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Determination of the Bargaining Unit under the New Pennsylvania Public Employee Relations Act

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DETERMINATION OF THE BARGAINING UNIT UNDER THE NEW PENNSYLVANIA PUBLIC EMPLOYE RELATIONS ACT

I. INTRODUCTION

The Public Employe Relations Act[1] is one of the most far-reaching statutes enacted by the 1970 Session of the Pennsylvania Legislature. The Act gives the public employes of Pennsylvania the right to bargain collectively and a limited right to strike.[2] Pursuant to the Hickman Commission's recommendations,[3] the Act provides comprehensive regulation of labor relations between public employers and public employes. Public employers include the Commonwealth of Pennsylvania, its political subdivisions, "any non-profit organization or institution and any charitable, religious, literary, recreational, health, educational, or welfare institution receiving grants or appropriations from a local, state or federal government."[4]

The Act affects a wide variety of occupations. Bargaining units must be determined for schools, hospitals, prisons, courts, and agen-

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1. PA. STAT. ANN. tit. 43, § 1101.101 *et seq.* (Supp. 1971) [hereinafter referred to as the Act].

2. *Id.* § 1101.1003. The public employes' right to strike is limited to situations which do not create a clear and present danger or threaten the public health, safety or welfare. The bargaining procedures set forth in sections 801 and 802 of the Act must be exhausted before the strike is called. Section 801 calls for the service of the Pennsylvania Bureau of Mediation in case of impasse. Section 802 provides an option whereby the Labor Relations Board may appoint a fact finding panel if the Bureau of Mediation cannot bring the parties to an agreement.

See generally for a discussion of public employe strikes, Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Geddie, *Public Employee Strikes*, 21 S.C. L. REV. 771 (1969).

3. Composed of Leon E. Hickman, chairman, Harold F. Alderfer, P. Freeman Hankins, John W. Ingram, Bernard N. Katz, Robert H. Kleeb, Edward B. Mifflin, N. R. H. Moor, Emil E. Narick, Max Rosenn, William G. Willis, and John K. Tabor, Pennsylvania Governor Raymond P. Shafer directed the Hickman Commission to:

> Review the whole area of the relations of public employes and the public employers and to make recommendations . . . for the establishment of orderly, fair, and workable procedures governing those relations. . . .

REPORT AND RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION TO REVISE PUBLIC EMPLOYE LAW OF PENNSYLVANIA, at 1 (1968).

4. PA. STAT. ANN. tit. 43, § 1101.301(1) (Supp. 1971).

cies at all levels of government. Approximately 500,000 public employes,[5] and 250,000 employes of nonprofit groups[6] will be affected by the Act. The Act applies to all public employes except

> elected officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession [and] employes or personnel at church offices or facilities when utilized primarily for religious purposes. . . .[7]

Police and firemen who are covered separately,[8] are also excluded from the Act's coverage.

One of the first problems encountered in the implementation of the Act is the determination of appropriate bargaining units. The petition for a representation election, when filed with the Pennsylvania Labor Relations Board, must contain a description of the unit which includes the general classification of the employes included in the proposed unit *and* those to be excluded.[9] Thus, the bargaining agent must decide before the election who is to be excluded. The make-up of the bargaining unit is important to all concerned. Inclusion of improper personnel can result in the voiding of a union election and force reorganization of the unit.[10]

The Act specifically excludes supervisory and confidential employes from its coverage.[11] Therefore, any bargaining unit which erroneously included such personnel would be subject to defeat. Although the Act clearly excludes confidential and supervisory personnel, there is no clear-cut method of determining which employes actually fall into these two groups. Jurisdictions which have examined the problem of supervisory employes have used a variety of tests including methods of computing wages, vacations, fringe benefits, time spent supervising and number of employes supervised, as well as the key test of the amount of discretion used. The

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5. Harrisburg Patriot, Oct. 21, 1971 at 1, col. 8, and at 2, col. 1. The public employes include 28,300 county employes, 79,200 municipal employes, 178,900 school district employes, 25,000 township employes and 16,000 special division emploes.

6. *Id.*

7. PA. STAT. ANN. tit. 43, § 1101.301(2) (Supp. 1971).

8. PA. STAT. ANN. tit. 43, § 217 (Supp. 1970) gives police and firemen the right to bargain collectively but not the right to strike.

9. 1 PA. BULL. 420 Lab. Rule 3.4(c).

10. *In re* City of Hartford and Local 1716, AFL-CIO, 3 CCH LAB. L. REP. (Conn.) ¶ 49.723 (1966); *In re* City of Highland Park and Highland Park Supervisory Employees, 3 CCH LAB. L. REP. (Mich.) ¶ 49,830 (1967); *In re* City of Stamford (Public Works Dep't.) and Teamsters Local 145, 3 CCH LAB. L. REP. (Conn.) ¶ 49,750 (1966).

11. PA. STAT. ANN. tit. 43, § 1101.604 (Supp. 1971).

exclusion of confidential employes, because of their close ties to material which is used in the bargaining process, presents similar problems. Questions arise concerning the nature and amount of contact required to make an employe "confidential."

A second basic requirement for any unit is that it is large enough to facilitate negotiations, yet small enough to truly represent its members. The public employer's interest is best served by larger units which mean fewer negotiations. Small units however, are more representative of their members. The members of the unit must share a community of interest. The problem is to balance these two conflicting goals and come up with a unit which is small enough to adequately represent its members, yet large enough to bargain effectively and efficiently with the public employer.

This Comment will examine the problems in determining the size and composition of bargaining units.[12] The approach taken by other jurisdictions in solving these problems will be analyzed, and suggestions for factors to be used by the Pennsylvania Labor Relations Board will be offered.

II. Exclusions from the Bargaining Unit

Supervisors and confidential employes are generally excluded from the bargaining unit due to their close ties with management. Units which have improperly included them have been forced to reorganize and hold new elections before they are permitted to bargain.[13] The basic difficulty is determining just who is a supervisor, or a confidential employe.

A. *Supervisors*

The Act excludes management level employes from the bargaining unit.[14] Management level employes are those who are involved in making policy decisions or who direct their implementation. This classification includes all employes "above the first level of supervision."[15] Those on the first level of supervision are not permitted in the regular unit but may form a unit of their own.[16] The Act defines supervisors as:

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12. *See generally* Hartley, *Pennsylvania's Proposed Public Employees Relations Act: A Landmark of Sound Progress or an Invitation to a Quagmire?*, 30 U. Pitt. L. Rev. 693 (1969).

13. *In re* City of Hartford and Local 1716, AFL-CIO 3 CCH Lab. L. Rep. (Conn.) ¶ 49,723 (1966); *In re* City of Highland Park and Highland Park Supervisory Employees, 3 CCH Lab. L. Rep. (Mich.) ¶ 49,830 (1967); *In re* City of Stamford (Public Works Dep't) and Teamsters Local 145, 3 CCH Lab. L. Rep. (Conn.) ¶ 49,750 (1966).

14. Pa. Stat. Ann. tit. 43, § 1101.604 (Supp. 1971).

15. *Id.* § 1101.601(6).

16. *Id.* § 1101.704. This unit is not permitted to strike but must "meet and discuss."

> [A]ny individual having authority in the interests of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employes or responsibility to direct them or adjust their grievances; or to a substantial degree effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely routine or clerical in nature but calls for the use of independent judgment.[17]

The Act has established several criteria relating to the supervisor's ability to make independent judgments or decisions which affect the other employes.[18] Other Boards with more experience in the area have formulated a variety of tests to apply to a so-called supervisor to see if he should be disqualified.

The most important test remains the amount of independent judgment and discretion which are used by the supervisor. This use should be consistent and continuous.[19] If the power to hire, fire, or discipline fellow employes is vested in an independent authority and not in the titled supervisor, they have been permitted in the unit. In *In re West Orange Board of Education and Operating Engineers Local 68*[20] the issue involved the head custodian's status. The New Jersey Public Employment Relations Commission decided that the power was with the Board of Education to hire, fire and discipline. The only authority which the head custodian had was to evaluate the other employes concerning their annual wages.[21] In another case, the power to hire and fire lay with a Director of Welfare who made his decisions only after making an independent investigation of his own.[22]

The authority to make decisions or recommend action must be real. Whether it is used is not important as long as it actually exists.[23] Department chairmen who made sporadic use of their investigatory powers were still held to be supervisors. Their reports on probationary teachers or on departmental situations were influential in the final results.[24] However, if the man had only the title of supervisor and none of the responsibilities accompanying it, he is

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17. *Id.* § 1101.301(6).
18. PA. STAT. ANN. tit. 43, § 301(6) (Supp. 1971).
19. *In re* Town of Ashburnham School Comm. and Ashburnham Teacher's Assn., 3 CCH LAB. L. REP. (Mass.) ¶ 49,993.19 (1968).
20. 3 CCH LAB. L. REP. (New Jersey) ¶ 49,995.18 (1969).
21. *Id.*
22. *In re* Middlesex County Welfare Bd., 3 CCH LAB. L. REP. (New Jersey) ¶ 49,995.06 (1970).
23. *In re* School District of E. Detroit and E. Detroit Fed'n of Teachers, 3 CCH LAB. L. REP. (Mich.) ¶ 49,719 (1966).
24. *Id.*

not a supervisor. In a Michigan case[25] involving the status of a deputy office manager, billing supervisor and a chief meter reader, the board based its decisions on evidence that the titles were given solely to justify an increase in pay. They were paid on an hourly basis, their fringe benefits were calculated the same as the other employes and they had no real supervisory powers. These conditions overruled the mere designation made by the employer that they were supervisors.[26]

Wisconsin and Connecticut have established criteria for determining what constitutes "supervision." The Connecticut Labor Board, in a case to decide the status of non-elected department heads in the City of Waterbury, set out four tests:

(A) performing such management control duties as scheduling, assigning, overseeing, and reviewing the work of subordinate employees;

(B) performing such duties as are distinct and dissimilar from those performed by the employees supervised.

(C) exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing the provisions of a collective bargaining agreement; and

(D) establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards.[27]

If the individual meets any two of these tests he is considered a supervisor.[28]

Using these crieria, cook managers who performed the same basic work as their assistants were not supervisors since they could not hire, fire or recommend disciplinary action.[29] The large difference in pay scale was an inconclusive factor. Connecticut requires the supervisor to exercise actual authority, in more than one sense. He may schedule the tasks and observe how they are carried out but that alone won't make him a supervisor unless he is active in establishing standards or adjusting grievances or unless his duties are dissimilar from those of the other employes. As long as he is doing the same basic work and is carrying out performance standards established and implemented by someone else, he can join the unit.

The Wisconsin test is more valuable than the Connecticut test

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25. *In re* City of Holland Bd. of Pub. Works and Bldg. Service Local 515-M, 3 CCH LAB. L. REP. (Mich.) ¶ 49,800 (1966).

26. *Id.*

27. *In re* City of Waterbury and Waterbury Municipal Adm'rs. Ass'n., 3 CCH LAB. L. REP. (Conn.) ¶ 48,896 (1967).

28. *Id.*

29. *In re* Norwalk Bd. of Educ. (Food Services Dep't.) and Council 4, 3 CCH LAB. L. REP. (Conn.) ¶ 49,867 (1967).

because it is more detailed and is not restricted to department heads. It lists seven factors to be considered in deciding the employe's status. Many of these factors could be used in determining the unit under the Pennsylvania Act.

(1) The authority to effectively recommend the hiring, promotion, transfer, discipline, or discharge of employees;

(2) The authority to direct and assign the work force;

(3) The number of employees supervised and the number of other persons exercising greater, similar, or lesser authority over the same employees;

(4) The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;

(5) Whether the supervisor is primarily supervising an activity or is primarily supervising employees;

(6) Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising other employees;

(7) The amount of independent judgment and discretion exercised in the supervision of employees.[30]

The first two criteria are used by every labor relations board to determine supervision.[31] The Pennsylvania Act takes them into account with its definition of first level supervisor.[32] The remaining criteria merely indicate the possibility of a supervisory power. These tests are basic and are used by virtually all jurisdictions in one form or another as factors to be used in their decision. Test number three was used by the Michigan Labor Mediations Board[33] to determine the status of a so-called supervisor. The board examined the ratio of supervisors to employes and concluded that where there were only three employes and two supervisors, the employes in question should be permitted to join the unit.[34]

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30. Anderson, *Selection and Certification of Representatives in Public Employment*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 20TH ANNUAL CONFERENCE ON LABOR, 287 (1968).

31. *Id.* 286-287; *In re* Bd. of Educ., St. Joseph Pub. School Dist. 3 CCH LAB. L. REP. (Mich.) ¶ 49,993.60 (1968); *In re* City of Boston School Comm., 3 CCH LAB. L. REP. (Mass.) ¶ 49,996.05 (1969); *In re* Michigan Univ. & State Employees Local 166, 3 CCH LAB. L. REP. (Mich.) ¶ 49,798 (1970); *In re* Hackley Hosp., 3 CCH LAB. L. REP. (Mich.) ¶ 49,996.29 (1970); *In re* New York State Thruway et al., 3 CCH LAB. L. REP. (New York) ¶ 49,993.87 (1968).

32. PA. STAT. ANN. tit. 43, § 1101.301(6) (Supp. 1971).

33. *In re* Ypsilanti Township, 3 CCH LAB. L. REP. (Mich.) ¶ 49,993.97 (1968).

34. *Id.*

Test number six examines the amount of time spent in administrating activities, and is a frequent consideration. The issue of time is often a factor in the teaching profession where assistant principals may teach classes as well as attend to administrative duties. People with dual classification are often referred to as "working supervisors"[35] and could be considered as first level supervisors. If over 50% of their time is spent in administrative duties, courts usually have little difficulty in placing them in a supervisory classification.[36] In *In re City of Boston School Committee*,[37] the unit consisting of assistant principals was not joined to the unit representing the other teachers because up to 50% of the principal's time was spent in administrative duties.

A different time element is involved in the problem of the seasonal supervisor. This occurs when the employe spends part of the year as a regular employe and part as a supervisor. The problem arises often in highway maintenance employment situations. A man may often be a supervisor in the summer, when there is a heavy workload and extra employes on the job, and a regular employe without supervisory duties during the winter when the workload is lighter. The National Labor Relations Board has held that seasonal supervisors are to be included in the bargaining unit for that portion of the year during which they were not supervising.[38] The Michigan Labor Mediations Board has also allowed seasonal employes to be members of the unit.[39] They held it would be unfair to exclude the employe of a county road commission from the unit when he only spent three or four months of the year as a construction foreman. During that portion of the year when he is acting in his supervisory capacity, he is not a part of the unit. He has no voting rights at that time on the theory that while he is acting in a supervisory capacity his chief loyalty is with management.[40]

Ultimately the key to supervisory status is the amount of independent judgment the employe has. This can be determined by examining his authority and duties. The power to hire, fire, discipline, assign, or direct the work to be cdone are the most powerful indications. But other factors also enter into the decision. The time spent supervising and the number of employes supervised may be determinative in close cases. The level and method of computa-

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35. *In re* City of Boston School Comm., 3 CCH LAB. L. REP. (Mass.) ¶ 49,996.05 (1969).

36. Klein, *Unit Determination in New York State Under the Public Employees Fair Employment Law*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 21ST ANNUAL CONFERENCE ON LABOR, 497 (1969).

37. 3 CCH LAB. L. REP. (Mass.) ¶ 49,996.05 (1969).

38. Great Western Sugar Co., 1962 CCH LAB. L. REP. ¶ 11,271.

39. *In re* Schoolcraft County Rd. Comm'n and Teamsters Local 328, 3 CCH LAB. L. REP. (Mich.) ¶ 49,784 (1966).

40. *Id.*

tion of pay and fringe benefits are also important elements to consider. All factors must be evaluated in each case to find the true status of the employe.

B. *Confidential Employes*

Confidential employes are also excluded from joining the unit, due to their access to material which may be used in labor negotiations. The Act defines confidential employes as those who work

> in the personnel offices of a public employer and have access to information subject to use by the public employer in collective bargaining; or (ii) in a close continuing relationship with public officers or representatives associated with collective bargaining on behalf of the employer.[41]

All jurisdictions keep employes from organizing who have confidential information which would be useful to the unions in negotiations.[42] They do vary, however, in their definition of confidential employes and their determination of what information is considered confidential.[43]

The clerical staff with access to the personnel files is most directly affected. Personnel examiners who were hired by the Department of Personnel in New York and were concerned with "recruitment, job classification and promotion, and establishment of wage and salary ranges"[44] were not permitted to form their own unit because of their access to confidential material and direct participation with labor issues. Attorneys who gave advice to departments unconnected with the agency with which they would be bargaining could join the unit but an attorney with the municipality's labor negotiating branch could not join.[45] One case in which mere access to confidential material was held insufficient to justify exclusion from the unit was *In re Lake Michigan College*.[46] The secretary of a college administrative official, although she had access to confidential material did not use it in any way that reflected on the bargaining procedures. The Labor Mediations Board decided

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41. PA. STAT. ANN. tit. 43, § 1101.301(13) (Supp. 1971).
42. *In re* Ass'n of Municipal Attorneys of Milwaukee, 3 CCH LAB. L. REP. (Wisc.) ¶ 49,870 (1967); *In re* Lake Michigan College, 3 CCH LAB. L. REP. (Mich.) ¶ 49,997.18 (1970); *In re* AFL-CIO Local 188, 3 CCH LAB. L. REP. (New York) ¶ 49,994.16 (1968).
43. *Id.*
44. *In re* AFL-CIO Local 188, 3 CCH LAB. L. REP. (New York) ¶ 49,994.16 (1968).
45. *In re* Assn. of Municipal Attorneys of Milwaukee, 3 CCH LAB. L. REP. (Wisc.) ¶ 49,870 (1967).
46. 3 CCH LAB. L. REP. (Mich.) ¶ 49,997.18 (1970).

that there was no evidence that the secretary participated in the labor negotiations. There was no indication that she dealt in any way with the correspondence connected with the negotiations.[47]

Other employes excluded from the Act, besides supervisory and confidential employes, are police and firemen, who have collective bargaining rights, but not the right to strike.[48] The Act also prohibits guards at prisons or mental hospitals, or employes involved in the necessary functioning of the courts from striking.[49] It is obvious that in these cases the public welfare and safety would be directly involved. Strikes by these individuals can be enjoined.[50]

III. Appropriateness of the Bargaining Unit

The second important determination to be made in the creation of a bargaining unit is the appropriateness of the unit. Two very important criteria[51] are set forth in the Act for determining whether the bargaining unit is appropriate. The Pennsylvania Labor Relations Board must first consider whether there is a community of interest among the employes; second, the effect which overfragmentization would have on the employer must be considered. Appropriateness of the unit is not guaranteed by the fact that no excluded personnel are present in the unit.[52] Exclusions, size of the unit and common interests all are considered in forming the proper unit.

The most important aspect which the Pennsylvania Labor Relations Board has to determine[53] is the existence of an identifiable community of interest among the employes seeking to form the bargaining unit. There are numerous ways of reflecting a community of interest. The controlling factors may vary depending on which receive the most emphasis. The functions of the department may be examined for a unit which would be based on departments. If the key factor is a similarity of working conditions, the duties, skills and general employment conditions would be studied; or it could include the degree of supervision.[54]

A determination of a bargaining unit on the basis of departmental or agency divisions is permitted by the federal government.[55] The situation is most favorable to a departmental or

47. *Id.*
48. Pa. Stat. Ann. tit. 43, § 217 (Supp. 1970).
49. Pa. Stat. Ann. tit. 43, § 1101.1001 (Supp. 1971).
50. *Id.*
51. *Id.* § 1101.604(1).
52. *See* Section II *supra.*
53. Pa. Stat. Ann. tit. 43, § 1101.604 (Supp. 1971).
54. *In re* Wisconsin State Employees Assn., 3 CCH Lab. L. Rep. (Wisc.) ¶ 49,978 (1960).
55. Exec. Order No. 10988, 27 Fed. Reg. 551 (1963). "Units may be established on any plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned."

agency-wide unit where the department or agency has complete authority in handling its employes. Where the employing department or agency has the final say in hiring, firing, wages, promotions, discipline, working conditions and bargaining for contracts, and its employes are treated in a similar fashion, an agency-wide unit is generally most advantageous.[56] The employes not only have common interests in their bargaining, they also have the advantage of negotiating with an employer capable of granting their demands. If the unit were based on an agency level, but the decisions on salary, overtime, vacations, and working conditions were made at the city or state level, involving many agencies, the employe might have a more common interest with other employes outside of his agency. If a department head can make his own decisions, the employe is better off in a unit which can deal directly with him.

One practical areawide unit would consist of employes who perform similar duties or whose wages, working conditions, salary classifications and vacation schedules are similar.[57] In *In re City of Detroit and Teamsters Local 299*,[58] truckers were held to have sufficient common interest to cut across departmental lines and form their own city wide unit. The court decided that they did not have any common interest with the other departmental employees.[59] To determine a community of interest, boards generally consider similarity of conditions, skills, qualifications,[60] tenure, methods of compensation, computation of sick leave, vacation and retirement programs, common supervision,[61] and interchange of personnel among agencies.[62]

The bargaining unit should basically reflect the negotiable items. Members of the unit should have a common interest in "wages, hours, and other terms and conditions of employment,"[63] which are the negotiable items allowed by the Act. Inherent man-

56. *In re* City of Detroit, Operating Engineers Local 547, 3 CCH LAB. L. REP. (Mich.) ¶ 49,769 (1966).

57. Klein, *Unit Determination in New York State Under the Public Employees Fair Employment Law*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 21ST ANNUAL CONFERENCE ON LABOR, 498 (1969).

58. 3 CCH LAB. L. REP. (Mich.) ¶ 49,872 (1966).

59. *Id.*

60. *In re* City of Detroit, Health Dep't and Teamsters Local 299, 3 CCH LAB. L. REP. (Mich.) ¶ 49,729 (1966).

61. *In re* Grand Rapids Bd. of Educ., Teachers Local 256, 3 CCH LAB. L. REP. (Mich.) ¶ 49,771 (1966); *In re* Highland Park Gen. Hosp., 3 CCH LAB. L. REP. (Mich.) ¶ 49,856 (1967).

62. *In re* Henry Ford Hosp. and Teamsters Local 299, 3 CCH LAB. L. REP. (Mich.) ¶ 49,779 (1966); *In re* Wisconsin State Employes Assn., 3 CCH LAB. L. REP. (Wisc.) ¶ 49,978 (1968).

63. PA. STAT. ANN. tit. 43, § 1101.701 (Supp. 1971).

agerial policy, including "functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel"[64] are only negotiable with the permission of the public employer.[65]

Another basis for establishing a unit is the presence of a craft. Even if there are very few other craft workers in the unit, their skill, methods, and training set them off from other employes.[66] Professionals are also allowed to form their own units to represent their own specialized needs, although they may vote to join the regular unit.[67]

The bargaining unit for teachers poses problems somewhat more complex than other groups. As previously discussed,[68] the frequent intermingling of supervisory and instructive duties makes it difficult to separate teachers from supervisors. Another issue involves part-time and substitute teachers. Part-time teachers are rarely included within the unit.[69] It is generally held that they do not have a sufficient community of interest with the regular full-time teachers to be included. Their wage scales, methods of computing wages, vacation schedules and fringe benefits differ.[70] Therefore the bargained for issues would differ for each group and might even be at odds.

A problem also arises in respect to those teachers who have tenure and those who do not. Tenure gives a teacher job security as well as different duties and responsibilities. The permanent staff is frequently given a greater voice in school policy, and more committee assignments than newer teachers.[71] One of the items which the non-tenured teachers might want to bargain for is more committee assignments or participation in school affairs. This could be opposite to the desire of tenured teachers. If they were both in the same unit, this could create a conflict for their representative. For this reason, the City University of New York has separate units for tenured and non-tenured teachers.[72] Generally it would not be practical to separate the two in smaller school districts. It is rare that the interests would differ substantially. Both groups would

64. *Id.* § 702.
65. *Id.*
66. *In re* Sheet Workers Local 24, 3 CCH LAB. L. REP. (Wisc.) ¶ 49,816 (1966).
67. *In re* Wayne County Bd. of Supervisors, 3 CCH LAB. L. REP. (Mich.) ¶ 49,785 (1966).
68. *See* note 35 and accompanying text *supra.*
69. *But see, In re* Southwestern Michigan College Educational Assn., 3 CCH LAB. L. REP. (Mich.) ¶ 49,994.38 (1969).
70. *In re* Electrical Workers Local 953, 3 CCH LAB. L. REP. (Wisc.) ¶ 49,994.07 (1968).
71. Klein, *Unit Determination in New York State Under the Public Employees Fair Employment Law*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 21ST ANNUAL CONFERENCE ON LABOR, 495 (1969).
72. *Id.*

be bargaining over the same basic items, although on a different scale. Only if a situation arose in which the employer tried to pit one against the other could a conflict arise.[73]

The division on the basis of common interests must not however be carried too far. The Michigan Labor Mediation Board, in *Taylor Township School District Board of Education and Taylor Federation of Teachers*, defined the ideal unit as the "largest unit which is most compatible with the purpose of the law and will include all common interests in a single unit."[74] The public employer would obviously prefer to deal with as large a unit as possible.[75] Representatives of larger units have more power.

The government would prefer to deal with large units for several reasons. It limits the time involved, since the government only has to negotiate once rather than spend time bargaining with many small units. It also serves to prevent "whip-sawing," where each union tries to surpass the others and show that it can do more for its people than the others.[76] "Whip-sawing" can be detrimental by encouraging the unions to compete against each other and make outrageous demands. Negotiations become more prolonged and complicated since the union is not only worrying about how much it can get for its members but also how much more it can get than any other union. It would also be unfair, since some departments or employers could not pay as well as others but would be involved in competing with other departments anyway. However, if the unit is too large, the employes will suffer. The representation will be less personal in the larger unit, and individual problems may not be taken into account.

IV. Conclusion

Determining the bargaining unit is a crucial step in the organizational process. The Board must set up a series of test or guidelines to aid in the selection of a proper bargaining unit. The tests to determine who is a supervisor, and therefore excluded from the unit must consider the right to hire, fire, discipline, promote, or

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73. For instance, the employer might be able to grant a salary increase to tenured teachers only if the nontenured teachers did not get a similar raise.

74. 3 CCH Lab. L. Rep. (Mich.) ¶ 49,996.09 (1969).

75. Anderson, *Selection and Certification of Representatives in Public Employment*, Proceedings of New York University's 20th Annual Conference on Labor at 280 (1968). Governor Rockefeller of New York tried to establish three state-wide units, the state police, state universities and all other state employees. This was obviously too large.

76. *Id.*

transfer employes. The amount of discretion and judgment involved must be determined. The number of employes under the supervisor's control is another factor, as is the kind of work they do under his supervision. The number of other people having authority over the same employes must be examined. The pay of the supervisor must be considered. If it is hourly and determined in the same manner as the other employes and he gets the same fringe benefits; it could indicate he was not really a supervisor. The amount of time he actually spends in supervision in comparison with the time he spends on regular duties is another factor. Close ties with management is a reason for exclusion. A supervisor is supposed to represent management. Close proximity to confidential material concerning personnel, which would be used in labor negotiations, should eliminate confidential employes from the unit. It is submitted that the Wisconsin criteria[77] should be used as indications of what constitutes supervisory status. The Wisconsin criteria set forth simply and clearly the basic tests which are used in examining status.

Size is important in forming the unit. It should be large enough to make negotiations binding on most of the people affected by the decisions reached. The determination of unit size should consider the issues to be bargained over and the employer who is doing the bargaining. It would do little good to negotiate with an employer incapable of granting the demands.

The unit should be small enough to accurately represent the interests of the members. It should reflect a basic community of interest among the members. They should be desirous of obtaining the same goals. The main factor should be to consider the bargainable issues and to create a unit which is interested in securing the same resolution of those issues.

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77. *See* note 30 and accompanying text *supra.*