P.E.R.C. NO. 68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY

Public Employer

and

Docket No. R-111

NEW JERSEY STATE NURSES' ASSOCIATION and JERSEY NURSES' ECONOMIC SECURITY ORGANIZATION

Petitioners

STATE OF NEW JERSEY

Public Employer

and

Docket No. RO-164

PROFESSIONAL ASSOCIATION OF NEW JERSEY DEPARTMENT OF EDUCATION

Petitioner

STATE OF NEW JERSEY

Public Employer

and

Docket No. RO-208

NEW JERSEY INSTITUTIONS AND AGENCIES EDUCATION ASSOCIATION

Petitioner

STATE OF NEW JERSEY

Public Employer

and

Docket No. RO-196

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

NEW JERSEY DEPARTMENT OF LABOR AND INDUSTRY

Public Employer

and

Docket No. RO-230

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION

Petitioner

DECISION[1]

The above captioned cases raise questions concerning the representation of various groups of professional employees[2] employed by the State of New Jersey. Hearings were conducted on each of the petitions and thereafter Hearing Officers made the following recommendations. In Case No. R-111 ad hoc Hearing Officer Joseph McCabe recommended that separate state-wide units of supervisory and non-supervisory Registered Nurses be found appropriate. No exceptions were timely filed to that recommendation. In Case No. RO-196, wherein Petitioner sought certification in a unit of all Social Workers and Social Worker trainees employed by the Bureau of Childrens Services, Hearing Officer Martin Pachman recommended dismissal of that petition on two grounds. First, since not all social workers in state classified service were included, the unit sought, being less than state-wide in scope, failed to meet the minimum standards set forth by the Commission in its earlier disposition of other state cases.[3] Second, even if that state-wide standard were not a requirement, the exclusion of other social workers located in hospitals, training schools, etc.,who share the same characteristics of employment is not consistent with any reasonable definition of community of interest. In Case No. RO-230, wherein Petitioner sought certification in a unit of all Rehabilitation Counselors, their supervisors, aides and trainees employed by the Department of Labor and Industry, the same Hearing Officer recommended dismissal of that petition

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1/ Pursuant to Order, the above cases have been consolidated for purposes of decision.

2/ In most instances the parties do not contest the use of the term "professional" in describing the employees involved. For purposes of this decision, there is an assumption, but no determination, that such description is appropriate.

3/ State of New Jersey (Neuro-Psychiatric Institute, et al), P.E.R.C. NO. 50

essentially because the unit, even though state-wide as to the titles sought, would exclude employees with similar duties, skills, functions, goals and job qualifications and thus there was a community of interest which extended beyond those titles which that Petitioner sought to represent. Neither of the two Petitioners involved in these recommendations filed exceptions to the proposed dismissals of their petitions. The Employer took exception to certain observations made by the Hearing Officer which were not material to his recommendations above, but which were relied on to support his suggested resolution of the larger question of appropriate unit or units for professional employees of the State. Finally, in Cases Nos. RO-164 and RO-208, which, by virtue of certain amendments, amount to a single petition for a unit of all professional, non-supervisory, educational employees in the Departments of Education and Institutions and Agencies, Hearing Officer Jeffrey B. Tener recommended that a unit of all professional, educational employees be found appropriate. This is a modification of Petitioner's unit, principally in that it also includes a small number of employees in the Department of Higher Education. 4/ The Employer filed exceptions to a variety of the Hearing Officer's findings and conclusions as well as to his ultimate recommendation on unit.

Following submission of all Hearing Officers' Reports and exceptions thereto, a three member panel of the Commission heard oral argument on the positions of the parties in these consolidated cases. The Commission has considered the record, briefs, Hearing Officer's Report and Recommendations, exceptions and oral argument in each of these cases and makes the following

4/ The unit does not contemplate inclusion of the teaching faculties found within the Department of Higher Education, most of whom are already represented.

dispositions.

The cases will be discussed as one since the bases for disposition are the same in each. The Commission is not persuaded that the above units where recommended as appropriate for collective negotiations be found so. There are two interrelated reasons for this conclusion, the statute's policy and the community of interest of the employees concerned.

It was the Legislature's express determination that Ch 303 be enacted to promote permanent employer-employee peace and the health, welfare, comfort and safety of the people of the State. N.J.S.A. 34:13A-2. As the Supreme Court later observed, "The nature of the appropriate negotiating unit is a most significant factor in the production and maintenance of harmony and peace in public employment relations."[5/] Against this background the statute provides that the negotiating unit "... shall be defined with due regard for the community of interst among the employees concerned ..." N.J.S.A. 34:13A-5.3. Community of interest is an accepted term of art and the statute does not attempt to define it. There are several guidelines, however, only one of which is relevant here, namely, that in deciding which unit is appropriate for collective negotiations, the Commission may not include professional employees in the same unit with non-professional employees unless a majority of the former vote for inclusion. N.J.S.A. 34:13A-6(d).

When the Commission last examined the question of unit involving State employees, it concluded, with respect to the employees in question there, that to be appropriate the scope of the unit must be state-wide. Expressed and implied in that conclusion was an assessment that the strength and significance of the factors cited - in brief, a high degree of centralization of authority

5/ Board of Education of the Town of West Orange v. Wilton, 57 N.J. 404, 424 (1971).

in the top echelon of State government and a general uniformity of major terms and conditions of employment for State employees - required a finding that the first distinctive level of common interest among employees extended state-wide and that this was the minimum level for meaningful negotiation of terms and conditions of employment. The Commission recognized but refused to give controlling weight to the variety of lesser but more particularized points of common employee interest known to exist in a specific institution or department. Admittedly, a reasonably persuasive case was made for establishing units at the institution or department level by highlighting local differences in conditions and duties, but on balance the factors demonstrating a broader community of interest were considered more compelling. Conceivably, the Commission could have stopped at that point and relied on the factors cited to conclude, as one organization urged, that not only was this the first level of common interest, but that this was the only set of interests to be recognized in determining the unit question, meaning that there would be only one unit for all State employees. Instead, the Commission relied on that set of facts only to establish the base or scope of the unit. It then found, in agreement with the principal parties, that it was appropriate to fashion a unit, state-wide in scope, to encompass all employees sharing a broad occupational objective or description. That is, it found an additional mutuality of employee interest arising from the kind of work performed, not expressed in terms of specific job titles or functions, but in terms of the nature of the service provided. As a result of that proceeding, the following three units of nonprofessional, nonsupervisory employees were established: Health, Care and Rehabilitation Services; Operations, Maintenance and Services; and Craft.

The Commission is now asked to find appropriate several units whose

composition would conform to certain individual professions. To do so would require the Commission to recognize as controlling the common attributes and bonds which distinguish a particular profession, be it teaching, nursing, counseling, etc., and find therein the necessary regard for community of interest. The Commission views that concept in much broader perspective in these cases. Community of interest is, as the writers have said, an elusive concept. While it is purposely vague and undefined, a considerable number of factors has been identified as useful indicators. But in given cases some factors are emphasized over others, with still others regarded as insignificant; in other fact settings the weight given the same indicators may be substantially altered. It is essentially a question of weighing the facts in each case and deciding what will best serve the statutory policy. For example, no one would dispute that registered nurses share an identity simply by virtue of their common background and qualifications required for licensure and by virtue of their common goal to provide care of various kinds to those in medical need. Yet, it is obvious that these professional characteristics do not necessarily create an exclusive community of interest. The statute, which generally provides little insight, does contemplate that there may, in fact, be an identity of interest between professionals and nonprofessionals. In that event it requires a majority vote by professionals for inclusion with nonprofessionals, thereby recognizing the professional interest. But material to this discussion is the recognition that such interest is not so unique that it must be insulated.[6/] A fortiori, the lines between professional disciplines

6/ A graphic example from recent private sector experience is found in Barnes-Hind Pharmaceuticals, 183 NLRB No. 38 where the Board found it would be appropriate to group professional scientists in the same unit with nonprofessional technicians and employees such as glassware washer and animal caretaker.

are not necessarily natural barriers. The goal of providing medical care is common to nurses but it is equally common to medical doctors, clinical psychiatrists and pyschologists. True, the particular skills, functions and qualifications of these groups differ, but the same observation may be made of the shop teacher at Bordentown Youth Correction Institution, the teacher of the deaf at Marie Katzenbach and the curriculum consultant for elementary education, all of whom are sought to be included in the educational unit. Given the policy considerations of this statute, the Commission believes that the characteristics of a particular profession should not be the determinant in establishing units for negotiations. If community of interest is equated with and limited to such characteristics, the stability and harmony which this Act was designed to promote are in jeopardy. Potentially, every recognized professional group would be segregated, presenting the Employer with multiplicity of units and the likelihood of attendant problems of competing demands, whipsawing, and continuous negotiations which, disregarding the Employer's inconvenience, are not judged to be in the public interest. Fragmentation to that degree cannot be justified on the ground that individual professional interests are so unique that they cannot be adequately represented in concert with others, especially in the absence of a determination that matters of a professional concern are in every instance negotiable as terms and conditions of employment. At this point in the statute's development the Commission is inclined to believe that the purposes of the Act will be better served if, when dealing with professional employees, the individual distinctions among the professions not be regarded as controlling, but rather the more elementary fact that they are simply professionals and on that basis alone to be distinguished from other groups of employees. This approach

would parallel that taken in the case of craft employees where individual craft lines were not observed and the unit was established simply on the basis of a general craft distinction.

The Commission is not unmindful of the fact that several organizations were interested in representing all craft employees in one unit, whereas here the organizations concerned seek representation along the lines of separate professions. We consider the right to organize and be represented, not as an absolute right, but as one that is qualified by the statute's policy and purpose and by the requirement that the exercise of the right be channeled through units appropriate for negotiations. Moreover the Commission takes note of the fact that units already exist at state level containing substantial diversity of function and ranging in size up to 7,500 employees.

The Commission concludes for the reasons above that each of the petitions be and are hereby dismissed.

FOR THE COMMISSION

Charles H. Parcells

Charles H. Parcells
Acting Chairman

DATED: May 23, 1972
Trenton, New Jersey

STATE OF NEW JERSEY

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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STATE OF NEW JERSEY,

Public Employer,

and

DOCKET NUMBER:

NEW JERSEY STATE NURSES' ASSOCIATION and JERSEY NURSES' ECONOMIC SECURITY ORGANIZATION,

R-111

Petitioners.

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Appearances for the Public Employer:

Edward F. Ryan, Esq.
Special Counsel
Governor's Employee Relations Policy Council

Appearances for the Petitioners:

John J. Harper, Esq.
Director and Counsel

Ronald DeMaria , Esq.
Co-Counsel

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to Notice of Hearing to resolve the question concerning representation of Registered Nurses employed by the State of New Jersey, hearings were held on October 24, November 13 and December 5, 1969 and January 21, January 22, March 11, August 4 and August 12, 1970 before the undersigned hearing officer of the commission. All parties were given an opportunity to examine and cross-examine witnesses, present evidence and to argue orally. On the basis of all of the evidence contained in the report, it is determined:

1. The State of New Jersey is a public employer within the meaning of the Act and is subject to the provisions of the Act.

2. Petitioners, New Jersey State Nurses' Association and Jersey Nurses' Economic Security Organization, are employee representatives within the meaning of the Act.

3. The sole question to be determined in the proceeding is whether or not

(a) all non-supervisory Registered Nurses employed by the State of New Jersey and

(b) all supervisory Registered Nurses employed by the State of New Jersey

constitute appropriate bargaining units within the meaning of the Act.

BACKGROUND

The original petition in this matter was filed by the New Jersey State Nurses' Association and sought recognition for the Association as exclusive representative for all professional Registered Nurses employed at State Institutions and Agencies under the State Department of Institutions and Agencies. After several days of hearing, the petition was amended on January 21, 1970 and the Jersey Nurses' Economic Security Organization (hereinafter called JNESO) was substituted for the New Jersey State Nurses' Association (hereinafter called NJSNA) in the same unit. As testified to by petitioners' witnesses and indicated in Article II of the JNESO By-laws (petitioners' Exhibit #1, page 131), it is JNESO's intent to limit membership to non-supervisory professional Registered Nurses.

Petition was amended a second and last time at the hearing scheduled on March 11, 1970. At that time JNESO petitioned for a unit of all non-supervisory Registered Nurses employed by the State of New Jersey and NJSNA petitioned

for a unit of all supervisory Registered Nurses employed by the State of New Jersey. The amendment was received without objection by the public employer.

Much of the testimony taken prior to March 11, 1970 was directed toward NJSNA's status as a labor organization. The issue arose primarily because NJSNA admitted both supervisory and non-supervisory Registered Nurses to membership. The establishment of JNESO, its inclusion in the petition and the public employer's withdrawal of its objection has rendered moot most of this evidence.

It should also be noted here that prior to March 11, 1970 the unit sought by petitioner was limited to Registered Nurses employed by the Department of Institutions and Agencies. Considerable testimoney was offered in support of the contention that a unit, less than state wide in scope, was appropriate. Much of this testimony too, need not be considered here in light of the fact that the present joint petition is much more in accord with the state wide units urged by the public employer and found to be appropriate by the Public Employer Relations Commission, STATE OF NEW JERSEY (Neuro-Psychiatric Institute, et al) P.E.R.C. Case #50.

The State contends that the Registered Nurses employed by the State are appropriately included in a bargaining unit which it has described in its Exhibit 4(c) as Professional, Scientific and Technical Services.

> Any employee engaged in work (i) predominately intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

The public employer contends that this unit should not be limited to professional Registered Nurses but should include all professional employees employed by the State. It is further anticipated by both the petitioners and the public employer that this unit would be further broken down into a supervisory and a non-supervisory group. At pages 845-47 of the Record, the parties indicated their "off the Record" agreement not to develop at this hearing the exact cut off line between supervisory and non-supervisory Registered Nurses. It was indicated that

neither party anticipated any problem in this regard and believe that if the limited unit sought herein was appropriate, the placement of the Registered Nurses into supervisory and non-supervisory groups could be amicably achieved. In light of the agreement as well as the language of Chapter 303 1/, the question of supervisory and non-supervisory Registered Nurses was not developed at the hearing.

FACTS

Because of the above described amendments to the petition, agreements between the parties and previous decisions by the Public Employment Relations Commission, a single issue remains for determination in this report:

> Are the two units, composed of all supervisory Registered Nurses employed by the State and all the non-supervisory Registered Nurses employed by the State, appropriate negotiating units within the mean of Chapter 303?

1/ R.S. 34: 13A-5.3
Paragraph 7 . . . . but the commission not intervene in matters of recognition and unit definition except in the event of a dispute.

In advancing its position that Registered Nurses should be a part of a larger negotiating unit composed, basically, of all professionals employed by the State, the public employer points to several fiscal and administrative "facts of life" in the State of New Jersey. Included among these are the administrative and budgetary responsibilities of the Governor, Budget Director and agencies with state wide jurisdiction and responsibilities for all employees such as the Civil Service Commission, Salary Adjustment Commission, Division of Administrative Services and the Governor's Employees Relations Policy Council. As has been pointed out in previous Public Employment Relations Commission decisions, it was not the legislative intent in the Act of Chapter 303 to supercede any of those agencies or authorities but rather to preserve pre-existing rights. e.g. R.S. 34:13A-5.3; 34:13A-8.1. It is the opinion of the undersigned Hearing Officer, however, that the main thrust of such argument as well as most of the testimony of Commissioners McCorkle and Farrell, is directed at the appropriateness of state wide units rather than the composition of such units. Our concern herein is only with the composition of a unit.

In the Consolidated Hearing held before Hearing Officer Knowlton, the Deputy Director of the Governor's Employee Relations Policy Council indicated that the Council approached the problem of defining the composition of the bargaining units from two points of view. Primarily they considered the responsibilities of the State under Chapter 303 and secondarily, the basic composition of the State. The problem then was how to put the two together (State Exhibit 4, P. 669). In resolving this, it was indicated that the Council considered "community of interest among the employees concerned" to be only one of a number of criteria that were to be applied.

During the course of the hearing it was established that there are approximately 6,300 state employees who fall into the professional bargaining unit proposed by the State. It was further established that these employees would be found under a range of approximately 550 job titles. Included among this number of professionals, there are a total of approximately 800 nurses who share about 30 job titles. (Record, P. 698-730)

The rationale of the Governor's Employee Relations Policy Council in proposing all of the units

described in State Exhibit 4(c), and most particularly the professional unit consisting of over 6,000 professional employees is presented in great detail in the testimony of the Council's Deputy Director both in this matter and in the Knowlton hearing. Of particular, and perhaps paramount, importance to the Council was the concern that if state wide occupational units were found to be appropriate, they might be faced with petitions from each of the several separate professional disciplines which constitute the Professional, Scientific and Technical Services unit which they have proposed. However, there is nothing in the Record to indicate that any of the other professional societies have sought recognition. It may also be noted here that evidence was introduced indicating that both the Medical Society of New Jersey and the New Jersey Society of Professional Engineers opposes any negotiating unit in which its members would be mingled with other professional employees (Petitioner's Exhibit 29; Record P. 826).

FINDING

It is the recommendation of the undersigned that the negotiating units sought by petitioners in this matter be found appropriate by the Public Employment

Relations Commission. In reaching any conclusion on a unit determination, the statute itself must be the first source of guidance. At R.S. 34:13A-5.3. This statute provides ". . . . the negotiating unit shall be defined with due regard for the community of interest among the employees concerned. . ." While this language does not preclude the use of criteria other than community of interest, it is understood that the use of the word "shall" rather than a more permissive word, as well as the absence of other criteria indicates a legislative intent as to what the prime consideration should be.

After an acknowledgement of the fact that negotiating units for State employees must be state wide in scope, we must therefore attempt to determine what the community of interest is for Registered Nurses employed by the State. In that regard it is important to take into account the historical recognition of nursing as a separate and distinct academic discipline, its acceptance as a recognized profession and its maintenance of organizations, such as Petitioner New Jersey State Nurses' Association, which are concerned with internal self-discipline, training and the maintenance of standards and ethics on both a national and state wide basis (Petitioners' Exhibits 1 & 2). On a more particular

basis, note is taken of the fact that Registered Nurses are required to be licensed by the State of New Jersey and are subject to professional standards which apply to no others.

Taken alone, it is believed that the above facts are sufficient to establish that a state wide unit of all Registered Nurses employed by the State constitute an appropriate negotiating unit under the provisions of the New Jersey Employer-Employee Relations Act. In support of that conclusion, attention is called to the relatively high proportion of Registered Nurses that are included in the professional unit urged by the public employer. i.e. approximately 800 Registered Nurses in 30 job titles among 6,300 professional employees in 550 job titles. It has also been established that, while it may not have amounted to collective bargaining in the traditional sense of the phrase, there have been previous discussions between the New Jersey State Nurses' Association and State officials that have resulted in salary increases for all Registered Nurses employed by the State (Record, P. 746). Further, it is was conceded that there would be no violation of existing state law if the results of future negotiations were limited to Registered Nurses (Record, P. 811-12).

RECOMMENDATION

It is recommended that elections be directed in the units sought in the within petition as amended at the Hearing on March 11, 1970.

Joseph A. McCabe

JOSEPH A. MC CABE

DATED: March 9, 1971
Rockville Centre, N.Y.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY 1/
Public Employer
and
PROFESSIONAL ASSOCIATION OF NEW JERSEY
DEPARTMENT OF EDUCATION
Petitioner

Docket No. RO-164

In the Matter of

STATE OF NEW JERSEY 1/
Public Employer
and
NEW JERSEY INSTITUTIONS AND AGENCIES
EDUCATION ASSOCIATION
Petitioner

Docket No. RO-208

APPEARANCES:

Edward F. Ryan, Esquire
George F. Kugler, Attorney General
By Robert A. Goodman, Deputy Attorney General
for the Public Employer

Sterns and Greenberg, Esquires
By William S. Greenberg, Esquire
for the Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Petitions were duly filed by the Professional Association of New Jersey Department of Education (Docket No. RO-164) June 16, 1970 and by the New Jersey Institutions and Agencies Education Association (Docket No. RO-208) October 30, 1970 requesting certifications of public employee representatives.

Pursuant to a Notice of Hearing dated December 14, 1970; Orders Rescheduling Hearing dated February 3, March 16, March 25, April 29 and June 9, 1971; Orders Consolidating Cases dated March 16, March 25, and April 8, 1971; and Orders Severing Cases dated May 12

1/ The case captions were amended by stipulation at the hearing to correctly reflect the name of the public employer.

and June 9, 1971; hearings were held before the undersigned Hearing Officer June 24 and August 19, 1971 in Trenton, New Jersey at which all parties were given an opportunity to call, examine and cross-examine witnesses, to present evidence and to argue orally. Briefs subsequently were submitted by each party. Upon the entire record, the exhibits, and the briefs in this proceeding, the Hearing Officer makes the following findings of fact and recommendations.

BACKGROUND

The State of New Jersey was stipulated to be a public employer within the meaning of the New Jersey Public Employment Relations Act, hereinafter Chapter 303, and is found to be subject to its provisions. The Professional Association of the New Jersey Department of Education and the New Jersey Institutions and Agencies Education Association were stipulated to be employee representatives within the meaning of Chapter 303. It was also stipulated that the public employer has declined to recognize the units sought by the petitioners. Accordingly, the undersigned finds that there is a question concerning representation and the matter is appropriately before him for Report and Recommendations.

At the hearing, petitioner moved to amend the two petitions to indicate a single petitioner - the Professional Association of the New Jersey Department of Education - in a unit of so-called professional educational employees in the Department of Education and the Department of Institutions and Agencies. 2/ The public employer did not object to this proposed amendment and the undersigned hereby recommends that it be approved.

2/ This unit would include the professional educational employees of the Katzenbach School for the Deaf. Petitioner also indicated that he would have no objection to the inclusion of the professional educational employees in the Department of Higher Education but stated that he was not actively seeking these employees.

POSITIONS OF PARTIES

The Professional Association of the New Jersey Department of Education, in the amended petition, seeks to represent professional, non-supervisory educational employees of the two departments. The public employer contests the appropriateness of the unit sought and, further, contends that a single unit covering all professional employees of the State of New Jersey is the appropriate unit. Further, the employer maintains that the unit sought is inappropriate because it is less than state-wide in scope. Accordingly, the public employer urges that the petition be dismissed. Petitioner agrees that an appropriate unit would exclude craft employees, nonprofessional employees, policemen, managerial executives, and supervisors within the meaning of Chapter 303.

ISSUES

1. N.J.S.A. 34:13A-6(d) provides, in pertinent part, that:

> The division [PERC] shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes...(2) both professional and non-professional employees unless a majority of such professional employees vote for inclusion in such unit...

Therefore, if the unit sought is found to be appropriate, then the unit must be either confined to professional employees or the professional employees must vote to be included with non-professional employees. There is no claim of established practice, prior agreement, or special circumstances in this case. Furthermore, the petitioner does not seek to represent non-professional employees.

The parties stipulated that, in general, the employees in question are professional employees. The public employer specified

seven titles 3/ within the Department of Education and at least one title in the Department of Institutions and Agencies (Recreation Assistant) whose professional status he questioned. However, both parties agreed to defer this question. If the petition is dismissed, the question would be moot. If an election is directed, both parties expressed the belief that they could reach an agreement on this issue. Failing that, the hearing could be reopened. The number of employees in the disputed titles totals approximately 100 in this proposed unit of 1200 employees. The undersigned recommends that the matter of the extent of the unit be resolved before delving into the question of precise status of employees. Accordingly, a determination on the issue of what titles are and are not professional should be deferred.

2. Chapter 303 contains two references to supervisors:

> ...nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership....4/

> The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors...5/

The list of job titles which the petitioner seeks to represent contains a number of titles which the public employer regards as supervisory. Of the total of approximately 320 titles sought by petitioner, 93 are regarded as supervisory by the public employer. The number of

3/ Exhibit S-1 - Employer marked through those titles which he regarded as non-professional: Inspector Construction, Confidential Agent, Confidential Secretary, Supervisor of Forms Control, Supervisor of Tabulating Machine Operation, II, Planetarium Technician, Taxidermist.

4/ N.J.S.A. 34:13A-5.3.

5/ N.J.S.A. 34:13A-6(d).

people in these positions is somewhat over 100. As was the case with the professional status of certain employees, the parties agreed to defer resolution of this issue. Accordingly, the undersigned recommends that the basic unit question be resolved first and that the alleged supervisory status of the disputed titles be deferred.

3. The immediate issue, then, relates to the appropriateness of the unit as amended sought by the petitioner. The relevant statutory reference follows: "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." 6/ That provision must be interpreted in consonance with the policy declaration of Chapter 303:

> It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors; that strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic and public waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State. 7/

The issue can be summarized as follows: Is a unit of professional educational employees in the Department of Education and the Department of Institutions and Agencies an appropriate unit giving due regard for the community of interest among the employees concerned consistent with the policy declaration of Chapter 303?

6/ N.J.S.A. 34:13A-5.3 Emphasis supplied.
7/ N.J.S.A. 34:13A-2.

DISCUSSION:

The appropriateness of a unit has two elements: scope and composition. The public employer opposes the unit sought herein on the basis both of its scope and of its composition. We shall consider these two aspects in turn.

Scope

The petitioner seeks a unit composed of a large number of job titles within the Department of Education and the Department of Institutions and Agencies. However, not all of the titles sought are unique to those two departments. Therefore, the petitioner seeks to represent some employees in some particular job titles but not all employees in those job titles. The public employer urges dismissal of the petition, inter alia, on the ground that the unit sought is less than statewide in scope and is, therefore, inconsistent with the decision of the Public Employment Relations Commission in PERC No. 50. 8/ In that decision, the Commission found that units which were less than state-wide in scope were inappropriate for purposes of collective negotiations. 9/

The facts of the two cases are not identical. In PERC No. 50 over 80% of the employees involved were within the classified service. 10/ In the instant matter, 95-98% of the employees sought in the Department of Education and over 90% of the employees sought in the Department of Institutions and Agencies are unclassified employees. The difference between classified and unclassified employees is by no means inconsequential. Classified employees enjoy tenure after a working test period,

8/ State of New Jersey and American Federation of State, County and Municipal Employees, AFL-CIO, PERC No. 50.

9/ State of New Jersey and American Federation of State, County and Municipal Employees, AFL-CIO, PERC No. 50, p. 12.

10/ State of New Jersey and American Federation of State, County and Municipal Employees, AFL-CIO, PERC No. 50, p. 8.

they have rights of appeal with procedural safeguards to the Civil Service Commission in the event of discipline in excess of five days suspension, they enjoy sick leave and vacations as a matter of law, and they are entitled to overtime either in the form of cash or compensatory time. Unclassified employees have no tenure nor rights of appeal to the Civil Service Commission regarding discipline, sick leave and vacations are bestowed upon them by their appointing authorities rather than as a matter of law or of Civil Service regulation, and they are not subject to Civil Service regulations regarding overtime. In this regard, however, it should be noted that the Civil Service Commission apparently must approve at least the vacations of unclassified employees. 11/

There are, of course, many similarities between classified and unclassified employees. They are both part of the State compensation plan which is administered by the Civil Service Commission. All titles - classified and unclassified - fall into one of the approximately 40 salary ranges. Furthermore, to hire someone above the minimum rate or to have someone skip a step on the range requires approval of the Salary Adjustment Commission, regardless of whether an employee is classified or unclassified. Additionally, both classified and unclassified employees are part of the same state-wide health insurance program, enjoy the same holidays and leave privileges, and, with several exceptions 12/ are part of a single pension system.

Neither the list of similarities nor differences between classified and unclassified employees is intended to be exhaustive. On balance,

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11/ Tr. pp. 200-201.

12/ The State Police are in a separate pension system. Also, unclassified employees of the Department of Education who have been employed there over a year or so are in the Teachers' Pension and Annuity Fund. The proper allocation of new unclassified employees in the Department of Education to a pension system is unclear. Pending a final resolution, these employees have been assigned to the Public Employees Retirement System (PERS). This is the system to which most other State Employees belong including classified professional employees of the Department of Education (Tr. 178).

however, the undersigned concludes that the determination of the Commission that units which are less than state-wide in scope are inappropriate should be extended to units such as the instant one wherein the overwhelming majority of employees sought is in the unclassified service. Many of the same reasons which led to that conclusion in PERC No. 50 dictate the same conclusion here and do not need to be repeated at length. Suffice it to say that it is the opinion of the Hearing Officer that meaningful negotiations consistent with N.J.S.A. Title 11, Civil Service, as well as with Chapter 303, Laws of 1968 wherein good faith negotiations over terms and conditions of employment is mandated requires that negotiations be conducted on a state-wide basis for employees in both the classified and unclassified service; that is, all employees of a particular job title must be in the same unit.

Having found that only units which are state-wide in scope can be appropriate, it would be possible to stop here with a recommendation that the petition as amended be dismissed - as urged by the public employer - because the unit sought is less than state-wide in scope. However, the evidence suggests that with relatively minor adjustments, the unit could be made to conform to the state-wide standard without losing its essential identity. Exhibits S-3 and S-4 point out those job titles sought by the petitioner which are not unique to the Department of Education and the Department of Institutions and Agencies. Looking at Exhibit S-4, of a total of 662 people who hold titles sought by the petitioner, fully 606 are found in the Department of Institutions and Agencies and another 25 are in the Department of Education. If the 28 employees in such titles in the Department of Higher Education are included - employees which the petitioner has expressed a willingness to represent - then only three employees from other

departments would be included in the unit. 13/ Similarly, of those titles sought by petitioner within the Department of Education, of 278 occupants in all departments, 52 are in the Department of Institutions and Agencies and 15 are in the Department of Higher Education. Thus, 120 of the 278 are in one of these three departments. Alternatively, it would be possible to exclude all of the titles except Librarian I, Librarian II and Librarian III. To exclude all but these three titles would reduce the number of employees sought in the Department of Education by only 27. 14/ Thus, occupants of those positions - accountants, business managers, auditors, and data processors mainly - would be out of this unit and would, presumably, be included in some other unit. This discussion indicates that, with minor alteration, the instant petition could be modified to comply with the suggested standard requirement that units be state-wide in scope.

Based upon the above, the undersigned recommends that only units which are state-wide in scope be found to be appropriate and that, if an election is directed in the instant matter, that the unit be defined to conform to that standard.

COMPOSITION

The question of the composition of the unit is the most difficult one posed by this case. Both parties recognize the statutory constraints cited above regarding a mixed unit of professional and non-professional employees. Thus, the petitioner seeks a unit composed exclusively of professionals and the public employer does not oppose the unit on this basis. However, at this juncture the parties part.

The State contends that the only appropriate unit involving professional employees is one which includes all professional employees.

13/ Exhibit S-4.
14/ Exhibit S-3.

Such a unit would consist of approximately 6300 individuals in 550 job titles. 15/ Presumably, no other grouping of professional employees, in this view, would or could constitute an appropriate unit.

The petitioner,on the other hand, seeks a unit of approximately 1200 employees in roughly 300 different job titles. Thus, the position of the petitioner is not the extreme one of seeking a unit of employees in only a single title. Rather, petitioner proposes a grouping of titles based broadly upon function.

The testimony of the Director of the Governor's Office of Employee Relations which was offered as an exhibit in this case indicates a recognition and acceptance of the need to group occupations. 16/ Thus, the parties in the instant proceeding are in agreement that some grouping of professional employees would be appropriate.

The only question is how comprehensive a grouping should there be: should it be a grouping of all 6300 professional employees as proposed by the State or does the unit of 1200 professional educational employees sought by the petitioner constitute an appropriate unit?

Before considering the appropriateness of the unit sought, it would be useful to put the issue in perspective. The position of the State of New Jersey has been that a limited number of state-wide units is appropriate. The State proposes nine basic units, although, with refinements, it appears that there would be 13 units if the State position were to prevail. To a significant extent, the State has been able to gain approval of its unit proposals. Certifications have been issued in the Craft;Unit; Health, Care, Rehabilitation Services Unit;Operations, Maintenance,

15/ Exhibit S-2, testimony of Frank Mason, Docket No. R-111, Tr. 687.

16/ Exhibit S-2, testimony of Frank Mason, Docket No. R-93, Tr. 670 and 672; Docket No. R-111, Tr. 708.

and Services Unit; and State Troopers Unit. An election is scheduled in the Law Enforcement Unit. State university professionals have been recognized. State college professionals have negotiated a contract although there is a dispute over whether each college constitutes a separate unit. Additionally, a petition is on file (Docket No. RO-383) which is in close accord with the dimensions of the Inspection and Security unit proposed by the State. Thus, it can be seen that, to a large extent, the desires of the State regarding unit composition have been realized. In fact, the only groups whose status has not been considered or resolved are supervisors 17/, administrative services, and professionals.

In determining the appropriateness of a unit, one must turn to the statute for guidance. Section 7 provides that "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned..." 18/ This language clearly indicates, in the opinion of the undersigned, that community of interest must be given due regard but not sole or exclusive regard. Thus, other factors also can be considered. In the discussion which follows, the Hearing Officer shall attempt to apply this construction.

The concept of community of interest is a somewhat amorphous one. Some of the commonly accepted components of the concept may lead to a variety of conclusions depending upon which ones are selected. This will be illustrated below.

In the very broadest sense, all employees of the State of New Jersey may be said to have a community of interest. They are all employees of the same employer whose purpose is to provide a level of governmental services to the people of New Jersey consistent with the willingness of the people to pay for such services. With the two exceptions discussed

17/ Unrecognized or uncertified supervisors would not, in the future, have the right to negotiate collectively under Senate No. 2244 which the present Administration reportedly supported.

18/ C. 34:13A-5.3 Emphasis supplied.

above, all State employees are eligible for membership in the Public Employees Retirement System, a state-wide pension system for state employees. Furthermore, all State employees are in the same health insurance program and enjoy the same holidays. All are part of the overall compensation plan which is established centrally by the Civil Service Commission and enacted as part of the Appropriations Act by the Legislature. This list could be extended. Neither the State nor the petitioner herein argues that there should be a single unit for all State employees although a reasonable case for such a unit can be made. One reason, of course, that the State does not contend for such a unit probably is that Chapter 303 generally requires craft, professional, supervisory and police separation although there are exceptions and, in the cases of craft and professional employees, self-determination options.

It would also be possible to group classified and unclassified employees in separate units. In his testimony in an earlier case which was offered as an exhibit in this case, the Director of the Office of Employee Relations stated that the differences between classified and unclassified employees might suggest separation because of any of the reasons that unclassified employees are unclassified. 19/ The major differences between classified and unclassified employees relate to method of selection for jobs and promotions; vacations and sick leave, matters which are established by the Civil Service Commission for classified employees and by the departments with the approval of the Civil Service Commission for unclassified employees; tenure and appeal rights and procedures, matters which are enjoyed by classified employees but are not available to unclassified employees; grievance procedures, which must conform to Civil

19/ Exhibit S-2, Docket No. R-111, Tr. 732 and 734.

Service Commission standards, apply to classified employees as a matter of Civil Service Commission requirement but do not apply as a matter of such regulation to unclassified employees; overtime regulations, which apply uniformly to classified employees by virtue of Civil Service Commission regulation but not to unclassified employees. It seems clear that factors such as the above lead to the existence of a broad community of interest among unclassified employees at least with respect to the specified items. The factors which distinguish classified from unclassified employees are matters which, in the case of unclassified employees, are largely subject to departmental determination. Thus, it appears that, if this distinction is to have significance, there would have to be units of unclassified employees within each department. Negotiations could take place at the departmental level regarding tenure or job security, vacations, overtime, grievance procedure, etc. although such major items as salaries, pensions, and health insurance could not be discussed meaningfully at this level. This was, in fact, close to the position originally taken by the petitioner herein. Petitioner in Docket No. RO-164 sought professional employees of the Department of Education, the bulk of whom, as discussed above, were unclassified. However, this position was altered at the hearing so that the unit which petitioner now seeks is a unit still composed largely of unclassified employees but which crosses departmental lines. Likewise, the unit position of the public employer is not predicated upon the status of employees as classified or unclassified.

Another possibility would be departmental units. In view of the fact that departmental units are no longer possible - the certifications in several units cut across departmental lines but do not include <u>all</u>

employees of any departments - this discussion shall be limited to a consideration of departmental units of professional employees. In this case, the community of interest would be based upon factors such as similarity of purpose, common hierarchy and structure, common supervision at the higher levels, and the fact that professionals have had advanced specialized training, have a work product which is difficult to quantify, have a concern over professional standards, etc. This was the position taken by petitioner prior to his amendment at least to the extent that he sought a unit of all professional employees within the Department of Education. This position was changed, presumably in an effort to come up with a unit which the State could accept or which the Commission would find appropriate. Particularly to the extent that such a group - all professionals within a department - would be composed at least partially of classified employees, it is difficult to imagine meaningful bargaining at this level except with respect to departmental working conditions. To the extent that such a unit would not be state-wide in that certain professional titles are found in more than one department, this unit would be inappropriate for reasons discussed in the section on scope of unit above. Again, no party to this proceeding contends for a unit of all professional employees in a single department.

Another basis for unit definition of professional employees would be some sort of a functional grouping of such employees. Several of the units proposed by the State are functional in nature: Health, Care, and Rehabilitation Services; Law Enforcement; Inspection and Security; and Operations, Maintenance, and Services. Several functions can be readily identified within the professional group of State employees: education, health, law enforcement, engineering, social services, etc.

Any effort on the part of the undersigned to attempt to allocate different professional titles to groups such as those listed would be speculative at best. Nevertheless, some such grouping should be possible. The Director of the Office of Employee Relations testified in another matter that a unit of all professionals in health care facilities would be moving in his direction. 20/ He did not go so far as to say that, in his view, this would constitute an appropriate unit.

In almost any grouping of different professional titles, it is likely that conflict would arise. For example, in a grouping of health professionals it is easy to imagine that conflicts between graduate nurses and doctors could arise which might manifest themselves both at the negotiations table as well as in contract administration. The bargaining interests of doctors and nurses could well be different, inconsistent and conflicting. This point should not be overemphasized because any grouping of employees contains the potential for conflicts. These conflicts must be resolved by the employee organization. The question is whether a grouping such as, for example, health professionals would share a sufficient community of interest to constitute an appropriate unit in view of the conflicts of interest between or among unit members or titles. The obvious advantage of such a functional grouping - without going into the specifics of the number or dimensions of the groups - is that it cuts across departmental lines to include all State employees in the particular job titles. Thus the scope of such units would be state-wide. Meaningful negotiations on a centralized basis over salaries and certain other items could take place.

20/ Exhibit S-2 Docket No. R-111, Tr. 726.

It would also be possible to group several professional functions. A unit of health, education and social services professionals might constitute such a grouping. Another might be engineering, scientific and technical professionals. Again, this is totally speculative. Neither the petitioner herein nor any other petition filed with the Commission indicates a desire for such a grouping of several functions of professionals. In view of membership limitations of certain interested employee organizations e.g. New Jersey State Nurses Association, such a grouping of functions might create difficulties for some of these employee organizations. Presumably some sort of coalition of organizations could be created to conduct bargaining on a unit-wide basis. Whether the inconvenience to employee organizations and the loss of specificity in representation which could result to the elements of such a functional grouping would be balanced by the convenience to the State in having fewer negotiating units with the claimed increased ability of the public employer to respond meaningfully to employee organization demands is a matter for consideration. However, in view of the positions of the parties in the pending matter and in the absence of information relating to the positions of various parties which might be affected, such consideration is beyond the purview of the undersigned. The Commission is considering this matter and will not be operating in such a vacuum because it has before it several other matters relating to professional employees: R-111 filed by the New Jersey State Nurses Association seeking to represent graduate nurses, RO-196 filed by the American Federation of State, County and Municipal Employees, AFL-CIO seeking a unit of social workers in the Bureau of Children's Services, and RO-230 filed by the Office and Professional Employees International Union seeking to represent rehabilitation counsellors and several related titles within the Department of Labor and Industry.

Yet another possible division of professional employees could be based partly on occupation and partly on a functional grouping. Under such a scheme, graduate nurses might constitute an appropriate unit as recommended by Hearing Officer McCabe in Docket No. R-111. 21/ The Director of the Office of Employee Relations conceded in testimony on another matter that there may be a definable community of interest in a unit of nurses. 22/ Furthermore, he conceded that there would be no violation of existing state laws if the results of future negotiations were limited to registered nurses. 23/ Thus, there is evidently no legal proscription against a unit of nurses and, presumbably, other titles, so long as the units are state-wide. Other occupations might be singled out for separate treatment. At the same time, there could be groups of occupations which are related by function. Several possibilities have been mentioned above. The number of professional units that might result is purely speculative.

Returning to the petition before the undersigned, the unit sought is described as a unit of professional educational employees in the Department of Education including the Katzenbach School for the Deaf and the Department of Institutions and Agencies. If this unit were modified to conform with the state-wide requirement by adding several employees and removing several small groups of non-educational employees in the Department of Education as well as by adding professional educational employees in the Department of Higher Education and any other professional educational employees that have been overlooked or neglected, then the result would be

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21/ Hearing Officer's Report and Recommendations, Docket No. R-111, March 9, 1971 (pages unnumbered).

22/ Exhibit S-2, Docket No. R-111, Tr. 715.

23/ Exhibit S-2, Docket No. R-111, Tr. 811-812.

a functional professional unit. All unit members would be working in the field of education. To that extent, the employees share a community of interest. Further, they are united by the fact that the two groups - one at the Department of Education (and there was also another group at the Katzenbach School 24/) and one at the Department of Institutions and Agencies - were both represented by affiliates of the New Jersey Education Association. Thus, it apparently was possible for the groups to merge into a single petitioner. This, essentially, is an "extent of organization" factor which is not controlling. Additionally, almost all of the employees sought are certified teachers. This implies a similarity of specialized training in education. The employees within the Katzenbach School and the Department of Institutions and Agencies are teachers. Those within the Department of Education excluding the Katzenbach School have taught for a minimum of five years, this being a requirement for all such positions. 25/ They are all professional educators and have certain interests which are uniquely related to their function.

In the opinion of the undersigned, the above constitues a community of interest. No evidence was presented which would indicate a conflict of interest among the employees in the unit sought. Additionally, the Hearing Officer believes that a unit of approximately 1200 professional educational employees constitutes a logical functional grouping of such employees. One can envision perhaps six or eight such functional groups of professional (and perhaps related) employees in the State of New Jersey.

24/ This group, the Katzenbach Teachers Association, filed a separate petition, Docket No. RO-232, but withdrew it prior to the opening of the hearing.

25/ Tr. 37.

Thus, the ramifications of this finding in terms of the total number of units with which the State as a public employer would have to deal - assuming total organization - would be in the neighborhood of 20. This number of units can hardly be claimed to be beyond the capability of State to deal with although, admittedly, 20 units presumably would require more employee relations personnel than would 13 units. A unit of 1200 employees would be larger than at least two units with which the State deals and similar to the size of several others proposed by the State. Furthermore, by breaking down the professional employees into a number of functional groups, there is a greater likelihood that some of the professionals will be able to secure certifications and commence negotiations with the State as contemplated by the Legislature when the Act was enacted. 26/ The situation in New Jersey is different from that in New York State in that, unlike New York, in New Jersey there is no single employee organization which claims to represent a majority of professional employees. 27/ Thus, the decision of the New York Public Employment Relations Board that an all-embracing Professional, Scientific and Technical Unit was appropriate did not have the effect, as the same decision would in New Jersey, of denying all professional employees representation at least for the present.

26/ Section 7 of the Act provides that "Except as hereinafter provided, public employees shall have and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form and assist any employee organization or to refrain from any such activity."

27/ The New Jersey Civil Service Association filed a petition claiming to represent a majority of professional employees (Docket No. RO-295). However, this petition was dismissed due to the insufficiency of the showing of interest.

Also, the undersigned is convinced that a single unit of all 6300 professional employees would not constitute an appropriate unit. While it is conceded that elements could be cited which point toward a community of interest among professional employees, this does not mean that a unit of all professional employees is appropriate. It is true that the professional employees share many fringe benefits (as do all State employees). However, this grouping of 550 titles is so diverse in terms both of function and occupation that the undersigned is not convinced that effective and meaningful representation could be realized in such a broad professional unit. 28/

Accordingly, giving due regard for the community of interest among the employees concerned, the Hearing Officer finds that a state-wide unit of professional educational employees, wherever such employees are working in State government,constitutes an appropriate unit. 29/

RECOMMENDATIONS

Based upon the above, the undersigned recommends that the motion of the petitioner to have the Professional Association of the New Jersey Department of Education represent the employees sought in both petitions be approved; that an election be directed in the below-described unit; that the unit appropriate for collective negotiations is a state-wide unit of professional educational employees excluding non-professional

28/ The Hearing Officer is aware of the existence of a Professional, Scientific, and Technical Services Unit in New York State and of the fact that a contract has been executed between New York State and the Civil Service Employees Association (Exhibit S-6) covering that unit. No evidence was offered to indicate experience under that contract nor to demonstrate the effectiveness of representation in that situation. Impressive to the undersigned in his examination of that contract is the minimal recognition of special situations or needs. The contract as written seems to apply to all unit members with special consideration given only to employees of the Division of Employment (regarding entitlement to purchase for pension purposes (footnote continued next page)

employees, managerial executives, policemen, craft employees, clerical employees, professional employees whose function is not related to education, and supervisors within the meaning of the Act; that the parties work with a representative of the Commission in providing precision to that unit definition with respect to professional and supervisory status of employees as well as any other issues; and that the ensuing election be conducted in accordance with the Rules and Regulations of the Commission.

Jeffrey B. Tener
Hearing Officer

DATED: December 23, 1971
Trenton, New Jersey

28/ (footnote continued from preceding page) time served during World War II as Federal employees), State Education Department employees (regarding repayment of certain loans by payroll deducation and transfer from the State Teachers' Retirement System to the Employees' Retirement System), Institution Teachers (provision for 3 days of leave with pay during school year and for no loss of pay if scheduled to work on a State holdiday), psychiatrists (regarding duty in excess of 24 consecutive hours), and nurses (concerning stand-by and recall pay).

29/ Several titles such as Demonstration Teacher, Helping Teacher, Instructor Commission for the Blind, etc. appear on documents which were submitted as part of Exhibit S-2 which might belong in the unit found appropriate.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

State of New Jersey
Public Employer
and
American Federation of State, County and Municipal Employees, AFL-CIO
Petitioner
and
New Jersey Department of Labor and Industry
Public Employer
and
Office and Professional Employees International Union
Petitioner

Docket Number RO-196

Docket Number RO-230

Appearances:

For N.J. Department of Labor and Industry
Edward F. Ryan, Esquire
Frank A. Mason
Robert Goodman, Esquire

For the American Federation of State, County and Municipal Employees, AFL-CIO
Louis L. Kaplan,
Jack Merkel

For the Office and Professional Employees International Union
Doran, Colleran, O'Hara & Dunne, Esquires
By: Thomas J. Lilly, Esquire
Eugene Dwyer

HEARING OFFICER'S REPORT AND RECOMMENDATION

A petition for certification of employee representative was filed with the Public Employment Relations Commission by the American Federation of State, County and Municipal Employees, (hereinafter AFSCME) AFL-CIO on October 6, 1970 seeking a representation election for certain employees in the Bureau of Children's Services of the State of New Jersey. On December 10, 1970, a petition for certification of employee representative was filed with the Commission by the Office and Professional Employees International Union (hereinafter OPEIU) seeking a similar election for

certain employees of the New Jersey Department of Labor and Industry. These cases were consolidated pursuant to an Order Consolidating Cases dated June 22, 1971, and pursuant to a Notice of Representation hearing dated June 22, 1971 and subsequent Orders Rescheduling Hearing dated July 8 and August 3, 1971, hearings were held before the undersigned on August 12, 1971 and August 13, 1971 in Trenton, New Jersey. All parties at the hearings were given an opportunity to call, examine and cross-examine witnesses,1/ to present evidence and argue orally and to file briefs. Only the employer, State of New Jersey (hereinafter the State) has filed a brief herein.

The OPEIU seeks certification in the following unit: "All Rehabilitation Counselors, including Senior Counselors, Counselor's Aides, Counselor's Supervisors and Counselor Trainees in the Department of Labor and Industry"2/. This unit represents some 175 people in the Department of Labor and Industry, and is statewide in scope, that is to say that all Rehabilitation Counselors in state service are encompassed in the proposed unit. Two specific problems implicit in the unit as requested have been raised by the State. One is the possible supervisory status within the meaning of the Act of the "Counselor's Supervisors," and the other is the inclusion of Counselor Aides in this unit when they have already been included in the Health, Care and Rehabilitation unit certified by

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1/ Petitioner OPEIU chose to absent itself from the hearing room after presenting its case with full knowledge that the hearing would continue and that in absenting itself, their case might be prejudiced. (tr p. 177-179)

2/ As amended at the hearing (tr p. 13-14)

the Commission. Since the thrust of the examination made by this Hearing Officer went not to an examination of individual titles, but rather to the issue of the scope and definition of an appropriate uniting pattern for these and other state employees, no specific recommendations as to the inclusion or exclusion of these specific titles will be made. In the light of the discussion below, the effect of the issues raised would be de minimus, and could well be reserved for a later determination.3/

The unit in which AFSCME seeks certification is "All Social Worker I, Social Worker II and Social Worker Trainee employed by the Bureau of Childrens Services"4/. This unit embraces approximately 700 social workers in the Bureau, which is a part of the Division of Public Welfare in the Department of Institutions and Agencies who have been stipulated to be "professionals".(tr p. 14-15) There are other social workers working for the Division of Public Welfare, and also in various other facilities such as mental hospitals within the Department of Institutions and Agencies (tr p. 44-45). Therefore, this unit is not statewide in scope, in that it does not encompass all social workers in state service. The position of the State 5/ in

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3/ It should be noted that in any election ordered, if, in the first case, the title is found to be supervisory absent a finding of the statutory exceptions, the Counselor's Supervisors should not be placed in the same unit as the other employees sought.

4/ As amended at the hearing (tr p. 13)

5/ All parties have stipulated that the State of New Jersey is the public employer within the meaning of the Act. (tr p. 11-12)

this matter is that it seeks a single unit of all "professionals" 6/ in state service as appropriate. It, therefore, opposes the units sought by petitioners in that AFSCME's is not statewide in scope, and both fail to embrace all professionals in state service. The State's position is based upon the Commission's decision in P.E.R.C. No. 50 which found that the units sought therein which were less than statewide in scope were inappropriate, and also upon the danger of over fragmentation in unit structure which would be deleterious to the ability of all parties to utilize meaningfully the process of collective negotiations.

The issue before this Hearing Officer, therefore, in its broadest sense is what uniting structure would be appropriate for employees of the State of New Jersey who are not currently in one of the three certified units.7/ While both the State and AFSCME

6/ The "professional" unit has been defined by the State as consisting of "Any employee engaged in work
(i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
(ii) involving the consistent exercise of discretion and judgement in its performance;
(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;
(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes."
The employees sought by AFSCME herein have been stipulated to fall within this definition, and those sought by OPEIU, with the exception of the Counselor's Aide, have been described in testimony as meeting those requirements. (tr p. 133-135) Therefore, without deciding whether that definition does within the meaning of the Act define "professionals", it is hereby found that these employees would fall within the State's preferred unit, if found appropriate.

7/ Those units as enunciated in P.E.R.C. No. 50 are: 1/ All Health, Care and Rehabilitation Services employees, 2/ All Operations, Maintenance and Services Employees, and 3/ All craft employees employed by the State of New Jersey.

have stipulated that the employees involved herein are "professionals" (tr p. 14-15), OPEIU does not join in this admission, and further seeks inclusion of the Aides who are clearly not "professional" personnel within the states definition. For this reason, and others to be discussed below, the analysis of the undersigned will not be limited to only those employees labeled "professional" by the State. This broad issue will be examined in its two component parts; that is initially, must a unit be statewide to be appropriate, and second, what composition or definition should units for State employees take.

Discussion

In its argument for a statewide unit of all professionals, the State relies heavily upon the logical underpinnings of P.E.R.C. No. 50. In that decision, the Commission analyzed the authority vested locally, and that vested in the central authority, the Civil Service Commission, by virtue of Title 11, N.J.S.A., Civil Service. In the latter category were found to be "the determination of compensation plans; the regulation of hours of work, sick and vacation leave, holidays, travel and per diem allowances, and overtime; the establishment of classification plans, job qualifications, eligibility of applicants for appointment and promotion, and procedures and grounds for demotion and removal 8/. As the Commission said there, "all of the foregoing relate to the classified service,"9/ and both Rehabilitation Counselors and Social Workers are within the classified service. (tr p. 45, 84) Other preemptions of local authority pointed to in that decision are those of the Salary Adjustment Commission, which must approve an out of sequence wage adjustment or a hiring above the

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8/ P.E.R.C. NO. 50, page 8

9/ P.E.R.C. No. 50, page 8

normal entry level, and of course, those which are preempted by legislative action, such as the appropriation of funds upon the submission of a unified budget by the Governor, and the uniform medical benefits and pension programs enacted for all state employees.

In that decision, the Commission also pointed out that not only should the units be statewide in scope, but also that units less than statewide in terms of occupational coverage would be inappropriate. It was said there

> "The same reasons supporting the statewide approach compel the rejection of more restricted units. The administrative make-up of the employer; the concentration, at the highest level, of responsibility for policy and authority to regulate and implement the most significant aspects of labor relations; the obligation implicit in the concept of Civil Service to insure equality of employment opportunity and uniformity of treatment once employed, and in consequence of that obligation, the basic consistency of terms and conditions of employment throughout the state for employees engaged in essentially like functions- and for certain terms such as fringe benefits, a consistency regardless of function; for all these reasons units limited to individual institutions departments or subdivisions thereof can scarely be appropriate for purposes of collective negotiations.10/

While the specific groups of employees involved in that case were blue collar, and Health, Care and Rehabilitation Services employees, rather than professional employees, the underlying set of relationships which mandate that an appropriate unit be statewide

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10/ P.E.R.C. No. 50, page 10

in scope are unaffected by the distinction. Therefore, it is the recommendation of the undersigned that for any unit to be appropriate, it must be statewide in scope. The unit proposed by AFSCME, therefore, is found to be inappropriate by the undersigned, since it does not encompass all Social Workers, but only those employed by the Bureau of Children's Services. Even if, however, the statewide uniting mandate, were not in existence, in the opinion of the undersigned, the unit petitioned for by AFSCME would not be appropriate. In addition to the fact that, as indicated above, the major terms and conditions of employment are responsibilities of the central authorities, is the testimony on the record as to the existence of other Social Workers, who take the same test for their position (tr p. 24) may transfer between the B.C.S. and other institutions laterally (tr p. 243) and may compete for promotion by initally affecting a lateral transfer and then taking the promotional examination, or by direct application if an open competitive examination were announced(tr p. 251-253). Further, the testimony indicates the the primary distinctive feature of Social Workers in the Bureau of Childrens Services is that their clients are children, and therefore, their work is with children and their families and other sources of help which are geared specifically to children. If a child is institutionalized, another Social Worker assigned to the institution proceeds to help the child for as long as he remains and then returns the case to B.C.S. (tr p. 214). Other Social Workers are located in hospitals, training schools, corrective institutions and in research units. (S-6 in evidence) As can be seen from the above discussion, the only distinction between B.C.S. Social Workers and others is a jurisdictional, rather than functional one. By any yardstick of community of interest, in the opinion of the undersigned, no unit of only B.C.S. Social Workers could be deemed appropriate, while the other Social

Workers with all the shared characteristics noted above are not included therein.

The standard to be applied to any proposed unit is that found in the Act: "...the negotiating unit shall be defined with due regard for the community of interest among the employees involved..."11/. It has been determined above that this community of interest of necessity must extend to all employees in any particular title; that is; a state wide grouping of employees is the only appropriate grouping. Left to be examined is that community of interest which transcends a particular title and determines the composition of the bargaining unit.

There remains for discussion the appropriateness of the unit proposed by OPEIU, which meets the above standard, in that it seeks to include all Rehabilitation Counselors employed by the State. This unit is limited to that single group of titles, however, and therefore, raises the issue of whether or not a single occupational unit is appropriate in the context of the representation of employees of the State.

As briefly stated above, the position of the State regarding this issue is that all professionals in state service should be placed in a single unit.12/ This position is based upon two interconnected grounds: that narrow occupational groupings would inevitably lead to such a multiplicity of units that it would be impossible for the State to enter into meaningful collective negotiations and for any

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11/ Chapter 303, Laws of 1968, Section 7

12/ The other proposed state units are craft, law enforcement(two units), supervisory, administrative, health care, operations, maintenance and service, inspection and security.

single unit's representative to meaningfully represent its' constituency at the bargaining table, and also that the language of P.E.R.C. No. 50 quoted above supports the contention that "felt" community of interest is not a valid criterion for consideration, and that implicit in that decision was recognition of the undesireability of fragmentation. (Employers brief p. 5, 8, 9, 11)

Much of this harkens back to the same considerations raised with regard to scope of unit. As Chief Examiner Farrel testified "The jurisdiction of salaries and the fixing of salaries is the sole approval or disapproval on the part of the Civil Service Commission," (S-1 Farrel p. 80) and that the mandate of Civil Service is uniformity of treatment. (S-1 Farrel p. 89). The argument goes, therefore, that since uniformity of treatment is mandated by law, regulation and practice, over-fragmentation would not permit such procedures to continue. The pitfalls of over-fragmentation are amply pointed out by the testimony of Commissioner Ruffo of New York City. However, in contrasting that picture with present practice in New York, the Commissioner testified that bargaining was more sophisticated than it had been since now bargaining was done with unions representing a group of allied titles. He says "...what is being done now is to pay a lot more attention to the duties and skills of employees, so that they are by reason of a community of interest, placed in a unit which is deemed appropriate for bargaining purposes..." (S-1 Ruffo p. 317) "The composition is one where we tried to do is to place people who have allied skills and duties in a similarity of functional occupations in the same unit..." (S-1 Ruffo p. 313) In response to a question asking him his opinion as to appropriate units, Commissioner Ruffo testified "Based upon my experience and on balance, I think that in the public employment sector particularly

the largest practical unit would to me be appropriate for bargaining purposes. I can express that in various alternate ways: As broad and comprehensive as possible without at the same time enfringing upon the representation rights of employees." (S-1 Ruffo p. 323)

In his testimony concerning the position formulation of the State, Mr. Frank Mason, then Deputy, now Director of the Office of Employee Relations testified that after taking into account, Public Law 303, the structure and size of the State and other factors "we concluded that the appropriate unit for state employees...would be... a Statewide bargaining unit, wherein all people within any one job classification would be represented, and further that there ought to be a kind of collection of the various classifications wherein ther was some reasonably defineable community of interest". (S-1 Mason p. 672)

In the opinion of the undersigned, the conclusions stated above by Commissioner Ruffo, and Mr. Mason should be adopted by the Commission as an analytical tool and methodology of approach to unit determinations for state employees. With this approach, a reasonably limited number of statewide units might well be established each consisting of a group of titles requiring allied skills and duties in a similar functional occupation.

By thus grouping employees, it would be possible to bargain effectively even regarding such items as salaries with each group. As Mr. Farrel testified when events forced a change in compensation the line of certain titles, other related titles were adjusted. Specifically, when a change became necessary for nurses, fifty or sixty titles had their ranges changed. Again, when the ranges for certain Motor Vehicle employees were changed, changes became necessary in other related titles. (S-1 Farrel p. 129-132). In each case, the ripple effect carried the need for adjustment to other related titles,

but certainly not to all two thousand titles within state service. The key to this is apparently the identification of the related titles etc. not in these specific instances alone, but throughout the state service.

Regarding the States proposed unit of "professionals", that unit should be examined in the light of the stated criterion.

Does this unit of some 6300 employees in approximately 550 titles consist of a group of titles requiring allied skills and duties in a similar functional occupation, such that a cohesive pattern of bargaining relationships might result? A careful examination of the list of titles submitted leads the undersigned to the conclusion that while this group of titles could be broken down into a number of categories to which the recommended standard would apply, it does not apply to the unit as proposed. It should be noted, in this context, that the definition of professional utilized by the State is that which appears in the National Labor Relations Act, not as a category for uniting, but for the same purpose for which it appears in Chapter 303, that is, to afford those employees meeting the definition an option when community of interest would place them within a unit of non-professionals.

Since this Hearing Officer was not in a position to examine in depth all of the titles involved herein, the titles themselves will be taken as an indication of the function performed. It would not be unreasonable to expect, however, that there are relatively few skills, and duties and bargaining table interests shared by the following: Assistant Biologist, Auditor Accountant Trainee, Senior Highway Engineer, and Judge of the Superior Court; all of whom would be included in the proposed professional unit.by virtue of meeting the State's definition of "professional."

It is true that the Commission in P.E.R.C. No. 50 has stated that "no doubt a kind of community of interest can be said to exist among blue collar employees at a single institution if for no other reason that because they perform similar duties at one location under the direction of a local administrator. But that does not negate the possibility of a stronger, broader and higher level of common interest which threads through various administrative units and which derives from the fact that employee terms and conditions in greatest measure are established by a central authority superior to the local administrator...",13/ In the opinion of the undersigned, it would be error to read into this the broad disavowal of the statutory community of interest standard which the State urges herein. It is also not clear that in this context, the language used by the Commission in discussing "the more significant aspects of labor-relations"14/ regarding blue collar employees, can be lifted wholesale and deposited upon a group characterized as professionals. In his decision establishing a professional unit in New York State, the Director of Representation quotes a witness as stating "Blue collar workers are concerned about such matters as shift differentials, a shorter work week, uniform allowance, and early retirement, whereas professional employees are eager to be granted such benefits as time-off to attend professional conferences, tuition support for career development and the vesting of pensions." (Employers Brief p. 6) If this is in fact so, might it not be that in the case of "professional" employees the truest expression of their particular concerns could come about only in groups performing related functions and facing related problems.

From all that has been said above, the undersigned recommends that both the unit proposed by the State and that proposed by OPEIU be found inappropriate in that the former is so broad that the

13/ P.E.R.C. No. 50 P. 11
14/ P.E.R.C. No. 50 P. 8

requirement of community of interest has not been met, and the latter in that the unit proposed does not encompass all employees possessed of allied skills and duties performing similar functions. It would appear to this Hearing Officer that a unit consisting primarily of both the Social Worker and Rehabilitation Counselor groups might well form the basis for a Social Services unit which would meet the standard recommended and encompass some 1400 employees in a single unit.

Based upon similar qualifications in terms of college degree with specialization in similar areas, and their interrelated functions. Mr. Kruger, a Counselor described the goal of his job as not only vocational adjustment but going to make the whole person adjust and find satisfaction in work. (tr p. 140) Also, a Counselor may be assigned to a youth who is also a client of B.C.S. and the Counselor and Social Worker work closely toegether (tr p. 141). Both groups have as their goal the treatment of psycho-sociological problems of the individual client, and having their similar training to hear on those problems by advisory and counseling the client regarding personal social and health problems (S-4, S-6) and also by aiding the client in availing himself of community facilities. (S-4, S-6)

What is being said here is actually this; since the more significant aspects of collective negotiations for all state employees can be affected only centrally, and then only if the ripple effect is taken into account, the other aspects of community of interest, of necessity, assume more importance. These aspects are similarity of skills, functions and duties. As the employer itself has intimated, if sound units of employees with similar roles and desires are established, the representatives of both the employees and the State can negotiate meaningfully.

On one sense, this functional approach has already been taken by the Commission in the units established by P.E.R.C. No. 50 and by the State with regard to some of its proposed units. If the government is analyzed from a performance viewpoint, it is apparent that two types of functions are being carried on. The first is the provision of services to the citizens of the State. These services are primarily in the areas of Health, Social Services, Education, Scientific and Engineering Services and Legal and Regulatory Services. The other function which government performs is that which enables it to run itself. In that area are such functions as Personnel, Fiscal Affairs, Clerical Function, and Operations and Maintenance.

It is possible to construct a model using these functional breakdowns which would encompass most of the titles in the "professional" list submitted by the State. Attached to this Hearing Officer's Report as Appendix I is a listing of all titles in that group with 25 or more employees. While there are gaps regarding exactly what functions some of these titles perform, it is clear that in the main, they could be allocated into the functional areas described above.

Such an approach to uniting state employees might well result in a situation in which the close community of interest between professional and non-professionals involved in the same service delivery system, coupled with the uniformity requirements of the employer results in a determination that a special circumstance exists which mandates inclusion of professionals and non-professionals with no option pursuant to Section 8 of the Act. Such a situation might well be found regarding the Counselors Aides who work with the Rehabilitation Counselors, (tr p. 119-121) even though the Aides do not have the degree required of a Counselor. Such a series of units would encompass all personnel involved in a particular function between the clericals (whose work is related not to any function but to that of other clericals)

and the supervisory personnel.

While this proposed uniting pattern has been based upon the standards developed above, and the list of titles submitted by the State in the instant matter, its application beyond the instant group has merely been posed as a hypothetical approach at this point since no detailed review of the other groups has been entered into. The hypothetical has been posed merely in an attempt to offer what may be an alternative to the positions taken by both petitioners and the employer.

Upon a careful consideration of the entire record, the exhibits and the brief submitted in this proceeding, the Hearing Officer makes the following findings of fact and recommendations;

1. That the State of New Jersey is a Public Employer within the meaning of the Act.

2. That American Federation of State, County and Municipal Employees and the Office and Professional Employees International Union are employee organizations within the meaning of the Act.

3. That the employee organizations have been denied recognition for the units described above, and therefore, a question concerning the representation of public employees exists and the matter is appropriately before the Hearing Officer for Report and Recommendation.

4. That the unit requested by AFSCME is not statewide in scope and that the petition docketed RO-196 be dismissed.

5. That even if the statewide standard is not applied, that the unit requested by AFSCME be deemed inappropriate in that the community of interest existing in that unit extends to all Social Workers whether at B.C.S. or in an institution and that the petition docketed RO-196 be dismissed.

6. That the unit requested by OPEIU is statewide in scope.

7. That the unit requested by OPEIU is not an appropriate unit for collective negotiations in that it does not include all employees who share a community of interest with Rehabilitation Counselors and that, therefore, the petition docketed RO-230 be dismissed.

Martin R. Pachman
Hearing Officer

DATED: December 23, 1971
Trenton, New Jersey

APPENDIX

TITLE	NR. EMPLS.
Accountant 2	67
Accountant 3	63
Administrative Analyst 2	37
Appeals Examiner Labor & Industry	28
Assistant Biologist	25
Assistant Engineer Highway	78
Auditor Accountant Trainee	42
Auditor 2	109
Auditor 3	175
Chaplain	29
Chemist	33
Civil Engineer Trainee	46
Claims Examiner Employment Security	107
Clinical Psychiatrist 2	40
Consultant	26
Data Processing Programmer 2	40
Data Processing Programmer 3	44
Demonstration Teacher 10 Mos	34
Dentist 2	30
Deputy Attorney General 3	25
Disability Examiner OASI	25
Employment Counselor	156
Employment Counselor Trainee	26
Employment Services Trainee	302
Examiner Disability Insurance	37
Field Representative Health	28
Field Representative 3 Div. of Civil Rights	31

Graduate Assistant	27
Graduate Nurse	276
Helping Teacher 1 Education-10 Mos	53
Instructor Commission for the Blind-10 Mos	37
Instructor Counselor	36
Instructor 1 School for the Deaf-10 Mos	65
Instructor 2 School for the Deaf-10 Mos	43
Interviewer Employment Security	261
Judge of the Superior Court	76
Librarian 2 State Colleges-12 Mos	31
Manpower Specialist 3 Employment Security	54
Medical Consultant	43
Member of Board	128
Parole Officer	95
Physician Specialist 2	44
Physician 2	53
Project Specialist Institutions and Agencies	35
Regional Staff Nurse Medical Assistance	31
Rehabilitation Counsellor	140
Right of Way Negotiator	106
Senior Engineer Highway	159
Senior Environmental Engineer	36
Senior Right of Way Negotiator	68
Social Worker Trainee	222
Social Worker 2	736
Staff Clinical Psychologist 2	25
Teacher 1-10 Mos	85
Teacher 2-10 Mos	219
Visiting Physician	71