

D.R. No. 2009-14

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

In the Matter of

SOMERSET COUNTY,

Public Employer,

-and-

Docket No. CU-2009-028

COMMUNICATIONS WORKERS OF
AMERICA LOCAL 1037,

Petitioner.

SYNOPSIS

The Director of Representation clarified a certified negotiations unit of "all regularly employed professional employees employed by Somerset County" to include all regularly employed hourly part-time professional employees. The Director found that the hourly part-time professional employees working at least one-sixth of the time worked by full-time professional employees exhibit a regularity of employment and share a community of interest with other full-time and part-time professional employees. The County's belief that the hourly part-time employees were not included in the newly certified unit was rooted in an expired collective negotiations relationship with a former representative and as such cannot define the unit or bind the newly certified representative to the former unit structure which excluded hourly/part-time employees.

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Appearances:

For the Public Employer,
Drinker, Biddle and Reath, attorneys
(Marion B. Johnson, of counsel)

For the Petitioner,
Weissman & Mintz, attorneys
(Rosemarie Cipparulo, of counsel)

DECISION

On February 11, 2009, the Communications Workers of America, AFL-CIO, Local 1037 (Local 1037 or CWA) filed a clarification of unit petition seeking to clarify a certified negotiations unit.

The unit was described as:

all regularly employed professional employees employed by Somerset County (County) at the Richard Hall Community Mental Health Center located at 500 N. Bridge Street, Bridgewater, New Jersey and those professional employees employed by Somerset County and assigned from the Richard Hall Community Mental Health Center to Somerset Vocational Technical School and the Somerset County Jail, and the professional employees employed by Somerset County at the Psychiatric Emergency Screening

Services facility located at the Somerset Medical Center 110 Rehill Avenue, Somerville, New Jersey.

This description is set forth in a Certification of Representative we issued on June 17, 2008 (RO-2008-071), based upon a card check authorization representation petition.

N.J.A.C. 19:11-1.2.

Excluded from the certified unit are:

managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, non-professional employees, police employees, casual employees, coordinators, and all other employees of Somerset County.

CWA now seeks a determination whether the phrase, "all regularly employed" as set forth in the certification includes all regularly employed part-time employees of the County assigned to the identified County locations. It asserts that the County has refused to acknowledge that part-time employees working less than twenty hours per week are included in the unit of "regularly employed professional employees."^{1/}

The County opposes the petition, claiming that it never intended that professional employees working less than 20 hours

^{1/} On February 17, 2009, CWA filed an unfair practice charge Docket No. CO-2009-293, alleging in part, that the County refused to negotiate with it over terms and conditions of employment for the entire unit. The charge alleges that the County claims that it never intended that part-time employees be included in the certified unit. The charge has been held in abeyance, pending disposition of this petition.

per week would be included in the certified unit. The County contends that because employees working less than 20 hours per week had been excluded from the collective negotiations unit by agreement between it and the employees' former negotiations representative, it believed that they would also be excluded from Local 1037's unit.^{2/} The County also argues that the "hourly" employees have no community of interest with the other unit members.

On February 17 and 19, 2009, Local 1037 also filed a representation petition and an amended petition (Docket No. RO-2008-073) seeking certification by election of "all regularly employed part-time professional employees of Somerset County providing mental health services." It is our understanding that CWA filed that petition in order to preserve its representational rights concerning the disputed employees; and that it is not intended to be an admission that those employees were not included in the unit certified on June 17, 2008.

On February 27, 2009, the County filed a letter replying to the clarification of unit petition and to the new representation petition. On March 4, 2009, a Commission staff agent conducted

^{2/} The County's mental health professionals were previously represented by the National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO District 1199J (1199J). On January 17, 2008, 1199J issued a letter to us disavowing interest in continuing to represent the unit after January 31, 2008.

an investigative conference concerning the new petitions. On March 18, 2009, Local 1037 filed a reply, together with exhibits, to the County's argument that the disputed part-time hourly employees are not included in the existing certified unit.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2 and 2.6. All of the parties' submissions have been considered. The following facts appear.

Representation Petition RO-2008-071

On April 25, 2008, Local 1037 filed a representation petition for certification by card check authorization of "all professional employees of the County at its Richard Hall Community Center including any outstations of the facility." CWA estimated 82 employees fit within this unit description. On May 5, 2008, the County filed an "alphabetized list of employees in the unit described in the petition, together with their job classifications." The list set forth 78 names. It did not distinguish between full-time and part-time or part-time and hourly employees.

On May 29, 2008, a Commission staff agent conducted an investigatory conference among the parties regarding the representation petition. The County objected to the proposed unit arguing that the unit description included a number of supervisory titles which, by the dictates of our statute - the

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:A-1 et seq., (the Act) - cannot be included in the same unit as non-supervisory employees.^{3/}

CWA and the County reviewed the County's list of employees and agreed to exclude as supervisors 6 titles (12 employees) from the petitioned-for unit. Neither party raised any questions during the conference concerning "part-time" or "hourly employees", or sought a definition of those terms, or sought the exclusion of either group.

The County has conceded that "part-time workers" were included in the unit of professional employees previously represented by 1199J. It appears that the County's mental health collective negotiations unit had its origin among the professional employees employed at what was once named the Somerset County Guidance Center. In Somerset County Guidance Center and Professional Employees Assoc. of Somerset County Guidance Center, affiliated with District 1199 National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, D.R. No. 77-4, 2 NJPER 358 (1976) we ordered an election among the County's mental health professionals. On January 20, 1977, we certified

^{3/} N.J.S.A. 34:31A-1 et seq. at 34:13A-5.3, provides that supervisors as defined by the Act cannot be represented by an employee organization that admits non-supervisory employees to membership (with certain exceptions not relevant here).

1199 as the majority representative of all of the County's mental health professionals.

In this matter, named but unspecified part-time employees were included on the County's list of employees filed in response to CWA's petition. "Hourly" employees were not included on the list. The County and CWA agreed upon, and then signed a stipulation of appropriate unit at the May 29, 2008 conference. The stipulation excluded supervisors and set forth the named County facilities where the unit employees worked.^{4/} On June 17, 2008, I certified a unit of "all regularly employed mental health professionals" employed by the County.

On November 14 and December 10, 2008, and on January 14, 2009, the parties met for collective negotiations regarding the professional and supervisory units.^{5/} In the November 14, 2008 meeting, CWA proposed prorated fringe benefits (exclusive of health benefits), wages and wage increases for all part-time unit employees. It also proposed full health benefits and pension coverage for all part-time unit employees working more than 20 hours per week. At the session, the County representatives said that there had been a "misunderstanding" about the definition of

^{4/} On July 18, 2008, Local 1037 was certified as the majority representative of a separate unit of "all regularly employed supervisory" mental health employees of the County.

^{5/} The County has written that November 18 was the first negotiations session. For purposes of consistency, we cite the earlier date.

"part-time," inasmuch as its agreement with 1199J excluded "hourly" workers from the non-supervisory unit, i.e., those working less than 20 hours per week. The County advised CWA that it has never provided hourly workers with paid leave or benefits and never intended to do so. In the succeeding negotiations sessions, the County maintained its position that hourly workers were not part of the certified negotiations unit.

The County's mental health professionals who work less than 20 hours per week are paid an hourly rate from a separate budget as a line item for the Richard Hall and PESS divisions. The line item budget for these employees references them as "part-time." They receive no paid leave time and no health or economic benefits beyond their wages. They are eligible for overtime pay. By contrast, full-time and "part-time" employees other than hourly are paid full or prorated salaries and receive full or prorated benefits. About sixty professionals are included in the unit, excluding the hourly-paid employees.

On February 3, 2009, the County's negotiations representative informed CWA that joint negotiations for the professional group and the supervisors could not proceed until the dispute about the scope of the professional unit was resolved.^{6/} CWA filed its petitions in the same month.

^{6/} However, negotiations for the supervisory unit have continued to date.

On March 4, 2009, the County filed an alphabetized list of 18 professional part-time employees and their titles. The list identifies these employees as "hourly workers." Except for the title, "peer support specialist," the titles of the employees on the County's list match those held by the professional employees in the existing certified unit. The part-time employees on the County's list work at least one-sixth (1/6th) of the average number of hours of regular full-time employees in the existing unit.

The parties reviewed the County's list and agreed that the named employees are appropriately included in the unit described in CWA's RO petition filed on February 19, 2009.^{2/} CWA maintains, however, that these titles are already included as regularly employed professional employees in its certified unit.

The County does not oppose a separate unit of part-time professional employees who work less than 20 hours and more than one sixth (1/6th) of the average weekly hours worked by the full-time professionals in the same job titles.

ANALYSIS

A clarification of unit petition is intended to resolve confusion concerning the composition of an existing collective

^{2/} The authorization cards submitted in support of CWA's April 2008 petition reveal that they met the requirements of N.J.A.C. 34:13A-5.3 for certification by card check based upon a majority of signed authorization cards. The certification will not be disturbed.

negotiations unit for which the exclusive representative has already been selected. Disputes may arise during contractual negotiations or during the administration of the parties' agreement. Clearview Reg. Bd of Ed., D.R. 78-2, 3 NJPER 248 (1977). In this context, the purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act or as set forth in the unit definition contained in a Commission certification. New Jersey Transit and PBA Local 304, P.E.R.C. No. 2000-6, 25 NJPER 370 (¶30160 1999).

In this case, Local 1037 has been certified as the majority representative of "all regularly employed professional employees employed by Somerset County . . ." at several of its mental health facilities. The parties do not dispute that the professional titles are appropriately included in the unit. Nor do they dispute that some professional employees in the unit work less than the 37 1/2 to 40 hours per week worked by regular full-time professional employees. Finally, they do not dispute that employees working less than full-time hold the same professional titles as the full-time employees and perform the same functions.

The County and CWA dispute only whether certain part-time employees are included in the certified unit. Their eligibility was not implicated during the processing of CWA's first representation petition, nor at a time before the unit was

certified. The dispute arose months later when the parties began negotiating their first collective negotiations agreement. The County asserted that it was "mistaken" and never intended that part-time employees working less than 20 hours per week would be included in the negotiations unit.

The County's intent was apparently formed in the context of its previous collective negotiations relationship with 1199J. The County and 1199 agreed to exclude from the unit employees who worked less than 20 hours per week, evidenced by "Stipulation 1" attached to their collective agreement. The County's asserted mistake or intent to exclude hourly part-time workers is rooted to an expired negotiations relationship. The expired collective agreement however, does not define the certified unit, nor bind CWA, the new majority representative, to a unit which excludes regularly employed hourly/part-time employees. The only eligibility issue discussed by the parties before signing the stipulation of unit concerned supervisory titles, which they agreed to exclude. The County never informed CWA that "all regularly employed professionals" meant the exclusion of regularly employed part-time professionals working fewer or more than 20 hours per week.^{8/}

^{8/} The difference between the estimated number of employees petitioned-for by Local 1037 (82) and the number of names on the list of employees provided by the County (78) was also insufficient to raise a question for the Local as to the
(continued...)

In Mt. Olive Board of Education, P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982), the Commission found that an employee who works at least one-sixth (1/6th) of the regular, full-time hours worked in the employee's job category has sufficient regularity of employment to have representational rights under the Act. Citing criteria set forth in In Re Bridgewater-Raritan Bd. of Ed., D.R. No. 79-12, 4 NJPER 444 (¶4201 1978), the Commission distinguished between regularly employed part-time employees who are granted representation rights, and casual employees who are not regularly employed.

In this case, the County has acknowledged that the part-time employees working less than 20 hours per week work at least one-sixth (1/6th) of the time worked by full-time professional employees in the same job categories. Therefore, in accordance with Mt. Olive, I find that these hourly employees are regularly employed and entitled to collective representation as are the other part-time employees included in the unit.

Community of Interest

The County also argues that the part-time "hourly" employees are not appropriately included in the certified unit because they lack a community of interest with the other regularly employed

8/ (...continued)
accuracy of the County's list, especially because the County's list did include "part-time" professional employees.

professional employees. The County contends that the hourly part-time employees are paid an hourly rate from separate division budgets for the Richard Hall and PESS divisions. Full-time and part-time employees working more than 20 hours per week are salaried. According to the County, the hourly employees' wages are listed as a line-item on the division budgets. The County also contends that unlike the full-time and part-time employees working more than 20 hours per week, the hourly employees receive no paid leave and no health benefits. It conceded that hourly employees are in the same professional title and require the same qualifications as full-time employees and part-time employees working more than 20 hours per week; they work at two of the same locations as the other professional unit employees; and they are under the same supervision as the other unit employees.

N.J.S.A. 34:13A-6 empowers the Commission to determine the appropriate unit. In State of New Jersey and Professional Assn. of NJ Dept. of Educ., 64 N.J. 231 (1974) our Supreme Court endorsed the Commission's adoption of the concept of broad-based employer wide, functional negotiations units. The Court upheld the Commission's decision to combine different professional titles in a broad-based unit, based upon a shared concern for the public interest in avoiding unit fragmentation and proliferation. In making a determination of appropriate unit, the Commission

weighs the facts and concerns of the employer, employee representatives and the public in determining what unit structure promotes the statutory goal of labor stability and peace. State of N.J., 64 NJ at 240. The Commission makes its determination with due regard for the community of interest among the employees concerned. West Milford Bd of Ed., P.E.R.C. No. 56, NJPER Supp. 218(¶56 1971).

The County does not dispute that the qualifications for hourly employees, their job duties, professional responsibilities, work locations and supervision are the same as for those of the other mental health professionals included in the unit certified in June 2008. The County elects to account for the wages of hourly employees through a separate budget. Differences in wages and benefits are primarily the result of the negotiated agreement between the County and the previous majority representative. Neither of these factors persuade me that hourly part-time employees do not share a community of interest with all other regularly employed professionals in the unit.

The County earlier argued that its part-time professional mental health employees shared no community of interest with full-time professionals. In Somerset County Guidance Center, the County and 1199 stipulated a unit of "all professionals employed by the Somerset County Guidance Center." Before the election was conducted, the County contested the eligibility of several

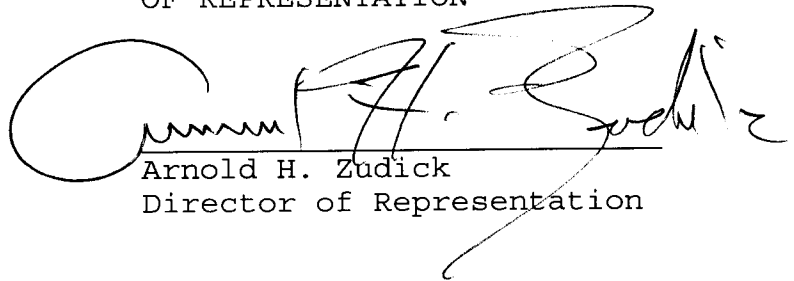
titles; among them was a psychiatrist who regularly worked 16 hours per week. The County argued that that part-time employee did not share a community of interest with other professionals in the unit. The disputed title performed the same work as full-time counterparts; was supervised by the same medical supervisors as his counterparts; and regularly worked for 16 scheduled hours per week rather than on an as-needed (casual) basis. We found that the position exhibited regularity of employment and shared a community of interest with other full-time professionals in the negotiations unit. We concluded the title was appropriate for inclusion in the mental health professional unit.

The circumstances of the contested titles in this matter compel the same conclusion for virtually identical reasons. Accordingly, all regularly employed part-time professional employees working at least one-sixth (1/6th) of the time worked by full-time professional mental health employees of the County are appropriately included in the certified unit represented by Local 1037. The unit description certified on June 17, 2008 is clarified to include all regularly employed hourly part-time professional employees (emphasis added).

This clarification does not automatically entitle the hourly part-time employees to any terms and conditions of employment greater than those they had at the time the unit was certified. Any new or additional benefits they receive must be achieved by

Local 1037 through negotiations with the County. The only requirement for the parties now is that they negotiate over the terms and conditions of employment for the entire unit, inclusive of regularly employed hourly professional employees, from the certification date of June 17, 2008.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Arnold H. Zudick
Director of Representation

DATED: May 19, 2009
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 is due by May 29, 2009.