P.E.R.C. No. 58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF CHOSEN FREEHOLDERS OF THE
COUNTY OF BURLINGTON
Public Employer

and

Docket No. R-58

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, LOCAL 1972,
AFL-CIO
Petitioner

and

BURLINGTON COUNTY COUNCIL NO. 16,
NEW JERSEY CIVIL SERVICE ASSOCIATION
Intervenor

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain employees of the Board of Chosen Freeholders of the County of Burlington, hearings were held on July 8, and 22, 1969 before ad hoc Hearing Officer Robert A. Gorman at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Thereafter, on October 28, 1969, the Hearing Officer issued a Report and Recommendations. Exceptions were filed by Petitioner to the Hearing Officer's Report and Recommendations. Upon a consideration of the record, the Hearing Officer's Report and Recommendations, and Exceptions, the Commission concluded that there was insufficient record evidence to permit a complete determination of the issues. Accordingly, the case was remanded to the Hearing Officer by Order of Remand and Notice of Hearing dated January 23, 1970. Further hearings were held on February 16 and 24, March 13, September 10, and October 16, 1970. Briefs were submitted to the Hearing Officer by December 15, 1970 and the Hearing Officer issued his Report February 10, 1971. Exceptions were filed by the Public Employer to the Hearing Officer's Report. The Commission has considered the record, the briefs, the Reports of the Hearing Officer and the Exceptions, and, on the facts in this case, finds:

1. The Board of Chosen Freeholders of the County of Burlington is a public employer within the meaning of the Act and is subject to the provisions of the Act.

2. The American Federation of State, County, and Municipal Employees, Local 1972, AFL-CIO and Burlington County Council No. 16, New Jersey Civil Service Association are employee representatives within the meaning of the Act.
3. The Employer refuses to recognize Petitioner as the exclusive negotiating representative for certain of its employees; a question therefore exists concerning the representation of public employees and the matter is properly before the Commission for determination.
4. The Petitioner seeks to represent a unit of all blue-collar employees employed at Evergreen Park Mental Hospital, or in the alternative, a unit of blue-collar employees at Evergreen and Buttonwood Hall, which is a home for the aged adjacent to Evergreen. The Employer and Intervenor dispute the appropriateness of both units sought and contend that a county-wide unit of all classified employees is appropriate, or alternatively, a county-wide blue-collar unit. They further contend that the petition, filed May 1, 1969 is untimely, being barred by the February 26, 1969 grant of recognition by the Employer to Intervenor for a unit of all county employees and also by the January 1, 1969 county-wide compensation plan, which, it is argued, amounts in substance to a contract.

In his first Report, the Hearing Officer recommended the petition's dismissal, citing the inappropriateness of the unit(s) sought by Petitioner and suggesting that the appropriate unit be county-wide and be composed of either all blue-collar or all classified civil service employees. The Hearing Officer did not specifically recommend a disposition of the timeliness issue. 1/ In his second Report, following the Commission's remand, the Hearing Officer detailed various facts regarding the status of the Intervenor and its relationship with the Employer in the years prior to the filing of the instant petition. He was not asked to and did not reconsider his earlier recommendation on the question of unit. The Petitioner excepts to the unit recommendation essentially on the ground that it ignores a singular situation which exists among certain blue-collar employees at these medical institutions, viz, that certain individuals are "...in varying stages of rehabilitation from their own institutionalization at other State institutions." Because their particular needs are greater and because of their limitations, it is contended, their placement in a larger unit would, in effect, deny them the constitutional right to organize and a statutory right to be represented in a unit appropriate for their interest.

This exception is without merit. The total number of these so-called "orderlies" is only eight. The record reveals that there are 93 employees at Evergreen Park of whom 76 are blue-collar and 111 employees at Buttonwood Hall of whom 83 are blue-collar. Thus, the orderlies constitute only a small proportion of the total work force at one or

1/ The Employer's motion that the Commission produce the Petitioner's showing of interest is denied for the reasons recited by the Hearing Officer.

both hospitals. There is no justification for establishing a bargaining unit different from what would otherwise be appropriate because a small group of employees are in a unique situation which arises not from the employment relationship but from their medical history. Moreover, it is not clear how the special interest of this small group of employees would be assured protection even in a unit of one or both hospitals.

Equally without merit is the contention that the Employer's compensation plan and its later recognition of the Intervenor operate to bar this petition. The restrictions concerning the timely filing of a petition are solely the product of rule-making authority; they do not necessarily flow from the statute. Since the Commission's rules on timeliness were adopted after the operative facts here, those precise rules are not dispositive of the contention advanced. But we are asked to apply, if not the literal rule now existing, at least the sense of that rule which is intended to protect a properly designated representative for a reasonable period of time so it may, without the disruption of competing claims, achieve its objective, i.e., the negotiation of a first contract, which, if accomplished, warrants an additional period of protection. It seems to us that if a party expects to enjoy the benefits of such a concept, it is encumbent upon it to satisfy, obviously not all the procedural niceties in the existing rule, knowledge of which the parties here could not have had, but at least the substantive conditions which such a concept contemplates. 2/ That is, if an incumbent organization seeks protection of its status as exclusive representative, then its right to that status must be firmly grounded. Such has not been demonstrated on this record. The Hearing Officer was not able, nor are we, to find as fact that the Intervenor clearly enjoyed majority support as an employee representative at the time it received recognition. The membership records of Council No. 16 are inconsistent and their reliability is clouded by the manner in which they were maintained. The Employer refuses to "...argue that, in fact, Council No. 16 represented any specific number of employees in any one year..." All parties concede that majority status was never claimed or proven to the Employer; rather the Employer relied on the traditional relationship with Council No. 16 as the basis for recognition. If majority status is not established and if the Employer relied on less, recognition as exclusive representative falls, and the question of whether the compensation plan should be construed or not as a contract, or in any event as a bar, becomes moot. The Commission concludes that there is no bar to entertaining this petition.

2/ While the Commission's rules had not yet been adopted, Chapter 303 did exist. That statute provides for exclusivity of representative, designated or selected by a majority of employees in an appropriate unit.

For the reasons set forth below, we agree with the Hearing Officer that a blue-collar unit limited to Evergreen Park or to Evergreen Park and Buttonwood Hall is inappropriate.

The Employer and its employees have been subject to Civil Service rules and regulations for over 25 years and consequently there has been and is a general uniformity of treatment in matters of hiring, promotion, termination, title changes etc. The Freeholders retain authority on personnel matters for all county employees and do not delegate significant authority in this area to department or institution administrators. Thus, the administrator for Evergreen-Buttonwood makes recommendations on major personnel actions such as discharge, but does not have the final authority. Since 1949 there has been a single, county-wide wage and compensation plan assuring that occupants of the same job title are in the same pay range regardless of where they work. In that regard, there are several blue-collar classifications at Evergreen-Buttonwood which are also found elsewhere in the county. Thus, a maintenance repairman at Evergreen receives the same rate of pay as a comparable maintenance repairman elsewhere in the county. The compensation plan in effect in 1969 contains a number of provisions in addition to salary range, such as, longevity, overtime, vacations, life insurance, health insurance and sick leave. Each of the items, adopted by the Freeholders, applies uniformly regardless of job title or location of work. It is clear from the above that for a number of years the most significant aspects of personnel policy and authority have been formulated and exercised at the county level (or in conformity with Civil Service regulations) as opposed to departmental or other lower levels, and that such policies are implemented county-wide producing a substantial measure of uniformity in conditions of employment.

A reflection of this fact, and another reason for finding inappropriate the units sought, is the long standing relationship between Council No. 16 and the Employer. As more fully detailed by the Hearing Officer in his second Report, the record reveals that Council No. 16 has for many years been intimately involved in personnel matters on a county-wide basis without regard to particular departments or titles in the county. For a period in the 1940's significant personnel decisions for the county were first cleared with Council No. 16. For 30 years, it has processed employee grievances throughout the county. Since 1949 the method of operation for adoption of the compensation plan has been that Council No. 16 and the Employer discuss in detail proposed changes not only in wage structure but, increasingly in later years, fringe benefits as well. Whether these discussions and this course of dealing rose to the level or fell short of what is now termed collective negotiations is not particularly significant to a resolution of this

unit question and need not be decided here. 3/ The important fact is that Council No. 16 was a moving force and an influential, acknowledged advocate in the formulation of a variety of personnel policies having county-wide application. If Council No. 16 had directed those same efforts to benefit only the limited group of employees at Evergreen Park, and if the Employer had responded with policies affecting that group only, this fact - call it collective negotiations or something less - would be a factor favoring the Petitioner's position. Since, however, Council No. 16 spoke and acted on behalf of all titles in the county 4/ and since the product of that relationship with the Employer was in the same context, that fact fortifies the conclusion that what Petitioner seeks is inappropriate. It demonstrates that the Employer and an organization can act in concert on mutual problems relating to a larger group of employees.

In conclusion, the record in its entirety does not indicate that the blue-collar employees at one or both hospitals constitute a group so distinct as to negate their community of interest with other blue-collar employees of the county or with other county employees generally. The Commission concludes, under all the circumstances, that the interest of the blue-collar employees of the hospital or hospitals are so closely related to the interests of other county employees as to submerge their separate interests. Accordingly, the petition is dismissed. In view of this disposition, no comment is necessary on the Employer's exceptions.

BY ORDER OF THE COMMISSION

William L. Kirchner, Jr.
Acting Chairman

DATED: August 11, 1971
Trenton, New Jersey

3/ Collective negotiations is a requisite to finding "established practice" which under the statue bears on the composition of a unit. Here, however, the issue is scope of unit. And as the Hearing Officer correctly observes, something less than "established practice" or a history of collective negotiations is relevant to a determination of that issue.

4/ A posture not inconsistant with a finding that it was not the majority representative at the time it received recognition.

STATE OF NEW JERSEY

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

Burlington County, Employer and American Federation of State, County, and Municipal Employees, Local 1972 AFL-CIO Petitioner and Burlington County Council No. 16 New Jersey Civil Service Association	:	Docket No. R-58

For the Board of Chosen Freeholders of the County of Burlington:

Sanford Soren, Esq.

For Local 1972, American Federation of State, County, and Municipal Employees:

Robert R. Klingensmith

For Council 16, Civil Service Association:

Martin J. Queenan, Esq.

REPORT AND RECOMMENDATIONS

Pursuant to a Notice of Hearing issued by the Public Employment Relations Commission, the Hearing Officer, Robert A. Gorman, presided at a hearing conducted at the offices of the Commission, on July 8 and 22, 1969.

I. INTRODUCTION

Facts. On May 1, 1969, a Petition for Certification of Public Employee Representative was filed on behalf of Local 1972 of the American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter, Local 1972 or the petitioner). The petition sought certification in a negotiating unit comprising "all 'Blue Collar' employees employed at Evergreen Park Mental Hospital," excluding "all professional, semi-professional, administrative, clerical and supervisors as defined in the Act." At the close of the hearing on the petition, counsel for Local 1972 urged that its petition should be treated as one for certification in either of two negotiating units -- blue collar employees in Evergreen Park Mental Hospital or blue collar employees in a combined unit of Evergreen Park and Buttonwood Hall, a nearby home for the aged (hereinafter referred to as the Evergreen-Buttonwood unit). Counsel stated the willingness and ability of Local 1972 to make an adequate showing of interest in the Evergreen-Buttonwood blue collar unit in the event the Hearing Officer were to find such a unit appropriate. (T. 293-94)

The other two parties to the proceeding -- the Chosen Freeholders of the County of Burlington (referred to herein as the County) and Council 16 of the Civil Service Association (Council 16) -- urged in effect that the petition be dismissed, the appropriate negotiating unit being all classified civil service employees in

the County of Burlington, without exclusion of professional, clerical and supervisory employees as a class. (T. 17, 20, 300, 307)

Evergreen Park Mental Hospital is situated in the County of Burlington in the State of New Jersey. The hospital is operated by the County and the persons employed there are employees of the County. Within sight of Evergreen Park, some 200 yards away on adjacent land, is Buttonwood Hall, an institution for the aged. (T. 87) Buttonwood Hall is also a County institution, and its employees County employees. The persons employed in each institution might fairly be said to fall into three classes: professional, by dint of advanced training in the medical arts; white collar or clerical employees, charged with administration and record-keeping; and so-called blue collar employees. The term "blue collar" employee, imported here somewhat inaptly from an industrial context, shall be defined for purposes of this report to include any employee charged with the rendition of patient care on a sub-professional level, or with the rendition of services to other employees on a day-to-day basis, or with the maintenance and operation of the physical facilities of the institution. Within each of the three classes are supervisory employees, i.e., employees who, in the words of Chapter 303, New Jersey Public Laws of 1968, have the "power to hire, discharge, discipline, or to effectively recommend the same." This division of employees into professional, clerical, blue collar and supervisory is not exclusive to Evergreen Park and Buttonwood Hall but pervades the entire personnel force employed by the County

of Burlington. (County Exhibit No. 6)

Since the advent of civil service in Burlington County in 1942, Council 16 has acted in a number of respects as spokesman for County employees. At first, it served as something of an overseer of personnel decisions made by the County, such as salary changes, title changes, promotion or termination. Any such decisions were first cleared or acknowledged by Council 16. (T. 186-87) Council 16 also participated over the course of time in the resolution of grievances; it served as intermediary between aggrieved employees and the County, and often provided counsel for employees appearing before the Civil Service Commission. (T. 187-89) And, since 1951, when Council 16 apparently first presented to the County its own proposals for a compensation plan to be promulgated by the County for all classified employees on a countywide basis, the County and Council 16 have engaged from year to year in frequent meetings regarding the terms and administration of the plan. (T. 188-90) The compensation plan for the current calendar year, promulgated on January 1, 1969, provides for an increase in annual salary ranges for classified employees on a countywide basis, merit increases, longevity pay, overtime pay, hospital and surgical benefits, life insurance, vacations and sick leave, and retirement. (County Exhibit No. 3) Dealings between the County and Council 16 regarding money matters have continued during the term of the plan. (T. 250)

By resolution of February 26, 1969 -- in response to a request framed by the membership of Council 16 at a membership meeting

on February 19 -- the Board of Chosen Freeholders of the County passed a motion formally recognizing Council 16 as the exclusive negotiating agent for all employees of Burlington County. (County Exhibits Nos. 1, 2) This formal act of recognition was apparently designed to comply with the provisions of Chapter 303, enacted some six months earlier. On March 6, 1969, Local 1972 requested recognition as negotiating agent for the "non-professional employees employed at the Evergreen Park Mental Hospital." (Joint Exhibit No. 2) By letter of March 10, counsel for the County expressed its inability to recognize Local 1972, in the absence of further relevant facts, in view of the pre-existing recognition of Council 16. (Joint Exhibit No. 3) On March 13, by letter to the Executive Director of the Commission, Local 1972 complained of this refusal to recognize, (Joint Exhibit No. 4) and a petition for certification was filed promptly thereafter.

Applicable Law. The relevant legislative guidelines for resolution of this representation dispute are to be found in Chapter 303, New Jersey Public Laws of 1968. Section 5.3 declares that "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." That section also provides that any supervisor shall not be represented by an employee organization that admits nonsupervisory personnel to membership "except where established practice, prior agreement or special circumstances, dictate the con-

trary." Nor, in the absence of such practice, agreement or special circumstances, shall a unit be declared appropriate which includes supervisors as well as nonsupervisors, or professional as well as nonprofessional employees (in the absence of majority consent by the professionals), or craft as well as noncraft employees (in the absence of majority consent by the craft employees). (Section 6(d)). Chapter 303 also declares that nothing therein "shall be construed to annul or modify, or to preclude the renewal or continuation of any agreement heretofore entered into between any public employer and any employee organization." (Section 8.1)

Summary of Conclusions. For reasons to be developed below, it is my conclusion that the petition of Local 1972 should be dismissed, regardless whether it is treated as a petition for certification as representative of the blue collar employees solely in Evergreen Park or the blue collar employees in Evergreen-Buttonwood. I conclude that the unit sought by the petitioner is not, under the circumstances of this case, an appropriate negotiating unit.

II. JURISDICTION OF THE COMMISSION

The County of Burlington is a public employer within the meaning of Chapter 303 and is subject to the provisions of the Act. Local 1972, American Federation of State, County, and Municipal Employees, AFL-CIO, and Burlington County Council No. 16, New Jersey Civil Service Association are employee representatives within the meaning of the Act. Neither proposition is contested.

By letter of June 2, 1969 to the Hearing Officer, copy to the Executive Director of the Public Employment Relations Commission, counsel for the County protested the failure of the Commission to disclose the showing of interest appended to the petition of Local 1972. The letter stated an intention to preserve this challenge to the "jurisdiction" of the Commission. By formal motion before the Hearing Officer, counsel for the County requested that the showing of interest be produced at the hearing. It was argued that this document, evidencing the support among employees for an election in the requested negotiating unit, was essential to the presentation of the County's case; the refusal to make it available to the parties for examination and challenge was said to constitute a denial of due process of law. This motion to produce the showing of interest was taken under advisement by the Hearing Officer, and the proceeding was conducted subject to this attack upon the jurisdiction of the Commission. (T. 10-13)

It is the recommendation of the Hearing Officer that the motion be denied.

The showing of interest is directed to the discretion of the Commission through its Executive Director. Its purpose is to inform him of the need for further proceedings pursuant to the petition for certification. It is not designed to support a claim of a majority in the suggested unit and consequent recognition by the employer, but rather to show that there is sufficient employee support for collective bargaining to warrant the initiation of a full-scale hearing and the possible invocation of the Commission's election machinery. No public interest will be served by the disclosure, prior to the representation hearing, of the names of employees who support an election. Indeed, the Commission might well conclude that the public interest will rather be served by non-disclosure, in keeping with the principles of the secret ballot which underlie the statutory election machinery. Nor has any convincing case been made in support of the proposition that the County's preparation of its case has been hindered by the non-disclosure of the showing of interest. The issue for counsel to address at this stage is not which union has the support of the majority of the employees; disclosure of the showing of interest might well shed light on that question, but it is of course properly to be resolved through the election machinery contemplated by the statute. The issue here is rather the scope of the negotiating unit in which an election might properly be ordered, or whether the petition for an election

is for some reason untimely. The showing of interest is not germane to any issue presently disputed before the Commission.

A contention similar to that of the County was made early in the history of the National Labor Relations Board. The Board rejected the employer's request for disclosure of the showing of interest in order to litigate its sufficiency. It stated:

> [The Company] asserts that the non-disclosure of the report at the hearing in this case is an instance of "star chamber" procedure. These contentions have no merit. We have repeatedly pointed out that such reports are administrative expedients only, adopted to enable the Board to determine for itself whether or not further proceedings are warranted, and to avoid needless dissipation of the government's time, effort, and funds. As such, we have frequently explained, the reports are not subject to direct or collateral attack at hearings.[1] (emphasis in original)

Exactly this view has been endorsed in representation proceedings under the recently enacted Public Employment Relations Act of the State of New York.[2]

Accordingly, the motion of the County to produce the showing of interest appended to the petition for certification, and to dismiss the petition in the event of non-disclosure, should be denied.

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1. O.D. Jennings & Co., 68 N.L.R.B. 516, 517-18 (1946).

2. In the Matter of Union Free School District No. 21, Town of Oyster Bay, Case No. C-0079, N.Y. P.E.R.B. ¶ 1-405 (Dir. of Representation 3/27/68).

III. THE APPROPRIATE NEGOTIATING UNIT

The central question for decision is whether a negotiating unit comprised of the blue collar employees in Evergreen Park Mental Hospital -- alone or in combination with the blue collar employees in Buttonwood Hall -- is an appropriate negotiating unit, such that an election for employee representative within that unit will be consonant with the purposes of Chapter 303.

The job descriptions for all classified civil service positions at Evergreen Park and Buttonwood Hall are collected in County Exhibits 7 and 8, respectively. The parties were able to stipulate that, in the event the requested blue collar unit were found to be appropriate, a number of job titles fell clearly within that unit. Stipulated for inclusion were the cooks, the storekeeper, the seamstress, the maintenance repairmen, the chauffeur, the linen room attendant, the hospital attendants, the food service workers, the building maintenance workers and the building service worker. No stipulation could be secured, for different reasons proferred by different parties, regarding the practical nurses, the head cooks, the senior housekeeper, the maintenance repairman foreman, the senior maintenance repairman, the stationary engineers, the senior food service worker and the orderlies.

I conclude that the following disputed job titles would fall within a blue collar unit, were such held appropriate; the practical nurses, the second head cook, the senior housekeeper, the

senior maintenance repairman, the stationary engineers, the senior food service worker, and the orderlies. I conclude that the employees holding the following job titles are supervisory employees and may thus properly be excluded from a blue collar unit (or, indeed, from any unit comprised of nonsupervisory employees) in the absence of the "established practice, prior agreement or special circumstances" contemplated by Chapter 303: the first head cook and the maintenance repairman foreman.

The last-mentioned employees spend their time predominantly if not exclusively in the scheduling, direction, evaluation and reporting of the work of other employees. (T. 117-18, 276; 56-57, 81, 140-41) They have authority to "write up" their subordinates (T. 276, 57), thereby making an effective recommendation for discipline, normally accepted routinely by the hospital administrator (and his recommendation in turn by the County). (T. 122-24, 272) Accordingly, these employees fall within the statutory definition of supervisor.

The other disputed employees should, however, be included within any blue collar unit in the event such a unit at Evergreen Park or Evergreen-Buttonwood is held appropriate. Detailed reasons are set forth in the margin. Briefly, the tasks performed by the practical nurses are no different from many of these performed by the hospital attendants; they lack the intensive medical training to warrant treating them as professional employees and their control over the work of others is too limited to warrant treating them as

supervisory employees.[3] The second head cook, the senior maintenance repairman, the senior housekeeper and the senior food service worker engage in work with such a predominantly manual component, and their control over the work of others is sufficiently sporadic, limited or routine, that they should not be treated as supervisory employees for the purpose of Chapter 303.[4] The stationary engineers

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3. The job descriptions set forth in County Exhibits 7 and 8 are most revealing. The graduate nurse (a registered professional nurse), stipulated by all parties as excluded from the blue collar unit, must have a more extensive professional education, both in breadth and intensity, than does the practical nurse. The graduate nurse is required to bring a far more thorough knowledge of scientific principles to bear in her dealings with patients. She has greater responsibility regarding patient care and the storage and administering of drugs. (See also T. 278) She is charged with evaluation both of the physical facilities and of the nonprofessional personnel assisting her. She has the professional responsibility to keep abreast of scientific developments and is often called upon to deal with the family of patients or with civic and professional organizations. The practical nurse normally works at the direction of others and ministers to patients in a manner which does not invoke the learning of the biological, physical and social sciences. The operations in which she engages, such as patient care and testing, are relatively routine. In assisting patients in personal grooming and hygiene and the like, the practical nurse shares the responsibilities of the hospital attendants, who were stipulated by all parties for inclusion in the blue collar unit. Many of these distinctions between the registered professional nurse and the practical nurse are mirrored in the statutory law of the State of New Jersey. N.J.S.A. 45:11-13, 11-26, 11-27. Although it was noted at the hearing that the practical nurse is authorized when acting as charge nurse to make scheduling adjustments and to direct the work of others, this authority is invoked but rarely, in unusual or emergency circumstances, and only at times when there is no recourse to her superiors. (T. 111-13, 128) These occasions are far outweighed by the time spent by the practical nurse working in response to the scheduling and direction of her own superiors.

4. The second head cook and the senior maintenance repairman each assumes the responsibilities of his immediate superior in the event of ab-

do not possess those somewhat vague qualifications which warrant treatment as a craft.[5] Nor do the mental or physical disabilities of the orderlies warrant their exclusion from a unit of employees many of whom perform the same tasks under the same employment conditions.[6]

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sence; but this is apparently rare, and they for the most part do those chores which an ordinary cook and ordinary maintenance repairman do, respectively. (T. 48-49, 108-09; 61, 116-17) The senior housekeeper and the senior food service worker present more difficult problems of definition. The senior housekeeper, although possessed of authority to schedule the work of service employees and orderlies and to recommend discipline (T. 52-3, 277), spends almost all of her time engaged in the same unskilled labors as do they. (T. 109, 140, 276) The work of those she supervises is rather routine. Her pay, traditionally less than or comparable to others clearly in the blue collar class (such as seamstress and hospital attendant), reflects the largely nonsupervisory nature of her work. (T. 110, County Exhibit No. 3) (And, in her absence, her "supervisory" responsibilities are apparently regarded as sufficiently inconsequential such that there is no subordinate employee who is authorized to assume them. (T. 137,8)) The same is true of senior food service worker. (T. 67-69, 141-42) All of these "special circumstances" warrant the inclusion of the senior housekeeper and the senior food service worker in the blue collar unit (should such be declared an appropriate negotiating unit), even if those positions might otherwise be classified as supervisory. Chapter 303, section 5.3.

5. The stationary engineers operate the boilerroom at Evergreen Park (which, incidentally, feeds Buttonwood Hall as well, thus emphasizing the operational interrelation of the two County institutions), and are certified after a relatively short period of service. Although it might be urged that they constitute a separate craft, a position never espoused in such terms by any of the parties, it has not been shown that they require such a protracted period of apprenticeship or that they possess the high degree of judgment and manual dexterity which warrants their exclusion from any blue collar unit. Compare American Potash & Chem. Corp., 107 N.L.R.B. 1418, 1423-24 (1954).

6. The touchstone employed in Chapter 303 for determining unit appropriateness is community of economic interest. It is clear from the record that the work responsibilities of the orderlies, and the rules and standards applied to them in their employment, differ in no material regard from those pertinent to other food service and building service workers and building maintenance workers. (T. 69-70, 132-36)

In sum, in the event that a blue collar unit at Evergreen Park or at Evergreen-Buttonwood were to be regarded as appropriate, the following employees would be included for purposes of a representation election: practical nurses, second head cook and the cooks, senior housekeeper, storekeeper, seamstress, senior maintenance repairman, maintenance repairmen, stationary engineers, chauffeur, linen room attendant, hospital attendants, senior food service worker, food service workers, building maintenance workers, building service worker and orderlies. These employees, to the extent that they assist in assuring patient care, employee-service activities and building maintenance, on a nonprofessional and nonsupervisory basis, possess a common interest in representation by a single employee organization for purposes of collective bargaining.[7]

That fact alone, however, does not warrant the conclusion that the blue collar employees at one or both of the County medical institutions constitute by themselves an appropriate negotiating

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7. Although the maintenance repairman foreman and the first head cook fall within the statutory definition of supervisor and are thus properly excluded in the first instance from the blue collar unit here described, they are subject to inclusion "where established practice, prior agreement or special circumstances" so warrant. It is the conclusion of the undersigned that such a practice or circumstances do in fact exist in this case and warrant the inclusion of these two job titles, in the event the Commission should conclude that the undersigned is in error in finding the Evergreen Park or Evergreen-Buttonwood unit an inappropriate negotiating unit. The long-standing practice of dealing with these two employees, at least on matters of compensation, along with all other blue collar employees in the two medical institutions, warrants their inclusion in a common unit. This practice is evaluated in greater detail infra.

unit. That issue can be properly resolved only after considering the requested medical blue collar unit in the context of employment relations throughout the County of Burlington. Full consideration of that context requires the conclusion that the blue collar employees at Evergreen Park or at Evergreen-Buttonwood do not constitute an appropriate negotiating unit. The appropriate unit is no less inclusive than all blue collar employees in the County of Burlington or indeed than all classified civil service employees in the County.

It is true that Chapter 303 provides for an election in an appropriate unit, not the appropriate unit, the most appropriate unit or the optimum unit. Yet, job similarities within a small group of employees ought not be regarded as sufficient to constitute them an appropriate negotiating unit. There may be a community of economic interest between that small group and a larger group of employees which would render severance of the former so disruptive that it should be effected only in the most extraordinary circumstances. This principle is well established in private employment. Under the federal labor management relations act (which also provides for exclusive representation of employees in "an" appropriate unit), a part of an employing enterprise will be considered inappropriate when there is a community of interest among employees throughout the enterprise, created by such factors as similarity of skills and functions throughout the enterprise; central control over hiring and firing, personnel policy and working conditions generally; uniform standards for wages and other economic benefits; physical interdependence or

geographic proximity; and especially some history, or other evidence, of a viable collective bargaining relationship at the more inclusive level.[8] To fragment such a larger cohesive unit, rooted in the com-

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8. Each of these factors is relevant and must be assessed one against the other. The presence of one to a great degree may outweigh several weaker factors to the contrary. In balancing these factors, certain presumptions have been adopted in the private sector. The presumptive validity of the single-plant unit, see Gordon Mills, 145 N.L.R.B. 771 (1963), is met by another forceful presumption toward an employer-wide unit, Vaughn & Taylor Const. Co., 115 N.L.R.B. 1404 (1956). The presumption supporting a systemwide unit is especially strong in the case of public utilities. There, the desire is great to avoid interruption of important public services because of factional labor disputes. See Southwestern Bell Tel. Co., 108 N.L.R.B. 1106 (1954). The analogy in the field of public employment is telling.

Similarity of skills and functions is indicative of community of interest among employees. The similarities do not have to be great, but merely "allied" or in the same general category. See Pine Hall Brick & Pipe Co., 93 N.L.R.B. 362 (1951). Central supervision and control of wages and working conditions and of labor policy create practical difficulties in separating one segment for special treatment. Challenge-Cook Bros., 129 N.L.R.B. 1235 (1961). Centralized control of labor policy, similar to that exercised by the County here, has been held to outweigh contrary inferences from separate immediate supervision, Management Services, Inc., 108 N.L.R.B. 951 (1954), lack of employee integration and work units spread over a broad area, Great Atlantic & Pacific Tea Co., 153 N.L.R.B. 1549 (1965).

Perhaps the most important single factor is a history of successful bargaining on the basis of a requested larger unit. See, e.g., Great Atlantic & Pacific Tea Co., supra. In Bigelow-Sanford Carpet Co., 100 N.L.R.B. 1021 (1952), most of the factors usually considered and noted in the text pointed in the direction of separate plant units; but the fact that parties had been dealing together on a multi-plant basis for fourteen years was held controlling. Such a history has even been held to outweigh prior Board determinations on a single-plant basis, General Motors Corp., 120 N.L.R.B. 1215 (1958), and arguably distinct contracts, Gulf Atlantic Warehouse Co., 111 N.L.R.B. 1249 (1955).

munity of economic interest of the included employees, would be to pit one group of employees within that cohesive unit against another. There is no apparent reason why this principle, developed in the context of private employment, is not fully applicable in the public sector. Indeed, the fragmentation of a cohesive countywide unit, for example, would be even more unfortunate among public employees, in view of the more serious injury to the public which is likely to flow from multiple and divisive representation within a group of employees having a community of interest. This principle has in fact been frequently implemented in the State of New York, under its recently enacted Public Employment Relations Act: "[T]o warrant fragmentation, the record must establish that there is a sharp conflict of interest between the employees the petitioner seeks to represent . . . and all other employees";[9] "[T]he over-all unit determined by the employer must be considered to be the most appropriate unit claimed unless sharp conflicts of interest are caused by the inclusion therein of the employees within the proposed . . . unit [sought by the petitioner]."[10] Local 1972 has provided no reason for finding appropriate any unit of employees less inclusive than countywide.

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9. In the Matter of New Rochelle City School District, Case No. C-0154, N.Y. P.E.R.B. ¶ 2-4003, p. 4156 (Dir. of Representation 3/7/69).

10. In the Matter of the County of Rockland, Case No. C-0189, C-0209, N.Y. P.E.R.B. ¶ 1-430, p. 4104 (Dir. of Representation 10/31/68).

It should be stated at the outset that the blue collar employees in Evergreen Park Mental Hospital can in no way be properly regarded as constituting by themselves an appropriate negotiating unit. An examination of the list of job titles at both Evergreen Park and Buttonwood Hall shows that the blue collar structure at both institutions is identical. (Joint Exhibit No. 1, County Exhibit No. 5) The employees in the same job title at the respective institutions do the very same type of work. (T. 274-75; County Exhibits Nos. 7, 8) Even apart from the very modest degree of employee interchange (T. 87, 272-73) and the direct operational interdependence of the two institutions (the boilerroom at Evergreen Park provides light and power for Buttonwood Hall as well) (T. 274), the employees and the personnel policies at both are directed in common by a single Hospital Administrator. (T. 121, 271-72) He effectively oversees hiring and firing, discipline, and the work rules and conditions for both Evergreen Park and Buttonwood Hall. The scale of wages and fringe benefits, along with hospitalization and insurance plans, is uniform for all employees at both institutions. (Appendices A and B to County Exhibit No. 3) Given all of these circumstances, the strong community of economic interest of the blue collar employees in both Evergreen Park and Buttonwood Hall, in common, is obvious. From the point of view of labor relations and personnel policy, the central criterion for the invocation of the representation machinery of Chapter 303, it is as though both institutions were one. To order an election in the unit requested in the petition of

Local 1972 as originally filed would be unduly disruptive, and the petition as so limited should be dismissed.

It was perhaps with foreknowledge of this likely conclusion that counsel for Local 1972, at the close of the hearing, urged the Hearing Officer to treat the petition as one in the alternative for representation within a unit comprising blue collar employees at both Evergreen Park and Buttonwood Hall. Yet, for much the same reasons as those already adduced for rejecting Evergreen Park alone as an appropriate negotiating unit, the combined Evergreen-Buttonwood blue collar unit is not appropriate. Just as there is no conflict of economic interest which warrants fragmenting the blue collar employees within the two institutions, there is no such justification for fragmenting the Evergreen-Buttonwood blue collar employees from the blue collar employees throughout the County of Burlington. There are indeed other blue collar workers employed within other departments of the County, engaged in the same operations as their opposite numbers in the two medical institutions. (County Exhibits Nos. 6, 7, 8) The work of a maintenance repairman is, according to the job description contained in the civil service classification survey for the County of Burlington (County Exhibit No. 7), the same in nature whether the building in which he works is a hospital or a courthouse. The same would be true, for example, of the building service workers. These workers, all employed by the County in the relative geographic proximity circumscribed by County lines, possess a natural community of economic interest. Moreover, the Board of Chosen Freeholders of

the County retains central and ultimate authority over the hiring, discipline and discharge, and the wages and working conditions of the employees in all departments of the County, Evergreen Park and Buttonwood Hall included. And the standards centrally established are uniformly applied to all county employees having the same job title. Such is the case, for example, with the wage and compensation plan (County Exhibit No. 3) now in effect in the County; the benefits declared are structured not along departmental lines but in accordance with job title regardless of department.

Of special significance is the lengthy history of dealing between the County and Council 16 for all County employees. Personnel decisions have been screened and aggrieved employees represented by Council 16 for almost thirty years. The compensation plan, effective countywide, has been the product of annual joint negotiations between the County and Council 16 for eighteen years. This long-standing course of dealing on a countywide basis -- with no distinctions between blue collar, white collar or professional employees -- affords convincing evidence that a countywide negotiating unit is likely to be cohesive and viable in the future. It matters not that the dealings between the County and Council 16 have not been reduced to a formal, comprehensive and mutually executed collective bargaining agreement. It is not at all uncommon in public employment to have an agreement, negotiated in every sense of the word with an employee organization, take the form of a directive promulgated by the public employer. Indeed, it is not at all clear

that the County, prior to the enactment of Chapter 303, could lawfully have granted exclusive recognition to an employee organization through a formal bilateral contract; this, in view of the acknowledged responsibility of a public agency to hear all parties, individual employees and minority unions, petitioning for the redress of their economic grievances. In any event, what is important is that the record supports the conclusion that countywide bargaining can be successful and that divisive conflicts of interest within such a unit are not evident. It is also of some significance that there is an employee organization which is a party to this proceeding and which stands ready to represent the employees in a countywide unit; and that the County is itself prepared to deal with its employees on that basis.[11]

All of these facts -- similarity of skills, central determination of working conditions, uniform compensation throughout the county, geographic proximity, a long history of successful collective negotiations and an employee organization and public employer willing to deal on a countywide basis -- point compellingly toward a single countywide negotiating unit. No conflict of interests within the countywide unit was proferred by counsel for Local 1972 as a justification for fragmenting the unit.[12] Indeed, the preeminent reason for petitioning for the medical blue collar unit was that set forth

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11. The employer's unit determination is given "some weight" in the New York public employment decisions. See, e.g., id. at p. 4104 n. 19.

12. It is simply not sifficient -- given the weight of other facts in the case -- to argue that Evergreen Park employees constitute an

in the closing argument on behalf of the petitioner: Local 1972 is able to organize on that more limited basis and to bring promptly to Evergreen Park the benefits of collective negotiations. (T. 292-93) This "extent of organization" criterion is expressly condemned by the federal labor statute as the controlling factor in making a unit determination,[13] and has also, even in the absence of statutory mandate, been rejected as a sufficient basis for structuring collective negotiations among public employees under the New York Public Employment Relations Act.[14] Even assuming that Local 1972 could bring the benefits of collective negotiations to a limited group of blue collar employees in the County of Burlington, this should not warrant the fragmentation of a countywide unit which is in all respects an appropriate unit under the facts of this case.

A recent decision under the New York Public Employment Relations Act involved facts strikingly similar to those in the instant case. There too, the American Federation of State, County and Municipal Employees sought an election among blue collar employees working in two county medical institutions. The Director of Representation dismissed the petition, finding the unit inappropriate.

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appropriate unit because they do not work with the Buttonwood employees, may not administer the same kind of patient care and might conceivably have different work schedules from the Buttonwood employees without having any adverse effect. (T. 291-92) That hardly proves a lack of community of interest, let alone a serious conflict of interests.

13. Section 9(c)(5), 29 U.S.C.§ 159(c)(5). See National Labor Relations Board v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965).

14. In the Matter of the County of Cattaraugus, Case No. C-0193, N.Y. P.E.R.B. ¶ 1-441 (Dir. of Representation 1/13/69).

The employment structure within the two institutions was the same as that at Evergreen and Buttonwood. There too, employees with similar job titles and skills worked in other departments of the County. There too, compensation and fringe benefits and the like were applied countywide. There too, the County had recognized the county chapter of the Civil Service Association as the exclusive negotiating representative for an overall county unit, one month before the filing of the certification petition. The Director held:[15]

> In making this determination in a case where the employer has previously designated an over-all unit as being appropriate, it is important to ascertain whether there are any conflicts of interest between groups of employees included therein. . . . . [T]he Board has consistently refused to fragment out of an over-all unit including blue-collar employees, one small group of the latter.
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> In the instant case, it is clear that all county employees share a substantial community of interest inasmuch as they are subject to the same graded salary schedule and are entitled to many of the same fringe benefits. Therefore, the over-all unit determined by the employer must be considered to be the most appropriate unit claimed unless sharp conflicts of interest are caused by the inclusion therein of the employees within the proposed infirmary services unit. . . .
>
> . . . [N]o persuasive reasons are apparent for finding that the proposed infirmary services unit is appropriate, inasmuch as the record does not establish that they are subject to unique working conditions which negate for them the possibility of effective negotiations within an over-all unit. . . . Contrary to AFSCME's contention, it is clear that this proposed unit may not be deemed appropriate merely because it would exclude professionals and technical and clerical employees who work within the same departments as these

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15. In the Matter of County of Rockland, Case No. C-0189, N.Y. P.E.R.B. ¶ 1-430 pp. 4104-05 (Dir. of Representation 10/31/68).

> blue-collar employees. Accordingly, and in order to best effectuate the purposes of the Act, I find that the unit claimed in Case No. C-0189 is not appropriate.

In other representation cases brought before the New York Public Employment Relations Board, it has been held that, in the absence of a proven conflict of interests, a single department should not be fragmented from a village-wide or countywide negotiating unit;[16] and equally relevant, that a countywide group of blue collar employees should not be fragmented from a countywide unit of all classified civil service employees, white collar as well as blue

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16. In the Matter of the Incorporated Village of Great Neck, Case No. C-0041, N.Y. P.E.R.B. ¶ 1-411 (Dir. of Representation 5/24/68) ("Although the job duties and hours of work may vary from the sewer department employees in comparison to some of the other village employees, they nevertheless have a substantial community of interest with all other village employees since their terms and conditions of employment are determined in the same manner. Further, there is nothing in the record to establish any real conflict of interest between the sewer department employees and the other village employees, nor is there anything in the record to indicate that a general unit of all employees could not negotiate effectively with regard to terms and conditions of employment."); In the Matter of County of Cattaraugus, Case No. C-0193, N.Y. P.E.R.B. ¶ 1-441 (Dir. of Representation 1/13/69).

collar.[17]

In view of the request by the petitioner for, at the largest, a negotiating unit comprised of the blue collar employees at Evergreen-Buttonwood, and in view of the statutory directive that "the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute," the Hearing Officer in this case did not see fit to develop at length the question whether the appropriate countywide negotiating unit is comprised of all blue collar workers in the County or, more inclusive, all classified civil service employees in the County. Either unit might plausibly be regarded as appropriate.[18] In any event, neither of the two units sought by petitioner is appropriate, and the petition should accordingly be dismissed.

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17. In the Matter of New Rochelle City School District, Case No. C-0154, N.Y. P.E.R.B. ¶ 2-4003 (Dir. of Representation 3/7/69). The facts are similar to those of the instant case. In 1964 and 1967, the school district had passed a resolution recognizing the Association of Civil Service Employees as negotiating representation of all "civil service employees." In 1968, AFSCME petitioned for certification on behalf of all nonsupervisory employees in a single department of the school district, and subsequently amended its petition to cover all nonsupervisory blue collar employees through the district. In view of the central determination of working conditions, the uniform compensation schedule and benefits, and prior negotiations in an over-all combined unit of white collar and blue collar workers, the over-all unit was held appropriate. The record failed to support any conflict of interest between the white collar employees and the blue collar employees, and "there is nothing in the record to indicate that subsequent negotiations on such an over-all basis could not be conducted effectively." Id. at 4157.)

18. Thus, in the Rockland County case in New York, note 15 supra, the appropriate unit was a county-wide unit of blue collar workers; in the New Rochelle case, note 17 supra, the appropriate unit was a county-wide unit of both blue collar and white collar workers.

IV. TIMELINESS OF THE PETTTION

Apart from the question of the appropriate negotiating unit, much attention was directed at the hearing to the question whether the petition of Local 1972 had been timely filed. It was argued by counsel for the County and for Council 16 that the promulgation of the countywide compensation plan on January 1, 1969, and the February 26 resolution recognizing Council 16 as exclusive negotiating agent, constituted a bar to the filing of a certification petition in March. No authority was cited in support of this proposition. In effect, the Hearing Officer was invited to create a rule patterned after the so-called contract bar rule which obtains under the federal labor act.

A number of very vexing issues are raised by such a claim. First, there is the question whether a Hearing Officer of the Commission is empowered, in the absence of statutory directive and in the absence (at the time both of the operative facts and of the hearing) of rules formally promulgated by the Commission, to fashion such a rule in the context of a particular representation hearing. Second, there is the question whether the recognition extended to Council 16 on February 26 -- and, in effect, earlier when the County negotiated the 1969 compensation plan -- was consistent with the principles of Chapter 303; i.e., whether at the time of the recognition Council 16 in fact had majority support in the claimed countywide negotiating unit. The director of the Board of Chosen Freeholders of

the County of Burlington testified that the County believed Council 16 to have a majority in view of the long tradition of dealing with Council 16 as spokesman for the employees, apparently without objection on the part of those employees. (T. 248-49) But not only should the recognition be based upon a good faith belief in the majority status of the employee representative, but that status should exist in fact, in order to protect fully the rights given to employees by Chapter 303. Although Council 16 was prepared to make available to the Hearing Officer its membership records as of January 1, 1969 and earlier, it was decided that this rather burdensome offer of proof -- subject to particularized challenges by Local 1972 -- might be held in abeyance pending a determination by the Hearing Officer that it was absolutely necessary. The third, and perhaps most difficult, issue raised by a claim of contract bar is the question whether the compensation plan was the kind of agreement necessary to warrant the application of the contract bar rule. Counsel for Local 1972 asserted that the compensation plan was defective in both form -- there was purportedly no fully negotiated, mutually executed and mutually binding written agreement -- and substance -- it sets terms regarding only a single feature of the collective bargaining relationship, i.e., compensation. This third point in issue was helpfully discussed by counsel in their closing arguments.

Most of these issues have been clearly settled by the Rules and Regulations promulgated by the Commission on August 29, 1969. But

there is some doubt regarding the applicability of these rules to the instant case, in view of the fact that both the operative facts and the hearing pre-date the effective date of the Rules.

In any event, the issue of timeliness becomes relevant only if it is first determined that the negotiating unit sought by the petitioner is indeed an appropriate one. The Hearing Officer has concluded that the requested unit is not appropriate, and that conclusion serves as an independent ground for dismissal of the certification petition.

V. RECOMMENDATIONS

1. The motion of the County to produce the showing of interest appended to the petition of Local 1972 should be denied.

2. The petition should be dismissed.

Dated: October 28, 1969

Robert A. Gorman

Robert A. Gorman
Hearing Officer

STATE OF NEW JERSEY
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

IN THE MATTER OF:

THE BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF BURLINGTON,

Public Employer,

- and -

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1972, AFL-CIO,

DOCKET NO. R-58

Petitioner,

- and -

BURLINGTON COUNTY COUNCIL NUMBER 16, NEW JERSEY CIVIL SERVICE ASSOC.,

Intervenor

A P P E A R A N C E S

For the Public Employer: SANFORD SOREN, ESQ.

For the Petitioner: STEPHEN F. LICHTENSTEIN, ESQ.

For the Intervenor: MARTIN QUEENAN, ESQ.

REPORT

Pursuant to a petition for certification of public employee representative filed by Local 1972, American Federation of State, County and Municipal Employees (hereinafter, Local 1972), the undersigned Hearing Officer presided at hearings held on July 8 and 22, 1969. Local 1972 contended that the appropriate negotiating unit in which to conduct an election was comprised of nonsupervisory "blue collar" employees at Evergreen Park Mental Hospital (later orally amended at the hearing to include like employees at Buttonwood Hall, a contiguous institution for the aged), operated by the Board of Chosen Freeholders of the County of Burlington (hereinafter sometimes referred to as the County). Both the County and Burlington County Council No. 16, New Jersey Civil Service Association (hereinafter, Council 16), contended that the appropriate negotiating unit was county-wide, comprising either all "blue collar" employees in the county or all classified employees in the county, blue collar and white collar. In a Report and Recommendations issued on October 28, 1969, the undersigned Hearing Officer adopted the position urged by the County and Council 16 and concluded that a blue collar unit at the institutions would exclude other County employees who shared a

community of interest. Finding that unit to be inappropriate, the undersigned recommended that the petition of Local 1972 should be dismissed.

By order dated January 23, 1970, the Executive Director of the Commission remanded the case to the Hearing Officer. The order of remand stated that the Commission "concludes that there is insufficient record evidence to permit a complete determination of the issues." The purpose of the remand was narrowly confined: "Accordingly, the case will be remanded to the Hearing Officer for the limited purpose of taking evidence on the following questions," most of which dealt with specific aspects of the relationship between Council 16 and the County. Further hearings were held on February 16, February 24, March 13, September 10 and October 16, 1970. The hearing was declared closed as of November 4, 1970, and briefs were submitted to the Hearing Officer on December 15, 1970.

Although it was suggested by counsel upon the resumption of hearings on remand that the Hearing Officer was charged simply to "take evidence" on the five stipulated questions, it was then and continues to be the position of the Hearing Officer that the order of remand contemplates the making of factual findings

and conclusions by way of summary of and inference from the record evidence. The parties have, however, for the most part rather consciously avoided the re-argument of the strictly legal conclusions readhed by the Hearing Officer in his initial Report and Recommendations. The parties made no attempt to analyze the impact upon this case of various decisions of the Commission and of the Executive Director rendered since the filing of the Report and Recommendations in October of 1969. The undersigned also considers himself bound by the rather specific mandate of the order of remand, and has refrained from any systematic re-consideration of his earlier analysis of law.

The factual questions posed in the order of remand will be considered seriatim.

(1) <u>The precise nature of the relationship between the Employer and Intervenor and whether it differed in character from one period to another</u>.

The activities of Council 16 in and with the County apparently date back to the institution of civil service there in 1942. For a brief period of time thereafter, all significant

personnel decisions made by the Board of Chosen Freeholders, such as transfers and reclassifications, were first cleared with Council 16 through its Civil Service Committee. From 1942 until the present, Council 16 through its Civil Service Committee has also represented County employees before the Freeholders and before the State Civil Service Commission in prosecuting grievances relating to employment. From 1949 through 1969, the County salary resolutions and compensation plans from year to year followed upon arms'-length discussions between Council 16 and the Board of Chosen Freeholders, although the record shows that no bilateral written contract was ever executed by the parties and invites some doubt regarding the extent to which the Freeholders relinquished a determinative voice in the settling of such matters. Details as to the relationship between the County and Council 16 follow herein.

Personnel Decisions. As early as 1942 or 1943, the Board of Chosen Freeholders, when about to take action on personnel recommendations by County department heads, would inform the Civil Service Committee of Council 16 and wait for its approval

prior to doing so. This covered such matters as "employment, termination, salary changes, title changes," (T.186) and "vacation, sick leave, overtime, requests for a leave of absence, promotion" (T.569). Although the primary reason for this procedure appears to have been to inform Council 16 of such decisions in order to alert them to personnel developments within the County, there were also occasions on which Council 16 took issue with such a decision and communicated its differences to the County which thereupon modified or rescinded the action. (T. 569-70) It is unclear how long this practice continued, but it appears to have terminated no later than 1950, when regularity of treatment of employees was thought fairly well assured by the compensation plans settled between Council 16 and the County. (T. 188-89)

Grievances. As early as 1942 or 1943, employees of the County who felt aggrieved by decisions of supervision could and did take their case to the Civil Service Committee of Council 16. Council 16 served as spokesman for the employee in dealings with the Board of

Chosen Freeholders, and would provide an attorney for the grievant in the event his case reached the Civil Service Commission. (T. 187-89) Council 16 continues to process employee grievances before the Freeholders to this date, for all County employees. (T. 188, 241-42, 483) Indeed, shortly before the adoption by the Freeholders in February 1969 of a resolution recognizing Council 16 as exclusive bargaining representative for County employees pursuant to Chapter 303, Mr. Tamn, presently the President of Local 1972, took a grievance to Council 16 which through its Civil Service Committee presented the grievance to supervision, although it was ultimately settled adversely to Mr. Tamn. (T. 809, 823-25; Council 16 Exhibit No. X A(3), Minutes of October 16, 1968, at page 118). No other employee representative prior to the enactment of Chapter 303 played any similar role in the processing of employee grievances. (T. 571-72)

Compensation Plan and Salary Resolutions. From 1949 through 1969, the Board of Chosen Freeholders of the County promulgated salary resolutions for each year covering all employees

in the County, blue collar and white collar, professional, supervisory and craft. In each case, these followed upon a number of meetings in the fall preceding the effective year date of the resolution. Over the course of time these meetings came to cover such matters as annual salary ranges for classified employees on a countywide basis, merit increases, longevity pay, overtime pay, hospital and surgical benefits, life insurance, vacations and sick leave and retirement. (County Exhibit No. 3; T. 245, 613) There was typically no discussion at these sessions of such other general matters as promotions, demotions, transfers, seniority, grievance procedure, health and safety. (T. 245, 613) The reason for the exclusion of these matters was given by Freeholder Mahon: "(M)ainly because of Civil Service. They have their own rules and regulations that we follow, as far as grievance procedures are concerned and seniority." (T. 245) Typically, the year-end meetings between representatives of Council 16 and the County would number anywhere between one and six or seven, with meetings

held most frequently in the middle and late 1960's; for example, some six or seven meetings were held in late 1968 to discuss the 1969 compensation plan and it appears that these were supplemented by further more informal meetings. (T. 237, 568, 680-81) After the initial contact, usually the submission by Council 16 of written proposals regarding salary and fringes, further meeting times would be set up at the Freeholders office at the mutual convenience of the County and Council 16. (T. 496, 542, 567-68, 680) The meetings, some of which lasted beyond closing time at the Freeholders office, were usually held in an office occupied by the Director of the Personnel Committee of the Freeholders, and it was he who "presided" in the sense of beginning each meeting with an invitation to the representatives of the Civil Service Committee of Council 16 to make their presentation. (T. 542, 544, 569) There was apparently no formal chairman of the meeting with responsibility for channeling the course of discussion; the atmosphere was informal. (T. 544) The same procedures for discussion appear to have been followed throughout the twenty-year period during which the compensation plan was jointly considered, although in the period

through 1953 these private discussions were actively supplemented by appearances of Council 16 representatives at the public meetings of the Freeholders. (T. 563-66)

There appears to have been considerable "give and take" at these private sessions, in the sense of presentation of opposing positions, computation and discussion of costs by both parties, mutual consideration of alternatives, and modifications of positions earlier espoused. (T. 582-87, 761-62) Council 16 would always demand a salary increase for the forthcoming year; while an increase was commonly granted, it usually was less than that initially sought by Council 16. After each of the meetings, a different set of proposals would emerge from the discussion, and the Freeholders would have their Administrative Secretary make cost computations at each successive stage. This process of adjustment of position and re-computation of costs would typically occur on three or four occasions during the fall meetings. At each stage, the Freeholders would determine the cost of the economic package requested by Council 16, consider the feasibility thereof and present their objections to the representatives of Council 16. The record, however, affords no clear impression

whether the Freeholders actually formulated specific counterproposals to match those tendered by Council 16. At each stage, the costing appears to have been of the proposals put forth by Council 16, and it is those proposals which appear to have been modified at each of the successive meetings. Reading the record most favorably to Council 16, whether the source of the various proposals was the County or Council 16 is unknown or uncertain (T. 584, 589); reading the record most unfavorably, the modifications were all on the part of Council 16 and there were no counterproposals or compromises by the Freeholders (T. 585-86, 761-63). (The latter characterization is somewhat difficult to accept literally, witness the fact that on at least one occasion, the County accepted outright the compensation proposal put forward by Council 16. (T. 243))

The "final determination" as to the contours of the compensation plan appears to have been made by the Board of Chosen Freeholders. Defining that point at which there is a "final determination" on a matter of governmental policy is at best an elusive task. Suffice it to say that there appears to have been no point in time, at the conclusion of the discussion

meetings, at which there was a clear mutual understanding that a firm arrangement had been settled. Council 16 is said to have sat in on discussions until "just before" the County made its final determination. (T. 503) Council 16 received word of the specific provisions of the compensation plan at some later point in time, either shortly before its formal adoption (T. 504), or in January 1 of each year when it was promulgated by the Freeholders at a public meeting (T. 764). One of the witnesses -- who, although a former Clerk of the Board of Chosen Freeholders, exhibited some animosity toward that body (see T. 724-25, 738-40 for the possible reasons), but whose testimony is not contradicted in the record -- testified that Council 16 left the last meeting with the County representative without knowing the final form of the compensation plan (T. 764-65, 771), and that Council 16 was later informed by the Board of Freeholders of "its decision" at the same time as the public generally (T. 684, 687, 715). If the plan proved objectionable or inequitable at a later date, further consultations with the Freeholders would be initiated by representatives of Council 16. (T. 505)

The above description appears fairly to represent the course of dealings between Council 16

and the County throughout the period pertinent to this proceeding, 1949 through 1969. (T. 567, 765)

This description is confirmed by references in the minutebooks of Council 16, in which are recorded the proceedings of meetings of the membership and trustees of Council 16. Although none of the parties to this proceeding made specific references to the minutebooks, the Hearing Officer examined those books and, for the convenience of the Commission, sets forth herein certain relevant excerpts covering the period 1965-68. (Council 16 Exhibit No. X A(3)) In February 1965, it is recorded that the Board of Chosen Freeholders has reported that "they had already settled the salary question, but called the (Civil Service) committee in before same was released to the press." In October 1965, it is recorded that while there was no meeting with the Board on the salary plan, "two Freeholders have promised favorable action and were highly in favor of plan." In January 1966, it is reported that the Freeholders "lead the (Civil Service) committee to believe that every employee would receive at least $300" and major medical. In December 1966, the Freeholders are recorded as having expressed opposition to a civil service survey, but "The Board gave permission for the Civil Service Committee

to contact the Civil Service Commission" regarding revised titles and salary on the survey. In March 1967, the minutes note a letter to the Freeholders, thanking them "for considering the Civil Service Committee and officers as well; also for adoption of the Board of the new compensation plan" and other benefits. At the meeting of April 1967, 50 members present signed cards printed at the request of the president of the association and addressed to Governor Hughes (apparently in connection with collective bargaining legislation), those cards reading: "We protest 'deals' by any State officials turning public employees over to union domination. Grievance procedures logically belong in the Civil Service Department. Do not permit interference with Civil Service rights." And, in October and December 1968, reference is made -- apparently in each instance to the Board of Chosen Freeholders -- that "no decisions have been made as yet concerning our salary requests for next year." (Minutebook pages 15, 32, 38, 61, 79, 81, 118, 122) It must also be noted that at least one earlier entry reflects a more conventional picture of collective bargaining. In September 1961, the minutes state that it is "time

to consider the requests" to be made to the Freeholders regarding the 1962 compensation plan, and that a motion was carried that the salary committee should present its proposal to the Freeholders at the earliest date, and that "if this was not accepted by the Freeholders that a substitute proposal should be offered by the Board" and a special meeting of Council 16 called "to further consider the counter proposal of the Board of Freeholders." (Council 16 Exhibit No. X A(2) pp. 203-04)

There appears to be no credible evidence in the record -- either in the minutes of Council 16 or in the testimony -- that any compensation plan settled after discussions between Council 16 and the County was ever brought back to the membership of Council 16 for ratification. (Compare T. 498-500) It is uncontested that prior to the adoption of Chapter 303, the compensation plan was never reduced to writing in the form of a bilateral agreement intended for execution by both the County and Council 16, but was rather promulgated in the form of a governmental resolution. (T. 190-91, 502-03, 545) The contract between the County and Council 16, dated December 31, 1969, after the

initiation of this proceeding, is the first bilateral written agreement executed by these two parties. (T. 650-51)

Other Matters. It was stipulated that the County has never extended to Council 16 -- or to any other employee organization -- the privilege of check-off, or of deduction of association dues from the salaries of the County employees. (T. 424-26)

By notice to all County employees, apparently only in early 1968 and early 1969, a formal invitation was extended by the Freeholders to make an appointment to meet for the "purpose of general discussion and suggestions relative to Burlington County government and/or personnel matters"; a number of County employees appear to have taken advantage of that invitation. (County Exhibit No. 4; T. 524-26)

(2) Whether the Intervenor, acting in a capacity of employee representative, represented a majority of all county employees at any time; if so, for what period or periods of time.

This question invites in turn two separate inquiries: (a) Did Council 16, during the period in question, act "in the capacity of employee representative"? and (b) Did it represent at any

period of time a majority of all county employees? The first inquiry is one of "law," involving a definition of the term "employee representative," while the second is one of fact.

Chapter 303, section 34:13A-3(e) defines a "representative" to include "any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them." The application for membership in Council 16 (AFSCME Exhibit No. 8A) invites the applicant to sign the following statement:

> Understanding the purpose of the New Jersey Civil Service Association to be for Civil Service extension; the preservation of the Civil Service Laws; the promotion of the welfare of the members; that political action by the organization is restricted to the furtherance of these purposes, I hereby make application for membership in the New Jersey Civil Service Association.

It may well be too late in the day -- in this proceeding and in the development of collective bargaining in public employment -- to question the status of Council 16 as a "representative" of employees under Chapter 303. Although the status of Council 16 as employee representative was not contested at the hearing prior to the

order of remand, Local 1972 now rather clearly challenges its claim to that status in its brief herein. Chapter 303 requires an "authorization" by a group of public employees to "act on its behalf and represent it." Closest to this definition is the authorization in the Council 16 membership application of "political action" for the "promotion of the welfare of the members." This form of authorization contrasts sharply with the provision in the membership application currently being used by Council 16 (AFSCME Exhibit No. 10A), whereby the signatory designates and authorizes the Civil Service Association

> to act for me pursuant to Chapter 303, Public Law 1968, as my exclusive agent and representative for the purpose of collective negotiations with respect to terms and conditions of employment, the negotiation of collective agreements, and any questions arising thereunder . . . .

The old Council 16 membership application also contrasts with that employed by Local 1972 (AFSCME Exhibit No. 9A), wherein the signatory designates AFSCME "as my representative for purposes of collective bargaining of matters of wages, hours, and other conditions of work." In spite of this contrast, the Hearing Officer believes that the record as a whole will support the conclusion that members of Council 16 were aware that "policial action"

included direct dealings with the County, in the form of discussions and grievance-processing, and that the "promotion of the welfare of the members" encompassed improvement in their wages, hours and conditions of employment. Application for and retention of membership in Council 16 may thus fairly be treated as the kind of authorization contemplated in the definition of employee "representative" in Chapter 303.

The issue was mooted whether an employee organization can properly be denominated a "representative" if it deals with the public employer on only a single subject, i.e., compensation and fringe benefits, to the exclusion of such issues as seniority, discipline, health and safety and grievance procedure; and if that organization fails to secure a binding, bilateral and jointly executed written agreement from the public employer. There appearing to be no authority on either side of this issue, the undersigned Hearing Officer concludes that, while such information may bear upon the question of "established practice, prior agreement or special circumstances" as that affects the extent of the bargaining unit or of representation rights of an employee organization (Section 34:13A-5.3), it

does not under Chapter 303 bear directly upon the status of such an organization as a "representative" under section 34:13A-3(e).

If the Hearing Officer errs in that regard, and Council 16 is to be treated as an "employee representative" only in the event that its dealings with the Freeholders on personnel matters are expressly authorized by its members, or only in the event that it deals with the County on the full range of personnel issues (beyond compensation) and reduces any agreement to a bilateral written contract, then Council 16 may not be treated as such for purposes of Question 2 in the order of remand.

Assuming Council 16 to have been acting in the period 1942-1969 in the capacity of employee representative, the record lends considerable support to the conclusion that it did count among its members a majority of all employees in Burlington County. The evidence in the record is, however, fragmentary and largely inconclusive.

It should be noted at the outset that -- even assuming Council 16 to have numbered a majority of County employees among its members -- it never tendered formal proof of such to the

County; nor did the County, in dealing with it prior to 1969 and in recognizing it as exclusive bargaining representative in February 1969, request such proof or rely on any such proof. This matter will be explored more fully in the answer to Question 3.

The membership and financial records of Council 16 were introduced in evidence, and the number of paid members ascertained. The paid membership in each year from 1956 through December 1968 was computed as follows: (Council 16 Exhibit No. I(A); T. 332-33)

1956 -- 360	1962 -- 353
1957 -- 380	1963 -- 329
1958 -- 380	1964 -- 329
1959 -- 415	1965 -- 329
1960 -- 405	1966 -- 412
1961 -- 353	1967 -- 412
	1968 -- 412

There are some discrepancies in the record, however. Council 16 Exhibit No. XII(A), purporting to be a list of members as of 1966, totals roughly 470. A 1968 figure different from the above (but consistent with it) reveals a membership of 427 as of December 1968, just shortly prior to the recognition of Council 16 as exclusive bargaining representative for County employees. Unfortunately, the accuracy of these figures as representing those County employees

who were members of Council 16 at any given time is not fully compelling. The tabulated figures above were deduced from certain checks representing the periodic per capita tax paid by Council 16 to the state Civil Service Association (25 cents for each member); as such, cross-examination revealed that there may have been inaccuracies created by such circumstances as delayed payments and unrecorded withdrawal and resignation of members. (T. 338-42, 390-91) Moreover, the membership of Council 16 includes employees working not only for Burlington County but also persons employed by the state and by various municipalities; non-County employees were, however, estimated at only some 30 in number. (T. 256-57)

No specific figure was offered as the total number of County employees in any of the years in question. The Hearing Officer was, however, given access to County payroll records and to the annual salary resolutions promulgated by the Board of Freeholders. A random count of County employees as listed in the salary resolutions reveals that in 1959, there were 493 employees on the County payroll; in 1963, 603 employees; in 1966, 645 employees; in 1967, 694 employees; in

1968, 719 employees; and as of January 1, 1969, just prior to recognition of Council 16 by the Freeholders, 715 employees.

The most accurate count of Council 16 members appears to have been made from the individualized membership records as of December 1967 and December 1968, showing membership of 412 and 427 respectively. (T. 977-78) (The increases to 508 in December 1969 and 569 in September 1970 have been disregarded, since they post-date the recognition of Council 16 and the petition of Local 1972.) Discounting for the state and municipal employees who are members of Council 16, it appears that that employee organization counted among its members a clear majority of all County employees for at least two years prior to its recognition by the County. To the extent that the membership figures tabulated above for the period since 1956 can be treated as roughly accurate, it may be inferred that a majority of County employees held membership in Council 16 for at least a decade prior to its recognition as exclusive bargaining representative in February 1969.

(It should be noted that both the County and Council 16 appeared less than confident regarding the number of members of the Council

and the proportion of County employees comprised thereby. Indeed, in the County's post-hearing brief on remand (p. 13), it is stated that: "(W)e shall not play the 'numbers game' and argue that, in fact, Council No. 16 represented any specific number of employees in any one year during the 30 years in which they have been active in the County." Moreover, by petitions apparently circulated in late February and March of 1969, after recognition had already been extended by the County, Council 16 sought signatures beneath the legend: "We hereby recognize Burlington Council No. 16 Civil Service Association as the sole bargaining agent for us with the governing body." (Council 16 Exhibit No. 2) And, by letter of August 4, 1969, Council 16 sought signatures on authorization cards and asked the recipient employee "to give Council No. 16 an opportunity" to represent all County employees. (AFSCME Exhibit No. 10A) These petitions and letters, born no doubt of an excess of caution, are not necessarily inconsistent with a belief that Council 16 already had majority support

prior to recognition. In any event, counsel for the County stipulated that recognition was extended to Council 16 for reasons other than the petitions in question. (T. 166, 216-17))

(3) If the Intervenor enjoyed majority status, how was such demonstrated to the Employer. It is uncontested that Council 16 at no time made a formal showing of majority support -- by petitions, authorization cards, membership records or otherwise -- to the Freeholders prior to their recognition as exclusive bargaining representative in February 1969. The County continued to deal with Council 16 in view of the support it appeared to have from the employees of the County -- who were in visible attendance at meetings of Council 16, and who at no time challenged the authority of Council 16 to speak for them -- and in view of the fact that there was a tradition of dealing with Council 16 as spokesman for the County employees. (T. 166, 248-49, 305-306, 483-84, 505-06) The basis for recognition was articulated by Freeholder Mahon, in charge of personnel for the County, in response

to questions from the Hearing Officer:

> MR. GORMAN: Can you explain what moved the Board of Chosen Freeholders to recognize Council 16? Were there any petitions before the Board signed by the employees; was there any other evidence considered by the Board, such as the support which the Council had among the employees in the County?
>
> THE WITNESS: No other evidence, other than we have been dealing with these people for quite a few years.
>
> Certainly, we recognized them because they are the ones that --
>
> MR. GORMAN: They are the ones that you dealt with traditionally in the past?
>
> THE WITNESS: Yes
>
> MR. GORMAN: Although, as far as you know, at no time was there any specific showing that they represented or had the support of a majority of the employees of the County?
>
> THE WITNESS: Well, all I can say is that at no time was there any showing that they did not have a majority representation or that they did not represent the majority of the County employees.

Counsel for the County stated: "The basis for the recognition given to Council 16 was the 23 or more years in which they had negotiated with the Board of Chosen Freeholders . . . . " (T. 166)

(4) <u>If the Employer and Intervenor were parties to an agreement or agreements, were such binding and enforceable. If the relationship was governed, not by agreement but by legislative resolution, of what force and effect, if any, was such resolution</u>.

As noted in the answer to Question (1) above, the year-end compensation discussions resulted in the adoption and promulgation of salary resolutions by the Board of Chosen Freeholders. There was no memorandum of understanding initialed or signed by the parties, and there was no formal bilateral contract executed by them. (T. 190-91, 502-03, 545) There is no first-hand testimony of any agreement having been referred back to the membership of Council 16 for ratification (compare T. 498-500), and there appears to be no mention in the minutebooks of Council 16 of any such action. The salary resolutions promulgated by the Freeholders were effective as such, and there appears never to have been a cutback on the promised salaries (although there were some increases thereof). (T. 484)

(5) Whether the Employer entertained relationships with other employee representatives during the period(s) of time it dealt with Intervenor; if so, what group or group of employees were represented; also was majority status of such other representative(s) demonstrated to the Employer. If so, the specific nature of such relationships and the period involved.

Prior to the advent of Chapter 303 there appears to have been no other employee representative with whom the County dealt on personnel matters. No employee representative other than Council 16 was informed of and permitted to approve or challenge personnel decisions proposed by the head of County departments. (T. 571) There appears to have been no other representative engaged in the processing of employee grievances before the Freeholders. No other representative presented its views on the compensation plans to the County or participated in bilateral discussions leading to the promulgation of such plans and salary resolutions. (T. 249-50, 717) No other employee organization presented any kind of request for recognition by the County or was recognized by the County as an appropriately authorized spokesman for employees in the general discussion and settling of wages and other conditions of employment. (T. 479-80, 717)

APPENDIX

It may be appropriate -- despite the limited directions in the order of remand and the parties' failure to re-consider in argument or brief the legal conclusions initially reached by the Hearing Officer in his Report and Recommendations -- to note the possible relevance of certain decisions rendered by the Commission and the Executive Director since the filing of that Report and Recommendations. In the Camden County case, P.E.R.C. No. 29 (Dec. 17, 1969), the Commission concluded that a unit of blue collar employees working at Lakeland Institutions in Camden County comprised an appropriate bargaining unit. That case is arguably distinguishable in view of the facts that there the County had already entered into bargaining with a union representing a group of employees less than County-wide, and that the County had conceded the appropriateness of a unit comprised of all Lakeland employees in job classifications found only there and not also elsewhere in the County. The Commission concluded that the County had thereby belied its assertion that the only appropriate unit was County-wide. Although

such factors are not present in this case, it is rather clear that the Commission would here be more hospitable to an Evergreen-Buttonwood unit than had initially been assumed by the Hearing Officer. This inference is supported by much of the Commission's analysis in the Camden County case, and by its decision in the case of Bergen Pines County Hospital, P.E.R.C. No. 40 (March 30, 1970), in which the Commission found appropriate a bargaining unit comprised only of the employees of the maintenance department at the hospital. Since, however, none of the parties has treated the order of remand as an invitation to re-consider such matters, and since the Hearing Officer has not had the benefit of briefs and argument on such issues, the undersigned is reluctant to re-consider the position taken in his initial Report and Recommendations.

The questions on remand appear to demonstrate the concern of the Commission with either (or both) of two issues: (1) whether the history of dealings between the County and Council 16 is such as to warrant giving that history some weight (along with the other circumstances considered in the Report and Recommendations earlier filed by the undersigned)

in determining whether a County-wide unit is appropriate and an Evergreen-Buttonwood unit inappropriate; and (2) whether (regardless whether the appropriate unit is found to be County-wide or less extensive) supervisory employees are properly included within the unit because of a relevant "established practice, prior agreement or special circumstances" (Chapter 303, section 34:13A-5.3). To the knowledge of the Hearing Officer, the Commission has not considered the bearing of a history of dealings on the question of County-wide as opposed to department-wide units. It is arguable that no such history of dealings will be considered on that issue unless it also would satisfy the statutory requirement of "established practice" or "prior agreement," since in both instances the question is whether the larger unit (i.e., County-wide; supervisors included) will constitute a viable entity for collective bargaining, characterized by a community of interest. In the judgment of the Hearing Officer, however, a history of dealings short of "established practice" or "prior agreement" may properly be deemed relevant on the question of the appropriateness of a unit less than County-

wide. First, the statutory standard is, properly, a most rigorous one in view of the presumption which would otherwise obtain that there is a conflict of interest, rather than a community of interest, between supervisory and non-supervisory employees. No such presumption obtains in favor of the unit which is less than County-wide; if anything, the presumption might be thought to be the contrary (although the Hearing Officer is aware that the concept of burden of proof is out of place in the representation hearing). Second, the history of dealings on a County-wide basis will frequently appear, as in the instant case, in conjunction with and simply as reinforcement of other circumstances (such as similarity of skills and tasks and determination of personnel policy on a County-wide basis) pointing toward the appropriateness of the County-wide rather than the departmental or institutional unit.

If, however, the Commission is concerned herein with the question whether the dealings between the County and Council 16 over nearly thirty years have met the statutory standard of "established practice, prior agreement or

special circumstances," such that supervisory and non-supervisory employees may be included in the same unit, then a more rigorous test must be applied. Quite clearly, there has been no "prior agreement" in this case, as that term has been construed by the Commission and the Executive Director. The "prior agreement" exception "is construed to refer, minimally, to a particular kind of agreement, namely, a written agreement, reached in the context of collective negotiations, executed by both parties and providing for the inclusion, in a single unit, of supervisors and non-supervisors." Willingboro Board of Education, E.D. No. 3 (May 18, 1970). See Hillside Board of Education, E.D. No. 2 (May 6, 1970); Middlesex County College Board of Trustees, P.E.R.C. No. 29 (Dec. 17, 1969). Compare West Paterson Board of Education, E.D. No. 16 (Sept. 14, 1970) (Hearing Officer's report adopted pro forma in absence of exceptions). Without recounting the evidence summarized in response to Questions 1 and 4, suffice it to state that there was never, prior to the recognition of Council 16 by the County in February 1969,

any written, bilateral agreement jointly executed by those two parties.

It remains to consider whether the history of dealings between the County and Council 16 from 1942 through early 1969 constitutes an "established practice" within Chapter 303 such as to warrant the inclusion of supervisors in the same unit as non-supervisory employees. In that period of nearly 30 years, Council 16 represented County employees on personnel grievances before the Freeholders, was for a period of time consulted prior to the implementation of specific personnel decisions made by County department heads and, most significantly, engaged in year-end discussions with the County as to the compensation plan for the succeeding year, discussions which were characterized by a serious attempt to resolve differences between the parties. No other employee organization requested or was accorded similar treatment by the County during this time period. Again, the question whether this constitutes an "established practice" has not been presented to the Hearing Officer by the parties in oral argument or brief. The parties have, however, discussed in general terms whether

the history of dealings should be given weight in ruling on the certification petition of Local 1972. Local 1972 discounts the history, in some measure because it related only to a narrow range of subject matter (i.e., compensation and fringe benefits) but primarily because the County did not relinquish ultimate decisionmaking power over the matters discussed. The County appears to acknowledge the latter fact, but argues that under the law of New Jersey prior to the enactment of Chapter 303, it would have been unlawful for the County to have shared decisionmaking power with Council 16 through the process of collective bargaining akin to that in the private sector.

Although it is well established that there was no common law right of an employee representative to demand good-faith bargaining by the public employer, Delaware River & Bay Authority v. International Organization of Masters, 45 N.J. 138, 145 (1965), it does not follow that it would have been illegal and beyond the power of a willing public employer to engage in such bargaining. There does, however, appear to have been some limitation in the prior law upon the extent to which the employer could surrender to or

share with an employee organization the "final say" upon terms and conditions of employment. In an Opinion of the Attorney General (October 20, 1954), it is stated that the "concept of collective bargaining . . . implies two bargaining entities of co-equal status, each with unlimited power to enter into binding commitments. This does not apply in the case of the state in relation to its employees." And, as the Superior Court stated in New Jersey Turnpike Authority v. AFSCME, Local 1511, 83 N.J. Super. 389, 397 (1964), although the public employer is required to meet with employee representatives and to consider their grievances and proposals in good faith, "any decision reached must be the result of the independent judgment of" the public employer. Moreover, the Court stated that "It should be emphasized that any one or more representatives may speak only for those employees who chose them. The Turnpike has no right to recognize a representative of only a segment of its employees as agent for all of the employees of the Turnpike." The construction given by the Commission to the statutory phrases "established practice" and "prior agreement" appears, however,

to contemplate precisely that; i.e., a bilateral settlement of terms and conditions of employment for all employees in the unit by a process of adjusting differences by give-and-take negotiations.

The most relevant authority found by the Hearing Officer is Henry Hudson Regional School District Board of Education, E.D. No. 12 (Aug. 14, 1970), in which the statutory requirement of "established practice" was held satisfied by a five-year history of negotiations for a unit of teachers including department chairmen. The Executive Director noted there the existence of: "the give and take of a bilateral relationship, through proposal and counterproposal, directed towards consummation of a mutually acceptable agreement"; and "a process whereby differences were harmonized or adjusted in order to reach mutual agreement on certain terms and conditions of employment . . . " It is not as clear in this case as it was in the Henry Hudson case that all such conditions exist; indeed, it might be suggested here that the former condition was not met but that the latter was. As an initial matter, it appears of little relevance that the dealings between Council 16 and the County were limited to questions

of compensation (to the exclusion of such matters as safety and health, seniority and grievance procedure). The same limited focus of discussions did not negate the possibility of "established practice" in the Henry Hudson case. What is equally present here is the demonstration of a serious desire on the part of the County to consider and give weight to the proposals of Council 16, to discuss them at considerable length and to resolve differences in order to reach a mutually satisfactory arrangement. If a series of private, arms'-length conferences directed to that end and conducted over a period of almost 30 years is deemed sufficient to constitute "established practice," then such was present in this case.

If, however, there must also be the formal presentation of counterproposals by the public employer, then the record in this case will not sustain such a finding. Moreover, the record -- both the testimony and such documentary evidence as the minutebooks of Council 16 itself -- indicates that while the County sought seriously to reach an agreement satisfactory to Council 16, ultimate disposition regarding the subjects of negotiation was made by the County and was

announced to Council 16 thereafter. Perhaps, the Commission would be prepared to consider that this omission is not fatal to any claim of "established practice" in this case, especially in light of the legal authority then in existence which gave some color to the County's claim that it had no power to act otherwise and also in light of the fact that to require a literal adherence to the concept of "bilateral determination" would bring the statutory definition of "established practice" so close to that of the statutory definition of "prior agreement" as to make one or the other term supererogatory.

February 10, 1971

Robert A. Gorman

Robert A. Gorman
Hearing Officer