

P.E.R.C. NO. 94-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASSOCIATION OF RETARDED CITIZENS,
HUDSON COUNTY UNIT,

Respondent,

-and-

Docket No. RO-93-109

FEDERATION OF HUDSON ARC
EMPLOYEES, NJSFT, AFT/AFL-CIO,

Employee Organization.

SYNOPSIS

The Public Employment Relations Commission finds that the Association for Retarded Citizens, Hudson County Unit is an employer under the New Jersey Constitution and that ARC employees have a constitutional right to organize. It recommends that an election be held in a negotiations unit composed of non-supervisory employees and that professional employees be given the option of being included or excluded from that unit. The Commission does not enter any order and returns the matter to the Honorable Irwin I. Kimmelman, J.S.C., who referred this matter to the Commission after the Federation of Hudson ARC Employees, NJSFT, AFT/AFL-CIO sought to represent non-supervisory, non-managerial employees of Hudson ARC.

P.E.R.C. NO. 94-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASSOCIATION OF RETARDED CITIZENS,
HUDSON COUNTY UNIT,

Respondent,

-and-

Docket No. RO-93-109

FEDERATION OF HUDSON ARC
EMPLOYEES, NJSFT, AFT/AFL-CIO,

Employee Organization.

Appearances:

For the Respondent, Alan Zark, attorney

For the Employee Organization, Dwyer & Canellis, P.A.,
attorneys (Brian Miller Adams, of counsel)

For Amicus Curiae, Communications Workers of America,
Weissman & Mintz, attorneys (Steven P. Weissman, on the
brief)

DECISION

The Federation of Hudson ARC Employees, NJSFT, AFT/AFL-CIO, ("Federation") seeks to represent non-supervisory, non-managerial employees of the Association of Retarded Citizens, Hudson County Unit ("ARC") and has demanded a representation election. This demand has been referred to us by the Honorable Irwin I. Kimmelman, J.S.C.

ARC does not consent to an election. It asserts that it and the State of New Jersey are joint employers and that it lacks sufficient control over terms and conditions of employment to negotiate alone with an employee representative (1T14-1T16). The parties also dispute the scope of any negotiations unit.

I. BACKGROUND

The Federation filed an unfair labor practice charge with the National Labor Relations Board, naming ARC as the respondent employer and alleging that it had discharged an employee because of her Federation activities. On November 29, 1991, the NLRB's Regional Director declined jurisdiction. He wrote:

ARC is not an "employer" within the meaning of the National Labor Relations Act, and consequently, the alleged discriminatee, Migna Lopez, is not an "employee" within the meaning of the Act. In 1986, this office issued a decision...involving this employer, (R.D. #11-86, unpublished) wherein it was concluded that "...specific limits on employee compensation imposed by state guidelines and the budget approval modification process constitutes a control over essential terms and conditions of employment which precludes the employer from engaging in meaningful bargaining." As there has been no probative evidence submitted establishing that the relationship between the ARC and the State of New Jersey has become less dependent since the 1986 decision, I find that it would not effectuate the purposes and policies of the Act to assert jurisdiction herein.

The Federation then filed an action in New Jersey Superior Court, Chancery Division seeking enforcement of the employees' right under the New Jersey Constitution to bargain collectively. ARC moved to join the State of New Jersey and the County of Hudson as co-respondents. On November 2, 1992, Judge Kimmelman denied that motion, referred the Federation's election demand to us, and placed the case on the Court's inactive list pending our determination.

On February 4, 1993, our Director of Representation issued a Notice of Hearing. The Hearing Officer, Susan Wood Osborn, invited the State to participate, but it declined to do so absent a Court order. She outlined these issues:

1. Who is the employer of the petitioned-for employees?
2. Are these employees public employees under the New Jersey Employer-Employee Relations Act and/or the New Jersey Constitution?
3. What rights, if any, do these employee have to organize and negotiate collectively?
4. What is the appropriate unit for collective negotiations?

Hearings were conducted on March 9, 10, 19, 24 and 30, 1993. The parties stipulated certain facts, examined witnesses, introduced exhibits, and waived oral argument. On June 14, 1993, the Federation filed a post-hearing brief. ARC did not.

On September 13, 1993, we transferred this case to ourselves since Judge Kimmelman had suggested that the case be decided expeditiously and since no credibility determinations were necessary. N.J.A.C. 19:11-8.8. The parties had been informed by the Hearing Officer that such a transfer was possible.

The Communications Workers of America was permitted to file an amicus curiae brief, received eight days late, and ARC was permitted to file a response. ARC was granted a five week period of time in which to file its response, provided the response was received no later than the close of business on November 12. ARC was informed that this deadline had been imposed since the Commission would consider the case at its November 15 meeting. ARC did not file anything by that deadline.

Less than fifteen minutes before the Commission met on November 15, ARC faxed a statement asking that the case be removed

from the agenda and held over and that another extension of time for filing a brief be granted and that oral argument be scheduled. We considered these requests and voted to deny them in light of their untimeliness and ARC's ability to present its arguments to Judge Kimmelman when the case is returned to him.

II. FINDINGS OF FACT

A. Facts Relating to Employer Identity

1. Funding

ARC is a non-profit corporation that provides education, rehabilitation, and training for retarded citizens and their families in Hudson County (J-1;1T63-1T65). Its mission is to maximize its clients' growth, development and independence. Started as a parent support group in 1950, ARC has received State funding since 1971 (4T108).

ARC is operated by a Board of Directors, composed of 12 members. New members are selected by current members. The State has no role in such appointments. ARC and the New Jersey State Association for Retarded Citizens have no formal ties, although the State ARC once loaned ARC money (2T39;4T107-4T108).

ARC's annual budget revenues are close to five million dollars. About 95 to 97% of ARC's budget is funded through State grants under contracts between ARC and State agencies (2T27-2T28). These funds include federal funds passed through to ARC. ARC also receives contributions from Hudson County and United Way, a private contributor (J-1;1T63-1T65;4T41-4T42). These funds are used to match funds provided by the State's Division of Youth and Family

Services ("DYFS") and must be included in the line items specified by a DYFS grant (3T135;4T42). Raising money from other sources has not succeeded because of ARC's fiscal problems, the recession, and the small pool of area foundations. Private sources have told ARC to come back after its budget is balanced (2T83).

ARC receives automatic monthly installments of its funding rather than cost reimbursements. The State audits its accounts, as it does with any agency receiving over \$20,000 (2T33-2T35).

In November 1992, the State's Department of Human Services amended its contracts with ARC (J-8). Section 5.10 now states:

Employees of Provider Agencies that contract with the Department of Human Services are employees of the Provider Agency, not the State.

In accordance with the National Labor Relations Act, 29 U.S.C.A. 152(2) and State law, N.J.S.A. 34:13A-1 et seq., Provider Agencies are independent, private employers with all the rights and obligations of such, and are not political subdivisions of the Department of Human Services.

As such, the Provider Agency acknowledges that it is an independent contractor, providing services to the Department of Human Services, typically through a contract-for-services agreement. As independent contractors, Provider Agencies are responsible for the organization's overall functions which includes the overseeing and monitoring of its operations, establishing the salary and benefit levels of its employees, and handling all personnel matters as the employer of its workers.

The Provider Agency acknowledges its relationship with its employees as that of employer. While the Department has an adjunct role with Provider Agencies through regulatory oversight and ensuring contractual performance, the Provider understands that the Department is not the employer of a Provider Agency's employees.

Section 5.09 states that provider agency employees have statutory rights to organize and prohibits using contractual funds to keep employees from negotiating with the provider agency's management.

2. Programs

ARC's programs -- including its group homes, day care, early intervention programs (EIPs), adult training centers (ATCs) and summer camps -- are operated pursuant to contracts with the State's Department of Education and three divisions of the State's Department of Human Services (J-1;1T63-1T65;4T38). These contracts specify each program's services, clients, and hours (4T20).

The Division of Developmental Disabilities ("DDD"), a division of the Department of Human Services, is ARC's major funding source (4T29). DDD funds the adult training services program, including two training centers; the supported employment program; the residential services program consisting of eight group homes and supervised apartments; the family services program; the respite program, and a training program (2T13-2T14;4T37).

ARC operates two day care sites. The Jersey City site is funded by DDD and DYFS; the Union City site is funded by DYFS alone (4T35-4T38).

The parent support program supports the day care programs. The community service program, a one-person program, is funded through DDD. The mental health program, also a one-person program, is funded through the Division of Mental Health and Hospitals. The summer camp program is funded through participant fees, United Way contributions, and matching DYFS funds (4T38-4T39).

The Department of Education has a separate contract with ARC which covers EIP and the professional development program (4T30-4T31). Next year, EIP will be funded through the Department of Health (2T66). Chapter I funding is provided for the compensatory education program. The Day Care Peer Grouping program receives federal medicaid funding channeled through Hudson County to ARC. This funding, earmarked for the day care program and EIP, is spent on transportation services (4T39-4T42).

The State may terminate ARC's funding for any program (4T31-4T32), but the record does not indicate that it has done so. If the State terminates funding, ARC cannot operate the program absent other funding (4T86).

The State has named one "cognizant agent" -- DDD -- to administer a master contract covering all the programs contracted through the Department of Human Services. Each program component and grant is negotiated separately. The contract for each program specifies program details ("Annex A") and finances ("Annex B").

Each program's funds are dedicated for use within that program. Most State divisions have at least two contact persons: one for program concerns and one for fiscal matters. ARC's program directors negotiate with State representatives concerning program issues while ARC's Director of Administrative Services, Steven Chmielnik, negotiates with other State representatives concerning financial issues. The State representatives then negotiate with each other to integrate program and financial changes. For example,

if the program representative agrees to increase staff positions to meet client disabilities, the finance representative must agree to increase funding to add these positions (2T35-2T36).

3. Budgets

The Department of Education's annual budget approval process begins when it requests bids from the provider agencies it has funded before. Divisions of the Department of Human Services initiate their budget approval process when ARC submits its annual contracts for renewal (2T89).

Chmielnik prepares ARC's budget. After it is approved by ARC's Executive Director, Deborah Lorenzetti, and ARC's Board, it is submitted to the State agencies (2T5). These agencies review ARC's contract proposals line-by-line. The agencies occasionally tell ARC that a line item is excessive and must be reduced. But the State will invite ARC to negotiate before issuing such a directive (2T88-2T89;4T15-4T18).

Each contract sets a "reimbursable ceiling" -- a total amount to run a program. For example, the reimbursable ceiling for the Jersey City ATC is \$463,465; that amount includes all salaries and administrative costs. If ARC exceeds that ceiling, it must raise its own funds to cover the shortfall. However, ARC has never raised money besides its federal and State funding, its participant fees, and United Way contributions. If ARC's costs exceed the ceiling, the State funding agency will discuss the problem and may discontinue the program if ARC does not satisfy the State's concerns (2T30-2T31;2T70).

In 1989, ARC exceeded its reimbursable ceilings. When the State audited ARC's accounts, it required ARC to repay funds spent from prior budget surpluses instead of being returned to the State. State program and finance representatives met with ARC and told it to meet its budget or lose its contracts (2T69). This fiscal crisis resulted in a new ARC administration. The new Executive Director, Lorenzetti, asked the State agencies for more money, but was told to find money within ARC's budget. ARC's Board then ordered budget reductions, including eliminating family health care coverage for new employees, and borrowed money from the New Jersey State ARC to meet its payroll (4T15;4T55-4T56;4T65). To repay loans from the State and the State ARC, ARC is slowly raising the money through fund raisers, bank interest, and other fiscal procedures (4T65-4T66). Its current deficit is \$150,000 (2T39).

Upon State approval, ARC's budget for each program becomes final, although ARC may later seek State approval to change budget items. Budget modifications occur when the State increases funding, program changes require more funds, or ARC seeks to reallocate budget surpluses, such as salary line items (2T6).

At the end of a year, it is common to have unspent funds in some programs (4T58). Such funds cannot be reallocated to other programs (2T58-2T59). If a line item is in surplus, ARC can seek a contract modification permitting it to spend the money elsewhere within the same program; absent a contract modification, the money must be returned to the agency funding that program (4T93-4T94).

ARC regularly returns budgeted money to the Department of Education because it cannot fill therapy positions at the authorized pay rates.

ARC may shift funds between salary lines within the same program for such costs as overtime payments. But ARC may not permanently increase an employee's salary without obtaining approval from the State funding agent (2T43-2T44).

ARC usually does only one yearly budget modification with the Department of Education. Human Services, by contrast, is a rolling modification process (2T8). ARC annually submits to the State agencies a list of its positions showing how each position is charged to the funding sources. Several program positions are charged to more than one grant (J-9;2T18;2T40).

When a new program is created, the State puts out a "Request for Proposal." Any ARC may respond with a budget proposal. Hudson ARC competes with other ARCs, especially the Bergen/Passaic ARC, for programs and clients. When reviewing bids, DDD will consider the clients' location. Thus, if ARC has a higher bid for Hudson County clients, DDD will negotiate with it to lower its bid. But if ARC cannot match the lowest bid, DDD will select another agency and move the clients to that agency's area (2T37-2T38).

State agencies differ on the percentage of a grant they permit ARC to spend on administration. The Human Services divisions permit 10-12% of grant money to be so spent, the Department of Education allows only 5% (2T57). The State asserts no control over

how ARC covers its administrative costs. Administrators' salaries are set by ARC's Board without State review (2T73-2T74).

4. Hiring and Initial Salaries

ARC employees are not governed by the civil service system (4T86). Beyond setting minimum education requirements or certifications, the State is not involved in hiring (2T71;4T19;4T87). ARC's Executive Director has ultimate authority to hire. ARC's hiring procedures are contained in its policy manual and require the Executive Director's approval before salary is discussed with prospective employees (J-16;4T61-4T62).

New hires serve a 90-day probationary period. The employee's supervisor then forwards a written recommendation and Lorenzetti decides whether to grant permanent status (4T17;4T60).

When a program begins, the State approves the maximum starting salary for each title (2T78;4T17). As the program continues, ARC's ability to offer a higher salary is limited by contractual cost allocations and reimbursement ceilings while the labor market limits the ability to offer a lower salary (4T64). As employees are hired, their salaries are allocated to a program and funding source (4T43).

The State audits ARC's position listings to ensure they comply with the State's staffing requirements and minimum personnel qualifications. If not, the State will direct ARC to correct deficiencies or risk losing funding (4T20-4T21). State-ARC contracts also specify staffing levels and staff/client ratios.

5. Pay and Fringe Benefits

ARC pays its employees' salaries and fringe benefits through a payroll company. It also makes contributions for social security taxes and unemployment and disability insurance (4T12;4T90).

ARC's budget has a salary line item for each job and the contracting State agency has the power to approve or disapprove that line item. The total cost of a position -- including salary, fringe benefits, and overtime -- is specified in the State-ARC contracts (J-9;2T47). Salaries for employees in a title are not identical because of pay increases relating to an employee's years of service. For instance, a driver employed for several years may earn \$15,000, whereas a new driver may make \$12,000 (4T88-4T89).

ARC may negotiate with the State for approval to increase a cost allocation (2T10-2T11). While ARC could use non-public money to pay higher salaries, it relies on public grants (J-1;1T63-1T65;2T54).

The State increases its grants by an annual cost-of-living adjustment (COLA). Each August, after the Legislature has passed the annual appropriations acts, the funding agencies notify ARC how much of a COLA to expect for the next calendar year. ARC usually passes the COLA increases along to employees as salary increases, although once it used the COLA to cover a deficit (2T82). When asked if ARC could grant its employees a wage increase above the COLA, Chmielnik responded:

If the grant ceiling can hold a 4%, if [the COLA] is 3 [percent], I don't think the state would stop us. But considering budgeting realities, when you

have utilities going up 5 to 7% a year, health benefits going up 15 to 35% a year, and when you consider on some of these grants, you have to include statutory payments [such as workers' compensation, unemployment insurance], it's not realistic. [2T80-2T81]

ARC submits a budget modification to State agencies in January to reflect the COLA and how it affects each salary line. Another modification is usually submitted near the end of the fiscal year to show how the agency proposes to spend surplus funds and to cover line item shortages (2T11-2T12).

ARC grants new employees 12 sick days, 3 personal days and 10 vacation days per year. This allotment increases with length of service. ARC also permits employees to take holidays. Sick days, personal days, vacation days and holidays are set forth in the State-ARC contracts. ARC may change the number of these days by seeking a contract modification (4T91-4T94).

State-ARC contracts determine the total cost allocated for each position and thus indirectly limit the extent of fringe benefits. But the State does not choose fringe benefits. Permanent employees receive either HMO or traditional medical coverage. For employees hired before 1990, that insurance covers themselves and their families; for other employees, that insurance covers only themselves (4T14-4T15). The health plan includes life insurance. There is no pension plan (4T56-4T57).

6. Overtime

ARC's Board sets overtime policies. Supervisors receive time off, non-supervisors may receive cash. Cash payments are

funded through the substitutes' line item or through accruals (such as from unfilled positions) from other salary line items (2T42-2T43). Overtime payments must be within the reimbursable ceiling (2T84).

7. Personnel Policies

State programs require ARC to establish certain personnel policies, including performance appraisals. A handbook prepared by ARC's administration and adopted by its Board sets forth extensive policies and procedures on such topics as sick leave, other leaves, a drug free workplace, benefits, discipline, sexual harassment, work hours, outside employment and grievance procedures (J-10;4T66-4T70). This handbook applies to all ARC staff.

8. Work Hours

The State requires a program to run for a specified number of hours. ARC then proposes to operate the program during certain hours. If the State approves, those hours of operation are included in the State-ARC contracts (3T95-3T96;4T76-4T77). Given those hours, ARC sets individual work schedules and work hours. For instance, ARC may hire two part-time employees to replace a 40-hour employee. However, a budget modification would be required to reflect two part-time slots and to show how the savings would be allocated (2T65;4T98-4T99).

9. Training

The State requires new employees who will be involved with clients to attend six training modules within their first two months. DDD and DHS provide the curriculum and teaching materials. The State also requires that employees be recertified in certain areas annually (3T40-3T41;3T73-3T74).

10. Assignments and Evaluations

ARC alone manages its daily operations and assigns staff (J-1;1T63-1T65). The State requires ARC to evaluate its employees' performance periodically, but does not specify an evaluation process. ARC has developed performance criteria and a point rating system (4T23-4T24). According to Ed Brown, a former Program Director, the point rating system was to be used to determine the amount of employees' salary increases. But Brown conceded that by the time his ARC employment ended in July 1992, he did not know of any employees who had not received a COLA raise (5T63-5T68).

11. Discipline and Dismissal

The State does not review or approve ARC's disciplinary procedures. ARC's Board sets discipline and termination policies (EO-1), including a progressive discipline system. Supervisors may counsel employees if they use improper procedures, but may not discipline beyond a reprimand. A supervisor's incident report is forwarded through the chain of command. The Executive Director has the final say on what discipline, if any, will be invoked (4T25-4T26;J-12). The State expects that an abusive employee will be terminated and may cite ARC for contract non-compliance (4T27;4T75). In one situation, ARC persuaded the State to permit a developmentally disabled employee accused of client abuse to remain on staff. However, after another incident, the employee was terminated under threat of losing State funds (2T17;2T67-2T68). Except in abuse situations, the State does not involve itself in terminations (4T75). While an incident report must be filed when a

client is hurt, disciplinary measures taken for other violations of ARC policy are not reported to the State (2T68-2T69). Lorenzetti makes the final decision on terminations (4T105).

12. Grievance Procedure

ARC's Board has adopted a grievance procedure. These are the steps: talking with the immediate supervisor, further review by that supervisor, review by the next level of supervision, review by the Executive Director, and final review by the Board (J-10). The State has no role in the grievance process.

13. Transfers and Interchanges

Employees are hired in a specific title and program. While vacant positions are posted agency-wide, employees rarely transfer between programs or qualify for different titles (4T33-4T34). Employees may transfer between ATCs with the Program Coordinator's approval. ARC may make a transfer to prevent an employee from supervising a family member (4T82).

In emergencies, employees in one program may substitute for employees in another. For example, former ATC technician George Nyangena was occasionally assigned to group homes to cover for absent employees and to help clean group homes about to open (4T113). During a 1993 snowstorm, Lorenzetti directed ATC employees to staff the group homes because of transportation problems (4T85).

Each program maintains a pool of substitutes to cover absences or vacations. The State encourages the use of the substitute pool. Substitutes must meet the same hiring criteria as regular employees (4T105-4T106).

14. Monmouth ARC

NJSFT staff representative Dorothy Gutenkauf negotiates and administers labor agreements for NJSFT locals. One NJSFT local has represented a unit of approximately 140 Monmouth ARC ("MARC") employees since 1978. Gutenkauf has negotiated five agreements, each one covering a three year period (5T85-5T86, 5T96-5T98).

MARC is structured and funded similarly to ARC. It contracts with the same State agencies, but receives a slightly lower share of its funding from them (5T86-5T89). MARC must also meet the State's contractual requirements, including types of programs, procedures for running them, kinds of clients served, and staff-client ratios (5T99, 5T121). MARC's labor contract provides that staffing levels must meet State mandates (5T95).

NJSFT negotiates with MARC over salary schedules, pay increases, and other employment conditions. The State has not been a party to these negotiations. The NJSFT-MARC contract provides:

It is recognized by both parties that funding for salaries is dependent upon various governmental sources. The parties agree to use their best efforts to obtain increased funding. If increased funds for salaries are obtained from these sources during the term of this contract, the parties will negotiate amendments to the salary guides. This paragraph shall not be subject to the grievance procedure. [EO-4]

MARC has never advised the NJSFT that the State has rejected a part of the NJSFT-MARC agreement (5T94-5T98).

In 1989, DDD contractually committed more money to MARC than was available. After DDD informed MARC that its funding might

be decreased, NJSFT met with MARC's management and examined the State contracts to evaluate the underfunding. To avoid layoffs, NJSFT helped resolve the financial problem within the confines of the labor contract (5T87-5T88).

B. Facts Relating to Appropriate Unit

1. Background and Stipulations

ARC's Executive Director, Lorenzetti, is responsible for all programs and personnel decisions (J-12). ARC has three departments, each administered by a Director reporting to Lorenzetti. As Director of Adult Services, Amy Miano oversees the residential, employment, training, and mental health programs. As Director of Children and Family Services, Linda Flint oversees the day care, summer camp, parent support, respite, community services, and EIP programs. As Director of Administrative Services, Steven Chmielnik oversees training, personnel functions, buildings and grounds, and transportation. The larger programs -- adult training, residential living, day care and EIP -- are supervised by coordinators who report to the Directors. There is also a transportation coordinator. Employees in smaller programs report to their Directors (2T38-2T39;4T44-4T45).

The parties stipulated that the Executive Director, the department Directors, the ATC Coordinator, the ATC Supervisors, the Residential Coordinator, the Residential Program Directors, the Day Care Centers Director, the Camp Director, the Transportation Coordinator, the EIP Site Supervisor, the Respite Supervisor, the

Human Resources Coordinator, and the Administrative Assistant should be excluded from any negotiations unit. The parties also agreed to exclude respite providers and summer camp employees because they are not regularly employed. The parties dispute the unit status of the Assistant ATC Supervisors, Assistant Residential Program Directors, Assistant Respite Supervisor, Parent Advocate, Behaviorist, Medical Coordinator, Trainer, Physical/Occupational Therapists, Head Teachers in the Day Care Program, Accountant, Bookkeeper, and four administration Secretaries (1T55-1T57;3T16-3T25).

2. Assistant Center Supervisors-Adult Services

The adult training program consists of a Jersey City ATC and a Bayonne ATC, as well as a supervised employment program. Each ATC has a full time Center Supervisor and an Assistant Center Supervisor on site. The Assistant Center Supervisor reports to the Center Supervisor, who reports to Adult Training Coordinator Joseph Bauman, who reports to Director Amy Miano (R-9;3T94).

The Bayonne ATC employs 6 to 8 technicians for 36 clients and the Jersey City ATC employs 10 to 12 technicians for 54 clients. Technicians train clients in personal awareness, habilitation, and practical skills and are assigned to speciality areas, such as wood shop or ceramics (3T145-3T147).

Most of the Supervisor's work time is spent on the work floor, helping staff control clients (5T21). The Supervisor ensures that the staff is doing its job, transmits vacation requests to Bauman, prepares monthly reports and daily training records,

arranges for client "contract work," and develops individual habilitation plans (IHP) (5T6-5T7). The IHP is a set of client goals developed by the client's guardian, the DDD caseworker, Bauman, the ATC Supervisor or Assistant Supervisor, and an ATC Technician (5T20).

The Assistant Supervisor assumes an absent Supervisor's duties. Those duties include supervising adult training aides (R-9; 3T53;3T99). The Supervisor is occasionally away from the building developing contacts with contractors and picking up or dropping off projects. Lorenzetti could not estimate the percentage of time spent off-site daily (3T148). Former ATC Center Supervisor Van Dort testified that she rarely left the building because she telephoned contractors and conducted meetings in the ATC (5T21-5T22).

The Assistant Supervisor's workday is primarily spent on the work floor helping the Technicians train clients and keep order. Assistant Supervisors assign work and direct Technicians. They also complete payroll forms, maintain personnel records, check employee certifications, keep client attendance records, and dispense medications (3T52;5T39-5T41).

The Supervisor screens and interviews job applicants using questions provided by ARC's administration (5T25). The applications and interview responses are forwarded to Bauman, who conducts the second round of interviews (5T7;5T32-5T33).

Supervisors, and in their absence, Assistant Supervisors, ensure staff coverage. Employees notify either the Supervisor or

the Assistant Supervisor when they are out sick (3T98). The Supervisor or the Assistant Center Supervisor may not authorize employees to take compensatory time off without notifying the Program Director (3T106). If Bauman is unavailable, requests for time off go to Miano (5T24;5T37). The Supervisor or Assistant Supervisor calls in substitute workers or asks the Program Coordinator to reassign workers from the other site to cover temporary shortages (3T96;3T99-3T100).

If a Technician does not follow the Assistant Supervisor's instructions, the Assistant Supervisor tells the Supervisor, who then talks with Bauman (5T36). The Supervisor can write reprimands, but Bauman must approve them (3T123;5T8).

Lorenzetti testified that the Assistant Supervisor and the Supervisor have "input" into evaluations, but she does not know who signs the form (3T53;3T101). Van Dort testified that the Assistant Supervisor had no role in the evaluation process unless Van Dort was absent and even then the Assistant Supervisor had to go through Bauman (5T12-5T13). The Supervisor prepares draft evaluations using a point rating system and commenting on the employee's strengths and abilities. Bauman reviews the drafts and orders changes (5T10-5T11). Evaluations are then given to employees in a meeting with the Supervisor (5T15). Supervisors cannot recommend pay increases, but can commend employees orally.

The Assistant Supervisor may recommend to the Supervisor that an employee be disciplined or suspended. The Supervisor

carries the recommendation to Bauman, who may so recommend to Miano. Lorenzetti makes the final decision on all disciplinary matters (3T100;3T124). When asked whether an Assistant Supervisor's recommendations would be carried out, Lorenzetti responded:

[The] site supervisor would then make the recommendation to the program director over adult day program. That person would then, if they agree -- I mean, at any point during the line this thing could be kicked out and at any point during the line there is an investigation...it's looked into. And if there is an agreement that there shouldn't be discipline action, then that's as far as its goes, but if there is support for the recommendation that the assistant site supervisor made initially, it would go from the program director there to the department director to me (3T125).

This chain of command applies to all discipline (3T100-3T101).

ATC Technician George Nyangena was terminated. He was called into a meeting with the Supervisor, Bauman and Lorenzetti and was told that the Bayonne ATC Supervisor had reported that he had abused a client. Lorenzetti suspended him and Bauman notified him the next day that ARC had terminated him. After a grievance hearing, the Board upheld his termination. DDD told Nyangena that it would not investigate the abuse allegation because ARC had already terminated him (4T116-4T123;EO-3).

3. Assistant Program Directors

The Assistant Program Directors ("APDs") (also referred to as House Managers or Site Supervisors) must possess a bachelor's degree and two years' field experience (R-1). One or two APDs are assigned to each of ARC's residential living facilities

(3T33;3T142). The APDs report to the Program Directors, who report to Residential Coordinator Don Stevens (3T142;5T47). As the site supervisors, APDs assign work and direct the staff, which consists of one or two Residential Aides on each shift (R-1). There are usually one or two Aides on duty in each group home when the clients are present, and one employee stays overnight (3T142-3T143). The home is unstaffed during the day because clients work at the ATC then.

Residential Aides help clients with basic tasks such as waking up, dressing, eating and cleaning their rooms. Work shifts run around the clock, except when clients are at the ATC (5T69).

Program Directors usually work from 9 a.m. to 5 p.m., but their hours are flexible and they sometimes work longer (5T70). Program Directors report to ARC headquarters each morning, then visit group homes. Program Directors have no offices and use part of Stevens' office or space in the group homes for paperwork (3T31;5T57). Program Directors schedule and coordinate client activities, supervise the group homes staff, review evaluations, attend IHP seminars, and train new employees in living skills and writing reports (5T46,5T66). The Program Director supervises the house staff when the Assistant Program Director is absent or when there are difficulties.

The APDs' work schedule is set by the Program Director. They usually work from 3 p.m. to 11 p.m. and are paid an hourly rate. They may modify their hours, but cannot change their total

weekly hours. They must seek approval from the Program Director to work extra time and receive compensatory time for any overtime (3T33-3T35;3T62;5T78).

The APD assigns and reassigns work to Aides and Senior Residential Aides (3T32). If a problem with an Aide must be resolved immediately, the Program Director may be called at home (5T71).

The APD and the Program Director set work schedules for the group home. Requests for time off or vacation time must be forwarded to Residential Coordinator Stevens (5T51-5T53). When employees are absent, the Executive Director decides whether to call in substitutes or assign overtime, and whether overtime will be paid in cash or compensatory time (3T65-3T68). If authorized, the APD calls in substitutes using an approved list.

Job applicants are screened by Stevens and interviewed by one or more Program Directors. The Program Directors recommend candidates to Stevens, who makes recommendations to Lorenzetti, who makes the final decision (5T47). APDs are not involved in hiring.

Program Directors recommend discipline, firing, and promotion to the Executive Director who has the final say. If the staff does not follow directions, the APD reports it to the Program Director (5T51). APDs may recommend discipline; if the Program Director concurs, he or she will recommend discipline to Stevens. If an employee hurts a client, the APD may remove the employee from the home immediately (3T32-3T33,3T63;5T59).

When Stevens receives a disciplinary recommendation, he investigates and talks to the employees involved. Discipline and termination recommendations by a Program Director and the APD have been rejected. In one instance, a Program Director and APD recommended that Stevens terminate an Aide the APD suspected of theft, but Stevens investigated and rejected the recommendation. Former Program Director Ed Brown could only recall one termination recommendation that was followed. Sometimes personnel actions are initiated by supervisors above the Program Director. For example, after an Aide confronted a citizen, Brown was directed to write a termination recommendation. Brown testified that such directives occurred four or five time in a year and a half (5T55-5T62;5T78-5T79).

APDs consult with Program Directors and complete evaluations. The APD signs the evaluation and gives it to the employee after Stevens has reviewed it (5T48-5T49;5T80-5T82). Residential employees are evaluated on a point system using ARC's criteria. An employee may grieve a score, but the Program Director cannot alter it (5T63-5T65).

4. Assistant Supervisor - Respite program

The Assistant Respite Supervisor reports to the Respite Program Supervisor with whom she shares an office in ARC's headquarters. The Assistant Respite Supervisor must have a bachelor's degree and some experience with the program's clientele (R-4). She helps supervise, assign, schedule and monitor respite

care workers and she prepares their payroll sheets. There are approximately 20 respite care workers -- stipulated to be casual employees -- and one Assistant Respite Supervisor (3T144-3T145). She helps hire respite workers and has initiated disciplinary recommendations. She does not serve any clients (3T42-3T43).

5. Behaviorist

The Behaviorist, who must possess a master's degree and two years experience with developmentally disabled adults, is a professional employee (R-1;3T17). He reports to Miano (R-2;3T37) and works with an interdisciplinary team to assess clients. The Behaviorist trains staff and demonstrates techniques, such as physical restraint methods. The Behaviorist provides similar services to private clients in his consulting practice (3T35-3T37;3T69-3T71).

The Behaviorist directs staff responses to clients. He sets his own schedule. The Behaviorist cannot discipline or evaluate employees, but he does tell Miano his observations about a staff member's techniques for handling clients (3T70-3T71).

6. Medical Coordinator

This position requires a high school diploma and six months experience with developmentally disabled persons (R-3A). The incumbent works 20 hours a week as the Medical Coordinator and 20 hours a week as the Trainer. The Medical Coordinator is a physician, but is not licensed in New Jersey (3T79;3T83).

The Medical Coordinator reports to the Residential Coordinator (R-3A;4T6). As the liaison between clients and outside medical care providers, he develops community resources for client referrals and chooses medical care providers for clients. The Medical Coordinator arranges appointments with medical specialists and oversees the medication log, but does not treat clients (3T38;3T80). He directs the staff to administer prescribed medications and provide follow-up care (3T38;3T82) and reports any problems with medications or follow-up care to Stevens, who decides whether to initiate discipline (3T81;3T137;4T7). The Medical Coordinator has informal input into staff evaluations, but does not supervise anyone (3T80;3T83).

7. Trainer

The Trainer must have a bachelor's degree and two years experience in training. He reports to the Personnel Specialist, who reports to Chmielnik (R-3;3T41). The Trainer schedules and conducts State-mandated "pre-service" classes using a curriculum set by DDD. Continuation of employment depends upon completing six training modules. If an individual does not complete a module, the Trainer notifies the Program Director or APD and the probationary period is extended so that the employee can retake the module. The Trainer also conducts yearly recertification classes for staff and first-aid classes for parents and he instructs staff on infection control. The Trainer does not initiate training programs (3T73-3T77).

8. Parent Advocate

The Parent Advocate must hold a bachelor's degree in a related field or an associate degree together with experience. She reports to the EIP Administrator (R-8). When parents discover their child's disability, the Parent Advocate tells them about available services, refers them to a support group, and represents their desires about service. A major component of her job is bilingual interpretation (3T90-3T93).

The EIP Program Administrator determines what EIP services will be provided to whom (3T51). Some children receive EIP services at an ARC site; others receive them at home. The Parent Advocate meets with every parent who has an EIP child (3T90). She can identify problems and recommend clients for ARC services. The EIP Administrator also assigns new cases. The Parent Advocate evaluates programs, but not staff (3T51-3T52;3T88-3T94).

9. Therapists

The Speech/Language Pathologist must hold a pathologist license (R-7). The Occupational Therapist must be registered (R-6). The Physical Therapist and the Occupational Therapist titles are interchangeable; both titles perform infant care duties (3T48-3T49).

The positions of Speech/Language Pathologist, Occupational Therapist, and Speech Therapist are usually filled by outside contractors because therapists are in demand and ARC salaries are too low to attract them. When therapy services must be subcontracted, the State agency will approve a contract modification

to move money from a salary line to a consultant's line. ARC subcontracts therapists through Elizabeth Hospital for a weekly number of therapy hours. Contracted therapists maintain private practices. Only one of the three part-time occupational therapy positions is filled; the other positions are contracted out. The part-time therapist averages about 18 to 20 hours a week; hours vary weekly. A full-time therapist would work 32-35 hours a week. All Occupational Therapists work in EIP (2T77;3T45-3T49;3T84-3T85).

10. Head Teachers

The Program Coordinator designates one teacher at each day care center to supervise the site (4T83). These teachers have both administrative and classroom duties. They conduct initial interviews, coordinate training, write evaluations, and recommend discipline (4T53).

11. Accountant

The Accountant is a professional employee who must possess a bachelor's degree in accounting and who reports to Chmielnik (3T25-3T28;R-11). He prepares the weekly payroll (3T55), reconciles all accounts, charges salaries to the grants, and prepares monthly and quarterly reports for submission to the State (2T24;2T85). He advises Chmielnik when line items are running low or high and he may recommend adjustments for the next budget (3T112;3T117).

12. Bookkeeper

The Bookkeeper handles accounts payable, prepares checks, and pays bills (2T23). She works in the wing of ARC headquarters

where payroll and financial records are kept and has access to all funding contracts with State agencies and all subcontracts (3T109). Once funding contracts are signed, they become public information (3T149). The Bookkeeper helps prepare budgets and contract submissions. She also has regular contact with financial information and salaries, but does not look at the personnel files located in the Personnel Specialist's office (3T54;3T108). The Bookkeeper has no contact with clients.

13. Secretaries

ARC's administrative offices are located in a wing of ARC's Jersey City facility. Two full-time Secretaries, Virginia Close and Doreen Kates, work in an open office with the Administrative Assistant, Lorraine Quintella. Kates is the Receptionist and answers the telephones. Another full-time Secretary, Marie Shipe, and a part-time Secretary, Tanya Murray, work in another open area (3T57-3T60;3T128,3T131).

Quintella is the Director's Executive Assistant. She supervises the other four Secretaries and receives, opens, dates and distributes all mail (3T118;3T126-3T127). She and the four Secretaries share the work in the administration section (3T119). The group works for Lorenzetti, Chmielnik, the Personnel Specialist, the Program Directors and other administrators.

Lorenzetti and the other administrators give Quintella work request forms seeking clerical help (R-14;3T129;3T138). Quintella prioritizes the work, keeps some of it, and distributes the rest to

the other Secretaries who work as a pool (2T86;3T126). Because Lorenzetti trusts her, Quintella usually handles confidential matters. But other Secretaries have typed confidential documents (3T129-3T130;3T138).

All pool Secretaries type, copy and assemble budget and modification documents (3T140). They prepare and type contract expense documents, budget submissions, monthly reports, contract preparation documents containing salaries, and budget modification documents (J-5). While they have no access to the State contracting process, they copy line-item transfer documents and put State-ARC contracts in final form (2T88-90;3T60-3T61).

The pool Secretaries type disciplinary notices and termination letters (2T25;2T90-2T91). Chmielnik described a reprimand he wrote and a pool Secretary typed. Shipe typed a letter from Lorenzetti advising an employee that his termination was rescinded (EO-2). The pool Secretaries have also typed letters suspending employees and extending probationary periods (2T92). As they work for the Personnel Specialist, they have access to personnel and payroll records (3T60-3T61) and type personnel directives (EO-1).

ARC's Board meets regularly. It is not governed by the sunshine law. Discussions of labor-sensitive matters -- such as its reaction to this representation bid -- are reflected in the minutes. Any Secretary could be assigned to type the minutes (3T153-3T154). The Executive Director and the Board have their grievance responses typed by a pool Secretary (2T92;EO-3).

III. ARGUMENTS

The Federation contends that ARC is a private employer whose private employees have a right to organize under Article I, paragraph 19 of the New Jersey Constitution and that ARC's dependence upon State funding does not make the State a joint employer. The Federation seeks a broad-based unit of non-supervisory employees (1T7-1T9).

ARC asserts that State agencies control its services, thus making the State a co-employer (1T11-1T16) and excluding these employees from the reach of Article I, paragraph 19 (1T29). ARC also argues that the Federation is estopped by the NLRB rulings from relitigating ARC's employer status; it suggests that the Federation petition the NLRB to establish units of employees employed jointly by ARC and the State agency funding the program. Finally, ARC argues that negotiations units should be drawn along the lines of the separate ARC programs and facilities -- that is, a unit for each of the two ATCs, the eight group homes, and the two day care centers (1T10-1T30).

CWA asserts that ARCs are private employers, the State is not a co-employer, and ARC employees are private employees with a constitutional right to organize. Even if the State is considered a co-employer, CWA asserts that ARC workers nevertheless enjoy a constitutional right to select a majority representative and bargain collectively.

IV. ANALYSISA. The Right to Organize

What rights, if any, do these employees have to organize? To answer this question, we must study three potential sources of rights: the Labor-Management-Relations Act, 29 U.S.C. §141 et seq. ("LMRA"), the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and the New Jersey Constitution, Article I, Paragraph 19. But first, we reject ARC's contention that the Federation may not relitigate ARC's employer status. As will be discussed shortly, all that has been decided so far is that ARC is not subject to the NLRB's jurisdiction. That determination does not foreclose considering whether ARC is subject to our Act or the New Jersey Constitution.

1. The Labor-Management Relations Act

Employees covered by this Act "have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." They also have the right to refrain from any such activities. 29 U.S.C. §157. The LMRA covers employees of private sector companies engaged in interstate commerce, but excludes employees of "any State or political subdivision." 29 U.S.C. §152(2). Also excluded are supervisors, managerial executives, and confidential employees. Id; Gorman, Basic Text on Labor Law, at 33-39 (1976).

The NLRB has considered many cases in which non-profit corporations have contracted with governmental agencies to provide social services. Given the statutory definition of "employer," the NLRB holds that the governmental agency is not covered by the LMRA. To determine whether the non-profit corporation is covered, the NLRB asks two questions: (1) is that corporation an "employer" under 29 U.S.C. §152, and (2) if so, does that corporation have enough control over employment conditions to bargain meaningfully with an employee representative? The first test will not be satisfied unless the corporation meets the NLRB's jurisdictional requirements for interstate commerce. Gorman at 22-26. The second test will not be satisfied unless the employer has "the final say on the entire package of employee compensation, i.e., wages and fringe benefits." Res-Care, Inc., 280 NLRB 670, 122 LRRM 1265, 1269 (1986); Long Stretch Youth Home, 280 NLRB 678, 122 LRRM 1272 (1986). See generally Hardin, The Developing Labor Law, at 1605 (3d ed. 1992). If the second test is not satisfied, the NLRB believes that the LMRA's purposes would not be effectuated by requiring bargaining so it waives its discretionary jurisdiction. When it withholds jurisdiction, the NLRB will not consider whether the non-profit corporation and the governmental agency can be said to be joint employers. Id.

Applying the second test, the Regional Director of NLRB Region 22 has twice declined jurisdiction over this ARC. The Regional Director determined only that ARC did not have enough

control over economic employment conditions to permit meaningful bargaining under the LMRA; the Director did not determine that this ARC was not an employer under the first test or that the State was a joint employer. While ARC suggests that the Federation could file another NLRB petition naming the State as a joint employer, the NLRB would dismiss such a petition since it has already declined jurisdiction over ARC and it has no jurisdiction over the State. ARC employees, therefore, have no rights under the LMRA.

2. The Employer-Employee Relations Act

Employees covered by this Act "have...the right, freely and without fear of penalty or reprisal to form, join and assist any employee organization or to refrain from any such activity" and the right to have their majority representative negotiate over their "terms and conditions of employment." N.J.S.A. 34:13A-5.3. This Act covers employees of New Jersey public employers, including the State of New Jersey and its agencies. N.J.S.A. 34:13A-3. Supervisors are covered, but not managerial executives or confidential employees. N.J.S.A. 34:13A-5.3.

Our Director of Representation has declined jurisdiction over private non-profit corporations providing social services pursuant to a governmental contract. Bergen Cty. CETA, Inc, D.R. No. 82-2, 7 NJPER 422 (¶12187 1981); Bonnie Bray Child Care Counselors Ass'n, D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation Corp., D.R. No. 80-2, 5 NJPER 328 (¶10175 1979); Cape May Cty. Guidance Center, D.R. No. 78-19, 3

NJPER 350 (1977). A non-profit corporation that controls such employment conditions as hiring, assigning, scheduling, supervising, evaluating, promoting, transferring, disciplining, and discharging employees is a private employer instead of a public employer under the New Jersey Employer-Employee Relations Act. It does not become a public employer simply because it is funded by the government or because the NLRB has declined to exercise its jurisdiction. Bergen Cty. CETA; Bonnie Bray; Newark Housing Development; see also New Jersey Racing Commission, D.R. No. 91-35, 7 NJPER 357 (¶22165 1991); Mercer Cty. Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978); Passaic Cty., D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

We have recognized that joint employer status may be appropriate where two public employers share control over economic and non-economic employment conditions. See Bergen Cty. Sheriff and Bergen Cty., P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984); Monmouth Cty. Bd. of Recreation Commissioners and Monmouth Cty., E.D. No. 76-36, 2 NJPER 127 (1976). Cf. Palisades Interstate Park Comm'n, P.E.R.C. No. 89-123, 15 NJPER 328 (¶20146 1989) (no joint employer status when record did not indicate that State was unwilling or unable to negotiate over all employment conditions); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 82-83, 8 NJPER 209, 218 n.22 (¶13088 1982) (leaving open question of whether a welfare board and the State could be classified as joint employers). But we have never found joint employer status when one

entity, like ARC, is a private sector employer outside our jurisdiction and the other entity, like the State, is a public employer in general, but is not a party in the case before us.

Given these considerations, we conclude that ARC employees have no rights under the Employer-Employee Relations Act. This conclusion is consistent with the ARC-State contracts, all of which specify that ARC is the employer of these employees, and with the labor relations practices in at least two other counties, which involve negotiations between ARC and its employees without the State's participation.^{1/}

3. The New Jersey Constitution

Article I, paragraph 19 of the Constitution provides:

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

^{1/} Our findings of fact discuss the Monmouth County ARC. In two other cases referred to us by Judges Gibson and Boyle, respectively, the Atlantic County and Union County ARCs and CWA settled their representation disputes by agreeing to have elections. CWA won the election among Atlantic County ARC employees and CWA and that ARC have since entered into a two-year contract. While a majority of Union County ARC employees participating in the election also voted for CWA, that ARC declined to recognize CWA as the majority representative since a majority of all ARC employees in the negotiations unit did not vote for CWA. The dispute over the election's outcome is before the Appellate Division (App. Div. Dkt. No. A-5903-91T3). Another case involving the Raritan County ARC has been transferred to us by Judge Bachman and a case involving the Ocean County ARC is pending before Judge Huber (OCN-C-139-93).

Our Supreme Court has enforced the constitutional rights of private sector employees not covered by the LMRA. COTA v. Molinelli, 114 N.J. 87 (1987) (migrant farmworkers); Johnson v. Christ Hospital, 45 N.J. 109 (1965) (non-profit hospital employees); see also Bowman v. Hackensack Hosp. Ass'n, 116 N.J. Super. 260 (Ch. Div. 1971).

In CWA v. Atlantic Cty. ARC, 250 N.J. Super. 403 (Chan. Div. 1991), Judge Gibson held that employees of the Atlantic County ARC have a constitutional right to organize under Article I, paragraph 19. He rejected ARC's argument that its control over wages and working conditions was so limited that it was not the type of employer contemplated by that constitutional guarantee and he held that it had a duty to bargain over working conditions within its control. Id. at 409, 416.

Judge Gibson's lead should be followed. ARC is the employer responsible for social security taxes and unemployment and disability insurance. ARC and the State agencies have contractually agreed that ARC is an independent contractor "responsible for the organization's overall functions which include the overseeing and monitoring of its operation, establishing the salary and benefit levels of its employees, and handling all personnel matters as the employer of its workers." ARC substantially controls non-economic employment conditions. As shown by its handbook and other evidence, ARC determines such personnel matters as hiring, work hours, evaluations, promotions, transfers, discipline, and grievance

responses. The State's input on non-economic matters is sporadic and limited to such matters as setting minimum qualifications for hiring and urging that abusive employees be terminated. ARC also pays its employees, has the discretion to grant them salary increases above the annual COLA, and grants them fringe benefits such as medical insurance and various forms of leave. Under these circumstances, ARC must be considered to be an employer under the New Jersey Constitution.

Considering a motion for summary judgment and thus viewing the evidence before him in the light most favorable to ARC, *id.* at 407, Judge Gibson also suggested that the State and ARC could be viewed as joint employers under our Act or the New Jersey Constitution given the State's apparent control over wages and economic conditions. *Id.* at 415-417. He transferred the matter to us to find facts and determine our Act's applicability, but no hearing or determination was necessary since that ARC and CWA later agreed that ARC was the employer.

We have held that joint employer status is warranted when the record establishes that control over economic employment conditions and non-economic conditions is divided between two employers. Bergen Cty. Sheriff; Monmouth Cty. Bd. of Recreation Commissioners. Accord NLRB v. Browning-Ferris Inds., 691 F.2d 1117, 111 LRRM 2748 (3rd Cir. 1982); Jewel Smokeless Coal Corp. and Subsidiaries, 170 NLRB 392, 67 LRRM 1417 (1968); Manpower Inc. and

Armour Grocery Products Co., 164 NLRB 287, 65 LRRM 1059 (1967); Greyhound Corp. and Floors, Inc., 153 NLRB 1488, 59 LRRM 1665 (1965); see also The Developing Labor Law at 1599. That does not appear to be the case here. While the State has a say about salaries given such mechanisms as contractual cost allocations, budget reallocation procedures, and COLA determinations; ARC remains free to raise salaries if it secures additional funding. And while ARC's dependence upon State funding has been, and may continue to be, a central fact of economic life for ARC and its employees, that dependence alone does not make the State a co-employer.

In any event, this record was developed without the State's participation. Even if the record had established that the State controlled salaries, we would not impose joint employer status since the State is not a party and cannot be bound by such a determination. We do not know what evidence or arguments the State would have adduced to support its view that ARC is the sole employer of these employees; and the Federation has sought to negotiate with ARC only. Contrast Atlantic Cty. ARC.

Given our conclusions that ARC is an employer under the New Jersey Constitution and that the State should not be classified as an employer in this case, we ask whether negotiations between ARC and a majority representative would necessarily be so futile that the employees' constitutional rights should be deferred or denied. We think not. ARC can negotiate with respect to non-economic

conditions since it controls those conditions. And ARC can also negotiate over economic conditions, although its ability to grant raises and a union's ability to obtain them may be limited by economic realities. The absence of such realities is not a requirement for meaningful negotiations; indeed it is precisely those realities that must be considered and confronted in negotiations.

We do not foreclose the possibility that in an appropriate case the State could be held to be a joint employer under the New Jersey Constitution. But that is not the case here. The constitutional right of ARC employees should be implemented by permitting them to seek an election.

B. The Appropriate Unit

For private sector employees to be grouped into a negotiations unit, they must share a community of interest with respect to wages, hours, and other employment conditions. See generally, The Developing Labor Law at 448-456. That is also true in the New Jersey public sector. N.J.S.A. 34:13A-5.3; State v. Professional Ass'n of N.J. Dept. of Ed., 64 N.J. 231, 243-244 (1974). Summarizing private sector cases, our Supreme Court has listed these factors for ascertaining a community of interest:

[T]he cases regard unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations as pointing to common interest. They regard similarity of obligation to the employer as a factor; likewise similarity of working conditions; they consider the possible disruptive effect on employer-employee relations if the

employees involved are admitted to one unit. They decide whether the group involved will operate cohesively as a unit; whether the unit will probably be effective in the public quest for industrial peace. Community of interest has been regarded as identity of interest. An important consideration is whether an employee sought to be included in a unit is one from whom the other employees may need protection; whether his inclusion will involve a potential conflict of interest.

West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, 420-421 (1971).

Applying these factors, we believe that the overall unit of non-supervisory, non-managerial employees petitioned for by the Federation is more appropriate than the multiplicity of units favored by ARC. While employees rarely move between titles or programs, all ARC employees are subject to the same employment conditions set forth in the ARC handbook and the same centralized, tight control over personnel decisions exercised by ARC's administration. All employees share the same dependence on governmental funding to ensure they are gainfully employed and there is no evidence that ARC has distinguished among types of employees in passing on COLAs. No conflicts of interest divide the non-supervisory employees. Moreover, the multiple units suggested by ARC could lead to fragmented, inefficient, and disruptive bargaining. State Professional Ass'n at 250-252. Given the record before us, we believe that the most cohesive bargaining unit is the broad-based one proposed by the Federation. Without relying on this additional fact, we note that the Monmouth County ARC also has a broad-based unit rather than multiple units based upon separate programs.

C. Unit Placement Issues

1. Supervisors

Under the LMRA, a "supervisor" is:

any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [29 U.S.C. §152(ii)]

Supervisory functions must be regularly and effectively exercised; a rank-and-file employee does not become a supervisor by sporadically assuming some supervisory duties. A private sector employee classified as a supervisor loses all LMRA protection.

Under the New Jersey Employer-Employee Relations Act, a supervisor has "the power to hire, discharge, discipline, or to effectively recommend the same." N.J.S.A. 34:13A-5.3. As in the private sector, isolated exercises of such powers will not make an employee a supervisor. Unlike in the private sector, supervisors enjoy statutory rights even though they cannot be placed in the same negotiations unit as the employees they supervise.

ARC asserts that the Assistant Center Supervisors, Assistant Program Directors, Assistant Respite Supervisor and Head Teachers are supervisors and should be excluded from the proposed negotiations unit. We disagree. The Assistant Respite Supervisor oversees casual employees outside the proposed unit; she does not

supervise any employees who would be in the negotiations unit. The Assistant Center Supervisors and the Assistant Program Directors do not have actual or effective power to hire, evaluate, promote, discipline, or discharge employees below them in the hierarchy. Their responsibilities appear to be less supervisory than administrative and ministerial -- for example, filling out personnel forms and passing on vacation requests. All significant personnel decisions continue to be made at the top of ARC's centralized administration. While the Assistant Center Supervisors and Assistant Program Directors do assign tasks, the record does not indicate that this power divides them from their co-employees or gives rise to any friction. Standing alone, the limited power to assign work does not warrant exclusion from the proposed unit. Nor does the occasional assumption of supervisory duties by an Assistant Center Supervisor when a Center Supervisor is temporarily out of the office -- any decisions that might be made then would be independently reviewed by superiors later. The record with respect to the Head Teachers is too conclusory and sketchy to warrant finding that they possess more actual or effective power over their colleagues than is exercised by any other employees below the level of Program Director or Center Supervisor. For these reasons, we believe these employees should not be classified as supervisors.

2. Managerial Employees

Private sector caselaw excludes managerial employees from the LMRA's protections because of the belief that managerial

employees should not sit on both sides of the negotiations table. Managerial employees "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and...have discretion in the performance of their jobs independent of their employer's established policy." General Dynamics Corp., Corvair Aerospace Div., 213 NLRB 851, 857, 87 LRRM 1705 (1974). See generally, The Developing Labor Law at 1615-1618. In the New Jersey public sector, N.J.S.A. 34:13A-5.3 excludes managerial executives from the Act's protections, and N.J.S.A. 34:13A-3(f) defines "managerial executives" as "persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices." In Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1980), we added:

Simply put, a managerial executive must possess and exercise a level of authority and independent judgment sufficient to affect broadly the organization's purposes or its means of effectuation of these purposes. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.

ARC contends that the Assistant Center Supervisors, Behaviorist, Parent Advocate, Trainer, and Medical Coordinator are managerial employees. On this record, we disagree. Again, ARC's centralized management controls policies from the top. These employees have lower-level titles outside central administration.

They do not determine management policies in the first instance or independently determine the methods, means, and extent of reaching policy objectives. The problem of divided loyalties that engendered the managerial employee exception is not present since these employees have no role in labor relations matters and no power to determine ARC's overall purposes and policies.

3. Professional Employees

In both the private and public sectors, professional employees have organizational rights, but they may not be included in a negotiations unit with non-professional employees unless they consent. 29 U.S.C. §159(b); N.J.S.A. 34:13A-6(d). See generally The Developing Labor Law at 456-458. We agree with ARC that the Behaviorist, Accountant, and part-time Occupational Therapist on staff are professional employees. Given that the other therapist positions have been subcontracted and are not now occupied, they should not be included in the negotiations unit at present. We also note that the parties may choose to agree that other employees -- e.g., Head Teachers -- are professional although the professional status of other employees was not raised before us.

4. Confidential Employees

Private sector caselaw excludes confidential employees from negotiations units because of the belief that management should not have to negotiate with employees who know management's negotiations secrets. Confidential employees "assist and act in a confidential capacity to persons who formulate, determine, and effectuate

management policies in the field of labor relations." B.F. Goodrich Co., 115 NLRB 722, 724, 37 LRRM 1383 (1956); see also NLRB v. Hendricks Cty. Rural Electric Membership Corp., 454 U.S. 170, 108 LRRM 3105 (1981). In the New Jersey public sector, N.J.S.A. 34:13A-5.3 excludes confidential employees from the Act's protections and N.J.S.A. 34:13A-3(g) defines confidential employees as those employees "whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties."

The confidential employee category is narrow. For example, an employee is not "confidential" under the LMRA simply because he or she handles confidential business information, including personnel and financial records, or types grievance responses. The Developing Labor Law, at 1618-1620; 23 ALR Fed. §§16-17 (1975).

ARC contends that the four administrative Secretaries, the Accountant, and the Bookkeeper are confidential employees. Since ARC has never engaged in labor negotiations, we do not know what confidential labor relations functions these employees would perform if such negotiations were to occur and we are reluctant to speculate. Their access to financial or budgetary information does not make them confidential: what counts is whether they will know the employer's negotiations secrets before they are disclosed to the employees' representative.

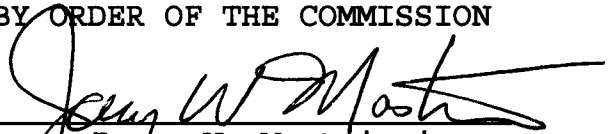
With respect to the administrative Secretaries, the employer can control any confidentiality problems since the parties have agreed to exclude the Administrative Assistant, Lorraine Quintella, from the negotiations unit and since Quintella distributes all secretarial assignments and usually performs the confidential duties. We see no reason to exclude other Secretaries at this point. With respect to the Accountant and Bookkeeper, only the Accountant should be excluded at this juncture. The Accountant is the higher-level employee whom the employer would trust for advice and information concerning the nature and effect of its negotiations positions. The Bookkeeper's role appears to be more ministerial and less sensitive. Should, however, the Bookkeeper be given confidential labor relations functions, ARC should be allowed to reassert its contention that the Bookkeeper should be removed from the negotiations unit.

V. CONCLUSION

Since ARC is not a public employer and the State is not a co-employer or a party, we do not have jurisdiction under the New Jersey Employer-Employee Relations Act and this opinion is non-binding. We find that the Hudson County ARC is an employer under the New Jersey Constitution and that ARC employees have a constitutional right to organize. We recommend that an election be held in a negotiations unit composed of non-supervisory employees and that professional employees be given the option of being included in or excluded from that unit. We suggest that this

election be conducted by the New Jersey State Board of Mediation, an agency with expertise and authority in private sector labor relations matters. N.J.S.A. 34:13A-4 and 5.1. We do not enter any Order and we return this matter to Judge Kimmelman for final disposition.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: Trenton, New Jersey
November 15, 1993