

D.R. NO. 81-7

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

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Public Employer,

-and-

DOCKET NO. RO-80-63

EAST ORANGE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation finds that supplemental teachers may vote as to whether they seek to be included in a negotiations unit comprised of the Board's certificated professional staff, but that night school teachers may not be added to the existing unit. The Director finds that the most appropriate unit for the representation of supplemental teachers is a unit of all instructional day personnel. The night school teachers, however, whose educational mission differs from day instructors do not share a community of interest with day personnel.

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Appearances:

For the Public Employer
Love & Randall, attorneys
(Melvin Randall of counsel)

For the Petitioner
Rothbard, Harris & Oxfeld, attorneys
(Nancy I. Oxfeld of counsel)

DECISION AND DIRECTION OF ELECTION

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on October 4, 1979 and amended on November 7, 1979 by the East Orange Education Association (the "Association") seeking to add the titles of supplemental teachers and night school teachers (in positions for which teaching certification is required) to the existing Association

unit of professional employees employed by the East Orange Board of Education (the "Board"). By letter dated February 27, 1980, the undersigned advised the parties that, pursuant to N.J.A.C. 19:11-2.6, the information obtained in the administrative investigation was sufficient to resolve the issue concerning supplemental teachers but that there were substantial and material disputed factual issues relating to the night school teacher issue to require the convening of an evidentiary hearing.

Pursuant to a Notice of Hearing dated February 27, 1980, hearings were held with respect to the night school teacher issue before Commission Hearing Officer Arnold H. Zudick, on May 1 and 5, 1980, in Newark, New Jersey, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. The parties chose not to file post-hearing briefs and the Hearing Officer issued his Report and Recommendations on June 27, 1980, a copy of which is attached hereto and made a part hereof. Neither party has filed exceptions to the Hearing Officer's Report.

The undersigned, having reviewed the entire record including the results of the administrative investigation regarding supplemental teachers and the transcripts and the Hearing Officer's Report regarding the night school teachers, finds and determines as follows:

1. The East Orange Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (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 East Orange Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association is currently the exclusive representative of a collective negotiations unit including the following employees: classroom teachers, nurses, guidance counselors, librarians, social workers, reading resource teachers, vocational counselors, psychologists, speech correctionists, learning disability teacher consultant, department heads, administrative assistants, supervisors, coordinators and continually employed certified substitutes. These employees are employed during the regular day program offered by the Board.

4. The Association seeks to add to its unit all supplemental teachers and night school teachers (in those positions for which teacher certification is required). The Association contends that these employees share a community of interest with current unit employees and are appropriate for inclusion in the existing collective negotiations unit.

5. The Board disputes the inclusion of the supplemental teachers and night school teachers in the Association's unit claiming that these employees do not share a community of interest with current unit employees.

6. Regarding the supplemental teacher issue, the Board's position focuses upon the supplemental teachers' specialized employment as a factor which precludes a community of interest with other Board professional personnel. However, the undersigned has previously found that a community of interest is shared among personnel who directly provide instruction to regular classroom students. Accordingly, the undersigned has found that various professional educational personnel may be included in negotiations units with other professional personnel notwithstanding their employment in a specialized function and notwithstanding the part time or per diem nature of their employment. In re Newark Bd. of Ed., D.R. No. 80-1, 5 NJPER 314 (¶ 10170 1979) (part time psychiatrists); In re Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977) (support teachers accreted to a unit of regular teaching personnel). Further, in In re Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980) the Commission reiterated its policy of discouraging fragmentation in the formation of negotiations units comprised of school district personnel. Subsequent to that decision the undersigned found in In re Hamilton Tp. Bd. of Ed., D.R. No. 80-23, 6 NJPER 99 (¶ 11051 1980), that supplemental teachers are

most appropriately included in a unit of regular teaching personnel because supplemental teachers are engaged in providing specialized and individualized instruction to regular classroom students, a function which is immediately related and necessarily adjunct to the education functions performed by full-time classroom teachers.

Accordingly, the undersigned determines that supplemental teachers employed by the Board share a community of interest with employees in the existing unit of Board instructional personnel and may vote on the question of representation in this unit.

7. Regarding the night school teachers, the Commission Hearing Officer evaluated several factors relating to community of interest considerations respecting the night school teachers and regular day teachers. The Hearing Officer concluded that a community of interest did not exist among the night school and regular day school teachers. His recommendation was based upon an analysis of the working conditions and benefits inuring to both categories of personnel as well as the educational mission of these personnel. The Hearing Officer emphasized the differences in educational mission and philosophy between the day program and the night program.

The undersigned is in agreement with the Hearing Officer's analysis. There is ample evidence in the record

to support his factual findings. The Hearing Officer properly analyzed the issues with respect to community of interest and correctly found that night school personnel do not share a community of interest with day personnel. Accordingly, the undersigned adopts the Hearing Officers findings of fact and recommendations with respect to this issue and dismisses this aspect of the Petition.

Accordingly, the undersigned determines that the Board's supplemental teachers share a community of interest with instructional professional personnel currently included in the Association's negotiations unit. Therefore, the undersigned finds that the appropriate unit for collective negotiations is: all classroom teachers, nurses, guidance counselors, librarians, social workers, reading resource teachers, vocational counselors, psychologists, speech correctionists, learning disability teacher consultant, department heads, administrative assistants, supervisors, coordinators, continually employed certified substitutes, and supplemental teachers, but excluding the superintendent of schools, secretary-business manager, assistant to secretary-business manager, principals, directors, assistant principals, assistant directors, assistants to the director and night school teachers.

Pursuant to N.J.A.C. 19:11-2.6, the undersigned directs that an election be conducted among the supplemental

teachers. The election shall be conducted no later than forty-five (45) days from the date set forth below.

Those eligible to vote are the supplemental teachers who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were out ill, or on vacation, or temporarily laid off, including those in military service. Employees must appear in person at the polls in order to be eligible to vote. 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. 19:11-9.6, the Public Employer is directed to file with the undersigned and with the Association an election eligibility list consisting of an alphabetical listing of the names of all eligible voters together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the undersigned no later than ten (10) days prior to the date of the election. A copy of the eligibility list shall be simultaneously filed with the Association with statement of service to the undersigned. The undersigned shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

Those eligible to vote shall vote on whether or not they desire to be represented for the purpose of collective

negotiations by the East Orange Education Association.

The exclusive representative, if any, shall be determined by the majority of valid ballots cast by the employees voting in the election. The election directed herein shall be conducted in accordance with the provisions of the Commission's rules.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: August 22, 1980
Trenton, New Jersey

H.O. NO. 80-20

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

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EAST ORANGE BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. RO-80-63

EAST ORANGE EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

A Commission Hearing Officer recommends that night school teachers who possess a regular teacher certification must meet a test of regularity and continuity of employment in order to be considered as a public employee within the meaning of the New Jersey Employer-Employee Relations Act for their night school work. The Hearing Officer further recommends that even assuming that some East Orange night school teachers satisfied the above test, they lacked a community of interest with employees in the Association's unit of day-time employees.

The Hearing Officer considered several elements of community of interest and found that the control, supervision and purpose of the night school program substantially differed from the day program. The Hearing Officer therefore recommended that the Petition be dismissed in regard to night school teachers.

The Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation Proceedings who reviews the Report, any exceptions thereto filed by the parties and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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Appearances:

For the Public Employer
Love & Randall, Esqs.
(Melvin Randall of Counsel)

For the Petitioner
Rothbard, Harris & Oxfeld, Esq.
(Nancy I. Oxfeld of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative was filed with the Public Employment Relations Commission (the "Commission") on October 4, 1979 and amended on November 7, 1979, by the East Orange Education Association (the "Association") seeking to add the titles of supplemental teachers and night school teachers in positions for which teaching certification is required to the existing Association unit of employees employed by the East Orange Board of Education (the "Board"). By letter dated February 27, 1980, the Director of Representation limited

the issue in this matter to a determination of whether or not night school teachers as petitioned-for, are appropriate for inclusion in the existing unit. ^{1/}

Pursuant to a Notice of Hearing dated February 27, 1980, hearings were held by the undersigned Hearing Officer on May 1 and 5, 1980, in Newark, New Jersey, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. ^{2/} Prior to the close of the hearing both parties indicated that they would not exercise their option to file written briefs in this matter. The transcript of the proceedings was received by the undersigned on June 3, 1980. Upon the entire record in this proceeding the Hearing Officer finds:

1. The East Orange Board of Education is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (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 East Orange Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

^{1/} The Association's existing unit includes the following titles employed during the regular day program: Classroom Teachers, Nurses, Guidance Counselors, Librarians, Social Workers, Reading Resource Teachers, Vocational Counselors, Psychologists, Speech Correctionists, Learning Disability Teacher Consultant, Department Heads, Administrative Assistants, Supervisors, Coordinators and Continually Employed Certified Substitutes.

^{2/} The hearing was originally scheduled for March 27, April 17 and 18, 1980. The Petitioner, however, requested that the matter be rescheduled to May 1 and 5, 1980.

3. The Association is seeking to add to its existing unit all night school teachers in positions for which teacher certification is required. The Association maintains that employees holding this position have a community of interest with and are appropriate for inclusion in the existing unit.

4. The Board maintains that the petition be dismissed because night school teachers have no community of interest with the employees in the existing Association unit. Consequently, a question concerning representation exists concerning night school teachers and the matter is appropriately before the undersigned for report and recommendations.

5. The parties agreed to stipulate into the record, as joint exhibits, copies of all the collective negotiations agreements between the parties, beginning with a document dated November 19, 1968. The parties also stipulated into the record a copy of the program of the East Orange Adult Community School for the Spring Semester 1980. ^{3/}

Background

The record shows that the East Orange Adult Community School (the "night" school) was designed to provide courses of interest to the local community as well as courses leading to a high school equivalency diploma. The night school is limited to adult students as opposed to regular day students who attend the regular day program. The testimony showed that the State Board of Education does not permit day students to

3/ The stipulated exhibits are marked as exhibits J-1 through J-8.

attend a night program such as that currently provided by the Board. The curriculum of the night program is divided into different areas, the first of which is labeled as general education. This includes a basic education course for adults, a course entitled English as a Second Language, and a high school completion course. These courses are generally those needed for an individual to obtain or finish a program leading to a high school diploma. The State Board of Education requires that the basic education course, also known as "ABE," be taught by certificated teachers. The other above referenced courses, however, do not require teacher certification. The remaining curriculum offered in the night adult program, which represents the bulk of the courses offered in the program, are of varying types, most of which are specifically designed to appeal to community interest. None of these latter courses require certificated teachers nor do they necessarily require a teacher in the traditional sense.

The Board maintains that its night program is completely separate from its regular day program and that the vast majority of the instructors in the night program are not otherwise employed as teachers in the East Orange or any other school system. The Association nevertheless maintains that any instructor of any of the courses who happens to be a certificated teacher in the East Orange system or for some other board of education, should be entitled to representation in the regular East Orange unit.

Analysis

The evidence produced at the hearing shows that approximately 35 teachers are employed in the night school program. Vernell Patrick, the Director of the Adult Community Education Program (night school), testified that only those three teachers who teach the ABE program are required to be certificated, but that there may be a total of six night school teachers who have certification. ^{4/}

In order to determine the appropriateness of the petition, two items must be examined.

First, whether there any certificated night school teachers who are eligible for representation as petitioned for:

Second, whether eligible certificated night school teachers have a community of interest with the existing Association unit.

Regarding the first question, the evidence shows that there is a very high turnover of certificated and non-certificated night school teachers. Mr. Patrick testified that of the three certificated teachers who taught the ABE program in the Spring Semester 1979, only one of those teachers returned for the 1979 Fall Semester. ^{5/} Mr. Patrick was not certain whether any other certificated teachers had taught in the previous semester, but he did testify that only four or five of the total 35 night school teachers have previously taught in the night school program.

Having reviewed the evidence, it appears that there is a lack of continuity and regularity of employment among most night school teachers. In order to classify any night school teacher at East Orange as

^{4/} Tr. II, p. 22.

^{5/} Tr. II, p. 10.

a public employee within the meaning of the Act, continuity and regularity of employment must be established. The test for regularity and continuity of employment which seems most applicable to the instant matter was enunciated in In re Rutgers, the State University, P.E.R.C. No. 76-49, 2 NJPER 229 (1976). In that matter the Commission found that some but not all coadjutant faculty members were eligible to vote in a secret ballot election. The Commission established the following test:

"All coadjutant faculty members who commence employment for at least their second semester during a given academic year, and who express a willingness to be rehired to teach at least one semester during the next succeeding year." Rutgers, supra, P.E.R.C. No. 76-49 at p. 4, 2 NJPER 229.

Therefore, the undersigned believes that in order for certificated East Orange night school teachers to become part of any negotiations unit, it must be established that the individual teacher has satisfied the test set forth in Rutgers, supra. That is, certificated night school teachers who commence employment for at least their second semester during a given year and who express a willingness to teach in the following school year would be eligible for representation in a negotiations unit.

Regarding the second question, even assuming that there were certificated night school teachers who were eligible for representation pursuant to Rutgers, supra, a determination must be made whether these teachers have a community of interest with, and are appropriate for

inclusion in, the comprehensive Association unit, There are numerous

hours and work place, commonality of benefits, supervision, the educational mission in question, the students, and several others.

Based upon a thorough review of the entire record and having utilized the elements discussed herein, the undersigned finds that certificated night school teachers in the East Orange program lack a community of interest with the existing Association unit. ^{6/} The facts developed at hearing show that the elements of community of interest as discussed herein differ sharply between night school and regular day school teachers. The night school teachers teach adults rather than regular elementary and secondary students, they teach for the most part in the evening hours rather than during traditional daytime hours of instruction, and night school teachers - even if certificated - are not entitled to tenure for their night school employment. ^{7/}

There are several other differences between the day and evening programs. Night school teachers - even if certificated - are not evaluated ^{8/} whereas regular day teachers are required to be evaluated; night school teachers are paid on an hourly basis and receive no other benefits whereas regular day teachers are paid pursuant to a yearly salary and receive numerous benefits. Perhaps most important, however, is that there is a different educational mission and philosophy between the two programs. The night school program is specifically designed to provide additional instruction on various subjects to adults living in the community. Although some of the night school courses are designed

^{6/} Since the Association only petitioned for "certificated" night school teachers, then no determination is necessary herein concerning the appropriateness of the non-certified night school teachers.

^{7/} Tr. II, p. 49.

^{8/} Tr. II, p. 8.

to lead to a high school equivalency diploma, none of the regular day students are permitted to attend night classes, and none of the night school subjects are taught in the regular day program. ^{9/}

Finally, there are two other elements that demonstrate a lack of community of interest between the day and evening East Orange programs. The first is that Mr. Patrick testified that the night program, unlike the day program, is almost totally funded from sources outside the Board. ^{10/} In addition, Exhibit J-8 shows that in a majority of the night courses students are required to pay a fee. These combined elements demonstrate a substantial difference in control, operation, and philosophy between the instant day and night programs.

The final element was expressed by Mr. Patrick and Mr. King, the Deputy Superintendent of Schools, when they indicated that although the Board is the employer of both day and night teachers, their supervision is completely different. Mr. Patrick as Director of the night program, does not supervise regular day teachers, and the principals who supervise the day teachers do not supervise the night school teachers.

^{9/} Some of the "night" courses are taught during "daytime" hours. Exhibit J-8 shows that the ABE course, the English as a Second Language ("ESL") course, and the High School Completion ("HSC") courses are offered during daytime and nighttime hours. However, regular daytime students are still not permitted to attend these courses (Tr. II, p. 19), and the two regular full time teachers who teach the ABE course during the day are already considered part of the Association's unit. (See Tr. II, pp. 47-48). Certification is not required to teach the ESL or HSC courses, and apparently there are only the above mentioned two regular full time teachers in the entire day program (See Tr. II, p. 20) and they are already represented by the Association.

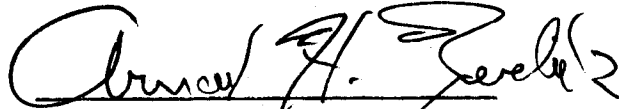
^{10/} Tr. II, p. 3.

Recommendation

Based upon the entire record herein, and for the above stated reasons, the undersigned Hearing Officer recommends that a unit of certificated night school teachers with regular day school teachers at East Orange is inappropriate. 11/

It is therefore recommended that the petition be dismissed with respect to certificated night school teachers. 12/

Respectfully submitted,



Arnold H. Zudick
Hearing Officer

DATED: June 27, 1980
Trenton, New Jersey

11/ Although the Hearing Officer found that certificated night school teachers were inappropriate for inclusion with the Association's unit in East Orange, that does not foreclose the possibility that night school teachers in other school districts could appropriately belong to units of regular day teachers. The elements of community of interest would need to be examined in each case.

12/ The Director of Representation reserved unto himself the question raised by this petition concerning supplemental teachers and therefore the Hearing Officer's recommendations only involve the certificated night school teachers.