D.R. NO. 82-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF REPRESENTATION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

DOCKET NO. RO-79-187

ASSOCIATION OF RESIDENCE
COUNSELORS OF RUTGERS COLLEGE,

Petitioner.

SYNOPSIS

The Director of Representation, adopting in part and modifying in part, the recommendations of a Hearing Officer, determines that residence counselors employed by Rutgers are employees within the meaning of the Act, but finds that the residence counselors do not manifest sufficient interest in their employment relationship to warrant the full rights of collective negotiations under the Act. The latter determination is based on the totality of the circumstances presented, and does not stand for the proposition that student employees, per se, are ineligible for collective negotiations under the Act.

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COUNSELORS OF RUTGERS COLLEGE,

Petitioner.

Appearances:

For the Public Employer, Pitney, Hardin & Kipp, Esqs.
(S. Joseph Fortunato, of Counsel; Nancy Adams on the brief)

For the Petitioner, Mr. Jack LeClair, President, Association of Residence Counselors

DECISION

On March 26, 1979, a Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") by the Association of Residence Counselors of Rutgers University (the "Association") seeking to represent all residence counselors employed by Rutgers University through the Rutgers College Dean of Students Office ("Rutgers"). Rutgers objected to the holding of an election among these employees, asserting that they are not employees as defined by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") and are thus excluded from the rights of self-organization

and collective negotiation granted to public employees by the Act.

Pursuant to a Notice of Hearing, hearings were held before Commission Hearing Officer Dennis Alessi on January 21, 22 and 23, 1980 and February 22, 1980. At the outset of these hearings the parties agreed, with the approval of the undersigned, that the Hearing Officer "would initially hear the question concerning whether or not these people [i.e., the residence counselors] are employees, and subsequent to that determination, if necessary, we would then at a separate hearing consider the question as to whether or not the unit of Petitioner [the Association] is appropriate." 1/ At these hearings, the parties were given opportunities to examine witnesses, present relevant evidence and argue orally. Both parties submitted post-hearing briefs. Subsequently, on October 10, 1980, Hearing Officer Alessi resigned from the agency and the undersigned, pursuant to N.J.A.C. 19:11-6.4, designated Hearing Officer Robert E. Anderson to issue a Report and Recommendation on the record as made. The Hearing Officer issued his Report and Recommendations on October 31, 1980, H.O. No. 81-6, 6 NJPER 575 (¶11291 1980), a copy of which is attached hereto and made a part hereof. On December 1, 1980, Rutgers filed exceptions to the Hearing Officer's Report.

The undersigned has considered the entire record herein, including the Hearing Officer's Report and Recommendations, the transcript, exhibits, factual stipulations and exceptions, and on the basis thereof, finds and determines as follows:

1/ Transcript of January 21, 1980, at page 6.

1. The Rutgers College Dean of Students Office, Rutgers - The State University, is a public employer within the meaning of the Act, is the employer of the employees who are the subject of this Petition, and is subject to the provisions of the Act.

2. The Association of Residence Counselors of Rutgers College seeks to represent a unit of residence counselors in collective negotiations with Rutgers pursuant to the Act.

3. Rutgers asserts that the residence counselors are not employees within the meaning of the Act and that the Association is not an employee representative within the meaning of the Act, contentions which the Association disputes.

4. The Hearing Officer concluded that the residence counselors are public employees and that the Association is an employee representative within the meaning of the Act. The Hearing Officer reserved judgment on the question of whether or not a unit of residence counselors would effectuate the purposes of the Act, and recommended that this question be considered at a subsequent hearing. In so ruling, the Hearing Officer concluded that Rutgers had not made public policy arguments sufficient to warrant dismissal of the Association's petition.

5. Rutgers has excepted to the Hearing Officer's findings of fact and conclusions of law. Specifically, Rutgers contends that the Hearing Officer erred in finding that the residence counselors are public employees and that the Association is an employee representative within the meaning of the Act. Rutgers also excepts to the Hearing Officer's recommendation that Rutgers has not adduced

public policy reasons sufficient to warrant the conclusion that these employees are not entitled to rights of self-organization and collective negotiations.

Having reviewed the entire record, including Rutgers' exceptions, the undersigned adopts the Hearing Officer's findings of fact and recommended conclusions that the residence counselors are employees within the meaning of the Act. However, for the reasons cited below, the undersigned concludes that public policy considerations compel a finding that the residence counselors herein can only be accorded limited rights under the Act, and that those rights do not include representation by the Association for the purpose of collective negotiations. Accordingly, the undersigned determines that the petition must therefore be dismissed.

The residence counselors at Rutgers are graduate students who perform a variety of student-related and administrative responsibilities that range from counselling students and helping them adjust to college life to supervising, opening and closing dormitories at assigned times. In return for these services, the residence counselors receive tuition remission for up to 24 credit hours per year, as well as a stipend of $3,500 for the first year, $3,750 the second year and $4,000 the third year (residence counselors are limited to a maximum of three one-year appointments). In addition, the residence counselors receive rent-free furnished living accommodations which they must reside in, and a campus telephone. Residence counselors receive neither health insurance nor pension benefits from Rutgers and Rutgers deducts federal income

tax and social security payments from their bi-weekly paychecks. 2/

The Act defines "employee" as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees. N.J.S.A. 34:13A-3(d).

The definition is very broad, and its exceptions are very specific. Rutgers does not argue that the residence counselors herein fall within the enumerated exceptions; instead, Rutgers urges that public policy concerns, including the importance of preserving the relationship between Rutgers and its students, compel a finding that the residence counselors are not employees within the meaning of the Act. The undersigned determines that the public policy arguments advanced by Rutgers are not relevant to the determination of public employee status, as defined by the Act, although these arguments are considered below in another context.

2/ The above facts concerning the responsibilities and remuneration were stipulated to by the parties in Exhibit J-1, Stipulations of Fact.

The determination of the status of the residence counselors as employees within the meaning of the Act is based on the statutory definition, buttressed by guidance from relevant private sector case law. Upon examination of the statutory definition of employee, there is nothing therein to suggest that the residence counselors are not employees within the meaning of the Act. The residence counselors are clearly appointed to positions in the service of a public employer, and do not fall within any of the statutory exceptions. It is important to note that the Legislature did not specifically exclude students from employee status. The undersigned concludes the terms "student" and "employee" are not mutually exclusive under the Act.

Moreover, a review of private sector case law indicates the residence counselors herein are the kind of students whom the National Labor Relations Board has recognized to be employees under the National Labor Relations Act. 3/ In this connection, the undersigned endorses the analysis of the NLRB case law by the Hearing Officer below.

The Board has denied employee status under the NLRA to students who worked as research assistants, 4/ interns, 5/ resi-

3/ Note that the determination that an individual is an employee under the NLRA or the absence of a determination that individuals are not employees under the NLRA does not require the conclusion that such employees are entitled to collectively negotiate with their employers. See, e.g., San Francisco Art Institute, 226 NLRB No. 204, 93 LRRM 1505 (1976).

4/ See, e.g., Leland Stanford Junior Univ., 214 NLRB No. 82, 87 LRRM 1519 (1974).

5/ See, e.g., Cedars-Sinai Medical Center, 223 NLRB No. 57, 91 LRRM 1398 (1976); Samaritan Health Services, Inc., 238 NLRB No. 56, 99 LRRM 1551 (1978).

dents [6] and clinical fellows. [7] The central thread running through these decisions is the Board's finding that all of these various types of students either received academic credit for their employment or were required to complete their employment to qualify for certifications in specialties or subspecialties. In this sense, the above-enumerated student groups were primarily interested in their academic status and secondarily interested in their employment qua employment. It is noteworthy that income derived in such pursuits is often not taxable under the Internal Revenue Code, Section 117(b). However, when the Board has found that no connection exists between the students' employment and their academic credit or certification, employee status under the NLRA will not be denied. [8]

The undersigned adopts the Hearing Officer's factual finding that "there is no more than a de minimis showing that the work performed by the residence counselors related to the academic degree program for graduate students...and the mutual interests of the residence counselors and Rutgers in the ungraded and fully compensated services being rendered must be considered predominantly, if not exclusively, economic rather than academic." Applying NLRB case law to this factual finding, and with the definition of "employee" in our Act not to the contrary, the undersigned concludes that the residence counselors are employees within the meaning of the Act.

The undersigned now turns to the remaining conclusions

6/ Cedars-Sinai, supra.

7/ Cedars-Sinai, supra.

8/ See, e.g., System Auto Rank and Garage, Inc., 248 NLRB No. 115, 10 LRRM 1550 (1980); San Francisco Art Institute, supra.

of law made by the Hearing Officer. The Hearing Officer determined that since the residence counselors were employees within the meaning of the Act, the Association was necessarly an employee representative under the Act. The Hearing Officer reserved judgment on another legal question: whether or not a unit of residence counselors would effectuate the purposes of the Act.

Whereas the Hearing Officer reserved judgment on the latter legal question, the undersigned finds that it is appropriate to make that determination at this juncture based on the public policy arguments amply litigated and briefed by the parties herein. For the reasons cited below, the undersigned determines that a unit of Residence Counselors would not effectuate the purposes of the Act, and therefore dismisses the instant petition.

The Commission has previously held that although individuals might be employees under the Act, nonetheless, circumstances might exist whereby those employees are not entitled to organize and collectively negotiate pursuant to the Act. In State of New Jersey, E.D. No. 67, 1 NJPER 2 (1975), the Commission's Executive Director considered the negotiations rights of consulting physicians employed by the State on a part-time basis. Initially, the Executive Director determined that the consulting physicians could not be "excluded from the definition of public employee." State of New Jersey, supra, at 2 NJPER 7. Based on his findings that the consulting physicians had flexible, inconsistent hours which they scheduled around their private practices, and that the pursuit of their private practices remained their top priority, the Executive

Director concluded:

> Their services to the State are ancillary to their private practices which are their primary means of livelihood. In sum, their employment relationship is too ephemeral to carry with it the rights and obligations of the Act.

In an analogous case involving students, the NLRB reached a conclusion similar to that of the Executive Director in State of New Jersey, supra. In San Francisco Art Institute, supra, the NLRB considered a representation petition filed by a group of students who also functioned as janitors and reached the following conclusion:

> The resolution of this question turns on whether the student janitors manifest a sufficient interest in their conditions of employment to warrant representation in a separate unit.
>
> Upon close consideration of the matter, we are of the opinion that it will not effectuate the policies of the Act to direct an election in a unit consisting of student janitors only. We are influenced in our decision chiefly by the brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather than with their part-time employment. In our view, the student janitors are best likened to temporary or casual employees, whose certification would predictably present unusually vexsome problems. For instance, owing to the rapid turnover that regularly and naturally occurs among student janitors, it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially.
>
> * * *
>
> The fact that the student janitors who presently seek representation attend the institution for which they work brings into sharp and special focus the very tenuous secondary interest that these students have in their part-time employment. By contrast, were these same students working for a commercial employer, the insubstantiality of their

> employment interest could not so readily be deduced. Accordingly, for the foregoing reasons, we find that a unit of student janitors only is not appropriate for the purposes of collective bargaining.

The facts of the instant matter, as found by the Hearing Officer and adopted by the undersigned, bespeak a situation similar to those in State of New Jersey, supra, and San Francisco Art Institute, supra, and call for a similar result. The residence counselors herein work variable hours, 9/ tailor their schedules to meet their academic requirements, 10/ and must be concerned primarily with their academic commitments rather than their part-time employment (i.e., if a residence counselor is dropped from his/her graduate program of study, and is no longer enrolled at Rutgers, he/she is ineligible to be a residence counselor). 11/ Moreover, in those instances where a student must contend with certain academic obligations, the requirements of his part-time employment are waived or relaxed. 12/

> Under established Board law the determination of whether student or other part-time employees are entitled to collective-bargaining representation depends upon whether the nature of their employment gives them a sufficient interest in wages, hours, and other working conditions to justify such representation. The sufficiency of this interest will ordinarily turn upon such factors as continuity of employment, regularity of work, the relationship of the work performed to the needs of the employer, and the substantiality of their hours of work. San Francisco Art Institute, supra, at page 1508 (dissenting opinion).

9/ Transcript of January 21, 1980, at page 122.

10/ Transcript of January 21, 1980, at pages 88-89.

11/ Transcript of January 21, 1980, at pages 85-86.

12/ Transcript of January 21, 1980, at pages 88-89.

The factors cited above indicate that the work performed by the residence counselors is not regular, but rather sporadic, and that the relationship of the work performed to the needs of the employer is secondary to the employer's concern for the academic obligations of the employees as students. The continuity of employment of the residence counselors over the last five years is measured by an annual turnover rate of 45 to 50%. 13/ The substantiality of the residence counselors' hours of work was estimated at an average of 17 hours per week. 14/

The totality of these circumstances indicates that the residence counselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations under the Act. This is not to say that any one of the above-enumerated factors, standing alone, would indicate an insufficient interest in an employment relationship. Nor does the finding here stand for the proposition that student employees, per se, are ineligible for collective negotiations under the Act.

For the reasons stated above, the undersigned concludes that the residence counselors do not manifest a sufficient interest in their employment relationship with Rutgers to warrant the full rights accorded to employees under the Act. Therefore, while the undersigned adopts the Hearing Officer's conclusions that the residence counselors are employees under the Act, the undersigned declines to adopt the remainder of the Hearing Officer's recommendations. Instead, the undersigned concludes that it would not effectuate

13/ Transcript of January 21, 1980, at pages 80-81, Exhibits R-11, 12 and 13.

14/ Transcript of January 21, 1980, at page 122.

the purposes of the Act to grant the residence counselors herein the right to collectively negotiate pursuant to the Act, and hereby dismisses the instant petition.

BY ORDER OF THE
DIRECTOR OF REPRESENTATION

Carl Kurtzman, Director

DATED: August 7, 1981
Trenton, New Jersey

H.O. NO. 81-6

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and- Docket No. RO-79-187

ASSOCIATION OF RESIDENCE COUNSELORS
OF RUTGERS COLLEGE,

Petitioner.

SYNOPSIS

The Association of Residence Counselors ("Association") filed a Petition for Certification of Public Employee Representative by which the Association sought to represent Residence Counselors employed by Rutgers College ("Rutgers"). The Association and Rutgers, with the concurrence of the Director of Representation, agreed to a bifurcated hearing. At the first stage of the hearing, the parties would present evidence on whether the Residence Counselors were public "employees" within the meaning of section 3(d) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") and whether the Association was an employee "representative" within the meaning of section 3(e). If the Hearing Officer of the New Jersey Public Employment Relations Commission answered both preliminary questions affirmatively, the parties at the second stage of the hearing would address the issue of which unit, if any, was the most appropriate.

After the conclusion of the first stage of the hearing, the Hearing Officer concludes that Residence Counselors are public "employees" and that the Association is an employee "representative" within the meaning of the Act. In addition, the Hearing Officer rejects, at this premature stage, Rutgers' arguments that New Jersey public policy prohibits all students employed by their educational institutions from organizing, voting or negotiating under the Act. However, the Hearing Officer cautions that his findings in the first stage of the hearing do not necessarily mean that a unit including or solely consisting of Residence Counselors would effectuate the purposes of the Act.

H.O. NO. 81- 6

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

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-and-

Docket No. RO-79-187

ASSOCIATION OF RESIDENCE COUNSELORS
OF RUTGERS COLLEGE,

Petitioner.

Appearances:
For the Public Employer, Pitney, Hardin & Kipp, Esqs.
(S. Joseph Fortunato, of Counsel) and Norris,
McLaughlin & Marcus, Esqs.
(Bruce P. McMoran, of Counsel)

For the Petitioner, Mr. Jack LeClair, President,
Association of Residence Counselors

HEARING OFFICER"S REPORT AND RECOMMENDATIONS

The Association of Residence Counselors of Rutgers College ("Association" or "Petitioner") has filed a petition seeking certification as the exclusive representative of a negotiations unit comprising all Residence Counselors employed by the Rutgers College Dean of Students Office ("Rutgers"). The parties, with the concurrence of the Director of Representation, have agreed that the Hearing Officer should first determine whether Residence Counselors are "employees" and the Association an employee "representative" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), before considering whether a separate unit or any other unit of Residence Counselors is appropriate. The undersigned determines,

based on the findings of fact and conclusions of law set forth in detail below, that Residence Counselors are statutory "employees" and that the Association is a statutory employee "representative." Accordingly, the undersigned recommends that the Director of Representation not dismiss the instant petition at this preliminary juncture.

Procedural History

On March 26, 1979, the Association filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission (the "Commission" or "PERC"). The Association sought certification as the exclusive representative of a negotiations unit composed of all Residence Counselors employed by the Rutgers College Dean of Students office.[1/] On April 4, 1979, Rutgers responded to the petition by denying that Residence Counselors had any right to organize or negotiate under the Act. Accordingly, Rutgers refused to consent to an election involving Residence Counselors.

After a pre-hearing conference and the parties' entry into a Stipulation of Agreement with respect to many of the facts pertinent to this case, Hearing Officer Dennis J. Alessi conducted hearings on January 21, 22, and 23, 1980 and February 22, 1980.[2/] At the outset of these hearings, the parties agreed, with the approval of the Director of Representation, that the Hearing

1/ Rutgers College is a branch of Rutgers, The State University.
2/ The Hearing Officer and the parties agreed to schedule the fourth and last hearing one month after the third hearing so that the parties would have sufficient time to gather statistical and documentary evidence bearing on the amount of financial aid which Residence Counselors receive and the policy of various departments on granting course credit for such work [Tr. 1/23/80, pp. 89-90].

Officer would first take evidence and make findings and recommendations pertaining to the status of Residence Counselors and the Association under the Act. If the Hearing Officer determined that the Residence Counselors were "employees" and the Association an employee "representative" within the meaning of the Act, a separate hearing would then be held to determine whether the Petitioner's claimed unit was the most appropriate [Tr. 1/21/80, p. 6].[3/] Both parties were given a full opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. At the close of the February 22, 1980 hearing, the Hearing Officer and the parties agreed that the parties would mail a questionnaire to former Residence Counselors asking whether they received course credits for their work and that the record would remain open pending the submission of questionnaires received within three weeks of mailing [Tr. 2/22/80, pp. 73-75]. On April 3, 1980, with the submission of the questionnaires, the record closed.

Both parties requested and received extensions of time within which to file their post-hearing briefs and reply briefs. On July 18, 1980, both parties filed their final briefs. Subsequently, on October 10, 1980, Hearing Officer Alessi resigned from the agency and the Director of Representation, pursuant to N.J.A.C.

3/ The parties understood that the hearing on the appropriate unit question would not be delayed pending the disposition of exceptions, if any, to this report.

19:11-6.4, designated the undersigned to issue a report and recommendation on the record as made.

Factual Findings

After carefully considering the entire record in this proceeding, the undersigned makes the following recommended findings of fact:

1. Rutgers, The State University is a public employer within the meaning of section 3(c) of the Act [J-1; stipulation 1].

2. The Constitution and By-laws of the Association of Residence Counselors of Rutgers College, Independent, adopted in November, 1978, provides that the Association exists to represent its members' concerns in the improvement of student life at Rutgers College and to represent its members as a collective bargaining agent as defined by the Act [R-8; Tr. 1/23/80, p. 66-67].

3. 13,301 students live in residence at Rutgers University; 6,165 of these students live in residence halls at Rutgers College [Tr. 1/21/80, p. 74]. Preceptors, Residence Counselors and the Dean of Students Office all work together to help resident students adjust to campus life. [Tr. 1/22/80, p. 14].

In each residence hall section, one undergraduate student serves as a Preceptor. The Preceptor is essentially a hall monitor who supervises the section and helps develop educational, social and recreational programs which enhance the experience of undergraduates at Rutgers [Tr. 1/21/80, p. 74].

In the academic year 1979-1980, Rutgers College employed 17 Residence Counselors [R-12]. Each of these Residence Counselors supervises 4-8 Preceptors and handles any counselling problems too difficult for the Preceptors [Tr. 1/21/80, p. 122; 1/22/80, p. 12]. The Assistant Dean of Students, in turn, supervises the Residence Counselors [Tr. 1/21/80, p. 103].

4. The Assistant Dean of Students for Residence Life sets the duties and responsibilities of Residence Counselors [J-1; stipulation 3]. A document entitled "Duties and Responsibilities of the Residence Counselor" describes the work which Residence Counselors perform [J-1; stipulation 2]. This work includes the following student-related responsibilities: counselling students and referring them to other agencies when appropriate, acting as a communication resource for students, advising residence hall government bodies, organizing training programs and establishing procedures for officers of residence halls as well as hall judiciary, developing programs and an environment conducive to beneficial educational, athletic, social, and recreational experiences for students, handling hall disciplinary matters, and promoting relationships and coordinating the Residence Life Program with services and departments which directly affect students. The Residence Counselor also has the following staff-related responsibilities: reporting directly to the Assistant Dean of Students for Residence Life, contacting the Dean of Students Office daily, interviewing, organizing, training, supervising and evaluating staff members in the hall, and conducting weekly staff meetings.

preferably in an education or counselling related field, the ability to provide staff supervision and training, experience in counselling individuals and advising student groups, a knowledge of residence hall life, and ability to work effectively with students in higher education [J-1; stipulation 2; Tr. 1/21/80, p. 79].

6. Rutgers advertises openings for Residence Counselor positions in graduate departments in the University and at various eastern undergraduate schools [J-1; stipulation 4; Tr. 1/21/80, pp. 75-76]. Prospective candidates fill out application forms which elicit information pertinent to whether the candidate has the basic qualifications. The Assistant Dean, and one or more Residence Counselors, Preceptors, and undergraduates interview the candidate [J-1; stipulation 4; Tr. 1/21/80, p. 78-79].

7. Each July, the Assistant Dean of Students appoints Residence Counselors for a one academic year period coinciding with the University's semester schedule commencing in the following September. A Residence Counselor may not receive more than three one year appointments [J-1; stipulation 5-7]. The annual turnover rate for residence counselors in the last five years has been approximately 45-50% [R-11, 12, 13; Tr. 1/21/80, pp. 80-81].

8. All Residence Counselors must live in their assigned residence halls. Rutgers provides them furniture and a school telephone and does not charge rent. [J-1; stipulation 8].

Finally, the Residence Counselor has the following administration-related responsibilities: assuming responsibility for complete office coverage in the evening and during the weekends, securing permission from the Assistant Dean of Students prior to spending any period of time away from the University, attending weekly staff meetings in the Dean of Students Office and other periodic meetings, establishing safety and security procedures for dealing with emergencies in the residence halls, formulating procedures for dealing with damages, vandalism and theft in the residence hall, maintaining certain records, and interviewing students seeking room transfers or desiring to leave the residence hall. In sum, the Residence Counselor acts as the "developer" of objectives for the hall and the prime source of motivation for the hall staff and students [J-1; stipulation 2].

In addition, Residence Counselors distribute mail from the Dean of Students Office to residence hall staff and hold the voucher books and make allocation refunds to students [Tr. 1/21/80; pp. 112-113]. Once or twice every ten nights, each Residence Counselor is on duty and must remain in his apartment to respond to any student problems. When on night duty, Residence Counselors must also make rounds in their buildings, check safety and security equipment, and write a duty report [Tr. 1/21/80; pp. 113, 118-119].

5. Basic qualifications for the position of Residence Counselor include the pursuit of an advanced degree at Rutgers,

9.- Rutgers pays Residence Counselors $3,500.00 for the first year, $3,750.00 for the second year, and $4,000.00 for the third year [J-1; stipulation 11]. Rutgers deducts federal income tax and social security payments from their paychecks [J-1; stipulation 13]. In addition, Residence Counselors, like the sons and daughters of other Rutgers employees and graduate, teaching, and research assistants, receive up to 24 credits of tuition remission each year [J-1; stipulation 10; Tr. 1/21/80, pp. 32-33]. Residence Counselors, however, receive no health insurance or pension benefits [J-1; stipulation 12]. They receive all vacations and recesses which appear on the academic calendar except that they must remain a half-day following the last class day before vacation and return a half-day before the first day after vacation [R-10; Tr. 2/22/80, p. 4].

10. Approximately 25% of students at Rutgers University receive financial aid [Tr. 1/21/80, p. 9]. The total value of such financial aid equals approximately 28 million dollars per year [Tr. 1/21/80, pp. 10-11]. This financial aid can take the form of either a grant (gift) or self-help aid. Self-help aid includes both loans and employment [Tr. 1/21/80, p. 16]. Of the 10,691 students who worked at Rutgers University during the fall semester of 1979 [R-15], 1,752 students were employed through College Work-Study funds [R-6; Tr. 1/21/80, pp. 18-19]. The federal government funds 80% of the Work-Study salaries, and Rutgers funds the remaining 20% [Tr. 2/22/80, p. 36]. One cannot obtain a College Work-Study job unless he is financially needy

[Tr. 2/22/80, p. 37]. The Financial Aid Office determines and administers College Work-Study awards [Tr. 2/22/80, p. 39].

11. The money Residence Counselors receive in exchange for the work they perform cannot be characterized as financial aid, although many Residence Counselors view their compensation as a means of financing their graduate education [R-39(D)-3(c), 11(c), 12(c), 16(c), 17(c), 18(c), 19(c)]. Rutgers does not consider the financial need status of an applicant in determining whether or not to hire him as a Residence Counselor. Thus, hiring decisions are made solely on merit rather than a desire to help particular students who might otherwise not be able to afford graduate school.

The Financial Aid Office plays no role in the selection or payment of Residence Counselors. The Financial Aid Office only becomes involved in considering the economic position of a Residence Counselor if that counselor applies for financial aid. Then, the Financial Aid Office will consider the compensation and the imputed value of the rent-free apartment and the tuition remission he receives for his work as available resources in its determination of whether financial need exists despite this income [Tr. 1/21/80, pp. 35-36]. In the last five years, 18 of 81 Residence Counselors have requested financial aid and 10 of these Counselors received it [R-38A]. Currently, Rutgers does not classify the Residence Counselor position as a College Work-Study job, although federal regulations now permit such a classification [Tr. 1/21/80, pp. 25,

34-35]. No Residence Counselor has ever received College Work-Study funds as part of his compensation for his work [Tr. 1/21/80, p. 63].

12. Residence Counselors work 10 months a year [R-10]. During these 10 months, they work, roughly on a half-time basis [R-9; Tr. 1/21/80, p. 123; Tr. 1/22/80, pp. 35, 66]. The average number of hours a week worked is approximately 17 hours [Tr. 1/21/80, p. 122]. Residence Counselors must also be on night duty from 7:00 p.m. to 7:00 a.m. once or twice every 10 nights and available to assist students with problems [Tr. 1/22/80, pp. 3]. However, while on duty, the Residence Counselor is free to do what he wants in his room unless a problem arises [Tr. 1/22/80; p. 4] and may spend his time doing Residence Counselor paperwork [Tr. 1/22/80, p. 46]. 4/

13. The work Residence Counselors perform may or may not be related to their field of graduate study. The Assistant Dean of Students testified that students of counselling or clinical psychology, social work, and advanced education find a residence counselorship an important practical experience and that about 50% of Residence Counselors in the past five years have pursued graduate work in these areas [R-13; Tr. 1/21/80, pp. 87-88]. She also testified that she permits Residence Counselors to miss staff meetings or submit paperwork late if their studies conflict with their work [Tr. 1/21/80, pp. 88-89].

4/ In its post-hearing brief (p. 6), Rutgers stresses that certain Residence Counselors worked only a few hours per week exclusive of duty time. The fact that duty time can be used to perform job tasks normally done outside duty time minimizes the significance of the cited testimony.

Rutgers grants both academic credits and "E" credits for particular non-classroom experiences relevant to a course of graduate study [R-26; R-27]. "E" credits do not count towards a degree; instead, they permit a student to maintain full or part-time student status which may be particularly relevant if a student is receiving financial aid [R-26, 27; Tr. 1/23/80, pp. 53, 63-64].

Only one department -- Counselling Psychology, Graduate School of Education -- has granted degree credit for experience as a Residence Counselor within the past five years; four students received such credit [R-29]. 5/ Only one department --Clinical Psychology, Graduate School of Applied and Professional Psychology -- reported granting "E" credits to Residence Counselors over the past five years; three students received such credit [R-28]. A number of Residence Counselors testified that they applied for academic or "E" credits based on their Residence Counselor position and were turned down either by the Dean of Students Office or their department [Tr. 1/23/80, pp. 30, 50, 72].

Of 19 former Residence Counselors who responded to a questionnaire on the relationship between their Residence Counselor work and their graduate study program, none received academic or "E" credits [R-39, "D" - 1(c) et seq.]. Five counselors, however, did submit papers on their experience as counselors as part of their course work [R-39, "D" - 4(c), 6(c), 9(c), 14(c), 18(c)].

5/ The Graduate School of Social Work reported that under appropriate circumstances, a Residence Counselor could receive field work credit (R-32). However, a Residence Counselor testified that when he applied for such credit, the School turned him down [Tr. 1/23/80, p. 30].

14. Generally, Residence Counselors may not enroll in courses offering more than nine credits each during the fall and spring semesters [R-10]. Over the past five years, 70% of Residence Counselors have taken between eight and nine credits each semester; 15% have taken fewer than six credits; and 15% have taken more than nine credits [Tr. 1/21/80, p. 89].

15. Three collective negotiations agreements were introduced into evidence. An agreement between Rutgers and the American Association of University Professors includes teaching and graduate assistants, except to the extent specifically provided in the agreement, in a unit containing faculty members [P-1, p. 2]. Agreements between Rutgers and two AFSCME locals exclude students from units containing maintenance and service employees and certain other job classifications and bar Rutgers from employing students to replace or layoff employees [R-16, p. 12; R-17, p. 26; Tr. 1/21/80, pp. 96-97].

Discussion

Rutgers first argues that Residence Counselors are not "employees" within the meaning of the Act. Rutgers characterizes these counselors as primarily students and couples this characterization with an assertion that students are not entitled to any of the rights or subject to any of the obligations of the Act.

N.J.S.A. 34:13A-3(d) defines "employee":

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of

> any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subject to the provisions of the Railway Labor Act. This term shall include any public employee, i.e. any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees. (emphasis supplied)

The broad threshold definitional phrase "shall include any employee," when read in conjunction with the very specific, narrow exclusions, illustrates "...the legislature's intent to provide to the widest range of public employees the opportunities under the Act to engage in collective negotiations concerning their terms and conditions of employment, while engaged in the public service." In re Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8, 10 (¶4006 1977); cf. In re Borough of Montvale, P.E.R.C. No. 81-52, 6 NJPER ___ (¶_____ 1980) (narrowly construing the "managerial executive" exclusion); In re Avon Borough, P.E.R.C. No. 78-21, 3 NJPER 373 (1977) (accord with Montvale). Compare NLRB v. Hearst Publications Inc., 322 U.S. 111, 129, 14 LRRM 614 (1944) (construing definition of "employee" broadly under LMRA).

The undersigned's review of the pertinent legislative history reveals no specific discussion of whether student employees of any kind are "employees" within the meaning of the Act. Absent this discussion, the undersigned turns to a consideration of whether Residence Counselors possess the essential charac-

teristics ordinarily associated with employee status. Indisputably, Residence Counselors possess these characteristics. They receive their positions by appointment from a public employer. They regularly work more than 20 hours per week, including duty time, for a period which by definition will last at least ten months and as much as three years.[6/] They perform work under an employer's control and supervision. In exchange for this work, they receive compensation, including taxable cash, rather than financial aid, scholarship payments, or academic credit.[7/] In

6/ One must distinguish between a determination that a particular person is an "employee" within the meaning of either our Act or the Labor-Management Relations Act, 29 U.S.C. §141 et seq., and a determination that a particular employee is or is not eligible to vote in either a separate unit or in a broader unit. Thus, for example, the National Labor Relations Board ("NLRB" or "Board") has held that temporary or casual employees are "employees" within the meaning of section 2(3) of the LMRA, but they are not entitled to vote in representation elections because they do not maintain a sufficient community of interest with other employees with respect to the conditions of employment. Such employees are, however, entitled to protection against employer unfair labor practices. See, e.g., Anthony Forest Products Co., 231 NLRB No. 161, 97 LRRM 1014 (1977); Oak Apparel, Inc., 218 NLRB No. 120, 89 LRRM 1381 (1975). The undersigned notes that past decisions under our statute have not clearly made this distinction, perhaps because no prior case arose in a bifurcated hearing context in which issues of "employee" status were cleanly separated from issues of appropriate unit composition. See, e.g., In the Matter of Rutgers University and College Teachers' Assn, P.E.R.C. No. 76-49, 2 NJPER 229 (1976); In re Bridgewater-Raritan Reg. Bd of Ed, D.R. No. 79-12, 4 NJPER 444 (¶4201 1978). The undersigned believes that Residence Counselors certainly have a significant enough temporal attachment to their jobs to be considered statutory "employees" although, as will be discussed infra at note 14, he reserves judgment on whether the three-year limitation on employment and the 45-50% annual turnover rate mean that a separate unit of Residence Counselors is inappropriate because it would not effectuate the purposes of the Act.

7/ Consider in this regard section 117(b) of the Internal Revenue Code which excludes from taxation payment for services required as a condition to receiving a scholarship or fellowship grant.

sum, Residence Counselors certainly perform as employees and are treated as employees when they do the work they are paid to do. See, e.g. Cedars-Sinai Medical Center, 223 NLRB No. 57, 91 LRRM 1398, 1402 (1976) (Dissenting Opinion of Member Fanning); Restatement (Second), Agency, §§ 200, 220 (1957).

Despite these manifest indicia of employee status, Rutgers argues, citing NLRB precedent, that student employees who are nevertheless "primarily students" are not "employees" covered under either the LMRA or our Act. The New Jersey Supreme Court has suggested that PERC, when considering cases arising in the representation context, should consider applicable NLRB precedent Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409, 424 (1970); Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Educational Secretaries, 78 N.J. 1, 9 (1978); contrast, Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 158-159 (1978) (private sector precedent of little value in determining scope of negotiations questions).

In St. Clare's Hospital, 229 NLRB No. 158, 95 LRRM 1180 (1977), the Board established an explanatory framework for its precedents concerning the rights of persons who were both students and employees. The Board divided its precedents into four categories: (1) students employed by a commercial employer in a capacity related to the students' course of study; (2) students employed by a commercial employer in a capacity unrelated to the students' course of study; (3) students employed by their own educational institutions in a capacity related to the students'

course of study; and (4) students employed by their own educational institutions in a capacity unrelated to the students' course of study. 8/ In each of these four categories, the cases concern two related, but different questions: (1) is a separate unit of student employees appropriate, and (2) under traditional community of interest analysis is a unit comprising both student and non-student employees appropriate? Neither of these questions directly raises the limited issue of statutory interpretation presently before the undersigned. However, as part of the analysis of these two questions, a few Board cases ask whether student employees enjoy statutory "employee" status. The undersigned shall therefore review the four categories of cases in search of cases specifically focussing on the question of "employee" status.

The first two categories of cases are only marginally relevant here since the Residence Counselors work for Rutgers, not for a commercial employer. Suffice it to say that the Board generally includes in a bargaining unit students working regular part-time hours for commercial employers in a capacity unrelated to their academic program in the bargaining unit, see, e.g. System Auto Park & Garage, Inc., 248 NLRB No. 115, 103 LRRM 1550 (1980), while the Board generally excludes from a bargaining unit students working regular part-time hours off-campus for commercial employers in a capacity related to their academic programs. See, e.g., Highway Inc., 223 NLRB No. 80, 92 LRRM 1088 (1976). In both

8/ The Board arranged these categories in a different numerical order; for ease of subsequent analysis, the undersigned has reordered the categories.

categories, the cases do not revolve around a determination of "employee" status within the meaning of the Act. Instead, they focus on the appropriate unit question: does a community of interest exist between the commercial employer's regular non-student employees and his student employees? See, e.g., Lake City Home for Aged, Inc., d/b/a Shady Oaks, 229 NLRB No. 5, 95 LRRM 1019 (1977). In the first category, a community of interest usually exists because the significance of student status as a differentiating factor is diminished by the lack of connection between employment responsibilities and academic study; in the second category, the significance of student status is heightened by the surrogate role the commercial employer plays for the educational institution in instructing the student employees.

The Board has decided a plethora of cases which fall in category number 3 -- students employed by their own educational institutions in a capacity related to the students' course of study. The most important cases, directly considering the LMRA definitions of "employee" and "labor organization," involve two types of student employees: (1) medical interns, residents, and fellows, and (2) graduate teaching and research assistants. In these cases, the Board has consistently denied these employees the right to separate representation or to inclusion in a unit containing non-student employees.

Cedars-Sinai Medical Center, supra, a case emphatically disapproved by the only Court of Appeals to pass on its analysis, House Staff Ass'n v. Murphy, ___ F.2d ___, 100 LRRM 3055 (D.C. Cir. 1979), illustrates the Board's position that interns,

residents and clinical fellows, although they possess certain employee characteristics, are "primarily students" and hence not "employees" within the meaning of section 2(3) of the LMRA. Representative of the Board's analysis is the following passage:

> From the foregoing and the entire record, we find that interns, residents, and clinical fellows are primarily engaged in graduate educational training at Cedars-Sinai and that their status is therefore that of students rather than of employees. They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties. While the housestaff spends a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. The number of hours worked or the quality of the care rendered to the patients does not result in any change in monetary compensation paid to the housestaff members. The stipend remains fixed and it seems clear that the payments are more in the nature of a living allowance than compensation for services rendered.[9] Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend. Rather their choice was based on the quality of the educational program and the opportunity for an extensive training experience. The programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice. The "Essentials," which describe the standards for approved

[9] In another part of the opinion, the Board characterized the stipend as a scholarship for graduate study.

> internships and residencies, indicate that the primary function is educational. Moreover, the tenure of a member of the housestaff at Cedars-Sinai is closely related to the length of the student's training program; thus few interns, residents or clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai following the completion of their programs.
>
> In sum, we believe that interns, residents and clinical fellows are primarily students. We conclude, therefore, that they are not employees within the meaning of Section 2(3) of the Act. Accordingly, no question affecting commerce exists concerning the representation of "employees" of the Employer within the meaning of Section 9(c) of the Act, and we shall dismiss the petition herein. Supra. at 1400 (footnote omitted).

Accord: Samaritan Health Services, Inc., 238 NLRB No. 56, 99 LRRM 1551 (1978); St. Clare's Hospital, supra; Clark City Mental Health Center, 225 NLRB No. 105, 92 LRRM 1545 (1976).10/

10/ Put mildly, the Board's ruling on interns, residents, and clinical fellows has met with mixed approval. The Pennsylvania Supreme Court, 4-3, has approved the Board's analysis and has held that interns, residents and clinical fellows are not "employees" under the Pennsylvania Labor Relations Act because their primary purpose in performing their work is not to earn money, but to fulfill state-mandated educational requirements; the Court stressed the absence of a normal bargained-for exchange. Philadelphia Ass'n of Interns and Residents v. Albert Einstein Med. Center, __ Pa. __, 1 PBC ¶10,286 (1976). Similarly, a California PERB Hearing Officer has excluded interns, residents, and clinical fellows from coverage under the California Act pursuant to Cedars-Sinai and a specific statutory provision including student employees only if their "...educational objectives are subordinate to the services they perform." University of California, 2 NPER 05-11058 (PERB H.O. 1980). By contrast, the District of Columbia Court of Appeals, focussing on the LMRA's broad definitional language, has reversed the Board and held that interns, residents, and fellows are "employees" under the Act. House Staff Ass'n v. Murphy, __ F.2d ___, 100 LRRM 3055 (D.C. Cir. 1979). The Nebraska Supreme Court has applied an analysis identical to the one applied in Murphy and reached the same result, House Officers Assoc. v. University of Nebraska Medical Center, 198 Neb. 697, 1 PBC ¶36,045 (1977), as has the District of Columbia Public Employment Relations

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Leland Stanford Junior Univ., 214 NLRB No. 82, 87 LRRM 1519 (1974), evidences the Board's belief that university research assistants are not "employees" under section 2(3) of the LMRA. Of central importance to the Board's ruling was the factual finding that payment to the research assistants constituted non-taxable financial aid which permitted them to pursue their advanced degrees rather than "wages" corresponding to the skills or function of a particular individual. Further, the research the assistants performed was evaluated and, if satisfactory, accepted in partial satisfaction of their degree requirements. Cf. College of Pharmaceutical Sciences, 197 NLRB No. 142, 80 LRRM 1456 (1972) (excluding teaching assistants from unit of faculty members); Adelphi Univ., 195 NLRB No. 107, 79 LRRM 1545 (1972) (excluding graduate teaching and research assistants from unit of all full-time and regular

10/ (continued)
Board, 1 NPER 09-10000 (D.C. PERB, Dec. 1, 1978). The Massachusetts Labor Relations Commission has found residents and interns working under one year contracts to be employees under its public employment statute since the hospital's paramount concern was not the education of students, but the care they supplied the patients. Matter of City of Cambridge and Cambridge Hosp. House Officers' Assn, 1 PEB ¶40,113 (April 29, 1976). Additionally, prior to the issuance of Cedars-Sinai, both the Michigan Supreme Court and the New York State Labor Relations Board found interns, residents and fellows to be employees under their statutes governing public employment labor relations. See, Regents of Univ. of Michigan, 389 Mich. 96, 70 LC ¶52,993 (1973); Wyckoff Heights Hosp., 34 SLRB No. 41 (1970); Long Island College Hosp., 33 SLRB No. 161 (1970); Brooklyn Eye & Ear Hosp., 32 SLRB No. 21 (1968). For a review of cases on interns, residents and fellows in both the private and public sectors, see Note, Student-Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital House Staff, 38 U.Pitt. L. Rev. 762 (1977); W.J. Maikovich, Rights of Hospital Interns and Residents, 2 NPER No. 7, (July 1980).

part-time faculty librarians and research associates).[11/]

St. Clare's Hospital, supra. at 1183, summarizes the reasons why the Board has excluded altogether from coverage under the LMRA students performing services directly related to their academic program at the educational institution they attend:

> The rationale for dismissing such petitions is a relatively simple and straight-forward one. Since the individuals are rendering services which are directly related to - and indeed constitute an integral part of - their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining

11/ Again, the Board's position on graduate research and teaching assistants has received some plaudits and some criticism. A two member panel of the Massachusetts Labor Relations Commission has determined that although teaching and research assistants are indeed public employees, they are not entitled to exercise any negotiation rights under the Massachusetts Act. One Commissioner emphasized that a collective bargaining relationship was inappropriate because students worked and studied at the same campus and because any negotiations would directly affect academic, financial aid, and admission policies. The other Commissioner stressed that the employer used its teaching and research assistant programs as a major component of its financial aid distribution. In re University of Massachusetts, Case No. SCR-2096, G.E.R.R. 818.12 (4/25/79). By contrast, in Board of Regents v. PERC, ___ Fla. App. Div. ___, 3 PEB ¶36,534 (1979), the Florida District Court of Appeals held that graduate research and teaching assistants were public "employees" under the Florida Act entitled to its full protection, including rights of negotiation. This legal controversy notwithstanding, Rutgers presently recognizes and negotiates with a unit of faculty members including graduate research and teaching assistants.

> process. It is for this reason that the Board has determined that the national labor policy does not require - and in fact precludes - the extension of collective-bargaining rights and obligations to situations such as the one now before us. (footnote omitted) 12/ (emphasis supplied)

This rationale is clearly inapposite to the factual matrix presented in this case. First, there is no more than a de minimis showing that the work performed by Residence Counselors relates to the academic degree program for graduate students. Second, the compensation received by Residence Counselors is not part of an attempt to target students needing financial aid; rather, it is offered and received as a quid pro quo for services rendered -- in short, wages. On the present record, Residence Counselors serve as employees, not students, and the mutual interests of the Residence Counselors and Rutgers in the ungraded and fully compensated services being rendered must be considered predominantly, if not exclusively, economic rather than academic. Thus,

12/ In some ways, St. Clare's Hospital may be viewed as a retreat from Cedars-Sinai's straightforward pronouncement that interns, residents and clinical fellows are not "employees" within section 2(3) of the Act. After the Board decided Cedars-Sinai, state agencies attempted to regulate the labor relations of hospitals and their housestaff on the theory that the LMRA did not preempt regulation since housestaff members were not statutory "employees." See, e.g. NLRB v. Committee of Interns and Residents, 426 F.Supp. 438, 94 LRRM 2739 (D.C. N.Y. 1977) (refusing to enjoin the New York State Labor Relations Board from asserting jurisdiction over housestaff). In St. Clare's Hospital, the Board attempted to stem the tide of state regulation by holding that federal law did preempt such regulation. In reaching this conclusion, the Board did not dwell on its Cedars-Sinai analysis of "non-employee" status. Instead, it focussed on national labor policy considerations which it believed made inappropriate the extension of collective bargaining rights to interns, residents and fellows.

the Board's third category of cases lends no support to an argument that Residence Counselors are not statutory "employees." 13/

We now turn to the fourth and most relevant category of Board cases concerning the hybrid species of student employees: students employed by their own educational institutions in a capacity unrelated to their course of study. According to St. Clare's Hospital, supra, the Board generally excludes such students from units including non-student employees and denies them separate unit representation rights. This exclusion rests on the Board's perception that students in this category are primarily interested in acquiring an education and work in order to supplement financial resources. St. Clare's Hospital, supra, at 1183, elaborates:

13/ Many cases have charged, with much reason, that the Board left the arena of statutory interpretation and entered the arena of legislative enactment when it found, despite the very broad statutory definition of employee, that an unwritten statutory exclusion existed for "students." See, e.g., House Staff Ass'n v. Murphy, supra; Philadelphia Ass'n of Interns and Residents v. Albert Einstein Medical Center, supra. (Dissenting Opinion of Robert, J.). By a narrow reading of Cedars-Sinai, Leland Stanford and related cases, one could find that the student employees involved in these cases were found to be non-employees because they did not receive "wages" -- as opposed to financial aid or academic credit -- or because they did not "work" -- as opposed to study --, not solely because of their "student" status. Such a finding would obviate the need to delve into the thorny problem of where interpreting leaves off and legislating begins.

> As in the first category, the students' motive for seeking employment cannot be deemed educational in the sense that it directly enhances their education, and thus in terms of their employment responsibilities they, too, must be considered "primarily employees." However, since their status as employees is in most instances directly related to their continued enrollment at the educational institution, their relationship to the bargaining unit is normally viewed as transitory. It is primarily for this reason that the Board generally excludes students from bargaining units of full-time employees at their own educational institutions.
> (footnote omitted)

The fourth category postulated in St. Clare's Hospital, consists of only one case, and that case was decided by a 3-2 vote. San Francisco Art Institute, 226 NLRB No. 204, 93 LRRM 1505 (1976). There, the Board found inappropriate: (1) a proposed unit including 12 student janitors and one non-student janitor and (2) a proposed alternative unit composed solely of the 12 student janitors.

Among the factors controlling the first determination were the differences in amount and method of payment of student employees (6 of 12 such employees performed their work in exchange for financial aid), the differences in the length of the work week (students worked 20 hours instead of 35 hours per week), the tailoring of student work schedules to accommodate their commitments as students, the relatively high turnover of students, and evidence showing that no student janitor had ever stayed on post-graduation to work as a full-time janitor.

Among the factors controlling the second determination were the brief nature of the students' employment tenure, the nature of compensation for some of the students, and the students' primary concern with their studies rather than with their part-time employment. Given these factors, the Board analogized these student janitors to temporary or casual employees who do not manifest a sufficient interest in their conditions of employment to warrant representation in a separate unit. In particular, the Board worried that the rapid turnover of student employees would create vexatious representation problems since the composition of any unit might change substantially between the holding of an election and the certification of its results. 14/

Contrary to Rutgers' belief, the fourth category of cases, as described in St. Clare's Hospital and embodied by

14/ The Board relied on one case, Saga Food Service of California, Inc., 212 NLRB No. 113, 86 LRRM 1673 (1974), to support its determination that a separate student unit was inappropriate. Saga actually belongs to category (2) of the St. Clare's Hospital framework since it involved a commercial employer. More importantly, as Member Fanning pointed out in his scathing dissent in San Francisco Art Institute, Saga Foods was essentially a community of interest case in which student food service employees were excluded from a unit of full-time non-student food service employees. A significant consideration in this determination was evidence that more than one half of the students had worked for less than five months and that students worked very few hours: only 9 student employees worked more than 16 hours per week; only 19 worked more than 10 hours per week; and the remaining 52 student employees averaged 5.8 hours per week. This same factual record of casual and temporary employment made inappropriate a unit comprising solely the student employees. By contrast to its citation of Saga Foods, the Board in San Francisco Art Institute did not mention Macke Company, Case 2-RC-16725 (1975) (not reported in Board volumes), in which the Board approved a stipulation for an election in a unit limited to students working in the Fairfield University cafeterias.

San Francisco Art Institute, has nothing to do with whether students in that category are "employees" within the meaning of section 2(3) of the LMRA. Indeed, the Board in San Francisco Art Institute conceded that the student janitors were primarily "employees" insofar as their work was concerned. Rather, this category of cases assumes that the students involved are statutory "employees" and then asks a different question: is either a separate unit or a unit containing non-student employees an appropriate unit?

On the basis of his review of the above four categories of student employee cases, the undersigned concludes that Residence Counselors are "employees" within the meaning of the Act since they possess all the normal indicia of employee status and since, unlike Cedars-Sinai and Leland Stanford, the only Board cases directly considering the LMRA definition of "employee," they receive taxable compensation instead of either financial aid or academic credit. Pursuant to the parties' stipulation, the question of the appropriate unit, if any, remains for determination after the next hearing.[15/]

15/ The undersigned emphasizes that although Residence Counselors are public "employees" within the meaning of N.J.S.A. 34:13A-3(d), it does not necessarily follow that they are entitled to vote in either a separate or a broader unit. See n. 6, supra. Because the issues of whether certain employees are temporary and/or casual employees do not depend on the statutory definition of "employee," but instead are interrelated with the composition of the appropriate unit, if any, the undersigned does not now reach these questions. In addition, in light of San Francisco Art Institute, the parties may also wish to consider whether the proposed unit or any alternative unit they might suggest would effectuate the purposes of the Act, even if Residence Counselors are not, in a strict sense, temporary or casual employees.

The undersigned's conclusion that Residence Counselors are "employees" within the meaning of the Act logically impels a finding that petitioner is a "representative" of public employees within the meaning of N.J.S.A. 34:13A-3(e). This section defines "representative" as including "labor organizations" and "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." Since Residence Counselors as public employees have formed petitioner association for the purpose, at least in significant part, of representing their collective interests as public employees, petitioner must be considered a "representative" within the meaning of our Act. The fact that petitioner also purports to represent the interests of Residence Counselors as students does not change this determination. See, e.g., Einstein Medical Center, 248 NLRB No. 9, 103 LRRM 1321 (1980); South Nassau Communities Hospital, 247 NLRB No. 67, 103 LRRM 1175 (1980). (Board, in interpreting definition of "labor organization", not contained in our Act, held that Nursing Advisory Committee is a "labor organization" although it was created in part to represent nurses on professional matters unrelated to wages, hours and terms and conditions of employment).16/

16/ In its post-hearing brief, pp. 15-16, Rutgers suggests that granting employee representative status to petitioner might raise certain problems if such an organization included students who were not employees as well as students who were. That is not the case here and such problems therefore need not be considered now.

Rutgers also argues that New Jersey public policy precludes negotiations between students and the educational institution they attend. In particular, Rutgers contends that collective negotiations might unduly disrupt student/teacher relationships, might affect financial aid programs based on need, might conflict with federal laws barring disclosure of student records absent student consent, might not be effective since many possible areas of negotiation might be unduly constricted and since a high turnover might destabilize employer-employee relationships, and might embroil PERC in a host of disputes unique to student employees.

Of course, the public policy underlying our Act favors permitting organization of all public employees who desire collective negotiations with their public employers. N.J.S.A. 34:13A-2; State v. Professional Ass'n of New Jersey Dept. of Ed., 64 N.J. 231, 253, 315 A.2d 1 (1974). At this juncture, the undersigned does not believe that Rutgers has adduced compelling reasons for displacing this fundamental policy.

Supposing that a unit containing student employees were found appropriate and that their representative won an election, any dispute over the propriety of collective negotiations on any particular issue could be expeditiously resolved through scope of negotiations or unfair practice proceedings before PERC on the basis of a concrete factual situation rather than an abstract argument contained in a brief. N.J.S.A. 34:13A-5.4(a), (d) City of Trenton v. P.B.A. Local No. 11, ___ N.J. Super. ___ (App.

Div. No. A-3966-78, October 3, 1980); Irvington P.B.A. v. Irvington, 170 N.J. Super. 539 (App. Div. 1978), certif. den. 82 N.J. 296 (1980). The undersigned has already determined that financial need is not a consideration in deciding whether to hire a Residence Counselor and that the work of a Residence Counselor bears at most an extremely tenuous relation to the pursuit of an academic degree. Thus, collective negotiations involving Residence Counselors are not likely to affect directly the two areas of university policy most inappropriate for collective negotiations: financial aid determinations and academic evaluation and decision-making. Contrast, In re University of Massachusetts, supra.[17/] Finally, Rutgers' arguments about the turnover of Residence Counselors and consequent impact on the stablity of collective negotiations can best be addressed in the context of deciding which, if any, unit is appropriate in the instant case. See, San Francisco Art Institute, supra.[18/] Accordingly, Rutgers' public policy arguments do not warrant dismissal of the petition at this stage.

17/ To the extent Rutgers argues that negotiations might raise Residence Counselors' compensation to the detriment of other students needing financial aid, there are two simple answers: (1) negotiating in good faith does not require agreement on any particular subject matter,and (2) the same result occurs any time Rutgers raises the salaries of faculty members or research and teaching assistants.

18/ Similarly, Rutgers' contention that collective negotiations would per force be unduly constricted because terms and conditions of student employment are unalterably fixed does not warrant an across-the-board declaration that no student employees may organize, vote, or negotiate; however, this argument may be relevant to the determination of whether an election in any particular unit would effectuate the purposes of the Act.

Recommendations

Based upon the entire record herein and his review of the parties' briefs and for the above-stated reasons, the undersigned Hearing Officer recommends the following findings and conclusions:

1. The Residence Counselors which petitioner seeks to represent are "employees" within the meaning of N.J.S.A. 34:13A-3(d).

2. Petitioner is an employee "representative" within the meaning of N.J.S.A. 34:13A-3(e).

3. Rutgers has not adduced public policy reasons sufficient, at this stage, to preclude the possibility of collective negotiations between Rutgers and its Residence Counselors.

4. The instant petition should not be dismissed at this stage.

5. A hearing to determine the appropriate unit, if any, should be held promptly.

Respectfully submitted,

Robert E. Anderson, Jr.
Hearing Officer

DATED: Trenton, New Jersey
October 31, 1980