

H.O. NO. 2003-1

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

In the Matter of

COUNTY OF ESSEX,
Public Employer-Petitioner
-and-

Docket No. CU-H-99-35

C.W.A. LOCAL 1081 & IBEW LOCAL 1158,
Respondents.

COUNTY OF ESSEX,
Public Employer,
-and-

Docket No. RO-H-2000-96

IBEW LOCAL 1158,
Petitioner.

SYNOPSIS

A Hearing Officer recommends that a clarification of unit petition and a petition for certification of employee representative be dismissed. The public employer filed a CU petition seeking a determination over which one of two negotiations units shall represent newly created and hired "employment specialists" and other clerical employees of the Department of Economic Development Training and Employment.

The employer initially "organizationally transferred" about 40 family service workers and 7 clerical employees, represented by CWA, from the Department of Citizen Services (Division of Welfare) to DEDTE, where the IBEW represented all non-professional employees. All but 7 family service workers (unofficially designated as "case managers" for their specialized duties) voluntarily returned to the Division of Welfare and the County hired new employees at DEDTE in the title, employment specialist. The employer's petition sought a clarification of either the CWA unit or the IBEW unit to include the disputed titles. CWA and IBEW sought the clarification of their separate units to include the titles.

The IBEW also filed a representation petition seeking a separate unit of employment specialists and clerical employees and excluding professional employees. Both majority representatives filed unfair practice charges against the County, claiming that they each had demanded the payment of membership dues or agency fees of the disputed employees, which the County had refused, allegedly violating 5.4a(5) and (1) of the Act. The charges were consolidated with the representation cases. The hearing examiner bifurcated the hearing, determining that the Complaint on the unfair practice charges shall be held in abeyance.

The hearing officer recommended that the clarification of unit petition requested an "accretion" to one of two negotiations units. The hearing officer recommended that neither unit should be clarified to include employment specialists; that the employment specialists were professional employees; and that they may be represented in any County unit that includes professional employees. The hearing officer also recommended that the representation petition be dismissed because it sought to exclude professional employees. Finally, the hearing officer recommended that the IBEW unit at DEDTE should be clarified to include newly hired clerical employees.

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

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Appearances:

For the Public Employer, Appruzzese, McDermott, Mastro &
Murphy, attorneys
(James L. Plosia, Jr., of counsel)

For Respondent CWA, Weissman & Mintz, attorneys
(Stephen P. Weissman, of counsel)

For Petitioner and Respondent IBEW, Carella, Byrne, Bain,
Gilfillan, Cecchi, Stewart & Olstein, attorneys
(Justine A. Niccollai, of counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDED DECISION

On March 29, 1999, the County of Essex filed a petition for clarification of unit (CU-99-35) seeking a determination that one or the other of two of its negotiations units be clarified to include "employees in the newly created Department of Economic Development Training and Employment" (DEDTE). The petition identified CWA Local 1081 as the majority representative of the employees who were to be "organizationally transferred" to the new department. It also

identified IBEW Local 1158 as having "made a claim" that it will represent the employees upon their transfer.

On April 19, 1999, the Communications Workers of America, AFL-CIO filed an unfair practice charge (CO-99-322) against the County of Essex. The charge alleges that the County had recently announced its intention to escrow CWA membership dues of about 50 employees of the "Welfare to Work Unit" in the County Department of Citizen Services. Contending that it is the majority representative of the 50 employees "affected by the organizational transfer" and that their duties have not been changed, the CWA alleges that the escrowing of employee dues "abrogates the collective agreement", violating 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-(1), et seq.

On April 30, 1999, the International Brotherhood of Electrical Workers, Local 1158 filed an unfair practice charge (CO-99-342) against the County. The charge alleges that in January 1986, Local 1158 was certified as the majority representative of all employees of the County Department of Planning and Economic Development, Division of Employment Training, excluding professional

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

and supervisory employees, etc., and that the parties have executed, without interruption, a series of collective agreements. The charge alleges that on March 23, 1999, Local 1158 advised the County that all "non-excluded" employees transferred into the Division of Training and Employment should be considered members of the negotiations unit, consistent with certifications of representative (A July 1985 certification provided that Local 1158 was the majority representative all County employees formerly represented by the Essex County Employee Association). The charge further alleges that Local 1158 demanded "all employee member dues" of transferred employees; that the County has refused to recognize Local 1158 as the representative of the transferred employees and has refused to pay dues to Local 1158, violating 5.4a(1) and (2)^{2/} of the Act.

On September 23, 1999, a Consolidated Complaint and Notice of Hearing issued on all three filings. The hearing was initially scheduled to be conducted on February 15 and 16, 2000, preceded by a pre-hearing conference on January 19. On December 13, 1999 and January 10, 2000, the County and CWA, respectively, requested that the pre-hearing conference be rescheduled. On January 24, 2000, CWA offered to circulate proposed stipulations of fact in order to narrow the factual dispute, thereby reducing the need for or scope

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

of sworn testimony at hearing. The hearing dates were adjourned, pursuant to the consent of all parties. On February 17, 2000, CWA faxed proposed stipulations, some of which were entered by the parties at hearing.

On March 15 and April 3, 2000, IBEW Local 1158 filed a petition for certification and an amended petition (RO-2000-96), together with a showing of interest. The petition seeks a unit of all County employment specialists, all training and employment specialists and all clerical employees employed at the Department of Economic Development Training and Employment in the Division of Training and Employment. The petition seeks to exclude all professional and supervisory employees, etc.

On April 5, 2000, an Order Consolidating all cases was issued, together with a Notice of Hearing. On May 3, 2000, I issued a letter to the parties advising that issues raised by the unfair practice complaints were "tangential" to the questions concerning unit composition or representation posed by the two petitions. I ordered that the hearing be bifurcated and that the Complaint (on the unfair practice charges) be held in abeyance. Finally, I advised the parties of the areas of inquiry about which evidence, documentary and testimonial, was to be adduced under oath.

On May 12, June 1 and 9 and October 17, 2000, and February 13 and November 20, 2001, I conducted a hearing at which the parties examined witnesses and introduced exhibits. On July 18, 2000, I advised the parties that the hearing would proceed on October 17,

18, 25 and 26, 2000. I received uncontested requests for postponements of the latter three dates. I granted the requests. On October 24, 2000, I wrote to the parties, advising that the hearing will proceed on January 12 and 16, and February 13, 14 and 15, 2001. On December 6, 2000, I wrote to the parties, inquiring of their interest in an informal disposition of the cases. On December 22, I wrote again, confirming their attendance at a January 3, 2001 informal conference before a Commission staff attorney. On January 2, CWA counsel advised all concerned of an injury he suffered and his consequential unavailability to attend the conference the next day. On January 10, he further advised of his continuing unavailability on January 12 and 16, owing to his injury. On January 11, I mailed a letter to the parties, reconfirming all three February hearing dates. The hearing had apparently concluded on February 13; no party expressed an interest in calling additional witnesses.

On March 15, 2001, I advised the parties that post-hearing briefs must be filed by May 25. On May 11, 2001, I asked all parties to advise me of their availabilities on five specific dates in June 2001, pursuant to CWA counsel's request to re-open the record for additional testimony, with the agreement of counsel for the County. IBEW counsel did not oppose the request. On May 24, I wrote again, offering seven specific alternate hearing dates in July and August 2001 because at least one or more of the parties were unavailable on each of the five June dates. One or more of the

parties was unavailable on each of the selected alternate dates. On June 25, 2001, I mailed an Order Scheduling Hearing for October 2, 2001. The final hearing date occurred on November 20, 2001, pursuant to two intervening and uncontested adjournment requests by one party or more than one party.

On January 28, 2002, I advised the parties that post-hearing briefs must be filed on March 8 and replies must be filed by April 12, 2002. On March 15, I received an unopposed request from CWA counsel for an extension of time to file briefs. On March 18, I wrote to the parties and granted an extension until April 29 and May 12, respectively. Two additional unopposed requests for extensions of time were granted. Reply briefs were filed by June 11, 2002.

The parties stipulated these facts on the first hearing date:

1. From approximately 1965 until in or about April, 1999, the County Welfare Agency in Essex County, initially the Essex County Welfare Board and then the Division of Welfare, administered State and/or federally mandated employment and training programs for persons receiving various forms of public assistance. The first such programs were known as "We Too" and "WIN." They were followed by the "REACH Family Development Initiative" and "Welfare to Work" programs.

2. CWA has represented employees of the County Welfare Agency since 1969. From 1969 to 1997, the Agency was an autonomous

agency, known as the Essex County Welfare Board. On May 1, 1979, pursuant to the Optional County Charter Law, Essex County reorganized its form of government. The Welfare Board was abolished as an autonomous body and its functions were assumed by the Essex County Division of Welfare. The Division of Welfare was placed in the Department of Citizens Services.

3. Prior to April, 1999, the Welfare to Work Program was administered by the Division of Welfare in the Department of Citizens Services.

4. In or about April, 1999, personnel assigned to the Welfare to Work Program within the Division of Welfare were transferred to the DEDTE [Department of Economic Development Training and Employment]. Included among the transferred employees were approximately 35 FSWs [family service workers] and 8 employees holding clerical titles, all of whom were represented by the CWA at the time of their transfer.

5. In August and September, 1999, employees who were transferred from the Department of Citizens Services to the DEDTE were permitted to return to the Division of Welfare.

6. The DEDTE is located at 50 South Clinton Street, East Orange on the third, fourth and fifth floors. Also located at 50 South Clinton Street is the Suburban Citizens Services Center and the food stamps office. The Suburban Center is located on the second floor of 50 South Clinton Street and the food stamps office is on the first floor.

7. Approximately 2 miles separate the Military Park and 50 South Clinton Street buildings. Documents relative to the food stamps, TANF [Temporary Assistance for Needy Families] and Welfare to Work programs are messengered back and forth between the two buildings.

8. Brian P. Scantleberry is the Director of the Department of Citizens Services and James J. Williams is the Director of the Division of Welfare. Jeffrey Bertrand is the Director of the Department of Economic Development Training and Employment.

[1T6-9]^{3/}

I find these facts:

9. On July 29, 1985, the Director of Representation issued a Certification of Representative (RO-85-123), identifying IBEW, Local 1158 AFL-CIO as the majority representative of all employees employed by the County of Essex, excluding confidential employees, professional employees, supervisors and others.

On January 14, 1986, the Director of Representation issued a Certification of Representative (RO-86-44), identifying IBEW, Local 1158, AFL-CIO as the majority representative of all County employees in the Department of Planning and Economic Development in the Division of Employment Training located at 576 Central Avenue, East Orange. The negotiations unit excluded all professional,

^{3/} "T" represents the transcript of the hearing, and is immediately preceded by a number designating which day of hearing the fact was transcribed. Number(s) following each "T" refer to page number(s) of the transcript.

supervisory, and confidential employees, managerial executives and others.

On March 2, 1970, CWA was certified as the majority representative of "welfare aides excluding all other employees" at the Essex County Welfare Board (RO-48). On December 1, 1987, CWA was certified as the majority representative of "all office clerical employees" of the Essex County Division of Welfare, excluding all professional and craft employees, supervisors and others (RO-88-21).

10. Bruce Nigro has been Deputy Director of the Division of Welfare since 1993 (2T9; 2T55). He is responsible for all Division operations, personnel matters, direction of staff, planning and coordination activities. He implements policies and procedures on his own initiative or pursuant to approval of the Director (2T9; 2T10). The Division employs about 670 people and operates 5 service centers in the County, providing direct services to clients in programs entitled, Work First New Jersey, TANF (Temporary Assistance to Needy Families), Food Stamps, Medicaid, General Assistance and Social Services (2T21; 2T26). Nigro also oversees the Office of Child Support, the Office of Special Services and the Investigational Unit, among others (2T27; 2T37-2T42; E-3).^{4/}

^{4/} "E" represents an exhibit moved into evidence by the Employer, Essex County, followed by the exhibit number; "CWA" represents an exhibit moved into evidence by the Communications Workers of America, followed by the exhibit number.

Each service center is operated by an Administrative Supervisor of Family Services. In descending organizational order are Assistant Administrative supervisors, family service supervisors, family service workers and clerical employees (2T23-2T24). Generally, each service center has 2 or 3 assistant supervisors and each family service supervisor oversees 6 family service workers (2T22-2T23). Family service workers and clerical employees are represented for purposes of collective negotiations by CWA (2T24; 2T27; 2T54).

11. A Department of Personnel "job specification" defines a "family service worker" and provides examples of work, education requirements, and "knowledge and abilities". Family service worker is defined:

Under direction, performs field and office work involved in aiding individuals and families having problems with family relationships or other aspects of their social functioning that adversely affect the family unit or personal lives, and in determining financial eligibility for public assistance programs: does related duties as required. [CWA-51]

According to the specification, a family service worker analyzes information on forms, applications and other financial assistance documents for completeness; identifies possible financial resources for applicants when appropriate. . .for [clients] to seek benefits from other [government] agencies; counsels and assists families and individuals requiring assistance in managing their affairs; responds to complaints about social conditions and financial eligibility and conducts investigations to resolve complaints; verifies and

determines entitlement and other required data; collects, analyzes and records data and information to be used to identify social service needs; works with families where disturbances in family relationships exist and contacts appropriate agencies as required; counsels clients about various aspects of public assistance and related programs; collaborates with appropriate staff members to plan and carry out social services for clients; prepares reports for case entries; and maintains liaison with organizations and agencies (CWA-51).

A family service worker must have an undergraduate degree or may "substitute experience on a year-for-year basis with thirty (30) semester hour credits being equal to one year of experience". The designated experience includes work performed in gathering information from clients, determining their needs, and planning and carrying out a prescribed treatment plan; or work performed in examining, adjusting, determining. . .eligibility for cash awards or benefits; or in coordinating a public welfare program (CWA-51).

12. About 250 family service workers assist "active" clients in all 5 service centers. About 35 other family service workers work in the Office of Child Support, the purpose of which is to establish paternity and ensure monetary support for children (2T26; 2T27). Other family service workers are engaged in the food stamps and Medicaid units, and others are engaged in an Early Employment Initiative, or work "intake" at the service centers (2T33; 2T37; 2T84-2T87; 3T36). Before April 1999, the Department of

Citizen Services employed a total of about 400 family service workers (3T99). Other divisions within the Department are those of Community Action, Aging, and Youth Services (a detention facility), where the IBEW represents detention officers and clerical employees (2T56-2T57).

13. In October 1992, the New Jersey Department of Human Services promulgated the "Family Development Program Manual". According to the manual,

The Family Development Program ["FDP"] is New Jersey's initiative to help public assistance individuals and their family members overcome barriers to employment to become members of the productive work force employed in full-time unsubsidized jobs with wages and benefits. . . .
[CWA-36]

The FDP superceded other programs, which also were State responses to federal legislation. The FDP manual defined the term "case manager":

Case manager means the individual in the AFDC/FDP [Aid to Families with Dependent Children/Family Development Program] case management component or GA/FDP [General Assistance/Family Development Program] case management component responsible for service coordination and participation by an individual in FDP. . . .
[CWA-36, subchapter 2, p.1.]

The manual also defined "family plan" as a plan developed by an AFDC recipient or GA participant which sets forth a "detailed action agenda", including the "educational and employment-related goals of the adult recipients"; the "steps" needed to achieve the goals; and the "supportive services" to be provided to the recipient (CW-36).

During the years the FDP was in effect (1992-96), family service workers in the Division of Welfare performed the functions of a "case manager" (3T35; 4T279). Not all family service workers were "case managers"; "generic" family service workers typically performed routine functions of determining client eligibility, including eligibility for social services and emergency assistance. Their typical caseload ranged from 125 to 175 cases (4T307; 4T308). Nor was every client assigned to a "case manager"; when grandparents care for grandchildren or no parent is living in a residence with children beneficiaries, a family service worker (without case management training) was assigned to the case (4T245).

In 1993, Nigro, together with his Director, implemented changes in the allocation of responsibilities among family service workers. Until that time, the relatively few family service workers performing case management functions had slightly lower caseloads than family service workers not performing case management functions, owing to the extra work (4T307). Nigro initiated a "specialized case management function", the purpose of which was the "develop[ment] of an employment goal for the client." The change resulted in an undisclosed number of family service workers working full-time on case-management responsibilities (4T281; 4T287). Generally, a family service worker functioning as a "case manager" would speak with a client or applicant and elicit facts about his or her education, employment history and recognized "barriers" to full-time employment (typically, substance abuse). The case manager

next "structured a program centering on training rather than a direct search and direct employment," according to Nigro (4T281).

During the FDP years, testing and training of clients generally preceded employment searches. The emphasis was placed on "client training, remediation and long-term self-sufficiency" (3T33). The process was "very individualized" (3T33). Enrolled clients were tested for "basic skills" at Essex County College, the results of which family service workers (acting as case managers) used for their placement in varied programs (3T35). Case managers would decide which vendor (a County-contracted provider of services/training of clients) was most appropriate for a client (3T36; 3T102; 2T124). Sometimes "job fairs" were sponsored at which local business representatives spoke with FDP clients. Case managers assisted their preparation of resumes (3T37).

The case manager had a duty to secure (or to try to secure) a client's placement in a permanent job (4T282). For example, a family service worker performing case management functions could send a client to a computer training program or course and next involve the client in his or her own job search (e.g., scan the classified advertisements in newspapers) or provide the client with specific referrals (3T38; 4T283).

14. In December 1993, the Essex County Division of Welfare issued a superceding section of a "Policies and Procedures Manual" intended for employee use in conjunction with the Family Development Program Manual (CWA-37; 4T285). The section required client cases to be "processed through FAMIS and referred to OMEGA" (CWA-37, p.2).

FAMIS (Financial Assistance Management Information Systems) and OMEGA are state-wide, complementary computer systems providing client eligibility and demographic information to County employees, including family service workers (2T46-2T47; 3T10; 3T18; 4T197-4T198). Under the FDP, Essex County family service workers predominantly sought information from the FAMIS system and other family service workers functioning as case managers were required to "input information" into the OMEGA system (4T287). Case managers sometimes "had occasion to make inquiries in FAMIS" (4T287). They were responsible for generating bi-weekly vouchers (payments) to service providers (i.e., child care); a family service worker entered that information into the OMEGA system (CWA-38; 4T293). Under the FDP, welfare recipients were required to "participate in employment or in FDP education and employment-directed activity. . . unless exempt from such participation. . ." (CWA-36). Family service workers functioning as case managers "reviewed client circumstances--pregnancy, age, student status, etc.--in light of the series of exemptions" (4T294).

The 1992 Family Program Development Manual also required the imposition of sanctions on welfare recipients refusing to sign the "family plan" or "FDP agreement" without justification (CWA-36). Family service workers functioning as case managers were responsible for carrying out the procedure (CWA-39; 4T295). The FDP permitted more client exemptions from "activities" than were permitted under later welfare legislation (4T310). Finally, the FDP

required the "scheduling, coordinating and conducting of group/individual orientation sessions for all mandatory/voluntary referrals. . ." (CWA-37). Nigro characterized these sessions as "similar" to those defined under "Workfirst New Jersey", a program prompted by federal legislation in 1996 (4T288).

15. In 1996, the Federal Personal Responsibility and Work Opportunity Reconciliation Act was passed by Congress and signed by the President. The legislation eliminated AFDC (Aide to Families with Dependent Children), the "mainstay" of the Welfare system, as supplemented by food stamps and Medicaid (2T58; 2T61). The new law, notable for its 5-year cumulative limit on benefit payments (payments now identified as TANF (Temporary Assistance for Needy Families)), required that participants be placed in a "work activity" within 2 years (2T59; 2T60).

In 1997, our legislature passed the Workfirst New Jersey Act (CWA-1; 2T61). It incorporated the State-funded "General Assistance" program--which benefited single adults and couples without dependent children (CWA-1). Altogether, the WFNJ program

. . . is designed specifically to emphasize personal responsibility, instill dignity, promote self-sufficiency and pride through work and strongly reinforce all parents' responsibility for their child(ren) through strict enforcement of child support requirements. [CWA-1]

The New Jersey Department of Health and Human Services administered the program and promulgated a comprehensive "manual" for counties and municipalities (CWA-1). In Essex County (acting on behalf of its participating municipalities), the WFNJ program was administered

by the Division of Welfare (2T68). The focus of the program was "getting the client a job" (2T59; 3T19; 3T110-3T111).

In April 1997, Nigro sent a memorandum to Director Williams, advising of the "new requirements for our clients" under WFNJ, particularly immediate "job search" and "participation" requirements and "sanctioning mandates." Nigro credibly testified that "there was a large increase in workload under WFNJ" and that the Division of Welfare needed to "expand the duties of all family service workers handling TANF eligibility issues" (CWA-2; 2T80; 2T81).

16. At an unspecified time between 1997 and March 1999, family service workers performing client "intake" duties, and others performing case management duties became known as the "Welfare-to-Work" (WTW) unit (2T70; 4T332-4T333). The formation of WTW was related to the emphasis on employment set forth in the WFNJ program.

Sharon Butler has been employed by the Division of Welfare for about 30 years and has been an assistant administrative supervisor of family services since 1994 (3T4). She has never been a CWA member (3T67). Butler credibly testified that WTW is divided into 7 units among two office sites--15 Rector Street in Newark and 15 South Munn Street in East Orange (3T7). Two "intake" units and five "active case management" units were each comprised of a supervisor, six family service workers (variously identified as case managers) and a clerical employee (3T5-3T6).

Each site had an intake unit that introduced the WFNJ program to applicants or clients (3T8). An applicant may be immediately referred to the Child Support unit for direction regarding an absent parent (2T84). A family service worker there will assist the client in completing an application form for TANF, food stamps and Medicaid benefits (2T85). Some clients are promptly diverted to an Early Employment Initiative (EEI), provided that they meet "relaxed" employability qualifications (2T86; 4T224). Five family service workers in the intake units, following State and County regulations, screen newspaper classified ads and work with State Employment Service employees (in Division offices) in order to place such clients in jobs (CWA-32; CWA-1; 2T87-2T89; 4T228).

A client placed in a job through EEI will not receive TANF benefits and will not suffer a diminution of the 5-year limitation period for receipt of benefits (2T32; 2T90; CWA-1). The family service workers administering the EEI question clients about their skills, needs for transportation, tools and uniforms and try to secure them job interviews (2T89; 4T219). They do not use vendor lists and do not contact vendors (4T228). They rarely enter client data into the OMEGA system or set up child care for the clients (4T234). Family service workers "monitor" clients placed in jobs through EEI; the Division is paid various incentive fees, depending upon the fact or length of client employment (2T89-2T90).

If an applicant is not suited for EEI enrollment, the intake family service worker assesses the completed application,

normally advising the client that his or her eligibility will be determined within 15 days (2T95). The client is normally referred to a State (DOL) employment services worker, who evaluates the client's work history, enters data into a computer system and may refer the client to a job (2T96; 2T98).

17. Before April 1999, family service workers mailed clients notices--on a form produced by the State Division of Family Planning--advising them of "call-ins" (CWA-7; 2T118). After April 1999, "call-ins" were identified as "orientation sessions" (2T121). The purpose of a "call-in" was to apprise about 300 or more selected people of WFNJ. Selections were based upon listings of individuals receiving various forms of public assistance--as recorded by the State (3T8-3T9). A Division of Welfare Intake Supervisor accessed the names on the State FAMIS system and distributed lists to family service workers. After verifying certain data, the family service workers "called-in" the potential clients (3T10). About 25% of those notified attended such sessions. After registering in person, clients attended group gatherings at which they were informed about WFNJ parameters (CWA-9; 2T122-2T125). Case managers told each registrant of the Individual Responsibility Plan (IRP), the purpose of which is to provide a "snapshot of what a client believes to be [impediments] in his life." Sometimes, clients with substance abuse problems were identified by their responses on a CAGE-8 form (3T16; CWA-13; 2T127; 3T14; CWA-10). Clients are next referred to vendors--agencies or employers under contract with Essex County to

train or employ clients. Vendors may also offer job search assistance, education or other work experience programs (3T15; 2T124). Clients are generally placed in a four-week "job search" activity which provides instruction in job interviewing, dressing, resume writing, etc. (3T19-3T20; CWA-41).

17. During the initial four-week job search, the client's file was assigned to an "active case" unit--specifically, to a case manager, who monitored the client's attendance (3T22). Each week, vendors sent attendance records to the case managers (3T24; CWA-20). If attendance was poor and the client did not offer a "good cause" excuse, the case manager initially warned the client about sanctions (3T25). If poor attendance was caused by a client's substance abuse (which had not been previously identified), the case manager referred the matter to a substance abuse unit counselor (3T26; CWA-14). Similar procedures were followed if the case manager learned that domestic violence or illiteracy impeded attendance or performance (CWA-4; 2T99-2T100; 3T26; 3T30). For example, if the case manager identified a "barrier" such as illiteracy during the initial "job search", he or she may seek a vendor that offered a GED course or remediation literacy skills in a subsequent work activity (3T30). Similarly, the case manager updated the IRP to reflect a client's literacy problem (2T136; CWA-10; 3T30). Case managers used the same form before and after April 1999 to identify domestically abused clients (CWA-4; 3T45). The case manager followed the client's attendance, progress,

problems, etc., in the subsequent work activity and kept abreast of support costs (such as transportation allowance), entering all data on the OMEGA computer system (3T31; 3T109-3T110). OMEGA generated "stop-date" reports periodically, informing case managers how many days remained in a client's work activity (3T28). As a client approached the conclusion of a work activity, the case manager mailed her or him a letter, advising that the activity was ending and specifying the next activity, together with the selected vendor's name and appointment date (CWA-12; 3T27; 3T29).

18. WFNJ prioritizes substance abuse as a remediable "barrier" to full-time, unsubsidized employment. On June 21, 1999, the State and the County Division of Welfare issued a comprehensive "policy and procedure," together with forms, regarding a "Substance Abuse Initiative" (CWA-13; 2T143). The procedures were implemented in January 1999, in advance of the issuance date (2T154). It was accompanied or preceded by a concise 20-step County "referral procedure" (CWA-14). The procedures in the latter document were in effect before June 1999 (2T146). They required family service workers to "screen" clients by recording their responses to drug or alcohol use questions on a "Cage-Aide" form and by soliciting their consent to release confidential alcohol and drug treatment information (2T144-2T145). The case manager has a continuing obligation to monitor clients for substance abuse throughout their "work activities" (see finding no. 17). Nigro credibly testified that before April 1999, substance abuse identification procedures

were "less formal" than afterwards (2T148-2T149). After April 1999, some clients' placement in rehabilitation programs became mandatory (2T149).

19. Clients failing to adhere to WFNJ requirements without a good cause will be "sanctioned." A sanction is a "financial penalty" (3T45-3T46). The process is governed by State administrative regulation and set forth in the 1997 WFNJ manual. See N.J.A.C. 10:90-4.11 (CWA-1). Sanctions may be escalated for repeated offenses, typically regarding lapsed attendance in work activities (3T46).

In 1994, Butler created a form that case managers used to recommend sanctions against clients. In 1998, it received "minor changes" to comply with WFNJ protocol (i.e., the changeover from the Family Services Development Act) (3T55-3T56; CWA-25). Beginning in 1997, case managers completed forms to record a client's history of sanctions and to set up appointments for sanctioned clients interested in "coming into compliance with work requirements under WFNJ" (3T53-3T55; 4T248; CWA-23; CWA-24).

On April 14, 1999, Nigro issued a memorandum about sanctions to family service supervisors and family service workers (4T236; CWA-22). Attached to the memorandum are two forms used by family service workers to notify clients of intended sanctions (CWA-22; 3T51). Butler compiled the client sanction list from information provided by her case managers (3T47-3T48). She relayed the list to Nigro, whose staff imposed the sanctions (3T48-3T49).

Butler credibly testified that Nigro's memorandum clarified a procedure that was in effect before April 1999 (3T52-3T53).

20. If a client chose not to comply with a requirement (for which a notice of sanction was issued), or disputed the circumstances prompting a sanction, he or she could contest the sanction in a "fair hearing" before an administrative law judge (3T57; CWA-22). Before April 1999, case managers assembled copies of all relevant letters, records, etc. and presented the documentation at the hearing (3T57-3T58). The family service worker (under Nigro's direction) who imposed the sanction sometimes testified at the proceeding (CWA26; 3T59).

The same procedures were followed between April and September 1999 (3T59). Such procedures were memorialized in the 1997 WFNJ manual (3T61-3T63).

21. The WFNJ manual sets forth the circumstances in which a client (in this instance, a TANF or GA recipient) will be exempted from the "60 cumulative month time limit" (N.J.A.C. 10:90-2.4; CWA-1). Exemptions may be granted for temporary disability or illness; the final trimester of a pregnancy or for a child under 3 months; or for domestic violence (2T105). Butler credibly testified that a proffered form recording an exemption was used after April 1999 (3T43; CWA-21). She and Nigro credibly testified that a similar form recording the same particulars was used by case managers before April 1999 (2T106; 3T43).

Clients may also receive "extensions" or "deferrals" from the time limit depending upon circumstances (2T105-2T107; CWA-15, CWA-16; CWA-17; CWA-18). Nigro credibly testified that case managers at the service centers used two forms regarding deferrals before and after April 1999 (2T159; CWA-16; CWA-17). Family service workers and supervisors reviewed recommendations for deferrals (2T161).

22. Butler credibly estimated that by March 1999, the Department of Citizen Services (the Division of Welfare) employed about 400 family service workers, 40 of whom were known as "case managers" because their duties differed from others in the same title (3T99-3T100). Case managers sought clients who were eligible for the "Welfare to Work" program. After a client's eligibility for TANF benefits was established, the case manager had a responsibility for "ongoing monitoring of the case for attendance, for compliance in the program" (3T102; 3T103; 3T106). Each case manager oversaw 200 or more cases, a number Butler characterized as "pretty high" (3T27). The "program" included work activities, decisions about which were most often made by case managers (typically, in consultation with vendors) (See finding nos. 16 and 17; 3T30; 3T38; 4T353). Case managers also worked with an employment counselor hired by the Department of Citizen Services to determine what businesses were to have been invited to job fairs and to assure that clients who had received appropriate training were notified of them (3T39).

Nigro testified credibly that a "generic" family service worker (i.e., a family service worker not performing case management functions) in 1993 could have performed the work of a "case manager" in 1998, provided that she would have received "some training" in the interim. By "training", Nigro testified, he meant a "re-review of employment services that were available--the differences and the requirements" and "training on the OMEGA [computer] system" (4T306). In distinguishing "case management" from "family service worker" functions, Nigro credibly testified: "By 1998, case managers did not do the normal routine functions--eligibility, social services, emergency assistance--that the remaining family service workers did" (4T308). Family service workers (as opposed to case managers) performed "eligibility for TANF, food stamps, Medicaid and emergency assistance programs". Nigro added that, "some family service workers specialized in child support, or document control or food stamp reconciliation" (3T334).

Nigro resisted a suggestion that by 1999, case managers' duties had moved to the far end of the "intake to services" spectrum. He testified:

. . . [I]n 1998 and 1999, we were moving case management services to intake. It was our belief that the small number of people dedicated to 'case management' needed to be expanded. With welfare reform, [i.e., WFNJ] there was more of a focus at the intake operation--get the client first into a job right from the beginning [i.e., initial job search by 'regular' family service worker staff]. [4T309]

He cited as an example the 1998 "suburban job search referral initiative" (CWA-5; 4T354). It was implemented to increase the number of family service workers performing a case management function--moving clients immediately into a "work activity". About 18 family service workers were assigned to the task (4T354-4T355). The initiative ended in April 1999, when "case management functions were transferred out of the Department of Citizen Services" (4T355).

23. Nigro prepared a list of "general duties of case management family service workers between January and April 1999" (CWA-6). He wrote the list on March 28, 2000, pursuant to a County request connected with the litigation of this case (2T113-2T115).

His list provides:

Develop Individual Responsibility Plan
(Employability Plan and identifiable barriers
with participants of Work First New Jersey)
(WFNJ).

Assign participants to community work experience
programs, vocational training, remedial
education, ESL, job search and job placement
activities.

Create activities and supports on the OMEGA
computer system that track participants
enrollment in various activities.

Monitor participants attendance and progress in
assigned activities.

Act as liaison between the participant and TANF
FSW in solving mutual problems on cases.

Contact other agencies as an advocate for the
participants.

Attend group orientation to process the
participants into various programs.

Provide statistics as to the participation of clients in various programs.

Complete reports for Fair Labor Standards Act (FLSA) which entails the recomputation of excessive number of hours in a community work experience program and minimum wage payment.

Adjust the number of hours for combined activities to meet program participation with Level of Service mandates for each fiscal year.

Recommends sanction[s] against participants who fail to comply with the program and the lifting of sanction[s] when participants complies with the fulfillment of program requirements. [CWA-6]

Nigro was asked about several items on his list. He testified that an example of a case manager's "liaison" responsibility (fifth item) was a client's acknowledgment of a difficulty with his or her child's school attendance; the case manager might refer the matter to another family service worker for remediation ("A social service component is funded by the State Division of Youth and Family Services") (4T257).

Another example was the threat of a client's eviction from housing; it is considered a "barrier" to employment, which a case manager would have referred to a family service worker for remediation (4T261).

Nigro testified that the next listed duty--"contact[ing] other agencies as an advocate for participants"--referred to a case manager's responsibility to contact vendors and on occasion, landlords and child care centers (4T264). The duty to "provide statistics. . ." referred to the case manager's obligation to "manually track" his or her assigned number of clients (4T265). The

duty to "complete reports for FLSA. . ." refers to a case manager's responsibility to ensure that clients placed in a community work experience program be compensated at a rate not less than the federal minimum wage, when compared to the amount they would have received under TANF, food stamps, etc. (4T266). Finally, Nigro was asked about the case manager's duty to "adjust the number of hours for combined activities to meet. . .mandates for each fiscal year." Nigro testified that under the welfare reform legislation clients have been required to work a specified minimum number of hours per week. Case managers ensure that they do (4T268).

I credit CWA-6 and Nigro's testimony.

24. In or around April 1999, Essex County approved an ordinance "restructuring" the Department of Planning and Economic Development as the Department of Economic Development, Training and Employment (E-5). The ordinance specified that the County is mandated to "enable greater numbers of Essex County residents to obtain job training and employment and locate permanent placement in the job market"; and that it desires "to enhance and broaden job training and placement services provided now through its Department of Planning and Economic Development, Division of Employment Training, by making the Division more diversified so as to assist greater numbers of Essex County residents to train for and enter the job market. . ." (E-5). Also included in the Department, headed by a Director, are the new Divisions of Economic Growth and Job Development, Housing and Community Development and an office of the

Workforce Investment Board. The Division of Economic Growth and Job Development "promotes and stimulates. . .use of commercial, industrial and residential resources" in part by "coordinating with business and industry to promote the creation of jobs in the County." The Division of Housing and Community Development "takes advantage" of grant and loan dollars to rehabilitate housing and business. Finally, the Workforce Investment Board function is to "coordinate welfare-to-work, school-to-work, literacy-to-work employment training and job placement programs in the local workforce investment area" (E-5).

About 53 employees of the "Welfare-to-Work" unit in the Division of Welfare of the Department of Citizen Services were transferred to the Division of Training and Employment in the new department (E-1; E-2; E-5; 2T72). The Division of Welfare did not participate in the decision to transfer employees (2T11). Among the transferred employees were 38 family service workers, 8 clerical employees, 7 family service worker supervisors and 2 assistant administrative supervisors (E-1). The transferred family service workers earned between \$34,000 and \$43,000. The transferred clerical employees earned between \$23,000 and \$28,000. The transferred supervisors earned between \$45,000 and \$49,000 (E-1). The transferred employees became employees of the DEDTE (3T68). The transferred family service workers had functioned as "case managers" (3T77). They were informed that they were (or were soon to be) employed as "employment specialists" (3T75). They were asked to

"sign paper work" acknowledging that they were surrendering their Department of Personnel title, together with their attendant "bumping rights" (5T8). On an unspecified date soon after April 1999, the transferred employees were provided an option to remain at DEDTE or return to the Department of Citizen Services in their pre-transfer titles (3T76). About 43 employees opted to return to the Department, including all but 7 family service workers and almost all of the clerical employees and supervisors (E-1; E-2). Returning family service workers were no longer assigned case manager duties. They were assigned other family service worker responsibilities (3T78; 3T79-3T80).

25. Nigro testified that many of the "functions" Division of Welfare employees performed before the transfers were transferred to the Division of Training and Employment at the DEDTE (2T73). About 7 employees opting not to return to the Department of Citizen Services were hired by DEDTE as "supervising employment specialists" (3T78-3T79). By December 1999, DEDTE had hired 27 or more "employment specialists" (E-4). By the hearing dates in this matter, DEDTE has employed about 40 employment specialists (5T10). Procedures set forth in subchapters 5-10 of the 1997 WFNJ manual which had been performed by Division of Welfare family service workers were "applied to" employment specialists at DEDTE. The subchapters set forth procedures regarding child care, transportation and work expenses; emergency assistance; administrative responsibilities; funeral and burial expenses; notice

of "fair hearing" procedures; and instances of fraud (CWA-1; 2T73-2T74; 3T63).

26. A Department of Personnel job specification defines "employment specialist." It provides:

Under supervision, assesses the education and training needs of participants, assists in their motivation and provides appropriate work experience and training services to those assigned to work experience and training projects as a means of improving the employability of such persons; does related work as required. [CWA-52]

Employment specialists "assign individuals to appropriate phases of the work experience and training program after reviewing educational records, employment histories and physical examination reports"; "maintain follow-up with participants, instructors, work experience unit sponsors and others furnishing services in order to evaluate progress"; "counsel participants on matters relating to training, work habits, motivation and relations with instructors and employers" and "evaluate participants' progress toward employability" (CWA-52).

An employment specialist must possess an undergraduate degree or may substitute one year of experience in "manpower development and training, job placement, education or vocational counseling." A master's degree in psychology, education, counseling or social work may be substituted for the alternate one year of work experience (CWA-52).

27. In 1996, Maureen Clifford was hired as a family service worker in the Division of Welfare and was assigned to "child

support" services (5T6; 5T17). Nigro credibly testified that family service workers assigned to "support centers" interviewed clients both initially and for "redetermination" of eligibility for benefits. The family service worker elicited information regarding present circumstances; income; residence; number of children; etc. (2T102-2T103). Clifford possesses an undergraduate degree and had been employed in social work at an Association for Retarded Citizens office from 1993 to 1996 (5T6). In September 1998, she was assigned to the Welfare to Work Unit and functioned as a case manager (5T7). Clifford credibly testified:

When I went to work for the Welfare to Work unit, everything I did was different than my family service worker position. I was focusing more on putting people into training places so they could eventually help get off the system, rather than dealing with the money end of it, of the welfare they received. [5T8]

According to Clifford, case managers "made sure that clients had their one job search for the year. And then just put them into a training; when that was over, place them into another training" (5T26). She denied that case managers performed "job placements." Clifford acknowledged that as a case manager in the Division of Welfare, she was responsible to "carry out the procedures contained in [the WFNJ] manuals" (5T55). She conceded that case managers and later on, employment specialists, reviewed with a client all social "issues" set forth in the IRP summary, (child care, transportation, housing, health care, substance abuse treatment, individual and family counseling) (CWA-10; 5T67).

In or about March 1999, Clifford was hired by DEDTE as an employment specialist (5T6; 5T45). Clifford is now one of seven senior employment specialists, each of whom supervise about 6 employment specialists (5T9-5T10). She testified that employment specialists "focused more on getting people into jobs and helping them more on social problems. . ." than did case managers (5T10). Specifically, an employment specialist "assisted" clients through a training program and,

When that was over we would focus more on what they had learned and try to set them up with a job, rather than just continuing into other training and let them find employment on their own. [5T11]

she testified that employment specialists "focused more on the long-term goal. . .that the person is now on a clock and they're running out of time [i.e., diminishing the 5-year limit on benefits] so they have to become self-sufficient" (5T29). Case manager family service workers did not have that responsibility (5T30). Clifford was asked about "things she did" as an employment specialist which she did not do as a case manager. She testified that she required resumes from clients after they completed a "job search" and that she works "more closely with JTPA [Job Training Partnership Act] employees to have job developers contact us with names of employers" (5T163). Butler testified that before September 1999, case managers had worked with JTPA employees regularly; "it acted as one of our vendors for placing clients in training for CWEP [community work experience program] slots" (3T115). I credit both testimonies; I

infer that Clifford did not personally work with JTPA employees while she was a case manager.

Clifford deemed drug dependency and low literacy as the two principal "social issues" facing clients (5T13; 5T15). As an employment specialist, Clifford "deals directly" with the State Department of Labor, "job banks" (a listing of job opportunities) and employers--functions that case managers did not perform (5T21-5T22). Specifically, she testified:

[T]here are two or three people DEDTE uses as 'contact' people so that if jobs are available, the personnel [dept] from that job would contact them. And then they send to us listings and qualifications. [5T22]

She testified that case managers did not give lessons or suggestions to clients about preparing for job interviews or writing resumes (5T24). Case managers performed these or similar tasks between 1992 and 1996 (see finding no. 12). She testified that employment specialists do "employment counseling" of a client if his or her resume is incomplete. They may recommend "additional training" (5T25). I credit Clifford's testimony.

On cross-examination, Clifford acknowledged that her entire experience in the Welfare to Work unit was from September 1998 through February 1999 (5T45). She agreed that family service workers performing "intake" duties were transferred to DEDTE in March 1999 (5T58). She agreed that employment specialists used the "Referral and Vendor Acceptance Form" until December, 2000, when they commenced inputting the information on a computer system (5T72; CWA-12).

Potential clients seeking TANF benefits meet with a family service worker. Once a client is deemed "eligible", family service workers "code them" into a computer system accessed by employment specialists. The family service worker issues a letter to the client advising of his or her need to comply with DEDTE (5T16-5T17). During the client's initial 4-week job search activity, his or her "case" is assigned to an employment specialist for monitoring (5T76; 5T79). The employment specialist reviews attendance data from the vendor. The attendance forms which had been used by case managers are substantially similar to those now used by employment specialists (CWA-43; CWA-45; 5T147; 5T151). If a client's poor attendance is without good cause, the employment specialist will initiate "the sanction process" (5T81-5T82). If a client attends the assigned training program regularly, a "stop date" report will be generated on the OMEGA system, advising of the approaching completion date of the work activity (5T82). Each employment specialist oversees about 800 cases, often requiring that clients be "rolled over" for a fifth week (or longer) in a job search (5T83). Vendors have sponsored work activities in CWEP and AWEP, where clients will learn English as a second language, adult basic education, or business office, medical office or food service skills (5T85; 5T88). Clients who poorly attend or disrupt a work activity may be sanctioned (5T90). Lists of vendor-sponsored "slots" are used by employment specialists to decide client work activities after the initial job search (5T92; 5T94; CWA-41).

Employment specialists complete forms which identify clients with possible substance abuse problems (5T101; CWA-13). If a client's responses to questions suggest such a problem, the employment specialist arranges an appointment for the client with a care coordinator associated with the Substance Abuse Initiative (5T104; 5T107-5T108). The coordinator contacts the employment specialist during a client's treatment so that "support services" can be arranged or adjusted (5T108).

Employment specialists enter data in the OMEGA system about client transportation allowances, uniform payments, GED test payments and child care support payments (5T111-5T112; CWA-44).

They also have a responsibility to complete forms enabling clients to receive medical deferrals. Clifford acknowledged that she had that same duty when she was employed as a case manager (5T114). The criteria for granting deferrals has not changed since 1998 (5T115). A medical exemption form which had been used by case managers and sets forth a signature line for "case manager" is currently used by employment specialists; they sign on the "case manager" signature line (CWA-48; 5T157-5T158).

Employment specialists work with family service workers when sanctioning or removing a sanction from a client's case (5T12). An employment specialist will "close out" the current "activity" on the OMEGA system, stop support payments, and issue a letter notifying the client of a pending sanction (5T125). If the client does not respond to the letter, the matter is referred to the

Division of Welfare, where, after approval (by Nigro), a family service worker initiates a sanction (5T127; 5T134; CWA-42). An employment specialist who had recommended a sanction and the family service worker who implemented it will appear together at any "fair hearing" at which the client will contest the sanction (5T131).

28. Debbie Horton has been employed by the State Department of Personnel since 1991. From 1997 through March 2001, she was the manager of a customer service unit. She oversaw and coordinated operations for reviews of personnel actions in State agencies and several counties, including Essex (6T6; 6T7). Horton is currently the Manager of Statewide Initiatives (6T6).

On December 10, 1999, Horton wrote a three page letter to CWA counsel, responding to his inquiry suggesting that family service workers should have been granted "title [or 'bumping'] rights" to employment specialist positions in the Welfare to Work unit of DEDTE (E-8; E-9). Title rights are "opportunities for people in one title to move to a similar title. . ." (6T7). In State service, the matter is governed by administrative regulation, which permits lateral movement if the duties of the two positions are "substantially similar." N.J.A.C. 4A:8-2.1(a)1. In order to determine the "substantial similarity" of two titles in County service, Horton compared the DOP job specifications for family service worker and employment specialist (6T8; see finding nos. 10 and 26). Horton compared the two "definitions." She wrote:

A comparison of the above definitions reveals that the major responsibility of the Family

Service Worker is significantly different than the Employment Specialist. The major responsibility of the Family Service Worker is to assist individuals/families having problems and to assist in the determination of financial eligibility for public assistance programs while the major responsibility of the Employment Specialist is to provide assistance in the area of training to improve the employability of individuals.

Although the experience and education requirements for the two specifications appear to be similar, there are major differences. For example, the experience requirement for Family Service Worker includes a substitution on a year-for-year basis that is specific to social needs whereas the experience requirement for Employment Specialist is specific to job placement, education, vocational counseling, and manpower development. [E-8]

Horton also wrote that the family service worker is categorized or catalogued in the "Social Services" occupational group and in the "Social Work" occupational family, pursuant to categorizations of employment in the Occupational Code Dictionary, a human resource industrial standard. Employment specialist is categorized in the "Administrative Specialization" occupational group and in the "Human Resources Management" occupational family (E-8; CWA-53; 6T11-6T14). Occupational groups and families "determine whether titles are similar or different" (6T14).

Horton did not conduct a "job audit" of the employment specialist. An audit is the DOP method "to find out what job duties are actually being performed" (6T14). Nor had an audit of the family service worker been conducted before December 1999 (6T15). Horton conceded that she had no personal knowledge of duties

performed by family service workers and employment specialists (6T16).

The DOP has not received a job audit request from any Essex County family service worker or employment specialist (6T17).

29. From May through August 2000, both Departments formed a "quality service committee," the purpose of which was to "improve coordination and service to clients" (CWA-60; 6T37). Among the suggestions memorialized was an "open house between the two agencies" for the purpose of sponsoring an employee question and answer session (CWA-60). In August, 2000, Nigro attended a State-sponsored meeting among the State Directors of the Divisions of Family Development, Medicaid and Youth and Family Services and all County Welfare Agency Directors (CWA-55; 6T28). Among the items discussed were "General Assistance Case Management", "TANF Case Management" and funding formulas for "more difficult clients". Nigro summarized the meeting in a memorandum to his Director and "copied" the DEDTE Director (CWA-55). No DEDTE representative attended the meeting (6T29).

30. In September 2001, Nigro issued a memorandum to administrative supervisors regarding the transferring of four selected employment specialists to Division of Welfare offices. The purpose of "colocating" employment specialists with family service workers was to "better serve clients and improve coordination and communication" (T621; T622; CWA-54). Nigro credibly testified that these "colocated" case managers (i.e. employment specialists) were

to perform similar functions that case managers (i.e. family service workers) performed before their transfer to DEDTE (6T21). The functions included "basic case management services", such as assignment of work activities, and referrals to child care, and "resolving problems with sanction cases." Nigro explained that the Division of Welfare experienced "major problems" in the "coordination" of applying and lifting sanctions. The problems had existed "for 3 or 4 months, if not longer" and the assignments were "dependent upon the hiring of [DEDTE] staff" (6T20). Nigro has the "continuing responsibility" to assess the initiative, including any recommendation to continue or terminate. According to Nigro, a Mr. Kurdziel at DEDTE had responsibility to assign tasks to "colocated" case managers (6T23).

The Division has recently assumed case management responsibilities for clients receiving general assistance in food stamps cases (6T24). About 18 family service workers have been assigned to those responsibilities (6T27).

ANALYSIS

The Commission clarification of unit process is intended to resolve confusion concerning the composition of an existing collective negotiations unit for which the exclusive representative has already been selected. "Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit." Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 251 (1977).

The County has filed a clarification of unit petition. Adding to the confusion in this case is a prospect of alternative negotiations units. Faced with competing claims by two exclusive representatives (CWA and IBEW) of County employees to represent a newly-created title, employment specialist, the County filed its petition, asking the Commission to decide the more appropriate negotiations unit. The Director of Representation wrote in Clearview:

. . . [A] new title may have been created by the employer entailing job functions similar to functions already covered by the unit and therefore warranting inclusion in the unit. In a similar vein, the employer may have created a new operation or facility with employees who function similarly to currently represented employees. In these circumstances a clarification of unit proceeding is appropriate.
[3 NJPER 251]

No party disputes that "employment specialist" is a new title or claims that a clarification of unit petition is an inappropriate means to decide this matter.

The second example from the quoted portion of Clearview concerns an "accretion" to an existing unit. In Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389, 390 (1977), the Director wrote that (clarification of unit) accretion petitions are appropriate at ". . . the start of a new operation by an employer whose employees perform the same or substantially similar work to that performed by employees in the existing unit. . . ." By "new operation", the Director wrote that it was,

. . .predicated on the Board's [i.e., the public employer's] written educational policy decision to institute a pilot program of individualized [student] instruction, substantially different in both kind and degree from that which existed previously with regard to support teachers and which amounted to an entire reorganization of the district's elementary reading and mathematics programs. [3 NJPER 390]

In the case, about 20 "support teachers" were hired in the same time period and performed duties similar to 2 "teacher assistants" that the Board had employed for about 5 years.

The 1999 Essex County ordinance declared the "restructuring" and renaming of the Department of Planning and Economic Development. A select group of almost 40 family service workers, some clericals and other employees were promptly transferred there and the former group was retitled, "employment specialists." Although most of the transferred employees voluntarily returned to their original workplace and title, and new personnel were hired in their place, the County's action is both a change of work location and a reorganization of the Departments. I believe that it is analogous to a "new operation" and falls within the ambit of an "accretion petition" described in Fair Lawn. (See also, NLRB Representation Elections, Law, Practice and Procedure, 3rd ed., 1994 supp. at §6.1.3(B), "Unit Clarification Petition, Accretion" (p.184); "When an employer expands its operations, changes locations, or reorganizes existing operations, the issue of proper bargaining unit placement of new or transferred employees may be examined by the [NLRB] through a UC petition" (emphasis added)).

If an accretion to an existing unit is appropriate, then ". . .no self-determination election is afforded to those employees so accreted. . .as this would be disruptive of a stable bargaining relationship." Fair Lawn at 3 NJPER 390. Permitting voter choice provides an opportunity to a minority group of employees to opt out of a unit into which they naturally belong--a privilege (set against the compelling policy reasons that a majority determine the representational status of a unit) that is not available to other minority groups of employees without extenuating reasons. Similarly, employees in newly created titles are entitled to no greater free choice rights than new employees in titles originally placed in the unit. The public interest in preserving stable employment relationships would, in view of the potential disruption to the existing negotiations relationship, mandate that these employees be included in the unit. See Fair Lawn, H.O. No. 77-6, 3 NJPER 44, 47 (1977), cited approx. in D.R. No. 78-22, 3 NJPER 390.

The IBEW Petition for Certification of Public Employee Representative is the more recent filing. Such a petition normally requires that the exclusive representative, if any, is chosen by a majority of employees voting in an election. ("Initially, this involves a determination of which unit of employees is appropriate for collective negotiations." Clearview at 3 NJPER 390). The IBEW advocates the creation of a new, separate unit of employment specialists and clerical employees as a second alternative to the clarification of its existing unit of County employees. A

representation petition found to be an accretion to an existing unit will be dismissed without recourse to the desires of the disputed employees. Fair Lawn; Granite City Steel Co., 137 NLRB 209, 50 LRRM 1111 (1962).

In order to determine whether new employees should be included within an existing negotiations unit as an accretion, various factors are considered, including 1) the integration of operations between the facilities involved; 2) the degree of centralization of managerial and administrative control; 3) geographic proximity of the facilities; 4) the similarity of working conditions, skills and functions between the employees at each facility; 5) the degree of common control over labor relations at the facilities; 6) the County negotiations history; and 7) the degree of interchange of employees between the facilities. See NLRB Representation Elections, Practice and Procedure, at §6.13(B), Accretion, p.185.

Some factors militate against accretion. The evidence shows that for purposes of delivering appropriate assistance (and denying or ceasing financial assistance appropriately) in welfare cases, from "intake" through "services", the DEDTE and the DCS (Division of Welfare) do not share centralized managerial and administrative control and sustain a small degree of employee interchange, both of which are effected or reinforced by their geographic separation.

The two departments have separate organizational structures and distinct lines of management and supervision, as shown by the DCS organizational chart (E-3), the ordinance creating DEDTE (E-5) and Deputy Director Nigro's testimony that he had to work cooperatively with both DEDTE Director Bertrand and his deputy, Mr. Kurdziel (see esp. finding no. 30). The small degree of employee interchange among DEDTE employment specialists and DCS family service workers is demonstrated by problems which both departments sought to remedy through the "quality service committee" (see finding no. 29). The record shows that no similar problems existed when case managers worked in the same facilities with other family service workers.

The record does not show that labor relations matters are governed and decided separately or departmentally. I infer that the County decides upon labor relations issues centrally, a factor favoring accretion.

The similarities and differences in working conditions, skills and functions between employees at each facility must be compared and contrasted. This factor in good measure defines their "community of interest", to which the Commission is mandated to extend "due regard" N.J.S.A. 34:13A-5.3.

The record shows that during the period of the Family Development Initiative (1992-96), the Division of Welfare's responsibilities to clients were relatively expansive. The Division's 1993 implementation of a "specialized case management

function" was intended to "develop an employment goal for the client." Training, remediation and long-term self-sufficiency of each client were featured over employment searches. Nigro placed many of the attendant responsibilities in an informal "case manager" position. Case managers consequently had smaller caseloads than other family service workers. They also were more conversant than "generic" family service workers with the OMEGA computer system.

The 1997 Workfirst New Jersey Act, limiting benefits to 5 cumulative years, reversed and compressed FDI client goals. Case managers were suddenly required to tend to immediate "job searches," "work activity" placements and "sanctioning mandates." The intricacies of referrals--EEI, child support, substance or domestic violence abuse, and mandates for client attendance and monitoring, together with all its myriad ushering forms curtailed a case manager's attention to a client's "long-term self sufficiency." Nigro's list of case manager's duties before April 1999 reveals a predominance of recording and directing functions (see finding no. 23).

By the fall of 1999, employment specialists were hired at the DEDTE. Case management duties or functions were excised from the Division of Welfare and grafted to the Division of Employment Training (see finding no. 24). Clifford's testimony demonstrates that employment specialists are counselors to welfare clients in matters of training and employment. They have extensive contact with vendors on behalf of clients, which exceed that undertaken by

case manager family service workers. They assess clients' employment histories and otherwise confidential medical reports to design training and/or employment programs for them. For example, case managers helped clients write their resumes; employment specialists analyze resumes for deficiencies in education, training or job experience. It is true that employment specialists must use numerous same or similar forms that case managers used at the Division of Welfare and like previous case managers, they abide by many of the procedures set forth in the Workfirst New Jersey Manual. Client "barriers", exemptions, deferrals, need for support services, etc. are not uniformly revealed (or not as yet experienced by the client) during "intake." Employment specialists are no less responsible than family service workers for appropriate referrals when the client reveals such circumstances later on, during a job search, or training/work activity.

The employment specialists' counseling of clients rather than the administering of referrals is reinforced by the Department of Personnel job descriptions, including education and work requirements. Family service workers "perform field and office work involved in aiding individuals and families." They identify, verify, collect and record data. They may substitute all college-level courses for specified work experience in "gathering examining for or determining" data for client eligibility for benefits. Family service worker case managers were more likely to "plan and carry out a prescribed treatment plan" (see finding no. 11).

Employment specialists assess client needs, provide appropriate work and training services after reviewing records, histories and medical reports; maintain "follow-up" and "counsel participants." Employment specialists must have at least three years of college credits plus one year of experience in job placement, education, or vocational counseling. A master's degree may substitute for the one year of experience (CWA-52).

In Aerojet-Gen Corp., 185 NLRB 794, 75 LRRM 1185 (1970), the Board held that because of special educational requirements which certain computer programmers had to meet as job prerequisites, they did not accrete to an existing unit comprised of programmers who did not have the same education, despite a similarity in functions between the two groups. Considering the special education and skills requirements of employment specialists, together with their unique job functions (contrasted with those of case managers listed by Nigro), I recommend that this factor disfavors accretion.

The record does not show that family service workers are interchanged with employment specialists. Nor are the operations of the two divisions interchangeable. This factor also disfavors accretion.

Considering all of the accretion factors, I do not recommend that CWA's unit of family service workers and clerical employees be clarified to include employment specialists. Similarly, the record does not show that IBEW represents County employees whose job duties are substantially similar to those of

employment specialists. Nor has the IBEW specifically demonstrated that employment specialists share a community of interest with its broad-based unit. I do not recommend the clarification of its unit to include employment specialists.

N.J.A.C. 19:10-1.1 defines a "professional employee" as follows:

'Professional employee' means any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment and requires knowledge of an advanced nature in the field of physical, biological, or social sciences, or in the field of learning. The Commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The term shall also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person. . . . The term shall include, but not be limited to attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.

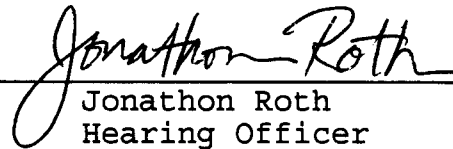
In Jersey City Medical Ctr., D.R. No. 80-9, 5 NJPE 456 (¶10230 1979), the Director determined that a "Community Mental Health Worker" was a professional title. The worker evaluated patients and made independent judgments and referrals as to the type of hospital service or outside agency service required. The worker was confronted by patients with a wide variety of problems and the work was performed virtually without supervision. All but one of the workers had either bachelor or masters degrees in psychology. See also Somerset County Guidance Ctr., D.R. No. 77-4, 2 NJPER 358 (1976).

I recommend that employment specialists are professional employees. They independently evaluate clients (which includes a review of employment, education and medical records) with a wide variety of problems, counsel and refer them to any of numerous training or employment programs, and direct them to employers with a long-term goal of economic self-sufficiency within five years. They sometimes refer clients into treatment programs. Clifford has testified credibly about these responsibilities. Employment specialists may have no less than three years of undergraduate academic credits plus one year of employment in vocational or other social counseling. The job specification requests an undergraduate degree; a master's degree in psychology, education, counseling or social work may substitute for the alternate one year of experience. Clifford has an undergraduate degree plus years of experience in social work.

Accordingly, I recommend that the Commission dismiss the clarification of unit petition regarding the employment specialists because neither CWA nor IBEW appear to represent professional employees and their certifications of representative exclude professional employees. The County petition also seeks a clarification of unit regarding clerical employees of the DEDTE. It appears that these employees are newly hired. The IBEW is the certified representative of non-professional County employees in the Department of Planning and Economic Development in the Division of Employment Training, the predecessor to DEDTE (see finding nos. 9

and 24). I recommend the clarification of that unit to include about 8 new clerical employees.

I recommend that the representation petition be dismissed because the IBEW does not represent professional employees and it seeks to exclude them from the petitioned-for unit. Finally, I recommend that employment specialists may be represented in an appropriate unit of County employees which includes professional employees.



Jonathon Roth
Hearing Officer

Dated: September 30, 2002
Trenton, New Jersey

