P.E.R.C. NO. 10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY WELFARE BOARD

Public Employer

and

COMMUNICATION WORKERS OF AMERICA, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the Middlesex County Welfare Board, a hearing was held before ad hoc Hearing Officer Eli Rock on April 17, 1969, at which all parties were given an opportunity to present evidence, examine and cross-examine witnesses and argue orally. On June 9, 1969 the Hearing Officer issued his Report and Recommendations. Exceptions have been filed to the Hearing Officer's Report and Recommendations by the Public Employer. The Commission has considered the entire record, the Hearing Officer's Report and Recommendations, the Exceptions and finds:

1. The Middlesex County Welfare Board is a public employer within the meaning of the Act and is subject to the provisions of the Act.
2. The Communication Workers of America is an employee representative within the meaning of the Act.
3. The public employer having refused to recognize the employee representative as the exclusive representative of certain employees

a question concerning the representation of public employees exists and the matter is appropriately before the Commission for determination.

4. The Hearing Officer's Report and Recommendations, attached hereto and made a part hereof, are adopted.

5. It is clear from all of the evidence, and the parties are in accord, that supervisors of case work as a class do not have the authority to hire, discharge or effectively recommend the same. The only issue is whether they have the authority to discipline employees or effectively recommend such action.

The job description of a "Supervisor of Case Work"which has been issued and prepared by the Civil Service Commission does not expressly confer the right to hire, discharge, discipline or effectively recommend any of the aforementioned actions. The parties, nevertheless, seem to agree that the exercise of the power to discipline case workers would be consistent with the terms of the job description.

While the job description uses the term "supervisor" and there is a possible "agreement" that the job description could confer the authority to discipline or to effectively recommend discipline, the petitioner contends that the incumbents classified as "Supervisor of Case Work" are not supervisors within the meaning of the Act. Inasmuch as the parties have not agreed upon the supervisory status of "supervisor(s) of case work", a determination by the Commission is warranted.

The record reveals that in the instant agency a "Supervisor of Case Work" has not in fact been given the aforementioned authority

nor has any such authority been effectively exercised and followed, as demonstrated by the following testimony of Mr. Baier, Director of the Middlesex County Welfare Board:

> "Q. Now, Mr. Baier, isn't it accurate to say that what you are telling us is that the way your department works is as follows: You ask your supervisors about certain workers in terms of their performance and on the basis of the information that you get, you decide what action should be taken, if any, to follow it up, but you have never said to the supervisors, look, you have the authority to recommend discipline and I want you to exercise that authority when you think it appropriate?
>
> A. It hasn't been said in those words.
>
> Q. In other words, the way I phrased it is a rather accurate description of the way the department has operated. Is that correct?
>
> A. I agree.

In view of the foregoing it is clear that the decision to discipline an employee is based on the independent investigation and judgment of the Director of Welfare.

Accordingly, the Hearing Officer's findings that a "Supervisor of Case Work" has never been specifically told or encouraged to assume the authority to discipline or to effectively recommend discipline and that such an exercise would be inconsistent with the entire administrative practice of this employer is supported by the above testimony and the totality of the record.

The record reveals that the employees who are classified as "Supervisor of Case Work" do not possess any of the attributes of a supervisor as defined by the Act. The fact that they are called supervisors in a civil service job description, give verbal evaluations of subordinates and otherwise assign, check and review case work does not warrant a finding that they are "supervisors" within the meaning of this Act. Section 7 of the Act

expressly provides that a supervisor is one "having the power to hire, discharge, discipline or to effectively recommend the same". The review and evaluation of the case work of a case worker in terms of its compliance with certain standards of an agency; all of which may constitute attributes of supervisory authority under other statutes, does not satisfy the criteria of a "supervisor" as set forth in this Act.

6. The Commission finds that the appropriate collective negotiating unit is: "All case workers and supervisors of case work excluding managerial executives and supervisors as defined by the Act." 1/

7. In accordance with the Commission's findings, set forth above, the Commission directs that a secret-ballot election shall be conducted among the employees in the unit found appropriate. The election shall be conducted 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 Section 6 who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were 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

1/ The Commission adopts the finding of the Hearing Officer that Agnes Demster has effectively recommended hire, discharge and discipline and is, therefore, a supervisor within the meaning of the Act. Accordingly, Agnes Demster is excluded from the unit found appropriate herein.

election date. Those eligible to vote shall vote on whether or not they desire to be represented for the purposes of collective negotiations by Communication Workers of America, AFL-CIO.

The majority representative shall be determined by a majority of the valid ballots cast.

BY ORDER OF THE COMMISSION

WALTER F. PEASE
Chairman

DATED: August 20, 1969
Trenton, New Jersey

NEW JERSEY PUBLIC EMPLOYEE RELATIONS COMMISSION

In the Matter of MIDDLESEX COUNTY WELFARE BOARD and COMMUNICATION WORKERS OF AMERICA	HEARING OFFICER'S REPORT and RECOMMENDATIONS

APPEARANCES:

FOR THE MIDDLESEX COUNTY WELFARE BOARD

John J. Hoagland, Esq.
Member, County Board of Freeholders

John T. Keefe, Esq.
Attorney, Middlesex County Welfare Board

FOR THE COMMUNICATION WORKERS OF AMERICA

Jack Wyecker, Esq.

Background

Pursuant to a Notice of Hearing issued by the Public Employment Relations Commission (herein called the Commission), the undersigned Hearing Officer met with representatives of the parties in New Brunswick, New Jersey on April 17, 1969. A transcript was taken of the proceedings, which was delivered to the undersigned on May 2%, 1969.

The prime issue in the present case is whether the classification known as Supervisor of Case Work should be included in

a bargaining unit with the classification known as Case Worker.

In the original employee petition to the Commission dated February 20, 1969, the bargaining unit requested was one consisting of Case Workers, Supervisors of Case Work and clerical employees. At the instant proceeding, however, the employee organization withdrew the request for inclusion of the clerical workers, and no objection was raised by the Middlesex County Welfare Board (herein referred to as the Board). The Board does not contest the appropriateness of a unit consisting entirely of Case Workers, but does contend that the Supervisors of Case Work should be excluded from such a unit.

In addition, when the above request of February 20, 1969 was filed, it was submitted in the name of the Middlesex County Welfare Board Employees Association. Subsequent to that date, however, and prior to the instant proceeding of April 17, 1969, the latter Association, according to the record, merged with the Communication Workers of America, AFL-CIO, and ceased to exist as a separate organization. This change in the parties had been called to the attention of Freeholder Hoagland prior to April 17, and at the latter proceeding no basic objection was raised by the Board to the request of the Communication Workers of America that it be substituted as the party of record. The Board's basic position, as indicated, is that whatever the employee organization selected by the employees, its rights of representation should not include

a unit consisting of both Case Workers and Supervisors of Case Work.

There would also appear to be no question that the Middlesex County Welfare Board is a public employer within the meaning of Section 3(c) of the Act and that it is therefore subject to the provisions of the Act. Similarly, there would appear to be no question that the Communication Workers of America is an employee representative within the meaning of Section 3(e) of the Act.

Lastly, and as part of the background facts, it should be pointed out that the procedure or machinery for determining the majority bargaining representative, for whatever the bargaining unit decided upon, has apparently not been finally resolved by the parties, notwithstanding some indication at the time of the instant proceeding that this, in itself, would not present an issue. To dispel any uncertainty on the matter, and to assure an expeditious and determinative disposition of all aspects of the present proceeding, the recommendations below will also deal with this aspect.

Discussion and Findings

On the basic issue of whether the here-requested bargaining unit should include both the Supervisors of Case Work and the Case Workers, or be limited solely to the Case Workers, the primarily applicable portions of the Act would appear to be the following:

"34:13A-5.3. Right of public employees; exceptions; representatives of majority. Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to any managerial executive except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute. (Emphasis supplied.)

. . .

"34:13A-6. . . .

"(d) The Commission, through the division of public employment relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes (1) both supervisors and nonsupervisors, (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...." (Emphasis supplied.)

There would appear to be little question, from a reading of the above two sections of the Act, that the definitive criteria governing the inclusion or exclusion of the instant Supervisors of Case Work, are those set forth in A-5.3. The broad language of A-6(d), wherein a unit of both "supervisors and nonsupervisors" is barred, could only mean that supervisors as previously defined in A-5.3 must be excluded from a unit with nonsupervisors. To hold otherwise would in effect render meaningless the earlier, detailed definition of a supervisor, for purposes of the appropriateness issue, set forth in A-5.3.

Turning, then, to the language of A-5.3 and its application in the present case, the Union has not, in the opinion of the undersigned, established a sufficient showing that the supervisors should be included under the exception phraseology which reads, "except where established practice, prior agreement or special circumstances, dictate the contrary." It is true that the previous organization known as the Middlesex County Welfare Board Employees Association included the supervisors in its membership, and that one or more of its officers were actually Supervisors of Case Work. The history of such representation, and particularly the history of any "collective negotiation" by this

organization are, however, extremely limited.

The Association only existed, in any formal sense, beginning January 1968, at which time a constitution and by-laws were first adopted. Any step in the direction of meaningful representation thereafter consisted of a single appearance before the Board on or about May 1968, at which time certain improvements in working conditions were requested. Basic salary was not then discussed since the date was midway in the budget year. No further joint meetings of any type are shown in the record, and there is no evidence that the above single appearance was in any way followed by either negotiation or discussion or agreement on any issues; there is not even any evidence that the Board acted, in any fashion, on the requests submitted at the May 1968 appearance, or that it in any way "recognized" the Association in a meaningful sense at that time. Quite clearly, the Board had simply regarded the appearance of the Association as being in the same category as that of any other "private" group, or for that matter any individual, to whom, as a public body, it customarily felt required to grant a hearing when requested.

The history prior to January or May 1968 does not alter the above basic picture. To the extent that the Association existed prior to those dates, such existence was on a completely informal basis. And if, in this prior period, appearances by these employees were made before the Board or the Freeholders, at

budget time, such appearances only consisted of an informal committee of three employees of the department. This "committee of three" submitted requests for salary increases at budget time, but this was also an appearance like that of numerous other individuals or groups of citizens appearing before the budget-makers with various types of requests; and there was clearly no meaningful recognition of or negotiation with the Board's employees during this pre-1968 period.

On the above basis, the undersigned cannot find in the present record "established practice, prior agreement or special circumstances" which, in themselves, could warrant the inclusion of the Supervisors of Case Work in a unit with the Case Workers, under Section 34:13A-5.3.

A case for <u>inclusion</u> of the supervisors does, however, appear to be established under the immediately ensuing language of A-5.3, where a supervisor, of the type intended to be excluded from a bargaining unit of nonsupervisors, is described as a "supervisor having the power to hire, discharge, discipline, or to effectively recommend the same." Plainly, the intent here is that <u>only</u> such a supervisor shall be automatically excluded--assuming his inclusion is not already permitted under the immediately preceding exception clause discussed above. The assumption must be made that unless other grounds exist for exclusion of the supervisor (such as perhaps a lack of "community of interest," referred

to is the closing sentence of the first paragraph of A-5.3), where a supervisor in point of fact does not have "the power to hire, discharge, discipline, or to effectively recommend the same," the Act contemplates that he may be included in a unit with nonsupervisors.

In the present case, there are approximately 10 Supervisors of Case Work and approximately 58 Case Workers employed by the Board. Excluding several of the supervisors who hold special assignments, each of the others normally supervises about 8 Case Workers. Of the 10 Supervisors, one of them (Mrs. Agnes Demster), who will be discussed below, clearly has a greater amount of authority than the other 9. The next step upwards in the administrative ladder is Deputy Director, and at the top of the ladder is the Director.

The job description of the Supervisor of Case Work, which has been prepared and issued by the State Civil Service Commission with state-wide applicability, has been introduced in the present record as "E-2." Although this job description does not specifically confer the right to "hire, discharge, discipline, or to effectively recommend the same," both sides are agreed that the exercise of such a right would be consistent with the job description. The difference between the parties is that the Union here contends that regardless of what the job description may say, in practice such a right does not exist for the instant Supervisors of Case Work. The Board disputes the latter, and also in effect argues that the job description must govern.

It is the finding of the undersigned that the actual practice here is consistent with the Union's interpretation, and that in point of fact the instant supervisors do not have "the power to hire, discharge, discipline, or to effectively recommend the same." Manifestly, such a question must be decided on a case by case basis, and while it is entirely possible that other agencies in the state which use the P-2 job specification do give such power to their supervisors, the evidence leaves relatively little question, in the opinion of the undersigned, that such a power is not given by the instant agency.

Plainly, one of the Supervisors of Case Work--by dint of her long service, plus other factors--does have such power. This is the aforementioned Mrs. Agnes Demster. Although her title and salary range are the same as that of the other Supervisors of Case Work, the evidence clearly establishes that, by informal administrative action, the type of power described in the Act has long been conferred upon and exercised by her. This is not to say that even she personally can hire, discharge, or discipline; that type of final decision is here made by the Director. Nevertheless, the Act does not require final authority, only the power "to effectively recommend." This Mrs. Demster has--but only she, and none of the other Supervisors of Case Work. Of this there can be no question, by the virtually overwhelming weight of the present record. (See, for example, Notes of Transcript, p. 122.)

The other 9 supervisors are requested from time to time to give their verbal evaluations of a Case Worker's performance. (Written evaluations are not used here.) This is clearly not the same, however, as "effectively recommending discipline." The other 9 have never, under the present record, been specifically told that they have the latter authority; they have never been encouraged, even impliedly, to adopt such authority; and in point of fact, such an exercise of authority would be basically inconsistent with the whole administrative framework and the practical operating lines, along which the instant agency functions, according to the clear impression left by the record.

This is not a matter for criticism, and none is here intended. From an administrative point of view, it is entirely defensible that the type of authority here discussed may be limited to a relatively small number of persons, considering that the agency is not overly large nor scattered, and considering also the special role occupied by Mrs. Demster as a type of administrative link, for a number of important purposes, between the other Supervisors of Case Work and the top administrators of the department. Nor is it unusual, for the public service generally, that "lower level" supervisors may be found to lack authority regarding discipline, as well as other matters, which supervisors at a counterpart level in the private sector may often possess.

For whatever the reason, however, it is clear in the present case that while Mrs. Demster does have the power "to effectively recommend" discharge or discipline, this is the point at which such authority stops, and that for the remaining 9 supervisors the authority does not exist. The Board itself concedes that the supervisors, other than Mrs. Demster, have no authority to recommend hiring, and there has therefore been no need to discuss that specific aspect here.

The very nature of the relationship, as described above, also helps to support a finding here of "community of interest" between the Supervisors of Case Work and the Case Workers, within the meaning of the last sentence of the first paragraph of 34:13A-5.3. The supervisors assign, check and in other ways supervise the case workers under them; but lacking the authority to recommend discipline, the potential for conflict of interest is substantially minimized. In any event, such a potential is clearly offset in the present case by the "community of interest" flowing from such factors as common interests in a closely-related range of salaries and fringe benefits, the kinship flowing from common professional interest and standing, mutual concern for the client's welfare, and mutual membership in the former Association, limited though the latter was in both duration and function.

Looking at the <u>particular</u> and specific facts of the <u>present case</u>, there is adequate justification and predominant argument

favoring the inclusion of all of the supervisors, with the exception of the position occupied by Mrs. Demster, in the same unit with the case workers. The exclusion of Mrs. Demster's position, based on the actualities of the administrative responsibilities as here delegated, does seem clearly called for, however. The exclusion should not be limited to Mrs. Demster as an individual, but rather should extend to whoever the incumbent of that position happens to be--so long as this special position continues as an administrative reality.

It is also clear, assuming a single unit of both supervisors and nonsupervisors is directed by the Commission, that machinery will then be necessary to determine the majority status of the instant union for such a unit. At the present stage, and unless the parties agree otherwise, the record justifies a recommendation that the Commission's usual type of election procedure be utilized for this purpose.

In this connection, the undersigned has given consideration to the possibility of a "Globe" type of election, under which the supervisors would first be given an opportunity to vote whether they wish to be included in the larger unit. However, the fact that Section 34:13A-6(d) specifically refers to such a procedure where there is an issue of including professionals in a unit with nonprofessionals, or craft employees with noncraft employees, but makes no mention of the procedure for other types of situations,

would appear to rule out such an approach in the present case where the disputed issue involves inclusion of professional supervisors in a unit with professional nonsupervisors.

Notwithstanding the latter, it should be recognized that the Commission may choose not to accept the undersigned's previously-outlined interpretation of the relative applicability and meaning of A-5.3 and A-6(d) on the question of inclusion of supervisors in a unit with nonsupervisors. An alternate interpretation is at least possible, under which the undersigned's findings of fact regarding the instant supervisors' lack of authority to recommend discipline would have the effect of permitting them, under A-5.3, to be <u>represented</u> by a union like the present one, which admits both supervisors and nonsupervisors, but would still not permit them, under A-6(d), to be part of a <u>single bargaining unit</u> with the nonsupervisors.

Assuming such an interpretation and decision by the Commission, the result would appear to require here the designation of separate units and separate elections for the supervisors and nonsupervisors, with the right, however, of the Communication Workers of America to appear on the ballot for both units and both elections.

RECOMMENDATION

The undersigned hereby recommends to the Commission as follows:

1. The appropriate unit to be designated should consist of both Case Workers and Supervisors of Case Work, exclusive of the administrative position presently occupied by Mrs. Agnes Demeter.

2. Unless the parties mutually agree on an alternative procedure, an election should be held to determine the majority status of the Communication Workers of America in the above appropriate unit at the earliest possible date.

Eli Rock

Eli Rock
Hearing Officer

June 9, 1969