P.E.R.C. NO. 77-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY REGIONAL HIGH SCHOOL, DISTRICT NO. 1, BOARD OF EDUCATION,
Respondent,

Docket No. CO-74

-and-

PASSAIC VALLEY OFFICE WORKERS ASSOCIATION,
Charging Party.

SYNOPSIS

In a decision in an unfair practice proceeding, the Commission affirms the findings of fact and conclusions of law, (but not necessarily the dicta) of the Hearing Examiner, and finds the exceptions filed by the Association to be without merit. The Association had alleged that the Board of Education had violated the Act by refusing to negotiate with it, as the majority representative, concerning the terms and conditions of employment of one of the employees. The Commission, in agreement with the Hearing Examiner, finds that the employee in question was a confidential employee as defined by N.J.S.A. 34:13A-3(g) and as such is not a public employee within the purview of the Act and thus is not afforded the protection of the Act regarding representation by the majority representative of the employees. The employer's refusal to negotiate with the Association concerning this employee is thus not in violation of the Act.

The Commission does note, however, that this dispute could have been more amicably and expeditiously resolved by utilizing the unit clarification procedure provided for in the Commission's Rules (See N.J.A.C. 19:11-1.5 Petition for Clarification of Unit or Amendment of Certification); which procedure, unlike an unfair practice proceeding, is non-adversarial. By refusing to negotiate, rather than filing such a petition, the board of education subjected itself to a finding of having violated the Act and a remedial order if its judgment as to the confidential status of the employee had proved incorrect.

The Commission concludes by indicating that the non-adversarial procedure is to be favored in resolving such questions as it is more consistent with the promotion and maintenance of stable and harmonious employer-employee relations in the public sector.

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PASSAIC VALLEY OFFICE WORKERS ASSOCIATION,
Charging Party.

Appearances:
For the Respondent, Francis R. Giardiello, Esq.
For the Charging Party, Goldberg, Simon & Selikoff, Esqs. (Mr. Theodore M. Simon, of Counsel).

DECISION AND ORDER

An unfair practice charge (the "Charge") was filed with the Public Employment Relations Commission (the "Commission") on April 1, 1975, by the Passaic Valley Office Workers Association (the "Association") against the Passaic County Regional High School, District No. 1, Board of Education (the "Board") alleging unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the Charge alleged that the Board engaged in dilatory tactics, refused to meet, unilaterally implemented policies of mandatory overtime and summer pay, refused to respond to grievances regarding changes in work load, unilaterally removed an employee from the negotiating unit, attempted to modify terms of an agreement arrived at during mediation, introduced new proposals after the said agreement was reached, and reneged on another agreement arrived at during mediation in

violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (5), and (6).[1/]

The Charge was processed pursuant to the Commission's Rules and it appearing to the Commission's Executive Director,[2/] acting as the named designee of the Commission, that the allegations of the Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 22, 1975.

Plenary hearings were held on October 2, October 22 and December 29, 1975, before Hearing Examiner Robert T. Snyder at which both parties were represented and were afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally.

At the opening of hearing, the Association's oral motion to amend the Charge and Complaint was granted. The amendment clarified an allegation regarding the unit status of one employee and added an allegation as to the unit status of another employee. Both allegations alleged that the Board unilaterally removed the employees in question from the Association's collective negotiating unit in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (5), and (6). The Board denied each of

1/ These subsections prohibit public employers 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ Now Chairman, Jeffrey B. Tener.

the allegations of unfair practice and, at the hearing, orally denied the allegations of the amended Charge and Complaint and interposed a separate affirmative defense that the position occupied by the employees in question are confidential within the meaning of N.J.S.A. 34:13A-3(g) and do not belong in the negotiating unit.

During the course of the hearing on December 29, 1975, the parties reported on the record that they had agreed to a collective negotiations agreement for the 1974 through 1976 school years which included the resolution of the outstanding dispute with respect to the unit placement of one of the employees previously the subject of the Complaint. Based upon this understanding, the Association requested withdrawal of all the allegations of the Charge and Complaint with the exception of the allegations relating to the unit placement of the remaining title in dispute, the Board's alleged unilateral removal of that title from the negotiating unit, and direct negotiations with the employee holding that title. We hereby approve that request. Accordingly, the only matter before us concerns the Board's alleged action regarding one employee whose unit status is in dispute.

On August 9, 1976 the Hearing Examiner filed with the Commission and the parties his Recommended Report and Decision (H.E. No. 77-5, published at 2 NJPER 268). On September 22, 1976, the Hearing Examiner issued an Errata Sheet correcting a typographical error in the Recommended Report and

Decision. A copy of the Recommended Report and Decision and a copy of the Errata Sheet is attached hereto and made a part hereof.

On August 18, 1976, the Association filed with the Commission a timely request for a thirty (30) day extension of time to file exceptions to the Hearing Examiner's Recommended Report and Decision, averring that the Board had consented to this request. Pursuant to the agreement of the parties and in accordance with the provisions of N.J.A.C. 19:14-7.3(a), the Commission extended the time for the Association to file exceptions until the close of business, September 23, 1976.

Pursuant to N.J.A.C. 19:14-7.3(a), the Association filed exceptions to the Hearing Examiner's Recommended Report and Decision on September 23, 1976. The Board has not filed any papers in opposition to the exceptions filed by the Association. The Commission, having carefully reviewed the exceptions filed by the Association, finds them to be without merit based upon its analysis of the facts in the matter which are more fully set forth below.

Based upon the entire record herein as specified in N.J.A.C. 19:14-7.2, the Commission, except as modified herein, adopts the findings of fact and conclusions of law, but not necessarily the dicta, rendered by the Hearing Examiner substantially for the reasons cited by him. Specifically, we find the employee in question is a confidential employee as defined in the

Act. See N.J.S.A. 34:13A-3(g).[3/] Further, we find that, in the context of negotiations for a successor agreement with the recognized majority representative, the Board did not violate the Act by refusing to negotiate with that representative concerning the terms and conditions of employment of an employee whose changed duties made her a confidential employee as defined in the Act.

It is this latter conclusion to which the Association excepts, arguing that "...the unilateral removal of a confidential employee from a negotiating unit and the direct dealing with such employee..." constitute violations of the Act. We find, in agreement with the Hearing Examiner, that the action of the Superintendent in January 1974 in notifying the employee in question of her exclusion from the unit may not form the basis of an unfair practice determination given the Act's statute of limitations. See N.J.S.A. 34:13A-5.4(c). Thus, that issue is not before us at this time. The Commission notes that the Board did not refuse to negotiate with respect to the entire unit owing to the dispute over the unit placement of the title in question. Neither was any evidence adduced tending to show that the Board's action was capricious in nature nor motivated by a desire to diminish the Association's majority status among the employees it represents in an appropriate unit. Had any of the aforementioned motives been proven,

3/ No exception was filed regarding this conclusion and N.J.A.C. 19:14-7.3(b) provides in part "Any exception which is not specifically urged shall be deemed to have been waived."

a different result might have obtained.

Further, in agreement with the Hearing Examiner, the Commission finds that confidential employees as defined by N.J.S.A. 34:13A-3(g) are not public employees within the purview of the Act. Thus, confidential employees are not afforded the protections of the Act regarding the right to be represented by an exclusive negotiating representative in an appropriate unit for the purpose of collective negotiations. Additionally, and in contrast to §201.7(a) of the New York Public Employees Fair Employment Law (the "Taylor Law"), the Act does not condition the establishment of the confidential status of an employee upon a determination made by the administrative agency upon application of the public employer.[4/] However, we note the Commission's Rules do provide a non-adversarial method for either a public employer or the exclusive negotiating representative to resolve a dispute concerning the unit placement of a disputed job title /See N.J.A.C. 19:11-1.5, Petition for Clarification of Unit or Amendment of Certification/.

It should also be noted that a public employer's refusal to negotiate with the majority representative of a public employee in a collective negotiations unit is an act that a public employer takes at his peril. The legality of this action is wholly dependent upon the propriety of the public employer's judgment that the employee in question is not

4/ This statutory difference makes the New York Public Employment Relations Board case cited by the Association in its exceptions clearly distinguishable from the instant matter.

entitled to the protections of the Act. In the event that the public employer's judgment proves faulty in this regard, he will have committed a violation of the Act, regardless of any good faith belief that the action was justifiable. Any such violation of the Act may be fully remedied by the filing of an unfair practice charge and the issuance of a Decision and Order by the Commission, pursuant to its broad remedial authority.

On the other hand, even if the employer's judgment is correct, he still subjects himself to the inconvenience and expense of vindicating his action in an unfair practice proceeding if that action is challenged. If the matter is resolved by means of a unit clarification proceeding pursuant to N.J.A.C. 19:11-1.5 as opposed to an unfair practice proceeding, the possibility of an adverse decision in an unfair practice proceeding would be precluded and the dispute would be resolved in the context of a non-adversarial representation proceeding.

Although in the instant matter we find that the Board's action was not in violation of any provision of the Act, we regard the filing of a Petition for Clarification of Unit as the most appropriate method of resolving disputes as to unit placement and as the method best suited to the promotion of stable and harmonious employer-employee relations in the public sector.

Based upon the above, the Commission finds and determines that the Association has failed to prove that the Act has been violated. The Complaint, therefore, must be dismissed.

ORDER

The Complaint in the within matter is hereby dismissed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioner Hartnett was not present.
Commissioners Hipp and Hurwitz did not participate in this matter.
Chairman Tener and Commissioner Parcells voted for this Decision.
Commissioner Forst voted against this Decision.

DATED: Trenton, New Jersey
October 19, 1976
ISSUED: October 20, 1976

STATE OF NEW JERSEY
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DISTRICT NO. 1, BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-74

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

E R R A T A

Page	Line	Correction
26	30, 35	change N.J.S.A. 34:13A-5.4(a)(1), (2), (6) and (7) to N.J.S.A. 34:13A-5.4(a)(1), (2), (5) and (6).

Robert T. Snyder
Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
September 22, 1976

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY REGIONAL HIGH SCHOOL
DISTRICT NO. 1, BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-74

PASSAIC VALLEY OFFICE WORKERS
ASSOCIATION,

Charging Party.

For the Respondent, Francis R. Giardiello, Esq.

For the Charging Party, Goldberg, Simon & Selikoff, Esqs.
By: Theodore M. Simon, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Statement of the Case

An unfair practice charge having been filed on April 1, 1975 by Passaic Valley Officer Workers Association (herein called "PVOWA" or "Association") and it appearing to Executive Director Jeffrey B. Tener that the allegations in the said charge, if true, may constitute unfair practices on the part of the Passaic County Regional High School District No. 1, Board of Education (herein called "Board" or "Respondent"), the Public Employment Relations Commission (herein called "Commission"), by its named designee, the said Executive Director, issued a complaint and notice of hearing on August 22, 1975 against the Board. The complaint alleges that the Board engaged in dilatory tactics, refused to meet, unilaterally implemented policies of mandatory over-time and summer pay, refused to respond to grievances regarding changes in work load, attempted to modify terms of an agreement arrived at during mediation, introduced new proposals after the said agreement was reached and reneged on another agreement arrived at during super mediation in violation of N.J.S.A. 34:13A-5.4(a) (1), (2), (5), and (6). At the opening

of hearing, the Association's oral motion to amend the charge and complaint was granted. The amendment clarified a complaint allegation regarding employee Shirley Ricciardi and added an allegation as to employee Majorie Oricchio. It alleged that the Respondent violated N.J.S.A. 34:13A-5.4(a) (1), (2), (5) and (6) on January 15, 1974 and in August, 1975, respectively, by unilaterally removing employees Shirley Ricciardi and Majorie Orrichio from the collective negotiating unit and advising them that if they wished to remain in their present positions they were precluded from membership in the Association, and since August, 1975, by negotiating directly with them with respect to their terms and conditions of employment rather than with the Association.

The Respondent, in its answer denied each of the allegations of unfair practice and at the hearing orally denied the allegations of the amended complaint and interposed a separate affirmative defense that the positions occupied by Ricciardi and Oricchio are confidential within the meaning of N.J.S.A. 34:13A-5.3 and do not belong in the bargaining unit.

Hearing was held on October 2, 22, and December 29, 1975. During the course of hearing on December 29 the parties reported on the record that they had agreed on a collective negotiation agreement for the 1974-75-76 school years including resolution of the outstanding dispute with respect to unit placement of Majorie Oricchio, the parties having agreed to exclude her position, that of Assistant to the Secretary to the Superintendent of Schools, as confidential in nature. Based upon this understanding the Association requested withdrawal of all allegations of its charge and the complaint with the exception of the allegations of violation of the Act relating to Ricciardi's exclusion from the negotiating unit and Association membership and direct negotiations with her.

Pursuant to N.J.A.C. 19:14-1.5(c) the withdrawal request could only be granted by the Commission or its named designee. Accordingly, I noted the parties' stipulation and took under advisement the Association's withdrawal request. In view of the parties' understanding and resolution of the issues relating to execution of a collective agreement and unit placement of Majorie Oricchio, I will recommend herein that the Association's request to withdraw the described portions of the charge be granted and that the complaint allegations based thereon be dismissed by the Commission and those portions of the case be closed.

At the conclusion of the hearing on December 29, 1975, the attorney for the Board argued orally for dismissal of the complaint and on March 9, 1976 the Association filed a brief in support of the complaint. Upon the entire record in this case, I make the following:

FINDINGS OF FACT

I

Respondent's Status

The complaint alleges, the parties stipulated and I find that the Respondent is a public employer within the meaning of N.J.S.A. 34:13A-3 (c).

II

The Employee Organization and its Status

The complaint alleges, the parties stipulated and I find that since the spring of 1971 when the Board voluntarily recognized it, the Association has been the exclusive representative of the custodians, [1/] attendance officer, and secretary-clerks [2/] employed by the Board for the purposes of collective

1/ In October, 1971, the custodians elected to form their own unit which the Board recognized and with respect to which unit agreements have been entered since that date.

2/ The current agreement between the parties describes the unit as "non-certified personnel under contract on leave employed by the Board of Education or hereinafter employed pursuant to the terms of this Agreement, including members of the Secretarial, Clerical and Bookkeeping Staff, except the Superintendent's Secretary and the Assistant to the Superintendent's Secretary." This unit description does not specifically include the attendance officer. Since the contract was submitted in evidence as an exhibit after the close of hearing this change is unexplained. It is possible the attendance officer remains included in the unit as a non-certified employee. Even if not included, as the scope of the unit is not in dispute (albeit the unit composition with respect to status of Secretary to the Assistant Superintendent as confidential or not is in dispute), see N.J.S.A. 34:13A-5.3 ("The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the Commission shall not intervene in matters of recognition and unit definition except in the event of a dispute." /emphasis added/), I find this unit to be an appropriate unit for purposes of N.J.S.A. 34:13A-5.4(a) (5).

negotiations concerning the terms and conditions of their employment and is thus an employee representative within the meaning of N.J.S.A. 34:13A-3(e).

III

The Alleged Unfair Practices

The remaining portion of the amended complaint alleges violations of N.J.S.A. 34:13A-5.4(a) (1), (2), (5) and (6) 3/ of the Act arising from the conduct of the Board on January 15, 1974 in unilaterally removing Shirley Ricciardi from the unit and conditioning her continued employment in her position upon her resignation from the Association, and its conduct, since August, 1975, in negotiating directly with her concerning her terms and conditions of employment.

Issues Presented

(1) Do the nature of employee Shirley Ricciardi's job duties and functions at all material times warrant the conclusions that she has been a confidential employee within the meaning of 34:13A-3 (g) of the Act.

(2) Has the employer engaged in acts of harassment and interference with Shirley Ricciardi's protected rights and negotiated directly with her-conduct which if she were an employee protected by the Act would constitute unfair practices within the meaning of 34:13A-5.4(a) (1) and (5) of the Act.

(3) If the employer engaged in such conduct and if Shirley Ricciardi has been a confidential employee at all material times, nonetheless, have the employer's acts and conduct directed toward her violated 34:13A-5.4(a) (1) and (5) of the Act.

The Salient Facts as to Shirley Ricciardi's Employment History and Functional Responsibilities for the Official to Whom She is Assigned

Shirley Ricciardi became employed as a secretary for the Board in November, 1969. According to Mrs. Ricciardi, until some time in 1973 she had been employed by the Board as senior secretary to the Director of Guidance, one Joseph I. Farrell. Ricciardi testified that some time either in the

3/ N.J.S.A. 34:13A-5.4(a) (1) prohibits employers, their representatives or agents from: "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act", (2), prohibits employers from "dominating or interfering with the formation, existence or administration of any employee organization", (5), in pertinent part, prohibits them from "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", and (6) prohibits employers from "refusing to reduce a negotiated agreement to writing and to sign such agreement."

the fall of 1973 or 1974, [4] Mr. Farrell became Assistant Superintendent and she continued to work for him in his new position as his secretary.

According to Mrs. Ricciardi, prior to Mr. Farrell's change in title, he had been involved with pupil personnel services, student services, and counselling. At that time, she was considered senior secretary to Mr. Farrell and oversaw work of the other secretaries employed in the guidance office and in pupil personnel services. When Mr. Farrell became Assistant Superintendent and she continued as his secretary, her job functions changed. She was no longer responsible for secretaries working in guidance; she worked only for Mr. Farrell, typing memorandum to staff, paperwork relating to fire drills and correspondence with parents, among other work details. Although Mrs. Ricciardi did not elaborate, the nature of her position as well as the testimony of other witnesses confirm that she performs the usual duties of a secretary to a high ranking administrator, including general secretarial, clerical, and typing work required by the Assistant Superintendent to whom she has been assigned. According to Mrs. Ricciardi, Mr. Farrell as Assistant Superintendent has been involved "in a great deal of things."

Mrs. Ricciardi testified that memoranda from the Superintendent, Francis Grady pertaining to a particular issue involved in the collective bargaining process between the Board and any of its bargaining units [5] "...may come across my desk..." Mrs. Ricciardi also testified that Assistant Superintendent Farrell, at one time, had been a member of the negotiating committee for the Board which dealt with the negotiations for a successor PVOWA contract and that she recently had typed memoranda relating to internal Board positions on contract issues in collective negotiations either with the PVOWA or the PVEA being circulated between Superintendent Grady and Assistant Superintendent Farrell. [6] Mrs. Ricciardi also noted that she could have also typed proposals in mid 1974 upon which Mr. Farrell had been working concerning the PVOWA negotiations.

[4] Mrs. Ricciardi testified both that she had been secretary to the Assistant Superintendent for two years prior to her testimony on October 2, 1975 and that her job functions changed in a substantial degree about a year prior to her testimony when her job title changed. In view of the testimony of Assistant Superintendent Farrell and others, and certain exhibits introduced into evidence, which will be described later in this report, I conclude that Mrs. Ricciardi became secretary to the Assistant Superintendent sometime in 1973, probably in the fall of that year.

[5] In addition to the separate unit of custodians established by voluntary recognition in October 1971, the Board maintains a collective negotiations relationship with the Passaic Valley Education Association ("PVEA") covering a unit of teachers employed by the Board.

[6] Mrs. Ricciardi later clarified that the internal proposals relating to collective negotiation positions of the Board she had typed related to PVEA negotiations and were Mr. Farrell's views for Mr. Grady and the Board's consideration and that she had done this typing as recently as the week of September 27, 1975 in which she testified.

Mrs. Ricciardi also stated that she thought that she had typed proposals considered confidential when Mr. Farrell had been part of the Board's negotiating team for PVEA negotiations. The proposals had to do with certain articles to be added or deleted to the Board's negotiation position. 7/

With respect to the typing Mrs. Ricciardi performs for Mr. Farrell, she files copies of the resulting memoranda in Mr. Farrell's office to which she has access.

Assistant Superintendent Farrell testified that he had been employed in his present position since sometime early in 1973. Previously he had been Assistant Principal in charge of pupil personnel services involved in guidance and special services work under the direct supervision of the then School Principal. At the time of his transfer the Board established the positions of Superintendent and Assistant Superintendent. He stated that he had participated in negotiations during the last two or three years and that he had been on the second of three negotiating teams of the Board which negotiated with PVOWA for a 1974 to 1976 successor contract. 8/ According to Farrell he has only one secretary, Mrs. Ricciardi who is involved in "...any negotiation matters I am involved in." He confirmed that Mrs. Ricciardi has access to the confidential files relating to negotiations kept in his office.

According to Mr. Farrell over the last two years up to the date of his testimony on October 22, 1975, Mr. Grady has been involved with labor negotiations on behalf of the Board, and he, Farrell, has been involved in correspondence with Grady relating to Board positions on negotiations. Farrell stated that he drew up the Board's position for negotiations with the PVOWA for review by Grady and that Mrs. Ricciardi typed it before meeting with the PVOWA for the first time during April or May 1974 as a member of the Board's second negotiating team. Farrell testified that any time Superintendent Grady was involved in negotiations at which Farrell was not present, he would send Farrell

7/ In spite of this and other testimony previously described, Mrs. Ricciardi denied she had ever been privy to internal Board or Administrative considerations in collective negotiations or personnel policies.

8/ By letter dated April 19, 1974, Board Secretary-School Business Administrator Andrew Hackes, advised Association President May Kuno, inter alia, that he and Mr. Farrell had been appointed by the Board to represent it in all future negotiations with the PVOWA. Hackes and Farrell continued functioning in this capacity until on or about November 20, 1974. However, even after this latter date, Farrell was called in on at least one occasion by the negotiators to clarify a point in contention.

memoranda relating to the Board's negotiating positions, which, on occasion, were filed by Ricciardi, and, further, that Grady and he were in regular contact on such matters in person and by telephone, to which his secretary is also exposed. Farrell has also asked his secretary on many occasions to look over his memoranda for errors before he approved their final preparation. Farrell also stated that he regularly attends Board meetings, including closed sessions. 9/

Farrell testified that he supervises the secretaries employed by the Board under the direction of Superintendent Grady and that he maintains a folder in his personal office dealing with the secretaries to which Mrs. Ricciardi utilizes access. Farrell added that he has direct responsibility to observe and report to the Superintendent with respect to secretaries' tardiness, work qualities and the like and that he has the authority to correct work problems involving secretaries on his own but, in his discretion, may bring them to the attention of the Superintendent.

Farrell also noted that he is the Board's representative at a grievance step in the grievance procedures under the PVEA contract. He also stated that even after he no longer was a member of the Board's negotiating team for the 1974-76 contract negotiations with the PVOWA he continued to receive copies of confidential memoranda prepared by Superintendent Grady for members of the Board on the proposed PVOWA contract, one of which had been received by Mrs. Ricciardi by hand on his behalf from Superintendent Grady's office on November 19, 1974. This particular memorandum from Grady had been in response to a confidential letter from a Board member who had critized the Association contract proposals. Farrell noted that he was still involved in PVOWA negotiations, not directly but by virtue of personal discussions with the Superintendent and the Superintendent's solicitation of his views on such matters on a continuing,

9/ The Board closed meetings to which Farrell testified were all held prior to January 19, 1976, the effective date of the Open Public Meetings Act (Chapter 231, P.L. 1975). However, under that Act, the Board can exclude the public from that portion of any of its meetings concerned with its public business which discuss "Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body." (N.J.S.A. 10:14-12(b) (4)).

ongoing basis. With respect to PVEA negotiations, he prepared a lengthy internal document dealing with Board proposals within the last three weeks preceding his testimony on October 22, 1975.

Superintendent Grady testified on December 29, 1975 that he had been employed as Superintendent for the last four years and that Mr. Farrell had been employed as his Assistant Superintendent for the last three years. Grady noted that he regularly discusses the state of negotiations with the PVOWA with Assistant Superintendent Farrell and Board Secretary-Business Administrator Hackes prior to negotiation meetings with the Association, even when the negotiating team consists solely of Board members. Written memoranda relating to these discussions have been distributed among their respective offices. Grady noted that even before Assistant Superintendent Farrell had been formally appointed with Board Secretary Hackes to the Board's PVOWA negotiating team to carry on the financial stages of negotiations, Farrell had sat in on the negotiations as an observer and as Grady's back-up. According to Grady, Farrell had been physically present at well over one-half of the negotiating sessions over a two year period with the PVOWA even before his formal appointment to the negotiating team by the Board.

According to Grady, confidential information respecting negotiations flows mainly through the three main administrative offices, his own, Assistant Superintendent Farrell's and Board Secretary-Business Manager's Hackes. Grady noted that there is only one school in the district - The Passaic County Regional High School. In effect, Grady as Superintendent is the Principal and instead of a Vice Principal, Farrell is the Assistant Superintendent. As the three principal administrators of the district, Grady, Farrell, and Hackes check very thoroughly any agreements the Board makes with the employee organizations representing its employees, and consults with the Board before agreements are approved.

Superintendent Grady agreed on cross-examination that of the eleven members of the secretarial-clerical and bookkeeping staff employed by the Board, only three have the title of secretary. 10/ These include his own secretary, Louise Famiano, admittedly excluded from the unit, Majorie Oricchio Assistant Secretary to his Secretary, also excluded from the unit by agreement

10/ Board Secretary-Business Manager Hackes is assisted by his wife who has the title of Assistant Board Secretary and Business Manager.

as earlier noted, and Shirley Ricciardi. All other employees in the unit have the title of clerk, employed at a lower pay scale.

Mr. Hackes testified on December 29, 1975 that he had served as Secretary and School Business Administrator since 1964. Mr. Hackes stated with particular reference to the then recently concluded PVOWA negotiations, that it was his responsibility to transmit copies of any Association correspondence and demands as well as Board proposals to Mr. Grady, Mr. Farrell, all Board members and the Board attorney. Some Board proposals and negotiating positions formed at meetings of the Board at which the three top officials including Farrell, had input, were the subject of such memoranda he prepared and circulated.

Mr. Hackes confirmed that Mr. Farrell assumes Mr. Grady's duties as chief administrator and in relations with the Board at meetings and otherwise in the absence of the Superintendent due to illness, vacation or conflicting commitments.

Although a number of clerks are employed in his office, only his wife, as his assistant, types and has access to confidential labor relations matters.

With reference to Farrell's contractual duties, the current collective negotiations agreement covering school years 1974-75 and 1976 contains an individual grievance procedure - Article III - providing for second step grievances to be filed with the Assistant Superintendent or the Superintendent's designee. The Assistant Superintendent or his designee shall conduct whatever investigation he deems necessary and shall render his determination in writing within three school and/or working days after it is brought to his attention. Unresolved grievance may be submitted thereafter to the Superintendent or his designee for his determination, and for final decision by the Board of Education. Although not designated in the 1972-74 contract, in practice, Assistant Superintendent Farrell would hear presentations before submission of grievances to the Superintendent. Farrell is also involved in hearing and seeking to resolve grievances filed in the other negotiating units of the school district.

The Board's Conduct With Respect to Shirley Ricciardi's Association Membership, Unit Status and Terms and Conditions of Employment.

By letter dated January 17, 1974, Superintendent Grady advised Mrs. Ricciardi as follows:

> As you will note by the attached, the Board of Education has approved my recommendation that you not remain a member of the Passaic Valley Office Workers Association. The reasons for this are obvious and are explained on the attached copy of the Agenda for the meeting of January 15, 1974.

The attachment contained the following recommendation of the Superintendent to the Board as to Shirley Ricciardi's continued membership in the PVOWA:

> Mrs. Shirley Ricciardi, Secretary to the Assistant Superintendent represents the Board's prudent assurance of confidentiality as second-in-command of Passaic Valley High School. For this reason I am requesting that Mrs. Ricciardi be designated as Secretary to the Assistant Superintendent of Schools whose duties will entail many of those sensitive areas that preclude her continuation in the membership of the Passaic Valley Office Workers Association.

At one point, Mrs. Ricciardi testified that her receipt of the letter coincided roughly with the time that her position changed from senior secretary to the Director of Guidance to Secretary to the Assistant Superintendent. 11/

After receipt of this letter, Mrs. Ricciardi, who up to that point had been a member of the Association and included in the unit without question, testified that it was "questionable" whether her membership continued. On the date of her testimony, October 2, 1975, she said she still did not know her status as Association member. 12/

In the fall of 1974, negotiations looking toward a successor to the 1972-74 agreement which had commenced a year before, were continuing. On October 18, 1974 Superintendent Grady forwarded to Association President May Kuno a set of counter proposals, including one which sought the exclusion from

11/ As earlier noted, sometime probably in late 1973, during the term of the 1972-74 agreement which failed to specifically exclude any secretarial titles from unit coverage, Grady and Farrell assumed their current positions as Superintendent and Assistant Superintendent, respectively, under a reorganization of the school district.

12/ Board Secretary Hackes testified that Association dues were not checked off by the Board. No evidence was offered by the Association as to Mrs. Ricciardi's membership status after January, 1974.

the existing secretarial-clerical staff and attendance officer unit of the Secretary to the Assistant Superintendent as well as the Administrative Assistant in charge of student services.

The Association advised the Board it would not agree to this proposal but had no real problem with other changes requested and at a meeting later in October, 1974, suggested that if it was the Board's desire to change the composition of the negotiating unit, it could file a unit clarification petition with the Commission. 13/ Mr. Joseph Gabriel, New Jersey Education Association consultant who attended this meeting as an advisor to the PVOWA in its negotiations, testified without contradiction it was his understanding derived from conversations with Mr. Grady at the meeting as well as conversations with a New Jersey Education Association field representative for the school district in its negotiations that the Board would treat the two positions it sought to exclude as within the bargaining unit until the Commission ruled otherwise on a petition. Although Superintendent Grady thereafter corresponded with the Commission with respect to such a petition, and the PVOWA apparently responded with a letter of its own to the Commission, no formal petition seeking to clarify the unit by removing the positions of Secretary to the Assistant Superintendent and Administrative Assistant in charge of student services was ever filed. 14/

In December, 1974, the Board granted increments of approximately $300 each, retroactive to July 1, 1974, to those employees in the secretarial-clerical unit who were not then at the top of their salary guide for the last year (July 1, 1973 to June 30, 1974) of the 1972-74 expired agreement. Although Mrs. Ricciardi was not at the top of her guide, which provided annual increments for employees with one to eight years of employment, she did not receive the increment. Similarly, on July 1, 1975, the same unit employees, again with the exception of Mrs. Ricciardi, who again was not at the top of her guide, received another annual increment in accordance with the 1973-74 salary guides. 15/

13/ N.J.A.C. 19:11-1.5, Petition for clarification of unit or amendment of certification.

14/ The record is devoid of any evidence that the Commission responded to any communication from the Board or PVOWA with respect to unit clarification of the Secretary to the Assistant Superintendent.

15/ These increases maintained the status quo while negotiations on a new agreement continued. See In the Matter of Galloway Township Board of Education and Galloway Township Education Association, P.E.R.C. No. 76-32, 2 NJPER ____, Appeal pend., Super.Ct., App. Div., Docket No. A-3016-75.

Then on or about July 15, 1975 Mrs. Ricciardi and Mrs. Oricchio each received formal notification from Mr. Hackes advising them of their reappointment and setting their new salaries, work week and work time during Easter and Christmas weeks. The employees were obliged therein to accept the contract offer as soon as possible. At the time, the unit employees' terms and conditions of employment for 1975-76 were still under negotiation. At least with respect to work week, the contracts deviated from the same provisions included in the 1972-74 agreement which had expired on June 30, 1974.

Ricciardi and Orrichio sought a meeting with the Board to discuss this notification and their terms and conditions of employment for the subsequent school year. They invited Mr. Gabriel to appear for them as individuals. A meeting was arranged with the Board for August 18, 1975 to review their salaries and working conditions. At the meeting, Mr. Gabriel advised the Board members that both Orrichio and Ricciardi were still technically part of the unit. The Board members' response was that they were not going to discuss the matter further, and no headway was made on resolving the two employees' terms and conditions of employment or their status.

On September 10, 1975, Board attorney Francis Giardiello wrote Mrs. Orrichio advising that it was his opinion to the Board that "as secretary to William F. Grady, you are in a confidential relationship and therefore, cannot be represented by the P.V.O.W.A. or be in that unit." Mr. Giardiello noted that should she choose to belong to such a unit and be represented by that unit she would have to resign her present position. The letter concluded with a request for a response in writing within three days of its receipt. By letter dated September 12, 1975, signed by both Mrs. Ricciardi [15/] and Mrs. Oricchio, Mr. Giardiello was advised that they had received his letter addressed

15/ While Mr. Giardiello's letter of September 10 was addressed to Mrs. Oricchio alone, because of the similar treatment Mrs. Ricciardi had been accorded with respect to direct contract negotiations and the notice to cease membership in the Association she had previously received, Mrs. Ricciardi apparently took the substance of the letter as involving her status as well. As will shortly be indicated, neither the Board's attorney nor anyone else responded for the Board. Such silence, however, may not be deemed an admission that the Board considered Ricciardi to have a similar choice. Section 301, Richardson on Evidence, 8th edition. (Admission Not Implied by Unanswered Written Communications); Cf. Rule 63 (8) New Jersey Rules of Evidence, 1972 Edition with Annotations (Authorized and Adoptive Admissions).

to Mrs. Orrichio and requested an opportunity to meet with him "...to clarify once and for all what our legal avenues for discussing our contract with the Board of Education might be" and requested that only Mr. Grady and Mr. Farrell be present, or, if Mr. Giardiello preferred, they would meet with him alone.

According to Mr. Giardiello, because hearing on the instant complaint raising the issues, among others, of the status of the two employees and the validity of the Board's efforts to remove them from the union and unit was eminent, having been scheduled for September 24, 1975, the Board chose not to reply to the secretaries' joint request for a further meeting.

Negotiations on a new agreement continued until resolved late in the fall of 1975. Sometime in November or December of 1975 the parties agreed to exclude from the negotiation unit as confidential the Assistant to the Superintendent's Secretary, the position held by Mrs. Orrichio, but left to Commission determination the status of the Secretary to the Assistant Superintendent.

At the close of hearing, on December 29, 1975, Mrs. Ricciardi was presumably still receiving the same salary she had received under the salary guide for school year 1973-74.

Positions of the Parties

Respondent argued at the close of hearing that Mrs. Ricciardi's own testimony established that she had become a confidential employee upon Mr. Farrell's assignment to the position of Assistant Superintendent. The Respondent noted that Mrs. Ricciardi testified she had typed memoranda for Mr. Farrell relating to the negotiation positions of the Respondent which were circulated to the Superintendent and Board members. Further, by her own testimony all material in the Assistant Superintendent's office was available to her, including negotiating and personnel files. Respondent noted that Mr. Farrell assumed the role of Superintendent in Mr. Grady's absence and that the Assistant Superintendent and Board Secretary and Business Administrator have continued input into the negotiation positions of the Board. As a consequence, although Mr. Farrell has not continued to serve on Respondent's team for negotiations with the PVOWA, nonetheless, his continued involvement in Board deliberations relating to negotiations and contract administration in all negotiating units, precludes and makes incompatible his secretary's inclusion in the unit.

The Respondent has not addressed itself to the contention of the Association that even if Mrs. Ricciardi's job is confidential, the Respondent is nevertheless prohibited by the Act from taking unilateral action seeking to exclude her from the unit, negotiating directly with her or conditioning her continued employment upon resignation from the Association.

In its brief, the Association argues that Ricciardi's immediate supervisor, Assistant Superintendent Farrell, has only limited involvement in negotiations and personnel matters. The Association notes that Farrell does not regularly participate in negotiations with PVOWA nor is he scheduled for such participation during the 1976-77 contract negotiations and although he maintains certain personnel records, he does not deal with them on a regular basis. Thus, as Farrell's participation in such matters is sporadic and isolated, the potential for a conflict of interest arising from his secretary's inclusion in the unit is so remote as to preclude the denial of her right to have the terms and conditions of her employment collectively negotiated.

In support of its contention the Association relies upon the definition of confidential employees which appears at N.J.S.A. 34:13A-3 (g) as follows:

> "Confidential employees" of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The Association argues that the definition requires evidence of an individual's access to and involvement with the data and other information encompassing the public employer's position in its relationship with its majority representative. It cites Woodbridge Township Board of Fire Commissioners, P.E.R.C. No. 51, for the proposition that the Commission requires inevitable contact with confidential labor relations information, whether by weighing of actual facts or derived from the peculiar characteristics of the position itself before confidential status can be derived. The Association also relies upon Board of Education Township of West Milford, County of Passaic, P.E.R.C. No. 56 in support of its contention that mere knowledge of data forming the basis for managerial decision affecting negotiations or contract administration is insufficient to characterize the employee as confidential without access to the totality of data comprizing the employer's entire operations. The Association also cites Plainfield Board of

Education, E.D. No. 1, for the principle that only frequent or constant exposure to labor relations material or access to such material on a regular or continuous basis warrants confidentiality. Since Assistant Superintendent Farrell has little routine contact with negotiations or labor policy decisions and the contact that he has, is not comprehensive in scope, Ricciardi, his secretary, lacks such regular exposure and thus cannot be found a confidential employee.

As to the Association's contention that the Respondent's conduct with respect to Ricciardi is in derogation of its negotiating duty and interferes with her exercise of employee rights under the Act, the Association relies on City of New York v. Communications Workers of America, 7 PERB 4629, 8 PERB 3041 affirming with modifications the recommendation of its hearing officer, determining that a public employer committed an improper practice by issuing a memorandum unilaterally determining that certain members of employee organizations were managerial or confidential. Such conduct was held to violate the public employer's duty under comparable provisions of the New York Public Employee's Fair Employment Act to refrain from conduct which interfered with, restrained or coerced public employees [who have not been determined to be managerial or confidential] in the exercise of their rights to join or assist an employee organization for the purpose of depriving employees of such rights.

Analysis and Conclusions

Ricciardi's Involvement with and Exposure to the Collective Negotiations Process

Under the Board's reorganization, sometime in 1973, Mr. Farrell, previously Assistant Principal in charge of pupil personnel services, became the Assistant Superintendent for the School District. His functions on assuming this position changed materially. Instead of concentrating on guidance and special services work, he became a full fledged Assistant and alter ego to the Superintendent. This change brought him into the small grouping of top administrators including Superintendent, Assistant Superintendent and Board Secretary-Business Administrator, who attend all Board meetings and executive sessions and consult with the Board and its negotiators on a regular basis with respect to negotiation positions and the effect of negotiated agreements upon their day-to-day administration of the District. Assistant Superintendent Farrell's

participation in such matters on a regular basis naturally results in his sole secretary, Shirley Ricciardi, being privy to labor relations memoranda circulated among the top administrators and having access to the Assistant Superintendent's files relating to his participation in such matters. Furthermore, Mr. Farrell testified without contradiction as to his responsibility since his appointment to observe and report to the Superintendent with respect to such personnel matters affecting terms and conditions of employment of secretarial-clerical employees as tardiness, work qualities and the like, and his authority to correct problems in these areas on his own or to bring them to the attention of the Superintendent. To the extent such duties involve the preparation of memoranda and reports Mrs. Ricciardi would naturally receive knowledge of recommendations and determinations which may well form the basis for the filing of grievances by individual employees or the Association under the individual grievance procedure of the parties collective negotiations agreement and therefore raise issues involved in the collective negotiations process. In addition, Farrell's role as Board representative on second step grievances under the current PVOWA agreement necessarily provides Mrs. Ricciardi with intimate knowledge of positions of the Board on employee or Association grievances prior to the Assistant Superintendent's determination.

Even prior to Farrell's appointment, Superintendent Grady testified, without contradiction, that Farrell was physically present at more than one-half of the negotiations sessions held over a two year period with the PVOWA. Farrell himself was actually a member, with Board Secretary Hackes, on one of the Board's negotiating teams during the spring of 1974 while negotiations were continuing with the PVOWA. And, in the words of Superintendent Grady with respect to Farrell's advisory role in the negotiation process, "we check very carefully on any understandings and agreements the Board makes with the employees."

Assistant Superintendent Farrell's functions with respect to the labor relations matters already summarized above, coupled with Mrs. Ricciardi's own testimony regarding her actual involvement in some of these matters and her access on a regular basis to Mr. Farrell's files, lead me to conclude that Mrs. Ricciardi should be excluded from participation as a member of an employee organization or inclusion in a unit under the Act. As noted earlier, since the effective date of C. 123 amendments, on January 20, 1975, the Act has defined

"confidential employees" as those "whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any [16] appropriate negotiating unit incompatible with their official duties." (N.J.S.A. 34:13A-3(g)) /Emphasis added/

I conclude that Mrs. Ricciardi falls within this definition based upon her functional responsibility as well as her knowledge as established by the record in this proceeding, both with respect to issues arising in the PVOWA unit and the other negotiating units.

Apart from the foregoing, another C. 123 amendment to P.L. 1968, C. 303, defines "managerial executives" to mean "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the Superintendent or other chief administrators, and the Assistant Superintendent of a district." (N.J.S.A. 34:13A-3.(g) /Emphasis added/

In the instant district, Mr. Farrell is the only Assistant Superintendent; thus, he is a managerial executive ineligible for inclusion in any supervisory or administrative unit of employees. [17] Since the formulation and direction of management policy and practices would normally include formulation and direction of labor relation policies and practices, it would appear to be a reasonable inference that the secretary of such a managerial executive as the Assistant Superintendent of the Board would normally fall within the parallel definition of confidential employees. [18]

None of the cases which the Association cites detracts from my conclusions although each of them was decided prior to the effective date of C. 123. However, the manner in which the concept of the confidentiality was applied demonstrates that the Commission even before the definition became a part of the Act applied a substantially similar concept in its rules. See

16/ See Bloomfield Board of Education and Bloomfield Educational Secretaries Association, E.D. No. 76-40 (5/28/76) at page 4 of the Decision.

17/ See C. 34:13A-3(d).

18/ This result is supported in the instant proceeding by a record which makes clear Mrs. Ricciardi's functional responsibility and knowledge of the labor relations process.

Bloomfield, cited supra, page 17. Compare N.J.A.C. 19:10-1.1, [19] effective March 7, 1974 with the present N.J.S.A. 34:13A-5.3(g).

Contrary to the Fire Captains in Woodbridge Fire Commissioners, P.E.R.C. No. 51, the Assistant Superintendent here is intimately and regularly involved in assisting in the negotiating process and in determining a labor relation policy by virtue of his role in regularly advising the Superintendent on negotiations policy and his decisions in the grievance process affecting terms and conditions of employment. In The Board of Education of Township of West Milford, County of Passaic, P.E.R.C. No. 56, the Commission excluded three positions from the unit as confidential, including the secretary and assistant secretary to the Superintendent and the secretary to the Business Administrator-Board Secretary. The decision fails to indicate whether or not an Assistant Superintendent such as the position occuppied by Mr. Farrell was employed in the school district. However, the Commission's description of the function of these three secretaries is easily applicable to the functions of the secretary to the Assistant Superintendent at issue in this proceeding, as well as to the Secretary and Assistant Secretary to the Superintendent excluded by the agreement of the parties. As the Commission stated at page 3 of its Decision and Direction of Election:

19/ The N.J.A.C. 19:10-1.1 definition provides as follows:

> "Confidential employee" means any employee for whom a principal duty is to assist and act in a confidential capacity to persons who formulate, determine and effectuate management policies in the area of labor relations. "Confidential employees"shall not be included in units of non-confidential employees. The term "confidential employee" shall be narrowly construed.
>
> Prior to this rule enactment, the Commission applied the same concept in determining whether to exclude employees from particular negotiating units because of the confidential nature of their relationship regarding labor relations policy matters. See Plainfield Board of Education and Educational Secretaries, E.D. No. 1 (5/4/70); Board of Education of West Milford and West Milford Education Association, Inc., P.E.R.C. No. 56 (7/8/71); Board of Education of Montgomery and Montgomery Education Association, P.E.R.C. No. 27 (12/17/69); Springfield Board of Education and Springfield Education Association, E.D. No. 52 and Woodbridge Fire Commissioners, District No. 1 and International Fire Fighters, P.E.R.C. No. 51.
>
> To the extent it is inconsistent, N.J.A.C. 19:10-1.1, would appear to have been superceded by N.J.S.A. 34:13A-3 (g) and N.J.S.A. 34:13A-5.3 which, read together, now exclude confidential employees from any rights to employee organization membership or activity otherwise granted to public employees by the Act. See discussion and analysis, infra.

> "These three secretaries work for and with those at a management level who share with the Board responsibility for personnel and labor relations policies and by virtue of that relationship these secretaries have, in the course of their normal duties, access to the knowledge of such policy information."

In Plainfield Board of Education, E.D. No. 1, the two Assistant Superintendent of Schools for Personnel and Curriculum were among four management personnel whose secretaries were excluded as confidential employees from inclusion in a recognized unit of secretaries employed by the Board of Education. Just as is the case with the Assistant Superintendent in the instant proceeding, the two Assistant Superintendents in Plainfield Board of Education, along with the Superintendent and Business Manager-Board Secretary, were "...involved in advising the Board, preparing minutes of closed meetings and correspondence with Board members on labor relation policy" (page 2 of Executive Director's Decision) and as a team "...prepares the strategy and/or is privy to the strategy of the Board of Education in matters of contract negotiations and/or grievance handling...some /of which information is handled by this management team/ is not public information and is not..and will not be released until the proper moment." (page 2 of Hearing Officer's Report and Recommendation)

The Respondent's Conduct in Seeking to Deprive Ricciardi's Association Membership and to Exclude her from the Unit of Secretarial-clerical Staff Employees

The acts and conduct of Respondent complained of in the amended complaint include the following: In the original charge, the allegation that on January 15, 1974, the Board unilaterally took Secretary Shirley Ricciardi out of the collective bargaining unit represented by the Association and advised her that her membership in the Association could no longer continue. This allegation was amended during the hearing to charge that Respondent, on January 15, 1974, and continuing up to the present time, advised Ricciardi that if she wished to remain in her present position she would be precluded from membership in the Association and since August, 1975, negotiated directly with Ricciardi with respect to terms and conditions of employment, rather than the Association. These acts are alleged to be in violation of N.J.S.A. 34:13A-5.4 (a) (1), (2)

(5), and (6). The evidence introduced at the hearing supports the allegations of fact in part in that the Respondent, by Superintendent Grady, directed Mrs. Ricciardi to cease her membership in the Association in a January 17, 1974 letter to her. Further, at the employee's request, members of the Board met with Ricciardi (and Orrichio) on August 18, 1975 concerning their terms and conditions of employment for the 1975-76 school year. The uncontroverted evidence also shows that after the two employees attended the meeting in the company of Joseph Gabriel, an N.J.E.A. Consultant, the Board refused to discuss their status and employment arrangements in his presence. Apart from this August, 1975 meeting, Mrs. Ricciardi (as well as Mrs. Orrichio whose status is not now in issue) received in July, 1975 a written contract proposal for continued employment for the 1975-76 school year containing offers as to such terms and conditions of employment as salary, hours and vacation benefits. These precise terms had not been negotiated with the Association, but the subjects generally were then being negotiated with the Association. While the Association alleged direct dealings commencing in August, not July, 1975, I conclude that the July 15, 1975 letter to Ricciardi is encompassed by the complaint since, even in the absence of a motion to such effect, I may, with respect to such technical non-controversial matters as precise dates and the like, conform the pleadings to the proofs.

Apart from the foregoing conduct, Respondent failed to provide Ricciardi with such contractual benefits as incremental salary increases uniformly granted the other unit employees in December, 1974 and July, 1975. In the absence of any explanation for their conduct, I may appropriately infer that Respondent had thereby manifested an intent to unilaterally remove her from the secretarial-clerical unit.

I have already noted that as to another alleged act, the Respondent's failure to respond to Mrs. Ricciardi's and Mrs. Orrichio's reply to a letter from the Board's attorney to Mrs. Orrichio only advising her that she could not be represented by the Association cannot be deemed to be an admission that the letter applied to Mrs. Ricciardi as well.

While the earliest conduct alleged, Superintendent Grady's letter of January 1974 to Ricciardi, may not form the basis for an unfair practice determination because of the Act's statute of limitations barring issuance of a

complaint based upon any unfair practice occuring more than six months prior to filing of the charge, N.J.S.A. C. 34:13A-5.4(c); City of Newark, P.E.R.C. No. 87, 1 NJPER 21; Essex County Board of Chosen Freeholders, et al, E.D. No. 76-33, the Respondent's later conduct is not subject to the same infirmity.[20/]

Assuming Ricciardi was an employee enjoying full rights under the Act, and not a confidential employee, the Respondent's conduct commencing in December, 1974, and continuing in July and August, 1975, of excluding her from the unit, by-passing the recognized exclusive representative by proposing terms and conditions of employment in direct dealings with her and by agreeing to, and meeting directly with her to review her salary and working conditions but only in the absence of the Association's consultant, would all appear to be violative of the Board's duties arising under N.J.S.A. 34:13A-5.4(a) (1) and (5) to refrain from interference with employee exercise of rights guaranteed by the Act and to negotiate in good faith with the Association majority representative in the secretarial-clerical unit. [21/] See Lullo v. Intern. Association of Fire Fighters, 55 N.J. 409, 424 (1970). J.I. Case v. N.L.R.B., 321 U.S. 332, 14 LRRM 501 (1944); C. & C. Plywood Corp., 163 NLRB 1022, enf. den. 351 F. 2d 224 (C.A. 9, 1965), rev'd and remanded, 385 U.S. 421 (1967).

However, I conclude that the determination as to whether such conduct, indeed, constitutes such violations of the Act necessarily turns upon the status of Ricciardi as a confidential employee or not at the time the alleged conduct was committed.

Unilateral Removal of a Confidential Employee from a Negotiating Unit and Direct Dealing with Such Employee as Violations of the Act

N.J.S.A. 34:13A-5.3 provides, in pertinent part, as follows:

> "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty

20/ Neither does the instant proceeding present a claim of unilateral assignment of an employee to a confidential position outside the unit. The assignment of Ricciardi to Secretary to the Assistant Superintendent was made in the fall of 1973, more than a year prior to the effective date of C. 123 and the Association has not alleged the assignment as a violation. Such an allegation presents a different issue not posed by the pleadings nor addressed in this Report.

21/ Such conduct would not violate N.J.S.A. 34:13A-5.4(a) (2) and (6).

> and reprisal, to form join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees..." /Emphasis added/

This provision, one of the amendments to the pre-existing Act added by C. 123, P.L. 1974, effective January 20, 1975, evidences a legislative intent that confidential employee, as defined in the Act, [22/] shall not enjoy the rights freely extended to other public employees to be members of employee organizations or to have the rights to be represented by a majority representative in an appropriate unit for purposes of collective negotiations with respect to their terms and conditions of employment. Without the right to form, join and assist any employee organization, no confidential employee may select or organize with other employees to select an employee organization to represent her in collective negotiations. Neither may such an employee become or remain a member of an employee organization without regard to whether or not the organization represents employees in a negotiating unit.

Since confidential employees lack the basic protections accorded other employees under the Act, a public employer is free to exclude such an employee from a negotiating unit, deal directly with such an employee with respect to terms and conditions of employment and even condition continued employment as a confidential employee upon renunciation of membership in an employee organization.

The Association argues that the New York Public Employment Relations Board (PERB) held improper an employer issuance of a memorandum unilaterally determining certain members of an employee organization to be confidential personnel, City of New York v. Communication Workers of America, AFL-CIO, 8 PERB 3041. The Association urges that just as PERB found that the public employer there could not unilaterally implement a determination that employees within an existing negotiating unit were confidential but was required to stay any such activity pending its application and a determination by the governing agency that such employees were confidential, the Board's only legitimate recourse in the instant proceeding was to file an appropriate petition

22/ See page 14 supra, for statutory definition of "Confidential employees" in the Act.

for unit clarification with the Commission.

I conclude that PERB's determination is not applicable here and may not govern the like issue posed in this proceeding under the Act. § 201.7(a) of the New York Public Employees' Fair Employment Law (The Taylor Law) conditions the establishment of the confidential status of an employee upon the determination made by the governing agency upon application of the public employer. Insofar as pertinent, the Section provides as follows:

> "7.(a) The term 'public employee' means any person holding a position by appointment or employment in the service of a public employer, except that such terms shall not include for the purposes of any provision of this article other than Sections two hundred ten and two hundred eleven of this article,...any persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board in accordance with procedures established pursuant to section two hundred five or two hundred twelve of this article, which procedures shall provide that any such designations made during a period of unchallenged representation pursuant to subdivision two of section two hundred eight of this chapter shall only become effective upon the termination of such period of unchallenged representation. Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)." /Emphasis added/

Sections 210 and 211 of the Taylor Law, concerned with prohibition of strikes and application for injunctive relief, respectively, are not relevant hereunder. Section 202 protects public employees in the rights of organization. Section 209-a prohibits certain improper employer and employee practices taken, inter alia, against public employees in violation of these rights. A confidential employee under the § 7(a) definition is appropriately excluded

from the protections accorded employees under section 202, enforced under section 209-a, provided an application is filed for such designation and the appropriate board issues such designation.

The PERB appropriately determined in City of New York that under § 201.7 of the Taylor Law (and § 2.20 of the Revised Consolidated Rules of the New York City Office of Collective Bargaining ("O.C.B.")) only the O.C.B. could make the determination that certain persons, members of the employee organizations involved, were managerial or confidential personnel and thus excluded from the protections provided by the Taylor Law. The City of New York's unilateral conduct in excluding employees from union activities in the absence of a determination by the appropriate board was appropriately found to interfere with, refrain or coerce the excluded public employees in the exercise of their rights to join and participate in any employee organization of their own choosing as provided in § 202.

Contrary to the Taylor Law, the Act, as amended (C. 123 P.L. 1974) does not condition confidential employee status upon determination by the Commission or any other agency upon application of a public employer. That status must be determined from an analysis of the facts relating to the functions performed by the employee and/or the employee's knowledge of issues involved in the collective negotiation process which would make their membership in any appropriate unit incompatible with their office duties at all material times involved in the unfair practice proceeding. Nowhere does the Act require a determination of confidential employee status upon employer application as a condition precedent to a determination as to whether an employee may freely exercise the basic employee organizational rights guaranteed in 34:13A-5.3. Surely, if the Legislature had intended such a result it would have provided language identical or similar to that contained in the Taylor Law to accomplish such objective. Instead, the Act merely provides that confidential employees, as elsewhere defined in terms of function and knowledge may not exercise protected rights.

A Commission rule (N.J.A.C. 19:11-1.5) does provide a means by which a public employer may petition for clarification of a negotiating unit by seeking to exclude employees as confidential. See, e.g., Bloomfield Board of Education, cited, supra, at page 17. This rule is a proper implementation of

the Commission's exclusive authority under the Act to determine the unit appropriate for purposes of collective negotiation (See, N.J.S.A. C. 34:13A-5.3; In re State and Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231 (1974), aff'g P.E.R.C. No. 68, 5/23/72). However, even the rule does not require that a public employer must file such a petition in order to eliminate an alleged confidential employee from a negotiating unit. Subsection (a) of the rule provides that "the majority representative of the public employer may file a petition for clarification..." /Emphasis added/ Furthermore, and apart from the foregoing, the unit clarification petition is not intended as a procedure for determining the rights of a confidential employee to membership in a employee organization, or even rights to membership in a unit other than the unit sought to be clarified; the clarification proceeding is designed merely to clarify an existing negotiating unit by excluding an alleged confidential employee. To determine whether such an employee, found to be confidential by such a process, may exercise protected rights, one must turn to an examination of the Act itself, more specifically, § 5.3. The determination of rights under the Act is appropriately made under the Commission's unfair practice authority, and such a determination is being made in the instant proceeding.

Since neither the Act itself nor the rules adopted by the Commission implementing its authority thereunder require confidential status to be determined by a separate proceeding as does the Taylor Law, I conclude that the Legislature has not intended that the confidential status of an employee may only be determined by a unit clarification proceeding and, further, that a public employer, at its risk, may unilaterally remove a public employee from an existing negotiating unit under the facts disclosed in the instant proceeding [23] and deal directly with such an employee, by-passing the majority employee organization.[24]

23/ Where a certification has issued to a majority representative as the exclusive representative in an appropriate negotiating unit following an election held pursuant to the Act, an employer who seeks to remove an employee from such a unit may well be limited to a proceeding to amend the certification pursuant to N.J.A.C. 19:11-1.5. The instant matter, however, involves a voluntarily recognized negotiating unit and a unilateral change in the employee's unit status after an admitted change in the employee's functional responsibilities.

24/ While I have concluded that the public employer under the circumstances disclosed in the instant record was free to unilaterally remove employee Ricciardi from the unit and negotiate directly with her, a public employer who undertakes such unilateral action with respect to an employee whom it wrongly determines is confidential will have committed a violation of the Act by so doing. If its judgment as to confidential status proves faulty

I find and conclude that under the circumstances here a preponderance of the evidence does not establish that Respondent has coerced Shirley Ricciardi, or refused to negotiate in good faith with the Association by direct negotiations with her by-passing the exclusive representative in the appropriate negotiating unit in violation of N.J.S.A. 34:13A-5.4(a) (1) or (5) of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

IV. Conclusions of Law

1. Passaic County Regional High School, District No. 1, Board of Education is a public employer within the meaning of N.J.S.A. 34:13A-3 (c).

2. Passaic Valley Office Workers Association is an employee organization and majority representative of employees within the meaning of N.J.S.A. 34:13A-3(e) and 5.3.

3. The Respondent has not engaged in the unfair practices alleged in this proceeding.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of N.J.S.A. 34:13A-5.4(c) and N.J.A.C. 19:14-7.1, I hereby issue the following recommended:

ORDER

It is hereby ordered that the charging party's request to withdraw those portions of the amended charge which allege violations of the Act other than violations of N.J.S.A. 34:13A-5.4 (a) (1), (2), (6) and (7) relating to the Respondent's conduct with respect to Shirley Ricciardi's unit status, status as a member of the Charging Party and the Charging Party's status as her exclusive negotiating representative, be granted, and the complaint allegations based thereon be dismissed and the remaining complaint allegation in this proceeding alleging violations of N.J.S.A. 34:13A-5.4(a) (1), (2), (6) and (7)

24/ (Continued) it risks an unfair practice proceeding and an ultimate Commission Order to restore the affected employee to unit status and all benefits under any agreement covering unit employees.

relating to the Respondent's conduct with respect to Shirley Ricciardi and the Charging Parties' status as her exclusive negotiating representative be dismissed in their entirety.

Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
August 9, 1976