P.E.R.C. NO. 27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTGOMERY TOWNSHIP BOARD OF EDUCATION

Public Employer

Docket No. R-77

and

MONTGOMERY TOWNSHIP EDUCATION ASSOCIATION

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of principals, administrative assistants,[1/] coordinators secretaries, special service personnel and vice-principals[2/] of the Montgomery Township Board of Education, hearings were held on June 23, 1969 and July 23, 1969 before ad hoc Hearing Officer Daniel House at which all parties were given an opportunity to examine and cross-examine witnesses, present evidence and argue orally. Thereafter, on November 3, 1969 the ad hoc Hearing Officer issued his Report and Recommendations. Exceptions have not been filed to the Hearing Officer's Report and Recommendations. The Commission has considered the record and the Hearing Officer's Report and Recommendations and on the basis of the facts in this case finds:

1. The Montgomery Township Board of Education is a Public Employer within

1/ The position of administrative assistant has been discontinued and was, therefore, not a subject of controversy.

2/ The position of vice-principal which was created after the issuance of the Notice of Hearing was litigated at the hearing and is properly considered in this matter.

the meaning of the Act and is subject to the provisions of the Act.

2. The Montgomery Township Ecucation Association is an employee representative within the meaning of the Act.

3. The public employer disagrees that certain employees, discribed below, should be included in the existing collective negotiating unit. There is, therefore, a question concerning the composition of the unit, and accordingly the matter is appropriately before the Commission for determination.

4. In the absence of Exceptions to the Hearing Officer's Report and Recommendations, attached hereto and made a part hereof, the Commission adopts the Hearing Officer's findings and recommendations pro forma.[3/]

5. The Commission finds in agreement with the Hearing Officer that no question exists concerning the majority status of the employee organization herein involved.

Since the Hearing Officer has found appropriate a unit of professional employees and non professional employees, we shall direct a self-determination election among the professional employees as a condition precedent to the establishment of the unit set forth below.

Accordingly, we find appropriate the following voting groups:

Voting Group 1 - "All certified classroom teachers, guidance counselors, librarians, nurses, coordinators, audio-visual coordinators, special service personnel including psychologists, speech therapists, remedial reading teachers and home-school coordinators, but excluding the superintendent of schools, principals, vice-principals, managerial

3/ The Commission's pro forma adoption of the Hearing Officer's findings and recommendations are not to be construed as an adoption or rejection of the Hearing Officer's rationale.

executives, supervisors as defined in the Act, policemen, craft employees and all other employees."

Voting Group 2 - "All clerical employees, secretarial employees and teacher aides, but excluding all professional employees, managerial executives, craft employees, policemen and supervisors as defined in the Act."

If a majority of the employees in Voting Group No. 1 vote for inclusion with Voting Group No. 2, we find that the appropriate collective negotiating unit is, "All certified classroom teachers, guidance counselors, librarians, nurses, coordinators, audio-visual coordinators, teacher aides, clerical employees, secretarial employees, and special service personnel including psychologists, speech therapists, remedial reading teachers and home-school coordinators, but excluding the superintendent of schools, principals, vice-principals, managerial executives, supervisors as defined in the Act, policemen, craft employees and all other employees."

If a majority of the employees in Voting Group No. 1 do not vote for such inclusion, we then find that each of the voting groups described above constitute separate appropriate collective negotiating units.

6. In order to determine the desires of the professional employees we direct that a secret-ballot election shall be conducted among the employees in Voting Group No. 1 as soon as possible, but not later than thirty (30) days from the date set forth below.

Eligible to vote are all employees listed in Voting Group No. 1 who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period

because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Those eligible to vote shall vote on the following question: "Do you wish to be represented for the purpose of collective negotiations in the same unit as nonprofessional employees?"

The election herein directed shall be conducted in accordance with the Commission's Rules and Regulations and Statement of Procedure.

BY ORDER OF THE COMMISSION

WALTER F. PEASE
CHAIRMAN

DATED: December 17, 1969
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Representation Proceedings Concerning

MONTGOMERY TOWNSHIP BOARD OF EDUCATION

AND

MONTGOMERY TOWNSHIP EDUCATION ASSOCIATION

- -

Docket No. R-77

REPORT AND RECOMMENDATIONS

OF HEARING OFFICER

The undersigned, Daniel House, was designated by the Commission as ad hoc hearing officer in the above matter to conduct hearings concerning the question of representation involved and to make a report and recommendations in the matter. Pursuant to notice of hearing dated May 28, 1969, hearings were held before me in Newark, New Jersey, on June 23, 1969, and in Trenton, New Jersey, on July 23, 1969. The parties were given the right to file briefs by August 29, 1969, and each of them did.

On the basis of the record, I find:

1. The Montgomery Township Board of Education, referred to herein as the Board, is a public employer within the meaning of Section 3 (c) of the Act and is subject to the provisions of the Act.

2. The Montgomery Township Education Association referred to herein as the Association, is an employee representative within the meaning of Section 3 (e) of the Act.

3. The Association having requested the Board and the Board having refused to recognize the Association as the exclusive representative for principals, administrative assistants, coordinators, secretaries and special service personnel as part of the same collective negotiating unit as certified classroom teachers, guidance counselors, librarians and nurses, a question of representation of

public employees exists and the matter is appropriately before the Commission.

4. In its brief the Association describes the unit for which it contends as consisting of all professional employees (except the Superintendent of Schools) and of certain of the nonprofessional employees (secretaries, clericals and teacher aides), and argues that "the ultimate question presented in this proceeding is whether to give effect to the freely expressed desire of the employees...to be included in a single negotiating unit or to exclude certain categories of employees involuntarily and to fragment the staff into a multitude of separate units?".

The ultimate issue in any unit determination is which unit in the particular circumstances of the case will most effectively carry out the purpose of the Act to prevent or to settle labor disputes by means of protecting public employees in the exercise of their right freely to form, join and assist any employee organization or to refrain from such activity, and in their right to negotiate collectively with their employer through the employee organization of their choice. In a case where more than one unit appears to be appropriate by the other positive (community of interest) and negative (supervisory-nonsupervisory, etc.) criteria, the freely expressed desire of the involved employees may determine the extent, if any, of fragmentation which will be consistent with the purposes of the Act as they are to be carried out by the means provided in the Act. However, first it must be determined by application of the positive and negative criteria that the units to be chosen from are appropriate, and this includes but is not limited to consideration of the desire of the involved employees.

The Association contends that each of the disputed categories has community of interest with the employees in the already recognized "teachers' unit"; that the principals, vice principal and the coordin-

ators are not supervisors within the meaning of the Act; and that, if they are found to be such supervisors, the history and special circumstances dictate their inclusion with the nonsupervisors in one unit; and that a majority of the professional employees have voted for inclusion in the same unit with the disputed nonprofessional employees.

The Board contends that the principals, the vice-principal and the coordinators (not including the Audio-Visual Coordinator and the Home School Coordinator) are supervisors within the meaning of the Act and should be excluded from the same unit with the nonsupervisors; that the function of the Audio-Visual Coordinator is non-professional and that the position should therefore not be included in the unit with the professional employees; that the functions of the secretaries and clericals necessarily include access to confidential material pertinent to collective negotiations and labor relations, thus making it inappropriate for them to be in the same negotiating unit with those who are the subject of the confidential material, and that, in any case, they and the teacher aides are nonprofessionals who should not be in the same unit with the professionals; and that the "special service personnel" (the Home School Coordinator, the Speech Therapist, the Psychologist and the Remedial Reading Specialist) do not have adequate community of interest with the employees in the teachers' unit to be included with them. The Board also argues that the inclusion of the alleged supervisory personnel in the same unit with the teachers would be improper because they are part of the "management team" and management's freedom of operation would be restricted if part of the "Management team" were in the teachers' unit.

The category "Vice-principal" was created after the dispute herein was joined; in the 1969-70 school year the vice-principal will take the place, with additional duties, of the administrative assistant, which position will not be filled in 1969-70 nor in the future. I agree

with the Board that the issue with regard to inclusion of the administrative assistants is moot and I will not further deal with it.

COMMUNITY OF INTEREST IN GENERAL

The second paragraph of Section 7 of the Act begins:

> "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."

In the context of this Act, which implements its purposes basically by protecting the rights of public employees to negotiate through employee organizations freely chosen by the employees, community of interest here refers not to any areas at all of common concern among the involved employees, but to the more narrow area of their common concern in collective negotiations, pertinent to which may be some of the other areas of common concern among them. Thus, the due consideration required by the Act requires that the commission judge whether the involved employees have enough of a stake in common in the collective negotiations so that they may usefully sit together on the same side of the negotiating table opposite to the employer. From this it follows that, unless some conflict between fractions of them about the outcome of the negotiations overrides their community of interest derived from all working for and having their wages, hours and conditions of employment set by the same employer, or unless subgroups of the overall unit of effective size and composition desire otherwise, all employees of a single employer (excepting only those excluded by the specific dictates of the Act) can be an appropriate unit from the point of view of community of interest.

In addition to "managerial executives" (the Superintendent of Schools) and policemen, the Act specifically bars from inclusion together in a unit (and these with exceptions in each case) 1. supervisors with nonsupervisors; 2. professionals with nonprofessionals; and 3. craft with non-

craft. From this it appears that the legislature intended to mandate in the cases of these classes of employees that, unless the conditions of the exceptions prevailed, the conflict of interest between these classes be found to negate the community of interest among them enough so that they should not be included together in a single unit.

But additional light is thrown on the intentions of the legislature by the fact that the commission is forbidden to intervene in matters of unit definition in cases where there is no dispute; thus, negotiating units which may contravene the negative criteria set forth in the Act can nevertheless become appropriate units by the pragmatic test of the agreement by the parties that they will work; and a multiplicity of such units may establish the practice or special circumstance necessary for the exceptions to the negative criteria to prevail. And further light is thrown on the intention of the legislature in establishing the negative criteria by the nature of the exceptions to those provisos: first, and common to all of the provisos - "except where dictated by established practice, prior agreement or special circumstances..."; and then for the second and third provisos - "...unless a majority of such (professional or craft) employees vote for inclusion...". Thus the only really rigid injunctions in the Act against certain employees being included in certain units is that exempting from the right to collectively negotiate the "managerial executives" and that forbidding the inclusion of police in the same unit with any other classes of employees. The other provisos require a balancing of the circumstances tending to show conflict of interest about negotiations against community of interest.

Except for the absolute exclusion of managerial executives from negotiating collectively, the composition of the "management team" and "management's freedom of operation" are nowhere indicated as criteria to be considered in determining which of possible appropriate units is

the appropriate unit. The only criteria indicated in the Act as intended by the legislature to be considered are community of interest (both positive and negative), the desires of the involved employees and the practicality of the unit as a successful vehicle for the employees in collective negotiations.

The record shows for all the disputed categories adequate community of interest regarding the important subjects for negotiation with the employees in the teachers' unit so that, unless other factors negate the community of interest, all may be part of the same appropriate negotiating unit.

THE ALLEGED SUPERVISORS

The Principals and Vice-principal

The record established that, as part of their job, principals make recommendations to the Superintendent regarding whether or not to hire new applicants for teacher jobs, whether or not to retain teachers already hired but not yet with tenure, and whether or not particular teachers should be given added pay. If it is decided that these recommendations are "effective" recommendations, then the principals and the vice-principal, who it was established is, among other things, to take over for the Principal in his absence, will be found to be such supervisors as are to be excluded from the same negotiations unit as nonsupervisors unless one of the exceptions set forth in Section 8 of the Act obtains.

It is argued by the Association that the recommendations of the Principals are not "effective" in that the Superintendent makes the final recommendation to the Board, which has the sole authority to act, and that he does not "rubber stamp" the Principals' recommendations, but evaluates them, and, when in doubt, makes his own investigation.

The underlying question is whether the inherent relationship of the Principals to those under them is such as negates the community of interest between them so that it would be inappropriate for them to sit on the same side of the table during negotiations:- is that relationship such that the rank and file member of the negotiating unit should look on the Principal as "the boss" whose decisions will likely affect the tenure or the disciplining of the teacher or other rank and file member of the basic unit?

To "effectively recommend" does not require that the recommendation go directly to the formal seat of power, the Board; nor that the recommendation is almost always acted upon affirmatively; nor does the fact that the Principal's recommendation is not always sought before hiring or disciplinary decisions are made by itself make the Principal's recommendations ineffective. The decisive test is: what may a teacher expect as the likely result of a Principal's recommendation?

I am convinced in this case that the Principals' recommendations are effective, as that term is intended in the Act, because the testimony showed that the Superintendent will ordinarily pass it along as his own with the likely expectation that it will be acted on affirmatively; thus the rank and file unit member must reasonably look on the Principal as his "boss". Thus I am convinced that in this case the principals and vice-principal do not belong on the same side of the negotiating table as the teachers unless prior agreement, established practice or special circumstances dictate otherwise.

The Exceptions to the Provisos

Sections 7 and 8 each have like exceptions to the restrictions in their provisos: in Section 7 - "except where established practice, prior agreement or special circumstances dictate the contrary...", and Section 8 - "except where dictated by established practice, prior agreement or

special circumstances...". The Association argues that these exceptions intend that where there is an established practice, a prior agreement or special circumstances, the supervisors (or other categories excluded by the provisos) be placed in the same negotiating unit as the nonsupervisors. The Board, on the other hand, argues that even in the face of practice, prior agreement or special circumstance, the conflict of interest between supervisors and nonsupervisors is such that a unit including both should not be found to be appropriate.

Unfortunately, there is no recorded or reported legislative history to indicate just how the legislature intended these exceptions to be applied; nevertheless, it is clear that at the very least the legislature intended that there are some circumstances in which supervisors and non-supervisors might be in the same appropriate unit, otherwise the language of the exception would be without any meaning at all. Examination of the exception in the context of the entire Act throws some light on the intent of the exception.

The first paragraph of Section 7, establishing the rights of public employees to freedom of choice with regard to employee organizations, contains the proviso and the exception with which we are dealing. The second paragraph establishes no rights, but enjoins that "The negotiating unit shall be defined with due regard for the community of interest among the employees concerned..." and, apparently as an exception to the injunction, continues "but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute."

Thus it appears that where there is no dispute about the unit, even if the agreed unit has been established without due regard for the community of interest of the concerned employees, the commission may not intervene to find that a different unit is the appropriate one. It follows that the legislature intended that, in cases where there is no

dispute, a unit could be appropriate which included categories of employees with such conflict of interest among them as would, in the case of a dispute about the unit, warrant their being forbidden placement in the same unit. In light of this a prior agreement or an already established practice by the parties of including such categories in the same unit or some special circumstance of similar purport may very well mandate the inclusion of such categories in the same unit; however, this conclusion must be modified by reference to the concept (expressed in the opening phrases of Section 7) that freedom of choice by the employees is one of the foundation rights established to implement the purposes of the Act.* Thus our conclusion must be modified to take into account the possibility that, in the face of prior agreement or established practice, some group of employees with their own community of interest may raise the question of a conflict between the freedom of choice concept and the "practice and/or agreement" exception.

In the absence, as in this case, of such a conflict question being raised, I conclude that where established practice or prior agreement or circumstances of the same purport are proved, such personnel (supervisors and nonsupervisors in this case) as are covered by the provisos in Sections 7 and 8 must be included in the same unit.

But in this case the record is clear that in practice the Board consistently refused to negotiate with the Association for the principals, although it did negotiate for the teachers' unit. And the special circum-

* The importance given by the legislature to the wishes of the involved employees, even if it means fragmentation of an otherwise appropriate unit, is indicated in the specific exceptions to provisos 2 and 3 of Section 8(d): "...no unit shall be appropriate which includes...(2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit or (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit..." That there is only the general exception for the supervisoy exclusion indicates that the legislature did not feel that the supervisors needed the same protection against being overwhelmed by the normally more numerous nonsupervisors as did the professionals and the craftsmen against the usually superior numbers of the nonprofessionals and noncraftsmen.

stances relied on by the Association - the inclusion of principals in other units in the State and the "attitude" of the rank and file teachers, because of the relative smallness of the School District, in considering the principals as helpful fellow workers - do not appear to me to mandate the inclusion of the principals and the vice-principal in the teachers' unit in spite of the conflict of interest between them. I recommend that the principals and the vice-principal be not included in the unit with the nonsupervisory employees.

The Coordinators

The record shows that the Coordinators do not have the right effectively to recommend the hire, discharge or discipline of personnel, and are thus not such supervisors as are required to be kept from a unit including nonsupervisors. The Board argues that it intends to review the assignments of the Coordinators and "possibly expand the responsibilities" so that the position may become supervisory; that therefore placement of the position in the teachers' unit "could very well impair the Board's intention at this time to expand their managerial function."; and that, therefore, the Coordinators should be kept from the teachers' unit. Speculation may not properly be substituted for fact; in addition I note that even if their managerial functions were expanded, the expansion would not necessarily include supervision as that term is intended in the Act; thus the speculation does not establish that Coordinators are supervisors within the meaning of the Act.

The Coordinators are teachers who perform extra duties in addition to teaching classes for an extra stipend above the teachers' scale on which their pay is based. Their benefits and working conditions are virtually identical with the teachers'. I recommend that they be included in the same unit with the teachers.

THE AUDIO-VISUAL COORDINATOR

The Audio-Visual Coordinator is a teacher who, in addition to his classroom teaching duties as Industrial Arts teacher, coordinates the use of audio-visual material and equipment for other teachers, maintains that equipment in repair with the help of students; for these additional duties he receives an additional stipend. The Board takes the position that his added duties might be assigned to a "blue collar" worker in the custodial unit and are nonprofessional in nature; that, therefore, the function and job should be excluded from the teachers' (professional) unit. Without passing on the accuracy of this description of the additional duties, I find that even if they were nonprofessional they were made part of the job of a professional teacher and are not now separated from it. Thus, the only real question involved is whether the additional stipend to be paid the Industrial Arts teacher for his performance of these added duties should be negotiated for by the Association which is recognized already to negotiate for him as a teacher; I conclude that the answer is "Yes.", and I recommend that the Audio-Visual Coordinator position be included in the teachers' unit.

SPECIAL SERVICE PERSONNEL

This group includes the psychologist, the speech therapist, the remedial reading teacher and the home-school coordinator. Except for the psychologist, all are teachers with special assignments and training; and the psychologist like the others is a professional dealing with pupils jointly with them and their regular teachers in connection with special problems. Except for the Psychologist, each is paid on the basis of the teachers' salary scale, and all are covered by the same basic benefits as are the teachers. No conflict of interest was proved which would overcome the evident community of interest between them and the teachers. I recommend that they be included in the teachers' unit.

THE TEACHER AIDES

It was agreed that some of the Aides are professional employees. While for these, there are some differences from the teachers' working conditions and wages and hours, they work together with the teachers in performing teaching functions in connection with the pupils, and are subject to the same supervision and are expected to live up to the same professional standards as the teachers. No evidence was introduced to show that any conflict of interest exists between the Aides and the teachers. I recommend that they be included in the unit with the teachers.

Other teacher Aides, it was agreed, are not professionals; they perform monitoring duties during lunch and other non-class time on a part time basis. There is no similarity between their basis of pay (they are paid on an hourly basis) or their other major terms and conditions of employment and the teachers', except that they are employed by the same employer and that they function with relation to pupils. There is, however, no conflict of interest sufficient to negate the community of interest described. If these Aides were excluded from the unit in which they have elected to be, they might well be effectively deprived of the right guaranteed them in Section 7 of the Act to be represented by an employee organization of their choice. I recommend that they be included in the unit with the teachers, subject to the condition set forth below.

THE CLERICAL AND SECRETARIAL PERSONNEL

The Board, in addition to arguing that the differing functions of the clerical employees creates a conflict of interest sufficient to negate any community of interest between the clericals and the teachers, argues that the clericals must be excluded from the teachers' unit because each of the four secretaries has access to confidential information related to the negotiations process. While there is no explicit

negative criterian "confidentiality" in the Act, I believe that conflict of interest would outweigh community of interest in the case of an employee whose central and necessary function was involved with access to the employer's confidential information relating to negotiations, and such an employee should be barred from sitting on the same side of the negotiating table as the employees in the unit. But such an exclusionary criterian must be used carefully in order not to deprive employees of the rights guaranteed in Section 7 of the Act; the Act (in the case of School Districts) deprives only the Superintendent of Schools or his equivalent of these rights. Therefore, I conclude that the confidentiality must be of a nature such that the "confidential" employee, with regard to negotiations, is the partial equivalent of the Superintendent (or of the employer, the Board) in being privy to the confidential information. The record shows that none of the clerical employees involved falls in this category: that access of each of them to confidential information relating to negotiations is neither inherent nor necessary to their central function.

According to the evidence, the salaries of the clericals are determined by a set relationship to the salary schedule of the teachers; and they have the same general working conditions and benefits. I find that the communit of interest between the clericals and the teachers is adequate for them to be placed in the same negotiating unit, and I will so recommend, subject only to the condition set forth below.

THE PROFESSIONAL VOTE TO ACCEPT NONPROFESSIONALS IN THE UNIT

The Board objects to the nonprofessional employees discussed above being placed in the same unit as the professionals for the additional reason that the vote taken at the Association meeting to permit their inclusion was not a valid vote because it was not a secret ballot vote.

While I find nothing in the Act to require that such a vote be by secret ballot, I do find from the record that it is not clear that only professional employees participated in the vote at the Association meeting; further, I have recommended that the principals and the vice-principal be excluded from the unit, and it is not clear whether any of them voted at the Association meeting. I condition my recommendation that the non-professional employees discussed above be included in the unit on a majority vote of the professional employees in the unit I have recommended in favor of their inclusion, and I recommend that a secret ballot vote be conducted among such professional employees on that question; such vote to be conducted under the supervision of the Commission.

Dated: November 3, 1969
New York, N. Y.

Daniel House

DANIEL HOUSE, Hearing Officer