

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

In the Matter of

CAPE MAY COUNTY GUIDANCE CENTER,

Public Employer,

-and-

Docket No. RO-77-163

CAPE LOCAL UNION 1983, IBPAT, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation, finding that the Cape May County Guidance Center is not a public employer within the meaning of the New Jersey Employer-Employee Relations Act, dismisses a petition seeking a proposed unit of certain of the Center's employees. The Center is governed by a Board of Trustees which controls labor relations policies applied to its employees. Although the Center receives 90% of its funding from public sources, this factor does not establish that the Center is thereby a public employer.

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Appearances:

For the Center, Joseph B. Fahy,
Acting Administrator

For the Union, John F. Waters,
Special Trustee

DECISION

On April 6, 1977, a Petition for Certification of Public Employee Representative, accompanied by a showing of interest, was filed with the Public Employment Relations Commission (the "Commission") by CAPE Local Union 1983, IBPAT (the "Union") seeking certification as the exclusive representative of certain employees of the Cape May County Guidance Center (the "Center").

The undersigned has caused an administrative investigation to be conducted into the matters and allegations involved in the Petition. The Center has certified that the usual Notice to Public Employees has been posted, and has supplied a list of employees.

The Union claims that the Center is a public employer of the employees sought to be represented by it. By letter dated April 19, 1977 and addressed to the undersigned, the Center, through its Acting Administrator, has stated that it is a private and not a public employer, and is therefore

not subject to the jurisdiction of the Commission. Because these conflicting claims raised a question as to whether the employer of the employees sought to be represented is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended (the "Act"), N.J.S.A. 34:13A-1.1 et seq., and, accordingly, whether the employees are public employees, the undersigned on April 29, 1977 assigned the case to a Commission staff member and directed further investigation into the facts.

Pursuant to the above-mentioned investigation the Commission staff member, by several telephone conversations and by letters dated May 11 and 16, 1977, solicited statements of position from both parties on the employer issue, and solicited detailed information relating to the Center's operation including information relating to the amount of public funds used to operate the Center, the extent of the Center's relationship to Cape May County (the "County"), and who controls the Center's labor relations.

The Union contends that the Center is a public employer because it receives approximately 90% of its operating budget from public funds ^{1/} and is required to submit budgets to the State and the County to obtain this money. Moreover, the Union argues that benefits granted to Center employees parallel those of County employees. For example, among these claimed benefits is participation in the same health program enjoyed by the County employees. The Union further argues that the Center is a public em-

^{1/} The Union submitted the following figures and alleged that the Center received:

1. \$70,000 annually from Cape May County
2. \$55,000 annually from N.J. State Department of Human Resources
3. \$4,700 annually from N.J. State Vocational Rehabilitation
4. \$8,000 annually from N.J. State Medicaid
5. \$2,500 annually from various Boards of Education within Cape May County
6. \$13,000 (approx.) annually from fees charged to patients

ployer because of a previous charge filed with the Commission on October 20, 1976, Docket No. CI-77-2, by a Center employee. Finally, the Union argues that a newspaper article of May 11, 1977 defines the Center as a public employer.

The Center argues that despite receiving a majority of its funds from public sources it is a private non-profit corporation designed to provide low cost services to County residents, and that its Medical Director, Administrator and Trustees direct the labor relations of the Center and are not County officials. Moreover, the Center argues that it owns its own facility, hires and fires its own employees, and that there is no inter-relationship between the Center and the County.

All parties have been advised of their obligation pursuant to N.J.A.C. 19:11-2.6 and have been afforded the opportunity to present to the undersigned documentary and other evidence as well as statements of position relating to the Petition. Based upon the investigation the undersigned finds and determines as follows:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that no substantial and material factual issues are in dispute which may more appropriately be resolved after a hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no need for a hearing where, as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The Center is the employer of the employees sought to be represented by the Union.

3. The Union is an employee representative within the meaning of the Act.

4. The Center receives a majority of its operating budget from public funds. In this regard the Center is required to submit an itemized budget to the County for the calander year and receipt of funds thereafter is not automatic. However, the County does not direct the way in which the funds are spent. Regarding State funding, the Center prepares an application for a grant under the Community Mental Health Services Act, and the Center must comply with the Rules and Regulations Governing State Aid under that Act.

5. None of the Center's other employees have been organized under the New Jersey ~~Employer-Employee~~ Relations Act or any other labor relations Act.

6. The Center Board of Trustees ^{2/} through the Medical Director and Administrator controls the hiring, firing, promoting, supervision, discipline and direction of the work of the employees. Neither the County nor the State interviews or recommends people for Center employment. The Board of Trustees fixes employee salaries. The Center employees are paid from the Center's operating budget on checks issued by the Center. Additionally, the Center owns and operates its own facility.

7. The Center Board of Trustees fixes the hours, vacations, sick time and holidays of the employees. Some of these benefits parallel County employee benefits. Additionally, Center employees belong to the same health plan as County employees, and the Center pays for such services out of its operating budget. Unlike County employees, however, the pension program for Center employees is not provided through the New Jersey Public Employee Retirement System, but rather is provided through the

^{2/} The Center was incorporated as a non-profit corporation under the Corporation and Associations not for Profit Act (Title 15, N.J.S.) on April 29, 1963 by a group of private citizens, and is currently governed by a 10 member Board of Trustees.

National Health and Welfare Retirement Association Inc. The Center is required to make unemployment deductions for Center employees. Center employees have neither the right nor the ability to transfer their employment or be promoted from the Center to the County without losing credit from time employed at the Center. Finally, Center employees are not covered under New Jersey Civil Service laws.

8. Newspaper reports in the May 11, 1977 Atlantic City Press indicated that the Center trustees contemplated turning over Center operations to the County.

9. On September 12, 1977, the undersigned notified the parties that, based upon the results of the investigation enumerated above, it appeared that no substantial and material factual issues had been placed in dispute and that in the absence of the presentation of substantial and material factual issues which would warrant the convening of an evidentiary hearing the undersigned would issue a decision on the basis of the administrative investigation. The undersigned provided an additional opportunity to all parties to present documentary and other evidence which would raise disputed factual issues as well as statements of position relating to the Petition. No further evidentiary proffer or statements have been provided by either party.

10. The Commission's jurisdiction in matters concerning representation is limited by various provisions of the Act to matters of public employment. N.J.S.A. 34:13A-8.1 provides: "(a) The Division of Public Employment Relations shall be concerned exclusively with matters of public employment related to determining negotiating units, elections, certifications...." ^{3/} N.J.S.A. 34:13A-5.2 provides: "This Commission shall make

^{3/} This section pre-existed the Commission's unfair practice jurisdiction added in January, 1975.

policy and establish rules and regulations in public employment relating to...administration including enforcement of statutory provisions concerning representation elections and related matters...." N.J.S.A. 34:13A-5.3 refers to rights of public employees and "(R)epresentatives designated or selected by public employees." N.J.S.A. 34:13A-6(d) empowers the Commission "to resolve questions concerning representation of public employees", and, if necessary, to conduct formal hearings with regard to representation matters.

The Act contains definitions of public employers and public employees. N.J.S.A. 34:13A-3(c) in defining the term "employer", provides:

"This term shall include 'public employers' and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service."

N.J.S.A. 34:13A-3(d), in defining the term "employee" provides:

"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."

The Commission has previously considered a matter in which it found that a claimed public employer was, in actuality, a private employer. In In re ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112, (1976), the employer, ARA Services, employed kitchen and cafeteria employees in the food service facilities at Glassboro State College. Although ARA was required to conform to certain hiring practices mandated by the State, the Executive Director found that ARA had, "control over 'labor and labor relations' in the food service operations at the college." 4/ Thereafter,

the Executive Director found that ARA was not a public employer within the meaning of the Act.

In related labor cases, the National Labor Relations Board, in considering the question of whether an employer was a private employer for the purpose of the National Labor Relations Act, has frequently found that the deciding factor is who controls the employer's labor relations.^{5/} In one case for example, Howard University, 224 NLRB 44, 92 LRRM 1249 (1976), the Board found that the University received approximately 90% of its funds from the Department of Health, Education and Welfare, and that University employees received substantially the same benefits and salaries as Federal employees. Nevertheless, the Board found that since the University, and not the government, controlled hiring, firing and working conditions of Howard employees, that Howard was a private employer within the meaning of the N.L.R.A.

More importantly, in a recent Board case, Camden Regional Legal Services, Inc., 231 NLRB No. 47 (August 11, 1977), the Board has asserted

^{5/} Howard University, 224 NLRB No. 44, 92 LRRM 1249 (1976), which specifically reversed Howard University, 221 NLRB 247, 86 LRRM 1389 (1974).

In Herbert Harvey, Inc. v. N.L.R.B., 424 F2d 77, LRRM 2213 (1969), enf'd. Herbert Harvey Inc., 171 NLRB 238, 68 LRRM 1053 (1968), the court at 424 F2d 778 held:

"The paramount question is whether enough authority over labor relations is lodged in [the Employer] to enable satisfaction of bargaining obligations under the Act...."

Finally, in We Transport and Town Bus Corp., 214 NLRB No. 91, 87 LRRM 1745 (1974), the Board asserted jurisdiction over a school bus operation which may otherwise have been exempt. In the Chairman's view the only issue was

"...whether a governmental entity...has sufficient control over the private employer's labor relations policies that either (a) the true employer is a governmental authority, so that we are precluded from asserting jurisdiction, or (b) the unit is not one 'appropriate for collective bargaining' because no meaningful bargaining could take place without the approval or participation of a governmental authority which is beyond the jurisdictional reach of this Board. At 215 NLRB No. 91 at p. 3. (emphasis added)

jurisdiction over the employer despite the fact that it receives primarily public funding through federal, state and county contributions.

In light of the above, the undersigned concludes that in resolving a public employer question such as in the instant matter, the deciding factor is whether the totality of the evidence establishes that the control, direction and development of the employer's labor relations is exercised by a private or a public entity.

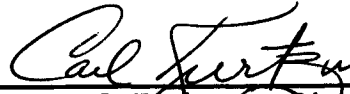
Despite the fact that the Center receives most of its funds from public sources, the undersigned finds that the evidence clearly establishes that the Center Board of Trustees, and not the County or any other public employer, controls, directs and develops the Center's labor relations. The Center controls hiring, discharge, discipline, hours, the fixing of wages, and other terms and conditions of employment. Although certain Center benefits parallel County benefits, the evidence does not establish that the County exercises any control over Center labor relations policies.

The Union's reliance upon the previous filing of an unfair practice charge with the Commission and upon newspaper accounts is misplaced. Just as the filing of a representation petition with the Commission, and the investigation thereof, does not automatically confer public employer status upon a claimed public employer, neither does the filing of an unfair practice charge. A review of the unfair practice charge matter relied upon by the Union indicates that the charging party withdrew the unfair practice charge prior to any Commission determination as to the public employer status of the Center. Additionally, newspaper accounts conjecturing possible future Center control cannot be considered viable evidence in reaching a decision in the instant matter.

Finally, the undersigned notes that in cases such as Howard, supra., and Camden Regional Legal Services, Inc., supra., the NLRB has found that, based on a totality of factors, an employer can be a private employer within the meaning of the N.L.R.A. despite receiving most of its funds through public sources. Although the undersigned cannot and is not passing upon whether the Board would assert jurisdiction over the Center, the undersigned is convinced that the Center is not a "public employer" within the meaning of the New Jersey ~~Employer-Employee~~ Relations Act.

11. Accordingly, the undersigned finds that the Cape May County Guidance Center is not a public employer within the meaning of the Act and the instant Petition is hereby dismissed. .

BY ORDER OF THE DIRECTOR
OF REPRESENTATION



Carl Kurtzman, Director
of Representation

DATED: October 27, 1977
Trenton, New Jersey