreement contains a recognition provision which provides as follows:

> A. The Wayne Board of Education recognizes the right of its professional employees to form and join professional employee organizations and for such organizations to present grievances and proposals to the Board, and the Board further recognizes that its professional employees may individually or in concert engage in other legal activities for the purposes of establishing, improving and maintaining professional standards.

5/ Exhibit JE-2

> B. The Wayne Board of Education, for the purposes of this agreement, recognizes the Association as the exclusive representative of its teacher employees, authorizing such representation and who are certified by the New Jersey Department of Education for collective negotiations on terms and conditions of employment.

* * *

In Article XI, the parties agreed to the following provision:

> A. The Board and the Association agree to enter into professional negotiations in good faith on all matters related to the terms and conditions of teachers' employment in accordance with the procedure hereinafter set forth.
>
> The subject of negotiation may include, but need not be limited to, teachers' proposals, salaries, insurance, medical and other fringe benefits, specialists, class size, teaching hours and teaching load, school calendar, extra curricular activities, performance of non-teaching duties, teaching conditions, teacher facilities, use of school facilities by the Association, summer school and evening school programs, teacher evaluation, sick leave, terminal pay, personal leave, leaves of absence, sabbatical leave, accident benefits, health services, substitute teacher, professional development and education improvement.

* * *

Ziccardi testified that the reason for Article XI was that the parties were proceeding, in the absence of a collective negotiations statute, in "guess work," speculating as to what could be negotiated once the anticipated Act was passed and providing for the intent to negotiate these items. The experimental nature of the Agreement was recognized by the parties in Article II which provides:

* * *

> B. The Board and the Association recognize the complexity of the subject matter of this first written agreement between them dealing with terms and conditions of employment between the association members as employees and the Board as employer, and they understand that the

> application of the terms and provisions of the agreement and their operation is experimental and they agree that this agreement after its termination shall not be used as evidence by either party in proceedings of any kind or nature in which they are adversaries including any legal proceedings related to conditions and terms of employment by the association's members and the "Board."

In light of the parties' agreement to pend salary negotiations, the 1968-1969 Agreement does not contain a salary schedule or any detailed list setting forth compensation for any personnel. There were, however, proposals and discussions relating to compensation.

An Agreement covering 1969-1970 was entered into by the parties on January 27, 1969. 6/ The Agreement is limited to economic issues. A "teacher's salary guide" for 1969-1970 is attached to the Agreement. Ziccardi's testimony confirms that the parties limited discussions to economic issues. 7/

The Association proposed a change in the language of the recognition clause for the parties' next negotiations agreement (1970-1972). The proposal was to provide the following language:

> The Board hereby recognizes the Association as the exclusive and sole representative for collective negotiation concerning the terms and conditions of employment for all certificated personnel whether under contract, on leave, on a per diem basis, employed or to be employed by the Board, including: teachers, guidance counselors, directors of guidance, department chairmen, nurses, but excluding: assistant superintendents of schools, the director of elementary education, the director of secondary education and the director of personnel. 8/

The parties' negotiated agreement, covering two years (1970-1972), provides the following as the recognition clause:

> The Board recognizes the W.E.A. as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all certificated personnel employed by the Board, including persons on leave of absence and nurses, but excluding assistant superintendents, directors of elementary and secondary education, directors of personnel, principals and vice principals. 9/

6/ Exhibit JE-4

7/ T 1:37

8/ Exhibit JE-6

9/ Exhibit JE-7

Charles Tucker, the Association's chief negotiator for the 1970-1972 Agreement testified that the Association patterned its proposed change in the recognition clause after the NJEA Sample Agreement language and that the proposed language change was reflective of increased sophistication in contract draftsmanship. According to Tucker, the Association did not intend to change the degree of its representation. Tucker recalled that the Board found the "or to be employed" language unacceptable and desired to exclude principals and vice principals from the unit. Tucker testified that to the best of his recollection, the Board sought no other exclusions. 10/ Later, upon cross-examination, Tucker testified that the exclusionary language in the recognition clause was not patterned after the NJEA Sample Agreement, but was initiated by the Board. Asked if any special thought was given to the phrase "for all certificated personnel whether under contract, on leave, on a per diem basis," Tucker responded, "Only as it may have appeared as I say in the contract put out, the suggested contract put out by NJEA." 11/

The 1970-1972 Agreement 12/ does not contain a specific provision relating to any of the groups of employees in dispute herein. Article IV-E(2) discourages and limits the use of regular teachers as substitutes. The sole salary schedule attached to the Agreement covers the regular teachers guide only. The Agreement sets aside a sum of money for extracurricular stipends with the proviso that the guides be mutually agreed upon by February 1, 1971. The extracurricular schedule, Exhibit JE-8, does not refer to any of the disputed titles.

During negotiations toward the 1972-1973 Agreement the Board proposed the following change in the recognition language:

> The Board recognizes the WEA as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all certificated personnel employed by the Board, including persons on leave of absence and nurses, but excluding assistant superintendents, director of elementary and secondary education, directors of personnel, principals

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10/ T 1:66-67

11/ T 1:85-86

12/ It is noted that the Agreement was reached pursuant to a mediation effort by a Commission appointed fact-finder.

> and vice principals, guidance personnel, coordinators, department heads and any individual involved one-half or more time in administrative or supervisory positions. (original proposal as italicized) 13/

Additionally, it was at about this time that WEA claims, and its witnesses so testified, that the Board first began to assert that individual WEA proposals, concerning the personnel in dispute herein, were not acceptable at the table for negotiation. Further elaboration of the specifics as to each category is contained in later sections of this report.

Negotiations for the 1972-1973 Agreement led to fact-finding and a fact-finding report issued on March 9, 1972. This report, Exhibit JE-10, does not identify the recognition clause, per se, as an item in dispute, although it does refer to a specific outstanding dispute over recognition concerning guidance counselors which had been placed before PERC. 14/

The 1972-1973 Agreement, dated August 31, 1972, contains a recognition clause that does not contain the additional exclusionary language proposed and emphasized by the Board [see above]. 15/ However, the parties did change the language of the 1970-1972 recognition clause by adding the word "contracted" before the word "certificated." Tucker, who was on WEA's negotiations committee, testified that the insertion of the word "contracted" was

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13/ Exhibit JE-9

14/ On January 28, 1972 the Board wrote to the Commission referring to the titles italicized in the initial Board proposal, and stating that both the Board and WEA "would like your opinion as to what positions are considered to be part of W.E.A.'s unit classification. [Exhibit JE-17] However, no formal Clarification of Unit Petition was filed until much later, after the execution of the 1972-1973 Agreement.

The Board filed a Clarification of Unit Petition on January 17, 1973 [Docket No. CU-101] wherein it requested that Coordinators and Supervisors, Nurses, Department Heads, Guidance Directors, Director of Special Services, and Athletic Directors be excluded from the unit. The matter was held in abeyance pending Commission resolution of similar petitions, particularly those involving department heads. On October 23, 1974, the parties, at hearing, stipulated an agreement resolving this dispute.

Apparently, the fact-finder's reference to a proceeding before PERC was based upon the January 28 letter.

15/ Exhibit JE-11

proposed by the Board and agreed to by WEA because it believed that the insertion of "contracted" represented a "meaningless" change. 16/ Later, Tucker corrected his testimony by testifying that the Association proposed the insertion of the word "contracted" 17/ to resolve the difficult dispute as to recognition. Tucker's later testimony that WEA proposed the insertion of "contracted" is supported by documentary evidence. Exhibit P-4 includes the word "contracted" in the WEA counterproposal. Tucker further testified that during the discussions concerning the recognition clause, the Board did not propose the exclusion of the personnel categories in dispute herein. Tucker's testimony as to this point is inferentially supported by Exhibit P-2, minutes of a November 3, 1971 negotiations session, in which the dispute as to unit structure was discussed only in the context of the personnel emphasized by the Board in its proposal, supra. 18/

David O'Grady, Board Superintendent since 1968, and a regular participant in negotiations for the Board from contract to contract, testified that the Association never represented that the insertion of the word "contracted" was intended to include the disputed categories. O'Grady testified that in the Board's view, the insertion of "contracted" was intended to refer to full time employees under contract from September 1 through June 30, and that there was specific dialogue with WEA's negotiations team as to this intent. O'Grady testified:

> That we wanted to have it clear that the contracted employees were those people who were full time on our staff who were working with a signed contract by both the individual and the Board president and they had gone to agenda and recognized as full time staff members which is different from those people who are substitute

16/ T 1:98

17/ T 1:123

18/ This testimony relating to the 1972-1973 recognition dispute must be considered in context with other specific testimony presented, infra, which more specifically trace the dispute over these categories. The intent of the parties in inserting the word "contracted" into the recognition clause is an important aspect of this matter and will be discussed infra.

teachers or people who are supplemental. 19/

The recognition clause of the parties 1973-1975 Agreement, 20/ dated August 27, 1973, recognizes the outstanding nature of the dispute then before PERC [supra, n.14]. Otherwise, the recognition clause remained substantially the same as in the 1972-1973 Agreement, and is set forth below. 21/

The 1975-1977 recognition clause reflects the resolution of the clarification issue, and is the same as set forth below at footnote 21, with the deletion of the underlining, asterisks, and the asterisked reference language. 22/

Neither the 1972-1973 Agreement or the 1973-1975 Agreement contain specific contract provisions or salary schedules applicable to the disputed personnel herein. The previously noted limitation of the use of regular teachers as substitute teachers remains in these contracts, with minor modifications. The instant Petition was filed on April 30, 1975, prior to the execution of the 1975-1977 Agreement.

19/ See, generally, T 3:10-17, and, specifically, T 3:15. O'Grady's recollection was that the insertion of the word "contracted" arose when the Board was represented in negotiations by Richard Powell, Esq. Powell, however, was retained in Fall 1972, and negotiated the Board's 1973-1975 Agreement. O'Grady's faulty recollection in placing the negotiations at a later time casts some doubt as to the accuracy of his recollection of these discussions.

20/ Exhibit JE-14

21/

ARTICLE I

RECOGNITION

A. The Board recognizes the WEA as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all contracted certificated personnel employed by the Board, including persons on leave of absence, nurses* and department chairmen, but excluding assistant superintendents, directors of elementary and secondary education, directors of personnel, principals and vice principals.

*Pending determination by P.E.R.C. of the Board's clarification of unit petition in the matter concerning Nurses, Department Chairmen, Director of Sepcial Services, Guidance Directors, Coordinators, and Athletic Directors and any appeals therefrom.

22/ Exhibit JE-16

II

INDIVIDUAL CLASSIFICATIONS

A.

Summer School Teachers

1. Employment Relationship

The Board has regularly operated a summer school program for students. The program commenced at the elementary level in 1951. A secondary level program has been in operation for 20 years. A Multiple Handicapped Center was added in 1968, and an Employment Orientation Program was added in 1970. 23/

Mr. Robert L. Argentero, the Board's personnel director, as well as Association witness Ziccardi, agree that 80% to 90% of summer school teachers are regular Wayne teachers. 24/ More specifically, in 1976, 52 of the 60 summer school teachers were regular Wayne teachers. Summer school lasted 25 days in 1976 [24 days at the secondary level], and school was in operation for five hours per day.

English language Arts (1-5), Math (1-5), Instrumental Music and Environmental Education were offered at the elementary level in 1976. Thirty-four classes at various levels were offered in the secondary level.

Hiring for summer school continues, if necessary, until the day before summer school begins, depending upon enrollment. Summer school teachers receive a letter of appointment indicating salary. There is no formal contract to sign. Regular Wayne teachers are given preference for summer school positions. A procedural summer school staffing policy has been followed by the Board since 1974 consistent with recommendations prepared by a WEA appointed "Committee for Summer School Procedures." The testimony of Superintendent O'Grady states that the Board's approval of the Committee suggestions was outside of the negotiations process. 25/ The policy provides, in part, for preference to Wayne Teachers by tenure and by subject area.

23/ Exhibit PE-2

24/ T 1:27; T 4:6

25/ Exhibit P-7; T 3:13-20. See also, T 2:20, 69-71

Two of the three summer school principals are regular Wayne teachers. The third principal is regularly a coordinator who is in a supervisory unit.

Summer school teaching does not provide any fringe benefits. 26/

2. Negotiations History

In its proposals for the 1968-1969 Agreement, WEA included a proposal that summer school teachers receive a flat 10% of their regular annual salary. 27/ WEA President Ziccardi testified that the Board did not respond that it questioned WEA's representative capacity, but rather that it considered the present rate sufficient and had experienced no trouble in filling summer school positions. 28/ On cross-examination, and upon redirect-examination, Ziccardi stated that he could not recall the Board negotiator, attorney Ruggiero, at any time stating that the Board was not going to negotiate with WEA over summer school salary. Ziccardi had a very definite recollection of discussing summer school. 29/ Later, WEA abandoned its summer school proposal. 30/

Board Superintendent O'Grady testified that he was present during 1968 negotiations, and that WEA "may have suggested that they represented some personnel, summer school teachers [sic]." According to O'Grady, the Board's response was that it considered summer school "independent of WEA," and that the Board would not recognize WEA as negotiating for summer school employees. O'Grady further testified that he could "never remember it [e.g. the compensation of summer school personnel] being discussed at the negotiating table." 31/

26/ See, generally, T 4:5-51

27/ Exhibit JE-1 The Board's policy was to apply a 10% rate; however, the Board limited the maximum salary for summer school to $650.

28/ T 1:23

29/ T 1:41; T 1:55-56

30/ Exhibit JE-1

31/ T 3:4 Both Ziccardi and O'Grady were forthright in their testimony. In light of the clear existence of documentary evidence indicating the presentation of a WEA proposal concerning summer school, and Article XI of the 1968-1969 Agreement, and the vivid recollection of Ziccardi, I credit Ziccardi's testimony that summer school was in fact disscussed in the manner described by Ziccardi.

WEA presented the identical summer school proposal for the 1969-1970 Agreement. 32/ Ziccardi testified that the proposal met the same response which was given the year before. 33/ Charles Tucker, who was on WEA's negotiations committee, also testified that the Board's position at the negotiations table was that it did not have a problem hiring summer school teachers for $650, and that it saw no need to increase the amount. Tucker testified that the Board did not raise any question as to the representative capacity of WEA for summer school personnel. Tucker stated that WEA ultimately dropped the proposal, without its resolution, in favor of seeking money in more important areas. 34/

Tucker, who was chief WEA negotiator for the 1970-1972 Agreement, testified that WEA's standard summer school proposal was reflected in WEA's proposals for that Agreement. 35/ The Board again responded that it did not have difficulty hiring teachers for $650 and did not have to increase the salary. Tucker testified that the Board did not question WEA's representative status for summer school personnel. However, the Board, according to Tucker, questioned whether a majority of summer school teachers were Wayne teachers, and WEA presented statistical data to the Board indicating that 89% of the summer school teachers were regular Wayne teachers. 36/ The dispute was eventually submitted to a Commission fact-finder as impasse item #6. The Board's written position before the fact-finder was the following:

> The Board of Education feels that we have adequate provision to meet the needs of a summer school program. Funds have been provided in the budget in the amount of $20,000 to underwrite any deficit that might be caused by the summer school. While the majority of summer school personnel are

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32/ Exhibit JE-3

33/ T 1:30

34/ T 1:59-63

35/ Exhibit JE-6, Schedule B-1

36/ T 1:68-70

> Wayne teachers, we do have staff members from other school districts on the summer school faculty. The increase in the number of summer schools in the neighboring school districts year by year may mean that we could reach a time in the not too distant future that it will not be necessary for us to have our own program for summer school. 37/

The Board's submission does not challenge WEA's representative capacity of summer school personnel.

Tucker testified that during negotiations toward the 1972-1973 Agreement the "Board first began to take the position that these items were not acceptable at the table." 38/ According to Tucker, the Board's position was first articulated by Calvin Koch, the Board's chief negotiator for the 1972-1973 Agreement, and that the discussions at the negotiations table "varied slightly" from previous years "in the sense that the Board was beginning to come around to a position of saying we're not sure we even ought to talk to you about this." Asked if this was the Board's initial position, Tucker replied, "I believe that developed during the negotiations." 39/ Tucker further testified, "As I recall, they only took that position verbally and only in the most nebulous way and I recall my thinking, my feeling that well, they're just saying that. They don't mean that." 40/

The summer school issue was placed before Commission fact-finder Daniel Collins. The dispute as to summer pay related to three items: pay for guidance counsellors, summer curriculum work performed by teachers, and pay for summer school teaching. 41/ Collins notes, in his report, that the Board presented a "unit" question as to all summer work, including summer school teaching, and indicated that the parties had not negotiated concerning summer school teaching due to the Board's position. 42/

37/ Exhibit P-1

38/ T 1:93 Tucker's response was directed to an inquiry relating to the Board's negotiating position concerning summer school personnel.

39/ Id.

40/ T 1:96

41/ Exhibit JE-10

42/ The fact-finder recommended negotiations; however, there is no evidence as to whether the parties accepted this position, or as to whether there were subsequent negotiations.

The Association included a summer school proposal in its proposals for the 1973-1975 contract. 43/ According to WEA witness and chief negotiator Michael Pelak, the Board discussed summer school salaries, at first taking the position that it could hire personnel at the existing levels. Pelak testified that after February 1973, and a budget defeat, the Board's position hardened in terms of the propriety of discussing summer school salaries with WEA. 44/ Richard Powell, the Board's negotiations representative for the 1973-1975 contract, testified that the Board, prior to negotiations, told him that summer school personnel were not included in WEA's negotiations unit. Powell stated that although there were WEA summer school proposals, these were not discussed until fact-finding. He stated, additionally, that the Board's position concerning non-negotiability did not change, but the words conoting non-negotiability were not expressed until fact-finding. The reasons, he explained, was that "very little negotiation on anything" transpired prior to fact-finding. 45/

Association witness Tucker testified that the Board's position in the early negotiations was that it would not discuss money items until the non-money items were resolved. Tucker stated that WEA's understanding was that the money items, including summer school salaries, were to be treated as one lump package. Tucker recalled that when WEA raised any money item (all WEA proposals were raised), the Board responded with the above negotiations position that it would not discuss the item until the non-money items were resolved. Tucker recalled that it was not until fact-finding that Powell indicated that summer school was not negotiable, and that WEA believed this constituted a change of position. 46/

Fact-finder Jonas Aarons issued his report on March 13, 1973. Aarons stated:

> The Association proposed a salary schedule for summer school teachers as follows:

43/ Exhibit JE-12

44/ T 2:8, 10-11, 32-42

45/ T 3:36-41 Powell recalled that there were about three sessions before mediation, that summer school was not discussed at mediation, and that "things started developing" at fact-finding.

46/ T 3:53-54

BA - - - - - - -	$ 850.00
MA - - - - - - -	1,050.00
Ma/30 - - - - - -	1,250.00

> The Board asserted that the summer school salaries are not a negotiable item. This Fact-Finder had submitted to him a copy of a previous Fact-Finding Report for the school year 1972-1973 and he noticed that the Board there raised the same objection to the proposal on summer school salaries, that is, that issue is not negotiable. For the same reasons that the previous Fact-Finder rejected the Board's argument it must be rejected this year. An overwhelming number of the teachers in the Wayne summer school are teachers within the system. The Board does pay these persons in accord with a percentage based upon their annual salary not to exceed $650.00. The contract does not in any way exclude summer school staff. All things considered it is very difficult to find any reasonable rational to exclude summer school salaries from the ambit of collective negotiations and failing any further evidence in support of the Board's position I must reject such position. It is common practice to negotiate summer school salaries. They have not been negotiated here but they should have. The Board because of its position as to negotiability did not make any counter-proposal as to summer school salaries, however, they were aware of the tenuousness of their position. It had been rejected before. It had not sought any clarification from PERC although the issue was not a new one. I must, failing any evidence from the Board as to merits of the Associations proposal, look for guidance to comparable districts. I therefore recommend based on comparable districts, $850.00. 47/

Tucker testified that he believed that Aarons was mislead by the Board into believing that the Board, at earlier sessions, had taken a position of non-negotiability. While WEA objected to some areas of the fact-finder's report, it did not raise this claim with either the fact-finder or the Board.

The 1973-1975 Agreement is dated August 27, 1973. Beginning in April 1974, WEA's Summer School Procedures Committee and the Board Superintendent exchanged letters relating to a summer school hiring procedure (discussed, supra, at p. 10). The exchange culminated on June 17, 1974. WEA had suggested this dialogue, believing that certain WEA adherents had been excluded from

47/ Exhibit JE-13, Issue 18

from summer job considerations. Tucker stated:

> We discussed this in the executive committee of the WEA and I had several telephone conversations with Mr. O'Grady concerning this matter and I suggested to him that the only alternative to bringing this up at the negotiating table and hammering out some kind of procedure, the only alternative to that was that he agree to meet now with a committee of our Association and come up with a procedure outside the framework of the Association.
>
> Q. And what was his response to that?
>
> A. He agreed to meet with that committee. 48/

Superintendent O'Grady recalled the WEA concerns prompting the formation of the committee, but he could not recall how the committee was formed. O'Grady stated that the procedure was not negotiated at the negotiations table with WEA. 49/ Tucker's testimony corroborates O'Grady's recollection that the context of the Board-WEA exchange was deemed "discussion," not negotiation. 50/

In September 1974, WEA submitted its proposals for the 1975-1977 Agreement, which contained the standard WEA salary proposal for summer school. 51/

B.

High School Equivalency Instructors

1. Employment Relationship

Edward Fritz has been Director of the Wayne Adult School since 1968. According to Fritz, the High School Equivalency Program (G.E.D., or General Education Development), included among the various adult programs, had been in operation prior to 1968. In 1970, the program was approved by the State. Prior to 1970 the program was financed through tuition. Since 1970, G.E.D. has been funded through a combination of State aid and tuition. The program is self-sustaining.

The program operates in the Wayne Hills High School at night. There are seven instructors and one guidance counselor. Four teachers are regular

48/ T 2:69

49/ T 3:13, 20

50/ T 3:60

51/ Exhibit JE-15

Wayne teachers; three teachers are not from the Wayne system (One teacher is regularly employed by American Cyanimid Corp.). The guidance counselor is a Wayne guidance counselor. The staff, all hired by Fritz, has consisted of the same personnel since 1970. They receive $15 per hour and do not receive fringe benefits or achieve tenure. Access to Wayne faculty rooms is closed. No state teaching certification is required. Neither Fritz, nor the G.E.D. staff, have interaction with the Board's K-12 program and instructors. Fritz establishes the salaries; not the Board. The salaries are sent to the State for approval.

In 1976, the program served 145 adult students. The average student age is 28-32. Students may start at 16, but must be out of school. Four courses (English; Social Studies; Science; and Math) are offered. Classes are held two nights per week, three hours per night (back-to-back). There are 12 weeks of instruction. Students complete 18 contact hours per class. The courses prepare students for five standardized tests. The instructional program, however, is not a requirement for taking these tests. 52/

2. Negotiations History

Notwithstanding the reference to adult school in the 1968-1969 negotiations Agreement as an item for future negotiation, Ziccardi could not recall night school being considered by the parties in the 1968 negotiations. 53/ The Association did not present a proposal for G.E.D. for the 1969-1970 Agreement, nor for the 1970-1972 Agreement, 54/ and Tucker, testifying as to the 1970-1972 negotiations, stated that evening school was not considered during the negotiations. 55/ Pelak, on the WEA negotiations committee since 1971 (for the 1972-1973, 1973-1975, and 1975-1977 contracts) could not recall any WEA proposal concerning G.E.D., 56/ nor do the WEA proposed agreements reflect proposals for G.E.D. compensation. 57/ Superintendent O'Grady testified that the subject of adult school had never been negotiated. 58/

52/ See T 5:72-107 and Exhibit PE-3

53/ T 1:33

54/ Exhibits JE-3, JE-4

55/ T 1:79

56/ T 2:51

57/ Exhibits JE-6, JE-12, JE-15

58/ T 3:7 The general term "adult school," as used in testimony, was specifically directed to the G.E.D. aspects of adult school.

C.

Driver Training Instructors

1. Employment Relationship [59/]

Lester Ricker, Director of Health, Physical Education and Safety, has general supervision of the Board's Driver Education program. The program currently has two distinct phases: theory, which is taught in class during the regular school day by Wayne teachers as part of the health education curriculum; and, behind the wheel instruction. Behind the wheel instruction is at issue herein. Behind the wheel instruction is currently operated within and without the school day by utilizing non-Wayne teachers. This was not always the case.

Behind the wheel commenced in the 1952-1953 school year with one instructor, a Wayne teacher, teaching both behind the wheel and theory. In 1956, two physical education teachers taught theory, and two teachers taught behind the wheel. The entire program was offered during the regular school day.

In Fall 1968, due to an overload in enrollment, the behind the wheel program expanded to after school and weekends. Remuneration for out of school services was established by the Board at $5 per hour. In 1969, the behind the wheel program was placed entirely outside of school hours. Ricker testified that this was done for several reasons: first, the physical education teachers preferred to utilize their time teaching physical education rather than behind the wheel; second, to reduce physical education class size. The Board further found it fiscally economical to allot the physical education instructors to physical education and to maintain behind the wheel on an hourly basis. All the behind the wheel instructors were regular Wayne teachers.

The behind the wheel program temporarily terminated in April 1973, when funding was unavailable. Budget monies were later partially restored,

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59/ See T 5:8-72.

and behind the wheel resumed outside the school day. 60/

In Summer 1974, the behind the wheel instructors, dissatisfied with their pay, terminated their services. The Board advertised for instructors and after about three weeks the program resumed.

At the time of hearing, the program was being operated utilizing six instructors. Two of the instructors "can work as many hours as they prefer to work." 61/ They basically work school hours, from 8:45 a.m. to 2:30 p.m., sometimes work after school, from 2:30 to 3:30 p.m., and sometimes work on weekends. These two insturctors are not regular Wayne teachers, and receive no additional fringe benefits although they do get paid for lunch break and when scheduled students fail to show. They are not formally evaluated or observed. The remaining four instructors are regular Wayne teaching personnel and perform behind the wheel instruction either after school, or on weekends. After school hours may be from 3:30 or 4:00 p.m. to 7:00 p.m. Weekend hours would be between 8:00 a.m. to 12:00 noon. Pay remains $5 per hour and no fringe benefits can be attributed to their employment as behind the wheel instructors.

Pupils and instructors arrange instruction time at mutually convenient hours. Student participation is entirely voluntary. Further, behind the wheel instruction is available to any Wayne resident student, private and public. 61a/

According to personnel director Argentero, no other day instructional program is offered to non-public students. Further, with the exception of auditing, no other instruction is offered without credit. 62/

60/ Pelak testified that of approximately a dozen instructors in the reinstated program, about 10 were regular Wayne teachers. These same teachers were previously involved in behind the wheel instruction. Pelak also testified that it was at this time that behind the wheel began outside of school hours. (T 2:13, 14, 59, 60)

In view of Ricker's close association and oversight of the program, I credit his account of when the outside hours program commenced. The fact that hourly remuneration was paid would account for the cost savings associated with terminating the program.

61/ T 5:25

61a/ Non-public school students first received instruction in Summer 1969. In Summer 1975, non-public school students comprised 26 of 258 enrollees; 4 of 600 enrollees in academic year 1975-1976; 22 of 113 enrollees in Summer 1976.

62/ T 6:3-7 Argentero testified, additionally, that the Board's Title I teachers, who were members of the WEA unit, have taught in parochial schools.

The record also indicates that all behind the wheel instructors, whether Wayne teaching personnel or other instructors, are certificated teachers.

2. Negotiations History

Both the Board and WEA agree that when behind the wheel instruction was taught by Wayne personnel as part of the regular school day, the instructors were included in the WEA unit. The instructors, however, were not paid a separate stipend at this time for the performance of behind the wheel responsibilities. Neither the contract proposals nor the contracts themselves for the school year 1968 through 1972 contain specific reference in any way to behind the wheel instruction. Pelak, however, asserted that for the 1973-1975 contract, WEA made specific proposals concerning drivers education compensation during the summer sessions in a separate schedule, marked as schedule F. Schedule F is referred to in the body of Exhibit JE-12 as relating to "salaries paid for summer work;" however, it is not attached thereto. Pelak testified that there were discussions relating to this proposal but that he did not remember the content of any discussion. 63/

There was an interruption in the behind the wheel program during the Summer of 1974 due to a termination of services by instructors. At the time, there were about 13 or 14 behind the wheel instructors. All but two or three of the instructors were regular Wayne teaching personnel. According to Pelak, the instructors were upset over salaries and indicated unhappiness as a group. This unhappiness was communicated to the Board by the instructors. The instructors, unable to obtain satisfaction from the Board, requested the assistance of WEA. 64/

WEA requested a meeting with the Board to discuss driver training teacher salaries. A written request was made on July 19. 65/ This request was in conjunction with several phone calls and the Board was advised of the possibility of a walkout of behind the wheel instructors. On July 22, 1974,

63/ T 2:4-7 Commission records containing the complete WEA proposal verify Pelak's testimony that a specific salary rate ($10 per hour) was proposed for driver education teachers in the summer.

64/ T 2:59-62

65/ Exhibit PE-1 In part, the letter stated: "The Association has authorization to represent these teachers."

Board President Beryl Paul wrote to Pelak stating:

> This will acknowledge receipt of your letter of July 19 and our phone conversation relative to the driver teachers.
>
> Summer school activities were excluded from the collective bargaining agreement. However, since drivers education is an on-going activity, a proposal for any adjustment in this area would be a proper item for submission for the 1975-1976 contract negotiations. 66/

There was a termination of services by the behind the wheel instructors; however, the program recommenced by the end of the summer although staffed by fewer personnel, and limited to those students who wanted to complete previous instruction.

WEA presented proposals in Fall 1975 regarding the rate of pay for behind the wheel instructors. 67/ The Board's initial position in Fall 1974, presented by Leon Consales in the presence of a majority of the Board members, was that, "the item was not appropriate for negotiations." Pelak testified that Consales was the Board's spokesman and the Board members "said nothing during those sessions." Pelak confronted Mrs. Paul and Consales on this issue in light of Mrs. Paul's letter and did not receive an explanation. After Pelak produced the letter there were no further discussions on that particular item. Pelak further testified that the Fall 1974 negotiations were "a sham," "a matter of positioning," and "not much got accomplished." Pelak further testified that the presentation of the letter "quieted Leon Consales" and that "for all practical purposes" further negotiations did not take place until after May. Pelak described the dispute relating to drivers education as "a stalemate for a good 7, 8 months." 68/

66/ Exhibit PE-5

67/ Exhibit JE-15, P. 16, proposed September 23, 1974

68/ T 2:25-29 Pelak testified that there were negotiations during this period including a mediation effort. The Clarification of Unit Petition was filed in April 1975.

WEA also made reference to accounts in newspaper articles with regard to the statements made by certain Board members concerning WEA's involvement in the behind the wheel instructor's walkout. The undersigned has not considered the content of these statements in the factual development of this proceeding due to their remote hearsay nature. The undersigned, however, accepts Pelak's reference to newspaper accounts as providing an evidentiary basis that the behind the wheel dispute became a known, public event.

The circumstances surrounding the Summer 1974 termination of services were described in the testimony of Beryl Paul. 69/ Mrs. Paul testified that several weeks after the program began, in the early part of July, she received a call from a group of driver education teachers who wanted to negotiate an increase in salary for that summer. She received two letters from individual driver education teachers as a followup to this call. The first correspondence from WEA was the July 19, 1974 letter. Mrs. Paul discussed the substance of Pelak's letter with a majority of fellow Board members at a meeting. Mrs. Paul further discussed her response of July 22 to Pelak with the Board. The Board "Stood very firm that the Association was not recognized as negotiating with [sic] the driver education teachers." Mrs. Paul further stated that she was not authorized to write the letter of July 22:

> Q. Were you authorized by the Board to write that letter of July 22 to Mr. Pelak?
>
> A. No, I was not.
>
> Q. Did the Board disagree with the portion of your letter that stated that the item was properly a subject of upcoming negotiations?
>
> A. When it became a subject of negotiations letter, they took the reverse stand on it.
>
> Q. Well, has the Board ever authorized you or told you that yes, this was properly an item of negotiations for the WEA?
>
> A. No.
>
> Q. So then when you wrote that letter, were you authorized by the Board to make that statement?
>
> A. No, I was not. 70/

69/ T 3:25-33

70/ While the testimony is ambiguous as to when this meeting occurred, I am satisfied that it occurred after the exchange of letters but before the Board met in September on negotiations strategy. Due to the public nature of the dispute, and the importance of the WEA letter in light of the subsequent termination of services by driver training teachers, the undersigned concludes that the Board was aware of the WEA letter and Paul's response during Summer 1974.

Mrs. Paul stated that she never advised the Association that she was unauthorized to send the July 22 letter.

D.

Bedside Teachers

1. Employment Relationship

George Peatick, the Director of Special Services, is responsible for the administration of the Board's bedside teaching program. 71/ A bedside program has been in operation since 1954. Bedside instruction is provided only to Wayne public (elementary and secondary) school students who cannot attend school due to a temporary physical handicap.

The provision of bedside services is triggered by a prediction of ten or more sick days. The average length of services is three weeks. The greatest number of students receiving instruction at one time occurs during the deep winter months, coinciding with skiing accidents. There are approximately 100 bedside situations per year.

When bedside services are needed, the Board's policy is to first attempt to utilize the pupil's classroom teacher for the bedside instruction. Failing success, the Board will attempt to utilize a teacher in the pupil's grade level. Failing that, the Board will attempt to utilize teachers in the subject department for which services are needed. As a last resort, the Board will attempt to solicit other Wayne teachers, teachers from its master list of substitute/supplementary personnel, or certified teachers outside of the Wayne system.

At the elementary level, about 30% of bedside instructors will be the pupil's regular teacher. Another 30% will be teachers from the same school. About 20% will be other Wayne teachers. The remaining 20% of instructors will come from the master list. At the secondary level, about 80% of instructors are Wayne staff. A pupil may have several instructors, depending upon subject area.

The Board provides bedside instruction to non-public school students, at Board expense. Those instructors are normally those students' private school teachers.

71/ See, generally, T 6:9-112.

Bedside teachers are paid $7.50 per hour. The Board only utilizes certified teachers. Acceptance of an assignment is voluntary. There is no expectancy of continued employment after the pupil returns to school. However, Dr. Peatick's department, which procures bedside teachers, finds that certain teachers are more inclined to accept bedside employment than others and are, in fact, preferrable drawn upon. There is no formal contract commemorating the acceptance and terms of bedside employment.

2. Negotiations History

WEA's first Agreement covering 1968-1969 did not include reference to bedside teachers. Item 15 of Exhibit JE-1, however, contains a WEA proposal to increase "bedside tutoring" pay from $5 per hour to $8 per hour. According to Chief WEA negotiator Ziccardi, "The Board did not want officially to increase that rate from five dollars to eight dollars per hour. Subsequently, however, I'm not sure precisely when after considerable dialogue on the question, the Board did in fact raise the tutoring rate to I believe at that time to $7.50. It was not however included in the agreement." 72/ Ziccardi further stated that the Board, during negotiations, did not discuss the "representational capacity" of WEA as to bedside tutors.

Superintendent O'Grady testified that to his knowledge, bedside compensation was not negotiated in his presence. 73/ Since and including school year 1969-1970, none of the parties' negotiations proposals, nor their negotiations agreements, make any reference to bedside tutors or teachers.

E.

Supplementary Teachers

1. Employment Relationship

Dr. Peatick's Department of Special Services administers the Board's

72/ T 1:22 At T 1:42, Ziccardi testified that such Board action may not have occurred until sometime in 1970.

73/ T 3:6 I find that the subject of bedside compensation was discussed. O'Grady's testimony is not inconsistent with Ziccardi's. In light of WEA's written proposal, one would generally expect some discussion on this item. Ziccardi clearly recalled that WEA did not present this item for final inclusion in the contract in light of the Board's committment. T 1:32

supplementary instruction program as well as the bedside program. 74/ The program has been in existence since the early 1960's. When a student enters the public school system, the student is evaluated by the child study team. The team, the department chairperson, and the classroom teacher develop a "prescription" which is utilized by a supplementary teacher in working with an educationally handicapped child in a particular area. The instruction is provided most always on a one-to-one basis. 75/ The supplementary teacher is a certified teacher.

In school year 1976-1977, there were 57 supplementary teachers, all employed on a part-time, per hour or per period basis, servicing 250 students. The supplementary teachers work daily at the same hour with a student. Due to an average workload of three to four students, they average three or four periods of instruction per day. Some supplementary teachers have as little as two students at a given period of time; a few have five students. Supplementary teachers design their schedule to match student availability.

Supplementary teachers are encouraged to work closely with the regular classroom teacher. Supplementary teachers submit six reports a year to the regular teacher and they review student progress. Supplementary teachers additionally, recommend a pupil grade. Most contact with the regular teacher is in informal discussion and conference. Supplementary teachers are not compensated for this service.

Supplementary instruction usually commences in the third week of the school year, after pupils have been identified as requiring this service. The pupil continues through May of the school year or until the objective of of instruction is met. There is an unwritten expectancy of continued employment.

Supplementary teachers are evaluated primarily through pupil progress. Supplementary teachers are hired from the Board's approved master list of substitute/supplementary/part-time personnel. They are interviewed by Dr. Peatick, Mr. Argentero and the child study team. The child study team makes a

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74/ See, generally, T 6:9-112.

75/ This concept differs than the services provided by "special class teachers," who operate in a classroom setting and develop their own curriculum more independently. The special class teachers are in WEA's unit. Additionally, the Board employs a full time speech therapist and reading specialists who provide individualized one-to-one instruction, and are in the WEA unit.

determination as to whether the particular supplementary prospect is suitable for a particular pupil.

Compensation is established at $7.50 per hour. There are no fringe benefits. Supplementary teachers are not paid for preparation time. They have no responsibility to meet with parents. They have access to all teacher facilities.

Fifteen to twenty of the supplementary teachers have been employed in that capacity for seven or eight years. About 25 have been employed a "couple of years." There has been some turnover. A dozen supplementary teachers are newly hired.

It is possible to be a supplementary instructor and a bedside instructor, simultaneously. It is not possible to be a substitute teacher and a supplementary teacher, simultaneously. Substitute teachers have become supplementary teachers.

2. Negotiations History

Ziccardi testified that WEA, in negotiations for the first contract (1968-1969), did not make a proposal for supplementary teachers. Ziccardi's testimony, further, suggests that WEA evaluated the few number of supplementary teachers in not making a proposal. The transcript provides this inquiry and response of Ziccardi upon examination by the Board's counsel:

> Q. Tom, is it your testimony that while you were the president of the WEA, the summer school and the bedside instructors and the supplemental instructors were represented by your association for negotiations purposes?
>
> A. Supplementals, we never made a proposal. In fact, as I said, I think there are only five other teachers in the district. With respect to summer school, we certainly did feel we represented those people. Those were on the 90%, are employees, are teachers. [sic] We consistently made proposals on their behalf. We never succeeded in getting an increase or having language appear in the contract. With respect to in terms of bedside, all the bedside teachers to my knowledge were Wayne teachers and there was an increase in their salary. 76/

76/ T 1:52-53 See also T 1:29.

WEA witness Pelak testified that he did not recall any negotiations concerning supplementary teachers from 1971 and thereafter. 77/ None of the parties' proposals from 1968 through 1973 and none of the respective contractual agreements contain any reference to supplementary teachers. WEA's proposal for a 1975-1976 Agreement contains a proposal as to "specialists" and a proposal for $35,000 of new monies into the "supplemental compensation schedules." 78/

WEA witness Tucker testified that in either 1973 or 1974, the number of supplementary teachers had increased dramatically with the addition of a supplementary program at the secondary level. 79/

Board witnesses O'Grady and Powell confirmed the absence of negotiations concerning supplementary teachers.

F.

Substitute Teachers

1. Employment Relationship

The Board's substitute teachers perform the traditional assignments of substitutes in the usual manner. 80/

The Board maintains a master list of about 200 substitute/supplementary/part-time prospects. All substitute personnel are certified teachers. About 25-30 substitutes are employed per day.

Substitutes are paid a per diem rate. However, a substitute assignment may become long-term after 21 consecutive days in one setting. In such case, the Board's policy, in effect since 1964, provides:

> If the substitute teacher's term of service goes beyond 21 days, he will be transferred to the regular teacher's salary retroactive to the beginning of his employment for that particular assignment. If it is known in advance that his term will exceed 21 days, he will be put directly on the regular teacher's salary schedule.

77/ T 2:50

78/ Exhibit JE-15, pp. 9 and 15

79/ T 1:133

80/ See, generally, T 4:84-120.

> Substitute teachers will not participate in the health and welfare plans or other fringe benefits of the school district. 81/

Where, before February 1, it is known that a substitute will replace a regular school teacher through the conclusion of the school year, the substitute is offered a teacher contract. After February 1, the substitute continues as a long term.

About 20-25% of the Board's substitutes return over a two year period. Approximately 10-15% have returned for a three year period.

2. Negotiations History

WEA's initial negotiations proposals for the 1968-1969 contract proposed increasing substitute salaries from $18 to $22 per day. 82/ Ziccardi testified that the proposal was discussed, that the Board's response was in the negative, that it did not present a counterproposal, and that it did not question the representative capacity of WEA for substitute personnel. However, as in the case of bedside personnel, the Board did, at some subsequent time, raise the substitute pay by $2. These increases were indicated to WEA privately, not at a formal negotiations session. 83/

Superintendent O'Grady testified that in 1968 the administration commenced a survey (prepared by the Director of Personnel and his staff) which eventually led to increases in the substitute, bedside and supplementary pay. According to O'Grady the administration's recommendation to the board to increase these rates of pay were not made in conjunction with any proposal in negotiations. 84/

Substitute pay was not raised as an issue in the 1969-1970 contract negotiations. WEA witness Tucker testified that in the negotiations toward the 1970-1972 Agreement, WEA discussed two concerns relating to substitute coverage with the Board: (1) the scarcity of substitute personnel due to low pay, and (2) the use of regular teachers to provide substitute coverage. According to Tucker, the Board, without questioning the representative status of WEA, responded

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81/ Exhibit PE-2

82/ Exhibit JE-1, item 17

83/ T 1:23, 24, 43, 45

84/ T 3:4-6

negatively and the matter was dropped prior to impasse. WEA's formal proposal for the 1970-1972 contract includes an item relating to the use of regular teachers as substitutes and proposes compensation for such personnel at one-sixth of a daily substitute's pay. No increase in the regular substitute rate of pay is proposed. 85/ Apparently, there was partial agreement as to WEA's proposal. The 1970-1972 Agreement, contains a provision discouraging the use of classroom teachers as substitutes. 86/

Tucker testified that he could not recall WEA submitting written proposals for the substitute rate of pay for the 1972-1973 contract and thereafter. The 1972-1973 Agreement carries over the same language concerning use of regular teachers as substitutes as in the 1970-1972 contract. 87/

WEA witness Pelak testified that WEA's twofold concern was present in the negotiations for the 1973-1975 Agreement. WEA recognized past difficulties of increasing substitute pay, and pursued a strategy of indirectly achieving this goal by pressing for a $7 remuneration for classroom teachers who performed substituting chores. Although this proposal is not reflected in WEA's initial written proposal, its negotiation was confirmed by Board negotiator Powell. The 1973-1975 Agreement reflects no change with respect to any remuneration for substitutes or regular teachers so employed, although with respect to the latter group, the procedure for designating involuntary substitution is changed. 88/

WEA did not present specific substitute pay proposals for the 1975-1977 Agreement, although it did propose that substitute teachers be obtained whenever a teacher was absent. 89/

85/ T 1:78, 79; Exhibit JE-6, p. 5

86/ Exhibit JE-8, p. 7

87/ T 1:105; Exhibit J-11, p. 9

88/ T 2:8, 46-68; T 3:43; Exhibit JE-12; Exhibit JE-13, p.9 Pelak's testimony was that WEA considered itself as negotiating over substitute pay. Pelak's testimony that WEA's proposal was "$7 an hour for teachers that cover classes so that we could bring up the subject during negotiations" (e.g., substitute pay, generally), is supportive of its claim that the Board had "hardened its position" on the scope of the unit in 1972-1973. The evidence does not reveal that the strategy was effective and that general substitute pay negotiations ensued. This is supportive of the Board's position that it did not consider substitutes as unit members.

89/ Exhibit JE-15

III

CONCLUSIONS & RECOMMENDATIONS

A.

Appropriateness Issue

The New Jersey Employer-Employee Relations Act, at N.J.S.A. 34:13A-5.3 and 6(d), requires appropriate collective negotiations units. Prior to resolving the clarification issues raised by the parties, the Board's threshhold questioning of the community of interest among regular classroom teachers and summer school teachers, G.E.D. teachers, driver training instructors, bedside teachers, supplementary teachers, and substitute teachers must be considered. A "community of interest" is an essential prerequisite for establishing appropriateness. N.J.S.A. 34:13A-5.3. 90/ Thus, the initial question before the undersigned is whether a unit consisting of any combination of regular teachers, summer school teachers, G.E.D. teachers, driver training instructors, bedside teachers, supplementary teachers, and substitute teachers presents an appropriate unit.

Among its decisions, the Commission, in various contexts, has found the following combinations of educational employees to constitute appropriate units: In re Jefferson Township, Board of Education, P.E.R.C. No. 61 (1971) (petitions to remove bus drivers, clerical, custodial, maintenance, and cafeteria employees from unit also including Board professional employees denied); In re West Milford Township Board of Education, P.E.R.C. No. 56 (1971) (petition to add office personnel and building aides to existing unit of teachers, nurses, and instructional aides approved); In re Montgomery Township Board of Education, P.E.R.C. No. 27 (1969) (petition seeking unit of professional personnel [including, among others, teachers, remedial reading teachers, speech therapists, audio-visual coordinators] and clerical employees, secretarial employees and teachers aides approved); In re Newark Board of Education, P.E.R.C. No. 20 (1969) (Commission approves unit including teachers, substitutes [over 30 days], helping teachers, social workers, psychologists and attendance counsellors); In re Fair Lawn

90/ The Commission is statutorily proscribed from interfering with unit recognition situations. Such recognitions may result in the creation of inappropriate units. Nevertheless, a Commission clarification may not sanction as inappropriate unit.

Board of Education, D.R. No. 78-22, 3 NJPER 389 (1977) (Director of Representation clarifies professional teachers unit to include regular, part-time support teachers); In re Long Branch Board of Education, D.R. No. 78-24, 3 NJPER 392 (1977) (Director of Representation clarifies unit to include regular, part-time support teachers); In re Rancocas Valley Regional High School Board of Education, E.D. No. 76-39, 3 NJPER 52 (1976)(evening high school teachers most appropriately belong in unit with day teachers); In re Middletown Township Board of Education, E.D. No. 76-17, 2 NJPER 20 (1976) (professional employee unit clarified to included suppiemental teachers); In re Hamilton Township Board of Education, E.D. No. 30 (1971) (professional unit clarified to include coaches and extra-duty personnel).

A common thread woven through these and other Commission decisions is that school employees share a community of interest by virtue of providing services directly relating to or adjunct to the educational process. As early as In re Bergenfield Board of Education, P.E.R.C. No. 7 (1969), the Commission adopted pro forma, the Hearing Officer's Report, recommending a mixed unit of teachers and custodians, which stated: "School employees are much more closely related and interdependent than most groups of public employees. The Bergenfield Board concedes that the work of both the custodians and the teachers can have a direct and important impact on the educational process." In In re South Plainfield Board of Education, P.E.R.C. No. 46, (1970) the Commission denied severance of nurses from a professional unit, stating: " ... (T)he Commission concludes that the interests of nurses are so closely related to the educational process that the factors distinguishing nurses from teachers are submerged in recognition of the broader community of interest shared by the two groups."

The performance of educational functions on a part-time basis is not a sufficient distinguishing factor when considering the broader community of interest issue. See Fair Lawn and West Milford, supra. In West Milford the Commission stated, as to part-time building aides, " ... (T)he fact remains that much of the work they do would, but for their existence, be done by teachers. It is the part-time feature of their employment which gives rise to the disparity of certain conditions and benefits; this same feature is what makes feasible the relief of teachers from certain duties they formerly performed."

It is abundantly clear to the undersigned that the services performed by Wayne summer school teachers, supplementary teachers, bedside teachers, substitute teachers, and driver training instructors are as necessarily vital to the educational process of the Wayne elementary and secondary pupil population as the services performed by regular classroom teachers. The undersigned further observes that in the supplementary, bedside and substitute context, the services are primarily directed to pupils of the regular classroom teacher in special situations. This too is generally true with regard to summer school students, who either require remedial assistance or who seek additional enrichment. 91/ As to driver training instruction, this program is another educational subject provided to students. The undersigned concludes that there is at the very least, a broad community of interest among the professional personnel who provide these services.

Further, with respect to the performance of part-time extra-hour assignments by classroom teachers in the areas of bedside and driver training, the undersigned believes that the appropriate resolution of this dispute is muddled by its presentation as a unit appropriateness or unit clarification issue. Part-time extra duty assignments to extracurricular pupil programs have traditionally been viewed as adjunct to the teacher role. See, for example, Asbury Park Board of Education v. Asbury Park Education Association, 145 N.J. Super. 495 (Ch. Div. 1976). Thus, in the Hamilton Township and Long Branch matters, the Directors, albeit in the context of unit clarification, determined that the majority representatives of teachers also represented those teachers when assigned to extra duty and coaching tasks. Although the record in these cases indicates that the duties were assigned, the undersigned interprets the Commission's logic as applying to any situation, voluntary or involuntary, where the teacher is asked to perform extra duty assignments. In this regard, the undersigned views driver training instruction as an extra duty assignment, not sufficiently distinguishable from other so-called "extracurricular" activities to warrant separate classification. Bedside instruction is another extra duty

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91/ See, in this regard, In re Great Neck Board of Education and Great Neck Teachers Association, 4 PERB ¶3017 (1971), where New York PERB has specifically rejected separate summer school units and has ruled that summer school teachers "most appropriately" belong in a regular teachers unit.

task, particularly emphasized herein by the fact that the primary candidate is the regular classroom teacher. The undersigned cannot distinguish a request of an employee to perform bedside instruction from any other request of unit members to work overtime. As the undersigned concluded in In re Montville Board of Education, E.D. No. 76-43, Hearing Officers Report attached, the issue of bedside instruction performed by unit members is not one of unit clarification, but rather an issue of negotiability. Therefore, for reasons apart from those discussed, infra, the undersigned recommends that regular Wayne teachers performing driver training instruction and bedside instruction are represented in those capacities by WEA in its teaching unit.

The undersigned does not see a community of interest existing between evening adult school G.E.D. teachers and any of the other employees involved herein. These are not the same evening employees as in the Rancocas matter, supra. The record in Rancocas indicates that those evening high school teachers were distinct from G.E.D. teachers who were a part of the evening adult school. The G.E.D. and other adult school personnel were not involved in the Rancocas decision.

The Wayne adult school program, including G.E.D., is an independent operation. The G.E.D. program is self-supporting. The Board does not assert any control over this program.

Staffing decisions and curriculum decisions are made independently of any consideration relevant to Wayne students or professional personnel. Indeed, there is no interaction either among students or among professional personnel, except for the fact that some teachers are also hired as G.E.D. instructors. Further, there are no employee benefits or terms and conditions of employment which have any relationship to those relating to other Wayne personnel, except as to employment location. Considering the usual criteria utilized in deriving a community of interest (common work site; common lines of supervision; similarity of aims, goals and purposes; level of interaction and independence; salary and fringe benefits; similarity in training, skills, and levels of education; absence of potential conflicts), the undersigned must conclude that adult education personnel have substantial differences from other school personnel. G.E.D. is a program for adults. Not unlike many other adult

programs, which can successfully prepare adults for various licensing examinations, G.E.D. prepares adults for taking a high school equivalency examination. There would be only rare matters of mutual interest among adult teachers and other personnel that would be items for common negotiation or even be of overlapping negotiating concern. 92/ Therefore, the undersigned, independent of other considerations relative to the clarification of G,E,D, instructors, which are discussed infra, shall recommend the conclusion that G.E.D. teachers are not part of WEA's existing negotiations unit.

B.

CLARIFICATION ISSUES

Framework for Discussion

In the following discussion, the clarification issues relevant to each contested group of employees shall be analyzed. Certain major clarification considerations provide the basis for these discussions. (1) Was there agreement or intent by both parties to include these contested employees in the WEA unit when it was first recognized; (2) Have the parties demonstrated an agreement or intent to exclude these employees from the unit; (3) Are there other factors, including or other than those discussed in the previous section,that compel unit inclusion or exclusion?

Additionally, prior to the invididualized discussion, the under signed must pass upon two major events concerning unit recognition which affect several combinations of the groupings of personnel in dispute.

92/ See, however, In re White Plains City School District, 2 PERB ¶3009 (1969) (Unit of basic adult education personnel and manpower development and training personnel approved. No "substantial community of interest with K-12 teachers."). Significantly, four years after the Great Neck Board of Education matter, supra, n.91, an adult education association in the same district petitioned PERB for a separate unit of adult education personnel (including personnel equivalent to the G.E.D. personnel herein). Whereas the Board had previously rejected the parties stipulation of a separate summer school unit, PERB's Director of Representation, in the adult education matter, approved a separate adult education unit. In re Great Neck Board of Education, 8 PERB ¶4031 (1975).

1. Initial Unit Recognition

The parties' first Agreement, entered into prior to the passage of Chapter 303, acknowledges WEA as the exclusive representative of certified teaching employees. Article XI of the 1968-1969 Agreement describes the subjects which the parties agreed to negotiate in the future concerning teacher employment. These include "specialists," extracurricular activities, summer school and evening school programs, and substitute teachers. Accordingly, a strong reasonable inference can be drawn from the parties' agreement that they intended to include summer school teachers, evening school teachers, and substitute teachers within the parameters of the WEA negotiations unit. 93/

The undersigned has carefully considered the language of Article II of the Agreement, in which the parties "agree that the agreement after its termination shall not be used as evidence by either party in proceedings of any kind or nature in which they are adversaries including any legal proceedings related to conditions and terms of employment between the association's members and the 'Board'," and the propriety, therefore, of deriving evidentiary value from Article XI. The undersigned has determined that Article II does not shield the utilization of Article XI from its utilization to derive evidentiary value in the instant proceedings for the following reasons. First, the Commission engages in a fact-finding process in clarification proceedings which is quasi legislative in nature. The burden for establishing a complete factual record is ultimately upon the Commission and its Hearing Officer. Evidence which is crucial to the findings of the Commission cannot be disregarded on the basis of bilateral agreement by the parties. Second, there is no indication that Article II was intended to preclude utilization of Article XI in this type of proceeding. The testimony indicates that the parties were concerned about the experimental nature of the agreement affecting terms and conditions of employment insofar as the passage of collective neogitations legislation was anticipated. It is reasonable to conclude that the parties' concern expressed in Article II was to avoid situations where their contractual agreements might be inconsistent with statutory provisions.

93/ The undersigned cannot draw a conclusion as to the scope of the term "specialists." Certain full-time teaching specialists are recognized by the parties as included in the existing unit.

2. Recognition Clause -- 1972-1973 Agreement

As stated supra, pp. 7-9, the parties changed the recognition clause of their agreement to provide that the word "contracted" be inserted prior to words "certificated personnel." Thus, the recognition clause provided:

> The Board recognizes the WEA as the exclusive and sole representative for collective negotiations concerning terms and conditions of employment for all contracted certificated personnel employed by the Board, including persons on leave of absence, nurses and department heads, but excluding assistant superintendents, directors of elementary and secondary education, directors of personnel, principals and vice principals. [Exhibit JE-11 Article I Para. B]

During negotiations for the 1972-1973 Agreement, the Board challenged WEA's representative status for certain personnel. Superintendent O'Grady testified that the insertion of the word "contracted" was intended to exclude all but full time employees under "signed contracts" with the Board from September 1 through June 30 and his testimony refers to subsequent dialogue with WEA negotiators in which the Board distinguished contracted personnel from substitute or supplementary personnel. As noted previously, at footnote 19 of this report, certain discrepancies in Mr. O'Grady's testimony casts some doubt upon his recollection of these events. The undersigned, for this reason and for the following reasons, concludes that the insertion of the word contracted was not tied into any agreement by the parties to exclude non-full time personnel from the unit but, rather, focused upon a dispute relating to other employees.

First, the recognition dispute in 1972-1973 negotiations initiated by the Board was to exclude guidance personnel, coordinators, department heads and individuals involved in one half or more time in administrative or supervisory poeitions. This dispute later became the subject of a Clarification of Unit Petition filed by the Board with the Commission. With regard to the personnel in dispute herein, WEA had submitted proposals for the 1972-1973 Agreement only for summer school employees. WEA did not submit proposals for the 1972-1973 Agreement for bedside teachers, driver training instructors (except for summer instruction), supplementary teachers, G.E.D. teachers, or regular substitute

teachers. There would be no need for the parties to concentrate their negotiations over the recognition clause upon non-full time teachers except for the dispute over summer school instruction.

Second, if the focal point of concern was with non-full time staff, the dispute certainly was not resolved. The dispute over summer school was submitted as an impasse item to fact-finding. The fact-finder recommended negotiations. The dispute apparently lingered past contract settlement, since WEA once again,in Fall 1972, presented a summer school proposal as an item for negotiation for the 1973-1975 Agreement. This issue was again submitted as a fact-finding issue. Notwithstanding the outstanding nature of the summer school dispute, in both contract negotiations, the Board did not raise the summer school issue before the Commission as an item for clarification either in its letter of January 28, 1972 or in its formal Petition filed on January 17, 1973. According to Fact-finder Aarons, the Board filed its formal Clarification of Unit Petition after his appointment.

Third, if the parties had agreed that the word "contracted" was intended to limit the unit to full time teachers, it is reasonable to conclude that the Board would have argued this in the 1973-1975 fact-finding proceeding. Instead, Fact-finder Aarons states that the Board's objections were the same as those raised before Fact-finder Collins in the previous year, i.e., the claim that a significant portion of summer school staff were not regular Wayne teachers. Aarons further states: "The contract does not in any way exclude summer school staff."

According to WEA, the insertion of the word "contracted" was a "meaningless" change which enabled the parties to resolve the dispute over recognition. WEA asserts that if the parties' intent was indeed to limit the unit to personnel who had "signed contracts," even tenured teachers, who do not sign individual contracts, would be excluded from the unit.

The undersigned notes that after the fact-finding proceeding for the 1972-1973 Agreement, the parties did include department head stipends in the contract. The recognition dispute as to department heads continued into the successor negotiations; however, the dispute, in the successor negotiations, as to guidance personnel became limited to guidance directors.

Having evaluated the entire context of the negotiations relationship, as discussed above, the undersigned is convinced and concludes that the insertion of the word "contracted" was not intended to limit the unit to full time teachers and to exclude non-full time personnel. The evidence, when evaluated, therefore, does not support O'Grady's recollection of what must have been a key WEA concession, if correct. 95/ The undersigned believes that the insertion of the word "contracted" enabled the parties to temporarily set aside the extant recognition dispute over administrative-type employees and to proceed into a collective negotiations agreement.

Summer School Teachers

The undersigned concludes, based upon the factual evidentiary record, that WEA and the Board negotiated with respect to summer school compensation at the inception of their collective negotiations relationship in negotiations toward the 1968-1969 Agreement. The undersigned credits Ziccardi's testimony that the Board did not question WEA's representative status for summer school teachers and that the Board took an adamant position in negotiations that it did not see a need to increase the salaries for summer school employees.

95/ As previously described at p. 5, the parties, in their 1970-1972 Agreement, changed the recognition clause to describe the unit as including "all certificated personnel employed by the Board" notwithstanding WEA's proposal of "all certificated personnel whether under contract, on leave, on a per diem basis, employed or to be employed by the Board." As recounted, WEA witness Tucker stated that the Board's sole concern was with the proposed language "or to be employed." Nevertheless, the undersigned has considered the possibility that Superintendent O'Grady's testimony of dialogue with WEA personnel over limiting the unit to full time personnel may have occurred in the context of negotiations for the 1970-1972 Agreement rather than the 1972-1973 negotiations. This confusion of negotiations settings is understandable, although it is noted that O'Grady clearly referred to the dialogue in the context of the insertion of the word "contracted." However, even if the setting was in the 1970-1972 negotiations, the undersigned's conclusion is the same. The parties at the time were reacting to NJEA sample agreement language. The disputes as to non-full time personnel continued and were not resolved. Furthermore, the term "certificated" certainly was not a limiting factor, when the Board's policy was, with the possible exception of G.E.D., only to hire certificated personnel for the categories of personnel in dispute herein. Additionally, the unit, from its inception in 1968, was described as containing certificated personnel. Thus, 1970-1972 Agreement did not change the scope of the unit.

WEA continued to present proposals for summer school employees in negotiations for subsequent contracts. In negotiations for the 1970-1972 Agreement, the Board initially questioned the majority status of WEA for summer school employees and WEA presented proof of its majority status. When the summer school item was presented to a fact-finder, the Board did not question WEA's representative capacity for summer school personnel but relied upon its position that it saw no need to increase summer school salaries.

The Board firmly took the position that it did not recognize WEA as the representative of summer school employees in negotiations toward the 1972-1973 Agreement; nevertheless, WEA continued to insist through the conclusion of fact-finding that the Board negotiate with it over summer school salaries. There is no evidence that WEA abandoned its claim to represent summer school personnel in view of the Board's refusal to negotiate.

The undersigned concludes from the evidence that summer school employees were included in WEA's negotiations unit from its inception. After negotiating with WEA over summer school employees, for three successive agreements, the Board determined to treat summer school employees as excluded from the unit. WEA has not subsequently agreed to this exclusion; nor has the conduct of WEA demonstrated an agreement to exclude summer school personnel from the unit, as might be the case if it had abandoned the presentation of proposals which would affect summer school employees.

Once the parties had agreed to include summer school employees in the unit, or had agreed to include any other personnel in the unit, whose inclusion would be appropriate, these personnel could only be excluded through mutual agreement or by Commission action. The Commission in In re Passaic Valley Regional High School Board of Education, District #1, P.E.R.C. No. 77-19, 3 NJPER 34 (1976) determined that an employer is at risk when it unilaterally treats unit employees as excluded from representation by the majority representative. If it is found that the employee shares a community of interest with the other members of the collective negotiations unit and that the majority representative was the representative of the employee(s) unilaterally executed by the employer, the employer will be found to have committed unfair practices. However, a majority representative does not abandon its claim to represent unilaterally excluded employees by its failure to file an unfair practice charge within the statutory six month filing period. The majority representative which continues to press its representational claim, but does not file

an unfair practice charge with the Commission, only loses its right to a retroactive negotiations order which might, under appropriate circumstances, be available in the unfair practice proceeding. The employees unilaterally excluded, in the absence of acquiescence to the improper employer conduct by the majority representative, continue to be represented by the majority representative.

Accordingly, the undersigned concludes and recommends that summer school employees continue to be represented by WEA.

High School Equivalency Instructors (G.E.D. Teachers)

Although Article XI of the 1968-1969 negotiations Agreement contains reference to "evening school programs," WEA did not present a proposal for G.E.D.s in 1968 nor did it subsequently present any proposals for G.E.D. personnel at any time prior to the filing of the instant Clarification of Unit Petition. Therefore, notwithstanding the cryptic Article XI reference, the undersigned concludes that WEA and the Board did not intend to include G.E.D. personnel in the WEA unit. Accordingly, even apart from the undersigned's belief that G.E.D. personnel do not share a community of interest with other Board certificated professional personnel, the undersigned concludes that the WEA negotiations unit does not include G.E.D. personnel.

Driver Training Instructors

During the negotiations for the 1968-1969 Agreement driver instruction was provided by regular Wayne teachers (mostly physical education teachers) during the regular school day. The Wayne teachers would perform driver instructor services in the place of a class assignment. The parties agreed that driver instruction at that time was a part of a teacher's duty and that, as such, driver training instructors were represented by WEA.

Shortly thereafter, in Fall 1968, there was an expansion of the driver training program to after school hours and weekend hours. After hour instruction was compensated on an hourly basis. In Summer 1974, there was a major dispute involving termination of driver instruction services by instructors. Until this time, WEA had not proposed any increase in hourly compensation, except for compensation during the summer.

In Summer 1974, dissatisfied instructors approached WEA, and WEA, in turn, requested that the Board negotiate with it. WEA simultaneously advised the Board that it was authorized to represent driver training instructors. The Board's President responded to WEA on July 22 stating that a WEA proposal for driver training would be appropriate as part of WEA's 1975-1976 negotiations proposals and noting that the 1973-1974 contract did not contain a driver training compensation provision. Notwithstanding the July 22 letter and the public attention drawn to the dispute, and notwithstanding the Board's knowledge of the July 22 letter, the Board did not advise WEA of its position that its President had not been authorized to extend this proposal to WEA. Only after WEA had presented its proposal in Fall 1974 for driver training instructors did the Board communicate with WEA its position that driver training instructors were not a part of the WEA unit. Furthermore, the Board President never advised WEA that she was not authorized to extend the July 22 proposal to WEA.

The undersigned has carefully considered the factors relevant to unit clarification with regard to the driver training instructors. There is no dispute that from the unit's inception driver instructors who taught during regular school hours were represented in WEA's negotiations unit. However, it is also clear that WEA did not seek to negotiate the salaries of driver instructors for the work performed outside school hours, with the exception of summer hours, whether performed by regular Wayne teachers or other part-time non-Wayne teaching personnel. The undersigned concludes, in light of the agreement as to the inclusion of driver training instruction as part of the unit work performed by regular Wayne teachers, that there was an intent by the parties to include driver training instructors as part of the WEA unit, at least with respect to the performance of such services during the regular school day. However, the fact that WEA did not negotiate or did not seek to negotiate for after hour compensation for its regular classroom teachers does not deprive WEA of its representative status for driver training instructors for after school hours. As the undersigned has previously recommended in the appropriateness section of this report, the majority representative of teaching personnel represents personnel in their performance of any after hour work which is tantamount to extra-curricular activity supervision. The failure to negotiate a rate of compensation

for such employment is not an abandonment of the representative status of the majority representative for employees engaged in such activities. See, In re Long Branch Board of Education, D.R. No. 78-24 (1977), wherein the Director of Representation clarified the teachers collective negotiations unit to include coaching services notwithstanding the fact that the coaches had been covered for at least three previous years under a separate collective negotiations agreement exclusively for coaches.

The undersigned also recommends the conclusion that even after the budget defeat of 1973, after which driver instruction was totally performed after hours, WEA remained the collective negotiations representative for driver training instructors. Thus, when the 1974 dispute occurred WEA was well within its rights to demand negotiations for driver instructors.

Even if the post-1973 program is termed a new operation, which removed unit work from unit employees and fixed such duties upon unrepresented personnel, the undersigned still concludes that the events of 1974 constituted a recognition of WEA as the exclusive representative for driver training personnel in the WEA unit. This recognition was extended in the July 22 letter from the Wayne President to the WEA President. Neither the Board President nor any other Board member expressed any reservation as to the authority of the Board President to enter into the recognition agreement with WEA. Additionally, the Board did not act in a forthright manner to attempt to rescind the recognition. Therefore, the Board operated at its own risk when it thereafter,in Fall negotiations, refused to negotiate with WEA. WEA has not acquiesced in the Board's actions.

Accordingly, the undersigned concludes that WEA represents all driver training instructors employed by the Board. However, those part-time personnel employed by the Board who are not regular Wayne classroom teachers, are casual employees, unless they meet a test of regularity in their part-time employment. Therefore, the undersigned recommends that those part-time personnel who are not regular classroom teachers but who perform services on the average of three time a week, whether during the regular school year or during the summer, are regular part-time employees entitled to representation. The undersigned recommends that those nonregular classroom teachers who perform driver instruction solely on weekends are casual employees.

BEDSIDE TEACHERS

WEA's initial proposal for the 1968-1969 Agreement embodied a provision for compensating bedside personnel. While the 1968-1969 Agreement, as was the case for all extracurricular activities, did not set a stipend for bedside teaching, this item was negotiated and, in fact, the bedside tutoring pay was subsequently increased from $5 to $7.50 per hour. While there is some evidence that the rate was established through studies made by the Board's administrative team of comparative school districts, the undersigned is convinced that the initial impetus for increasing bedside compensation was triggered by negotiations with WEA. A key element in WEA's presentation of the issues relating to various satellite groups was the low comparative rate of pay. WEA abandoned its negotiations proposal upon representation by the Board that it would be moving to upgrade the compensation for bedside tutors.

Therefore, even aprt from the undersigned's recommendation in the appropriateness section of this report wherein the undersigned recommends that bedside instructors be treated no differently than the treatment accorded to other extracurricular personnel and that bedside instructors therefore be represented by the majority representative, the undersigned finds that the parties evidenced an intent to include bedside personnel in the WEA negotiations unit. The fact that WEA did not subsequently present proposals in negotiations for increased renumeration does not indicate that WEA abandoned its representative status for bedside teachers but, rather, reflects the fact that WEA was satisfied with the upgraded rate of pay. 96/

Supplementary Teachers

WEA did not present a proposal for supplementary teachers until its proposals for the 1975-1976 Agreement. Ziccardi's testimony as to the formation of the unit is that WEA knew of the existence of supplementary teachers. Article XI of the 1968-1969 Agreement does not refer to supplementary teachers. The undersigned concludes and recommends that there was no agreement to include supplementary teachers in the WEA unit and that supplementary teachers are not part of WEA's negotiations unit.

96/ The undersigned recommends, however, that non-regular Wayne teachers who perform bedside teaching on a sporadic basis are casual employees.

The undersigned has considered this issue from the context of a unit "accretion," inasmuch as Ziccardi's testimony indicated that there were only five or six supplementary teachers in Wayne in 1968 and Tucker's testimony was that the number of supplementary teachers increased dramatically in 1973 or 1974. The undersigned concludes, however, that the concept of "accretion," which was applicable to the facts in In re Fair Lawn Board of Education, D.R. No. 78-22, 3 NJPER 389 (1977), is not applicable in this situation. In the Fair Lawn matter, supra, the support teacher program commenced after the unit had been established and the support teacher program was a "new operation." In Wayne, the supplementary program began in the early 1960's. WEA was clearly aware of the existence of supplementary teachers when it sought unit recognition. There is no evidence that WEA asked the Board to recognize it as the representative of supplementary teachers. WEA failed to submit any demands covering supplementary teachers then and, thereafter, for a period covering seven years and five contracts. Under traditional concepts of unit clarification, WEA's failure to exhibit a desire to seek recognition or to negotiate on behalf of a known group of employees constituted a waiver of any later claim that such employees are a part, or should become a part, of its unit. Further, the expanded supplementary program is not a "new operation," and, thus, does not constitute an appropriate accretion to the WEA unit. 97/

Substitute Teachers

The record demonstrates that the parties did negotiate with respect to substitute teachers in the 1968-1969 negotiations. The Board was opposed to increasing substitute pay; however, as in the case of the bedside personnel, the Board privately indicated to WEA that substitute pay would be increased. In fact, substitute pay was later increased by $2 per hour. For the same reasons expressed by the undersigned with regard to these circumstances involving bedside personnel, the undersigned concludes that there was an intent to

97/ The undersigned notes the testimony of WEA witness Tucker that with the passage of State legislation and the availability of state monies, the Board, in 1973, was able to expand its program from the elementary level to the high school level. This accounted for the increased complement of supplementary teachers. These circumstances do not amount to a "new operation." See H.O. No. 77-6, attached to Fair Lawn, for a more detailed analysis of the accretion concept.

include substitute teachers in the negotiations unit. This intent is further evidenced by the inclusion of a reference in Article XI of the 1968-1969 Agreement to substitute personnel.

In subsequent negotiations WEA expressed a twofold concern involving substitutes: (1) The utilization of classroom teachers as substitutes, and (2) the salary compensation of part-time substitute employees. However, the primary emphasis related to the use of classroom teachers as substitutes, which is supported by the absence of a part-time substitute pay schedule in WEA's proposals through 1973. In 1973, WEA sought to achieve an increase for regular part-time teachers, although by an unstated amount. The Board by this time has hardened its position concerning the representation by WEA of satellite groups. Therefore, WEA's strategy was to increase the rate of substitute pay by insisting in negotiations upon a pay rate for regular classroom teachers used in substitute situations. Thus, WEA avoided the situation wherein the Board would refuse to negotiate.

The undersigned concludes that WEA was well aware that the Board would refuse to negotiate with it as the representative of substitute personnel. WEA did not acquiesce in the exclusion of substitute personnel from the unit, but sought to achieve its aims by following the path of least resistance. Accordingly, the undersigned concludes and recommends that the parties initially included substitute personnel in the WEA negotiations unit and that there was no mutual agreement to exclude these personnel. Therefore, WEA's negotiations unit includes substitute personnel.

However, in accordance with In re Bridgewater-Raritan Regional Board of Education, D.R. No. 79-12, 4 NJPER 444 (¶4021 1978), part-time substitute personnel are not public employees under the Act but remain casual employees unless they meet the standard of regularity and continuity of employment established therein. Accordingly, WEA represents only those substitute employees who have been employed for thirty days or more during the past school year and who have indicated a desire to accept employment as a substitue in the succeeding school year. Thus, for the purposes herein, WEA represents those substitutes who worked thirty days or more in school year 1977-1978, and who have accepted any appointment as a substitute in this 1978-1979 school year.

The undersigned excepts from this conclusion those substitute employees who have received a teacher's contract. Under the Board's policy those personnel become regular classroom teachers and should be considered as such, and not as substitute personnel, for the purpose of their representation. Nevertheless,the undersigned recommends that where such an individual returns as a substitute teacher in the succeeding school year, the period of service as a regular teacher in the prior year should be considered as part of the continuity and regularity requirement set forth in Bridgewater-Raritan.

Therefore, for the reasons set forth above, the undersigned concludes and recommends that WEA represent summer school teachers, driver training instructors, bedside teachers and substitute teachers (as described above) in its existing collective negotiations unit and said clarification shall be effective immediately forthwith. The undersigned further concludes and recommends that WEA does not represent high school equivalency instructors (G.E.D.) and supplementary teachers.

Respectfully submitted,

Joel G. Scharff
Hearing Officer

DATED: February 15, 1979
Trenton, New Jersey