

D.R. NO. 2005-5

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

In the Matter of

KEARNY BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-2004-069

KEARNY TEACHERS' AIDES ASSOCIATION,

Petitioner.

**SYNOPSIS**

The Director approves a unit of full-time classroom aides. The Director noted that the full-time aides' repeated attempts to secure representation with the district's broader units were unsuccessful, and that the part-time aides had for many years not expressed an interest in representation. Accordingly, the Director determined in this unique situation, that the employees' rights to be represented outweighs the risk of undue unit fragmentation. An election was directed among the proposed unit employees. The Director observed that we would not likely approve a separate unit of part-time aides should those employees someday seek representation.

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Appearances:

For the Public Employer,  
Genova, Burns & Vernoia, attorneys  
(Joseph M. Hannon, of counsel)

For the Petitioner,  
John Dillon, NJEA Representative

**DECISION**

On January 12, 2004, the Kearny Teachers' Aides Association filed a Petition for Certification with the Public Employment Relations Commission seeking to represent a unit of nine full-time classroom aides employed by the Kearny Board of Education.

The Board will not consent to a secret ballot election. It contends that the proposed unit, limited to full-time aides, is inappropriately narrow.

The Association asserts that a unit of only full-time aides is appropriate. It argues that the Board's part-time aides are not interested in representation, and the employee

representatives of the existing collective negotiations units have all rejected inclusion of the aides in their respective units, and that the full-time aides have a right to organize and negotiate collectively.

An administrative investigation of this matter has been conducted in accordance with N.J.A.C. 19:11-2.2 and 2.6. By letter dated August 6, 2004, I made tentative factual and legal findings and advised the parties that I was inclined to order an election based upon the administrative investigation. I provided the parties with an opportunity to respond. After an extension of time, the Board filed a position statement advancing additional legal arguments, as discussed below. I find that the disposition of this matter is properly based upon the administrative investigation, as there are no substantial, material facts in dispute. N.J.A.C. 19:11-2.2 and 2.6. Based upon that investigation, I make the following:

#### **FINDINGS OF FACT**

The Board has employed aides in various titles since 1991. The Board currently employs nine full-time aides, seven of whom serve as classroom aides for special education students and two more work as bus aides. In addition to the full-time aides, the Board employs approximately 173 part-time aides: 86 resource program aides, 48 early childhood aides, 18 lunch aides, 10 hall monitors, 2 or 3 clerical aides. The resource program aides and

the early childhood aides all work as classroom aides in an instructional setting. Part-time aides may be called upon to substitute for a full-time aide who is out sick.

Full-time aides are eligible for medical benefits, although 8 of the 9 full-time aides have waived benefits. Part-time aides do not receive benefits. Full-time aides are given five paid leave days a year. Part-time aides receive no paid sick or other leave days.

All classroom aides (full and part-time) are paid \$10 an hour. Clerical aides are also paid \$10 per hour. Other part-time aides - hall monitors and lunch aides - are paid \$9.00 per hour. Aides have no supervisory authority over any other Board employee. Aides report to the director of special services and the principal of the school to which they are assigned.

Aides work pre-determined, regular schedules in Board buildings. They are assigned by the director of special services. All of the full-time classroom aides, except one, work 5 and 3/4 hours daily, for a total of 28 3/4 hours per week. The ninth full-time aide works 32 hours per week. Part-time classroom aides work 3 or 4 hours a day, for a total of between 15 to 19 1/2 hours per week. Hall monitors work 15 hours a week. Lunch aides only work during lunch periods, for a total of 10 hours per week.

None of the aides have ever been represented for collective negotiations. The Board's employees are organized in five collective negotiations units. The Kearny School Administrators and Supervisors Association represents principals and vice principals. The Kearny Department Chairpersons Association represents approximately 13 department chairpersons. The Kearny Education Association negotiates for about 400 teaching staff members, including a handful of part-time teachers. The Kearny Education Office Professional Association has represented full-time secretaries (about 20) for about eight years. The Kearny School Employees Association represents custodial and maintenance personnel. Other than the full-time and part-time aides, the only Board employees not in negotiations units are the central office personnel and the security guards.

In January 2000, the Aides Association filed its first petition seeking to represent the full-time aides. The Board objected to the narrowly configured negotiations unit. The then Director of Representation found that, balancing the potential for unit fragmentation against the rights of the full-time aides to obtain union representation, the weight of the evidence fell in favor of rejecting the proposed unit of full-time aides. Kearny Bd. Of Ed., D.R. No. 2001-4, 27 NJPER 68 (¶32030 2000). Without specifically concluding which negotiations unit would be the most appropriate, the Director found that a unit limited only

to those aides working more than 20 hours a week would potentially result in whipsawing, transfer of unit work claims, undue fragmentation, and would ignore the community of interest between full- and part-time aides. The Director dismissed the Association's petition, but observed that, if after a reasonable time period, no organization seeks to represent a more broadly configured unit, we would reconsider the proposed unit. In 2002, the aides approached the Education Association and the Office Professional Association seeking representation. By letters, both organizations formally declined to add the full-time aides to their respective negotiations units. No organization has sought to represent the part-time aides.<sup>1/</sup>

#### ANALYSIS

The issue in this matter is whether the proposed unit of full-time aides is appropriate under the circumstances. The Association argues that if we were to continue to deny the full-time aides their own unit, we would be disenfranchising the aides from exercising their statutory rights to representation. It asserts that the part-time aides are unlikely to ever have an

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<sup>1/</sup> The Board asserts that the Association has failed to establish as a fact that it has attempted to organize the part-time aides as part of the unit. I do not believe it appropriate to require the Association to reveal its organizing efforts. What matters is that the part-time employees have not demonstrated an interest in collective representation.

interest in organizing, and the existing units' representatives have rejected the aides' bid for membership.

The Board maintains that there is no basis to disturb our prior decision finding that the proposed unit of full-time aides is too narrow. It asserts that the community of interest among all aides, as well as Commission caselaw favoring broad-based units, requires full and part-time aides to be placed in the same unit. Additionally, it maintains that the Commission's caselaw concerning "residual units," is inapposite, since the full-time aides do not constitute a "residual unit." Finally, it argues that Camden Bd. of Ed., P.E.R.C. No. 87-53, 12 NJPER 847 (¶17326 1986) (proposed separate unit of school psychologists denied) does not provide appropriate authority for granting the proposed unit, and that the public interest must be considered.

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The Commission is charged with the responsibility of determining the appropriate unit for negotiations. N.J.S.A. 34:13A-6(d). N.J.S.A. 34:13A-5.3 requires that negotiations units be defined "with due regard for the community of interest among the employees concerned." In making unit determinations, we must also consider the general statutory intent of promoting stable and harmonious employer-employee relations, but we must also remember that the Act intends to give employees the right to organize and negotiate collectively when they so chose. The Act

and our community of interest standards were not intended to be used to deny employees their representational rights, potentially in perpetuity.

The Board maintains that the petitioned-for unit is too narrow and relies on the Commission's long-standing policy of favoring broad-based negotiations units as most appropriate. The Commission generally does favor negotiations units structured along broad-based, functional lines and has been reluctant to approve units organized along narrow lines such as those structured along occupational or departmental lines. In State of N.J. and Professional Ass'n of N.J. Dept. of Education, P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972), rev'd NJPER Supp.2d 14 (¶7 App. Div. 1973), rev'd 64 N.J. 231 (1974) (Professional Ass'n), the Supreme Court endorsed the Commission's broad-based unit approach, but it directed that a balance be struck between the rights of public employees to negotiate collectively and the public employer's right not to be burdened with undue proliferation of negotiations units. Thus, the desires of the employees and the parties, while relevant, are not paramount. We consider the totality of circumstances of the particular case, including the structure and history of existing units and the extent of organization of the employer's employees. Bordentown Reg. Bd. of Ed. and Bordentown Reg. Ed. Ass'n, P.E.R.C. No. 84-126, 10 NJPER 276 (¶15136 1984), aff'd 11 NJPER 337 (¶16122



App. Div. 1985); Willingboro Bd. of Ed., D.R. No. 97-7, 23 NJPER 142 (¶23069 1997); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 88-124, 10 NJPER 272 (¶15134 1984); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981).

In an educational setting, there is no one "most appropriate" unit that fits all circumstances. While the Board is correct that the Commission's preference is generally for broad-based units, our approach in an educational setting is not so rigid as to insist on the broadest possible unit configuration. The Commission observed in Piscataway Tp. Bd. of Ed. that "many different types of school district unit structures are appropriate for certification: some containing teachers alone, some containing one or more groups of supportive staff alone, and some containing a mixture of teachers and one or more groups of supportive staff." Id. at 274 (citations omitted). See also, Trenton Community Charter School, D.R. No. 2000-10, 26 NJPER 187 (¶31076 2000) (employer's insistence that the professional unit be expanded to include non-professionals is rejected).

The Board also argues that the community of interest between the full-time aides and the part-time aides compels a finding that the appropriate unit must be all aides together. I agree that the full and part-time aides employed by the Board share a community of interest. They have the same duties, work with the

same students, have common supervision, and in some instances do the same work. The differences in their working hours would not, by itself, be sufficient to require separate units for the full- and part-time aides. However, while community of interest is a factor, it is not the controlling factor in deciding the appropriate unit here. While I recognize the community of interest among all aides as a group, and for that matter, the community of interest between aides and the teaching staff and even the other support employees, I must also consider the number of units the Board already has which mitigates against its fragmentation argument, and the impact on employee statutory representational rights if this petition is dismissed.

In considering the appropriateness of the proposed unit the Commission's past treatment of employees in residual units is relevant, not because this unit strictly falls within the residual unit definition, but because those cases have common issues of employee group abandonment and prove to be instructive. A residual unit can be found when the broad-based unit exempts a category of employees when the unit is formed, and those omitted employees are left unrepresented. In considering the appropriateness of such splinter units, the Commission's concern has focused "not only on the posture of the employer, but on the positions of the existing majority representative and the petitioning employees seeking the residual unit." See University

of Medicine and Dentistry of N.J., P.E.R.C. No. 84-28, 9 NJPER 598 (¶14253 1984) (UMDNJ), citing Parsippany-Troy Hills Board of Ed., D.R. No. 79-7, 4 NJPER 394 (¶4177 1978); Essex County Sheriff's Office, D.R. No. 83-5, 8 NJPER 477 (¶13323 1982).

Using the Supreme Court's test in N.J. Professionals, the Commission is balancing the statutory rights of employees to organize and negotiate collectively against the administrative right of the public employer to be free from over-fragmentation of negotiations units. The Commission has found that the balance tips in favor of granting a residual unit the right to be represented separately where approving the unit would not risk further unit proliferation, the employees have remained unrepresented for a period of time, and the incumbent representative has not expressed a willingness to represent the petitioned for employees. See City of Passaic, D.R. No. 2004-1, 29 NJPER 393 (¶125 2003) (separate unit of emt's permitted where there were seven units already represented and representative of broad-based units not interested in representing emt's). See also, West New York, D.R. No. 2002-1, 27 NJPER 339 (¶32121 2001) (separate unit of crossing guards appropriate where incumbent representative of white-collar employees was unwilling to represent the guards); Bergen Pines Cty. Hospital, D.R. No. 87-3, 12 NJPER 619 (¶17234 1982) (unit of physicians and dentists appropriate where group existed before other

negotiations units of professionals organized, and employer had already accepted the organization of eleven negotiations units); Middlesex Cty., D.R. 81-4, 6 NJPER 423 (¶11212 1980) (where employer consented to the establishment of a multiplicity of negotiations units, a residual unit of previously excluded employees was found appropriate). In UMDNJ, the then-Director of Representation directed an election, over the employer's objection, on a petition seeking a unit limited to the faculty in the University's School of Allied Health. The University refused to consent to an election, arguing that a representation election could cause undue fragmentation of the University's negotiations units, and that the Allied Health faculty should be included in a unit with other University graduate teaching faculty who were already represented by the American Association of University Professors (AAUP). However, AAUP had twice expressed its unwillingness to represent the Allied Health faculty. The Director noted that:

(a)t this juncture, it would be fundamentally unfair to deprive the instant employees of representation of their choice by dismissing the within petition. It would appear to be consistent with the Court's instruction in Professional Assoc. supra, to consider at this time, the practical consequences of a decision which would leave these employees without representation. UMDNJ, 9 NJPER at 294.

The Commission upheld the Director's decision, finding that on balance, consideration of the relevant factors required the

approval of the petitioned-for unit. P.E.R.C. No. 84-28, 9 NJPER 598 (¶14253 1984).

In this case, the Association proposes to limit the negotiations unit to only full-time aides. The Board suggests that all of its aides share a community of interest and that the proposed unit should be rejected as too narrow.

Directors of Representation have consistently found as a general policy that full-time and regularly employed part-time employees sharing a community of interest should be represented together. See, e.g. Randolph Tp., D.R. No. 97-8, 23 NJPER 145 (¶28070 1997) (appropriate unit must include regular part-time employees together with full-time employees). It was so found in Kearny I. This decision is an exception to, not a change of that policy.

While the part-time and full-time aides in Kearny share a community of interest, the part-time aides have apparently not sought representation. By contrast, the full-time aides have approached two of the Board's negotiations units; both organizations have disclaimed, in writing, any interest in representing these employees. None of the Board's three other employee organizations have sought to represent the full-time aides since the dismissal of the Association's previous petition. I have noted that, other than the full-time aides who are the subject of this petition, the only other unrepresented employees

of the Board are the part-time aides, central office personnel and security guards. In Professional Ass'n, the New Jersey Supreme Court affirmed the Commission's decision rejecting the petitioner's bid to represent a unit limited to State nurses. The Court found that the proposed unit was impermissibly narrow and did not serve the public interest, notwithstanding that employee interest was then limited to that one employee category. It must be remembered, however, that the Commission decision in that matter was issued in 1969, just one year after public employees were afforded statutory rights to representation. The Commission and the Court were concerned that permitting State employees to organize along departmental lines or occupational lines would permit a multiplicity of bargaining units, would create unworkable labor relations, and be contrary to the public interest. The Commission and the Court wanted to give the employees a chance to organize along broad-based groups of generic classifications, such as all professional employees. However, the Court observed,

If, after rendition of our determination herein, there continues for a substantial period to be no movement in that direction, [toward organizing professional employees en masse] it will be open to any interested organization or group of professional employees to lay the matter of appropriate units before the Commission anew. Clearly, the ultimate organization of all employees who desire collective negotiation with the State is a logical objective of the public policy underlying the statute.

In any event, nothing in our holding or in the decision of P.E.R.C. precludes a later determination, under circumstances then existing, authorizing units of less than the total body of professional employees. [Id. at 253]

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In University of Medicine and Dentistry, P.E.R.C. No. 91-2, 16 NJPER 431 (¶21183 1991) the Commission, relying on Professional Ass'n, found a nurses unit to be appropriate since after many years, no interest had been demonstrated in organizing the broad-based unit of professionals. That holding and same approach are appropriate here.

The Kearny full-time aides have existed in the district for many years, have sought representation as a separate unit, and in combination with the existing negotiations units for at least the past four years. Recognizing that part-time aides constitute a significantly larger group, and one that has shown no interest in organizing, dismissal of the instant petition may result in the inability of the full-time aides to secure representation. In view of these circumstances, I apply the Court's Professional Ass'n balancing test to find that the statutory rights of the full-time aides to be represented outweighs the employer's administrative right to a broad-based unit of all aides. The Board's unit proliferation argument is not persuasive noting it already has five negotiations units. See Passaic.

Despite approving the petitioned-for unit, I recognize the Board's concern about the possible organization of the part-time aides in the future. I agree that separate negotiations units, one of full-time aides and a second unit of part-time aides would not, without the Board's consent, be appropriate. Absent Board consent, I am unlikely to approve a separate unit of part-time aides. Should part-time aides someday seek representation, the appropriate unit for their representation would be within a unit including the full-time aides. Consequently, the full-time aides are on notice that while their separate unit is appropriate now, that structure is not guaranteed.

The Board also argues that having full-time aides organized and part-time aides unrepresented leaves it vulnerable to constant claims of illegal transfers of unit work. While such claims are possible, they are unlikely to succeed because the aides duties have apparently always been shared among the full-time and part-time employees. See Tp. of Dover, P.E.R.C. 89-104, 15 NJPER 264 (¶20112 1989) (no duty to negotiate before assigning dispatch work because dispatching had been shared between unit employees and non-unit employees.)

Finally, in dismissing the previous petition, citing Camden Bd. of Ed., the then-Director of Representation noted that if, after a reasonable period, no employee organization sought to represent a broad-based unit including all aides, the Association



might re-petition for only the full-time aides. I concur with that decision and now find that a reasonable period of time has passed, and that, under all the circumstances of this case, the Commission's balancing of interests analysis favors these employees' right to collective representation. This fosters the statutory goal of providing the right to representation to all public employees so interested, and thus, is in the public interest. Therefore, I order an election in the petitioned-for unit.

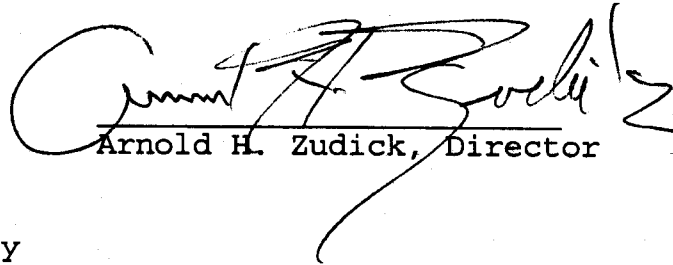
A mail ballot election shall be conducted no later than thirty (30) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to file with us an eligibility list consisting of an alphabetical listing of the names of all eligible voters in the units, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by us no later than ten (10) days prior to the date of the

election. A copy of the eligibility list shall be simultaneously provided to the employee organization with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The exclusive representative, if any, shall be determined by a majority of the valid votes cast in the election. The election shall be conducted in accordance with the Commission's rules.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION



Arnold H. Zudick, Director

DATED: October 15, 2004  
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review of this decision is due by October 28, 2004.