

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

In the Matter of

TRENTON COMMUNITY CHARTER SCHOOL,

Public Employer,

-and-

Docket No. RO-2000-50

NEW JERSEY EDUCATION ASSOCIATION,

Employee Representative.

SYNOPSIS

The Director of Representation directs an election among all professional employees employed by the Trenton Community Charter Schools. The School objected to the representation petition, contending that the petitioned-for teachers are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), and, therefore, are ineligible for membership in any negotiations unit. The Director found that the facts did not support the conclusion that the teachers were managerial executives within the Act's meaning. The School also asserts that five of the teachers are supervisory employees and may not be included in the proposed unit; that the unit sought is not the most appropriate unit, because nonprofessional titles are excluded; and that even if the proposed unit of professional employees is found appropriate, the unit should include teaching assistants and paraprofessionals, as these employees are also professional employees under the Act. The Director found that the facts did not support these contentions and ordered that an election be conducted among the teachers and other professional employees, excluding teaching assistants and paraprofessional employees, finding that they did not fit within the Act's definition of professional employee.

D.R. NO. 2000-10

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Appearances:

For the Public Employer
Genova, Burns & Vernoia, attorneys
(Robert Gifford, of counsel)

For the Employee Representative
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Richard A. Friedman, of counsel)

DECISION AND DIRECTION OF ELECTION

On October 13, 1999, and January 14, 2000, the New Jersey Education Association (NJEA) filed a representation petition and amendment, respectively, with the Public Employment Relations Commission seeking to represent all professional employees employed by the Trenton Community Charter School (School or Charter School). The petition was timely and accompanied by an adequate showing of interest.

The School opposes the petition and refuses to consent to an election. The School also contends that the petitioned-for teachers are managerial executives within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

and, therefore, are ineligible for membership in any negotiations unit. Alternatively, it argues that five of the teachers are supervisory employees and may not be included in a negotiations unit with nonsupervisory employees. The School further maintains that the petitioned-for unit of only professionals is not the most appropriate unit, because nonprofessional titles are excluded, thus leaving the school vulnerable to "undue [unit] fragmentation." Finally, the School asserts that even if the proposed unit of professional employees is found appropriate, the unit should include teaching assistants and paraprofessionals, as these employees are also professional employees under the Act.

We have investigated the issues raised by the amended petition. N.J.A.C. 19:11-2.2 and 2.6. On February 1, 2000, we advised the parties of our intention to order an election and the reasons therefore. We invited their responses. Both parties filed additional submissions, the last of which was received March 1, 2000. Having considered all submissions, we find that the disposition of this matter is properly based on our administrative investigation, as there are no substantial and material factual disputes which would require a hearing. N.J.A.C. 19:11-2.6(b). The investigation reveals the following:

FINDINGS OF FACT

The Charter School began its operation on September 3, 1997, under the Charter School Program Act, N.J.S.A. 18A:36A-1 et seq. The School, which offers kindergarten through fifth grade,

emphasizes a math, science and technology curriculum. The School requires a "high degree of...collaboration among the Board of Trustees, teachers, students and families" (School's position statement November 17, 1999).

The School's administration is comprised of an executive director, school director and business administrator. Reporting to the school director are approximately 16 teachers, a substitute teacher, two family services coordinators, the school nurse, three paraprofessionals, one teacher assistant, the technology consultant, two school secretaries, and the custodian.^{1/} Ultimately, all employees report to the executive director and the board of trustees.

Teachers meet with the administration to develop, evaluate and implement the school curriculum and course content and choose academic materials. Teachers review testing and evaluative tools to determine whether improvements are needed.

Teachers attend employment interviews of prospective teaching staff members, assess their qualifications and "make recommendations regarding candidate selection." During the past two years, approximately 40 teaching candidates have been reviewed by the administration and members of the teaching staff. "In most cases, the administration has followed the teaching staff's recommendations regarding whether to hire the candidate." (School

^{1/} It is not clear from the record whether the business manager and administrative assistant/board secretary also report to the school director.

position statement November 17, 1999, p. 3). The record does not contain any specific example of any teacher who made an effective recommendation to hire a specific applicant. The School expects teachers to mentor other professionals and share ideas with their peers.

Teachers have been involved in establishing the school schedule. Initially, the schedule was 7:30 am to 4:00 pm, Monday through Friday. As the result of a meeting with the teachers, the administration implemented the teachers' recommendation that the work hours be changed to 7:30 am to 3:30 pm.

Five teachers have been appointed as "unit leaders", for which they receive stipends. They are responsible for oversight of each of five grade levels. They attend weekly meetings with the school director to discuss curriculum, planning, issues of concern and personnel matters. The school director may choose to follow the unit leaders' recommendations regarding any personnel matter. However, the school director has greater authority than the unit leaders to act on the School's behalf concerning personnel matters, and he decides in each case what action should be taken or should be recommended to the executive director and Trustees. The record does not contain any examples of unit leaders having either imposed discipline on any other employees or having effectively recommended the discipline of any other employees.

The School employs three paraprofessionals and one teaching assistant. The qualifications for these positions include a high

school diploma with experience in education preferred but not required. The job responsibilities of the teacher assistant and the paraprofessionals include assisting teachers in preparing lesson plans and delivering the lesson; preparing and maintaining the classroom; maintaining adequate classroom supplies; maintaining student records, helping teachers develop non-academic student activities such as physical education, art and music; assisting in the evaluation of students; assisting teachers in monitoring students during meals, snacks, and arrival and departure times. In addition to these duties, the paraprofessional also organizes and supervises the distribution and clean-up of student meals.

ANALYSIS

The following issues are raised by the petition:

1. Are the teachers managerial executives within the meaning of the Act?
2. What is the most appropriate unit for collective negotiations?
3. Are the unit leaders supervisors within the meaning of the Act?
4. Are the paraprofessionals and the teaching assistant professional employees within the meaning of the Act?

Are Teachers Managerial Executives?

The School argues that its teachers participate in formulating policies and, therefore, are managerial executives within the meaning of the Act and not entitled to be represented for purposes of collective negotiations. The School contends that "a charter school is not a school district, but is operated

independently of a local board of education and is managed by a board of trustees." (position statement November 17, 1999, page 2, citing N.J.S.A. 18A:36A-3). N.J.S.A. 34:13A-5.3 provides:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent....

N.J.S.A. 18A:36A-3 provides:

...A charter school shall be a public school operated under a charter granted by the commissioner, which is operated independently of a local board of education and is managed by a board of trustees.

N.J.S.A. 18:36A-11 provides:

a. A charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools,....

N.J.S.A. 18A:36A-14 provides:

...b. The charter school and its employees shall be subject to the provisions of the "New Jersey Employer-Employee Relations Act.

Initially, for the purposes of determining questions concerning representation and issues of unit composition, the Charter School, while not by definition, a "school district," is a sufficiently analogous entity to a school district for the purpose of applying the statutory definition of "managerial executive." In a school district, the term managerial executive means the

superintendent or his/her equivalent. Applying the standard to this Charter School, I find that teachers are not equivalent to a superintendent and, thus, not managerial executives.

Moreover, assuming charter schools are not "school districts" within the meaning of the Act, the facts here do not support a finding of managerial status based upon these teachers' responsibilities. N.J.S.A. 34:13A-3(f) defines managerial executives as:

...persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district.

Our Supreme Court recently examined this statutory provision in New Jersey Turnpike Auth. and AFSCME Council 73, 150 N.J. 331 (1997).

The Court partially modified but otherwise approved the standards set forth in Bor. of Montvale, P.E.R.C. No. 81-52, 6 NJPER 507 (¶11259 1981). The revised standard provides:

A person formulates policies when he develops a particular set of objectives designed to further the mission of a segment of the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the

extent of discretion he exercises. [New Jersey Turnpike Auth., 150 N.J. at 356.]

The Charter School contends that its teachers are "similarly situated to the professors in NLRB v. Yeshiva University 444 U.S. 672, 103 LRRM 2526 (1980)." (position statement Nov. 17, 1999, at p. 7). In Yeshiva, the U.S. Supreme Court found that the professors'

...authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies and matriculation standards. [444 U.S. at 686.]

The Charter School offers no facts indicating that the teachers here possess the extensive authority exercised by the professors in Yeshiva. Our Commission has recognized that managerial executives "need not have final responsibility for signing off on policies, provided [their] recommendations effectively control what policies will be adopted by establishing their key components." State of New Jersey (DEP), P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998); recon. den., P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999). However, the Commission continued:

[We] will distinguish between a managerial executive's discretion to effectively determine policy and the duty characteristic of lower level positions to suggest courses of action or supply information. We will look to see who has the effective power to call the shots in formulating policies.... [Id. at 25 NJPER 53.]

The Charter School teachers are purportedly "instrumental" in developing school curriculum; "involved" in personnel

interviewing; they "make recommendations" regarding daily work schedules; they are "active" in selecting teaching staff. None of the quoted descriptions show that teachers have the "effective power to call the shots in formulating policies." Furthermore, nothing in the Charter School legislation^{2/} appears to restrict the representation rights of teachers, who in a public school district, are entitled to representation under the Act. Accordingly, I find that the Charter School teachers are not managerial executives.

What is the Appropriate Unit?

The Association seeks to represent the School's professional employees. The Association agrees that such a unit would include all regularly employed teachers, the regularly employed substitute teacher, the school nurse, and the family service coordinators. The Charter School contends that a negotiations unit limited to professional employees is not the most appropriate unit because it would leave non-professional support staff outside the unit, resulting in the potential for unit fragmentation. The School argues for a broad based unit of all non-supervisory employees.

I find that a unit limited to professional employees is appropriate. N.J.S.A. 34:13A-5.3 provides that "[t]he negotiating unit shall be defined with due regard for the community of interest among the employees concerned...." N.J.S.A. 34:13A-6 provides that:

^{2/} See N.J.S.A. 18A:36-1 et seq.

The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes...both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit....

Where more than one unit is appropriate, the Commission is charged with the responsibility of determining the most appropriate unit. State v. Prof. Assn. of N.J. Dept. of Ed., 64 N.J. 231 (1974). We do so by balancing the right of the public employer to be free from unit proliferation against the rights of employees to be represented for collective negotiations. In addition to statutory requirements, we also consider the extent of employee organization, the history of representation in the district, and the desires of the employees. Piscataway; Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981).

In State Professionals, the Supreme Court endorsed our policy of generally favoring broad-based units. However, that policy does not dictate that all employees permitted by the Act to organize together must comprise the most appropriate unit. In fact, in State Professionals, the Court found that the appropriate unit would be one of all professional employees. In Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984), the Commission observed 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).

In Children's Aid and Adoption Society, P.E.R.C. No. 94-90, 20 NJPER 186 (¶25084 1994), a case factually similar to this one, the employer asked that we impose a unit of all professional and nonprofessional employees even though the petitioner sought only nonprofessionals. In that matter, the Commission found:

Either proposed unit would contain employees who share a community of interest. Either configuration would be an appropriate unit. We have often certified units containing nonprofessionals alone as well as units containing professionals and nonprofessionals. Because of the statutory requirement that permits professional employees to choose not to be included in a unit with nonprofessional employees, N.J.S.A. 34:13A-6(d), it is always possible that either nonprofessionals or professionals will have to be in a separate unit. Thus, separate units could never be deemed inappropriate. [Id. at 187; fn. omitted.]

The Commission concluded that the petitioned-for unit of nonprofessional employees was appropriate and directed an election.

In Fairview Bd. of Ed., D.R. No. 80-7, 5 NJPER 427 (¶10222 1979), two competing organizations sought different units. One petitioner sought a unit of professional employees only and the other petitioner sought professionals and nonprofessionals combined. The Director of Representation determined that, as either unit configuration is equally appropriate and the professionals may, through the statutorily provided professional option, effectively "veto" a broad-based professional/nonprofessional unit, there was no need to determine the most appropriate unit.

The School argues that, under State Professionals, we must find the most appropriate negotiations unit, not merely an appropriate unit. Either proposed unit would contain employees who share a community of interest. Either configuration would be an appropriate unit. We have often certified units containing non-professionals alone as well as units containing professionals and non-professionals. Piscataway. However, only professional employees here have sought representation. Professionals have a statutory right not to be in a unit with nonprofessional employees. N.J.S.A. 34:13A-6(d). There is no real danger of undue fragmentation or proliferation of units, as it appears that the petitioned-for unit is one of only two possible units. As the Commission noted in Children's Aid,

We will not ignore the employer's preference for a single unit. But we must balance that against the desires of the petitioning non-professional employees. The employer's proposal asks us to impose on the petitioner a unit broader than the one it petitioned for, even though the petitioned-for unit is appropriate. It also would give to the professional employees, who have not petitioned for representation, a voice in deciding the negotiations unit structure, not only for themselves, but for the non-professional employees as well. [Id. at 187.]

Similarly, expanding the School's negotiations unit to include the non-professional employees, whom the Association does not now seek to represent, would potentially give professionals a voice in the unit structure, as well as the representation status of non-professional employees who had not been sought in the petition. There are no facts in this case which compel a finding

in favor of a unit which was not sought. Accord, Children's Aid. Accordingly, I find that under all of the circumstances here, the proposed unit of all professional employees is most appropriate.

Are Unit Leaders Supervisors?

N.J.S.A. 34:13A-6(d) provides:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, except where established practice, prior agreement or special circumstances, dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership....

The Commission has defined a statutory supervisor as one having the authority to hire, discharge, discipline or effectively recommend the same. Cherry Hill Tp. Dept. of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (1970). A determination of supervisory status requires more than an assertion that an employee has the power to hire, discharge, discipline or effectively recommend these actions. An indication that the power claimed to be possessed is actually exercised is needed. Somerset Cty. Guidance Center, D.R. No. 77-4, 2 NJPER 358, 360 (1976). Here, the teachers appear to exercise diffuse authority in hiring decisions, although no specific examples of any hiring decisions and methods were provided. They appear to have attended interviews and made recommendations to school administrators, who, as the ultimate decision-makers, adopted

their recommendations. We will not speculate as to whether teachers' hiring recommendations were by consensus, majority rule or other method. We find that the type of input described here is too attenuated to be indicative of supervisory authority. See Atlantic Cty. Bd. of Social Serv., P.E.R.C. No. 90-21, 15 NJPER 594 (¶20243 1989) (Commission held that professional employees' collective interviewing of job applicants does not rise to the level of an effective recommendation). No evidence provided indicates that unit leaders have exercised any disciplinary authority over other employees. Thus, we conclude that the petitioned-for employees are not supervisors within the meaning of the Act and are appropriate for inclusion in the unit.

Are Teaching Assistants and Para-professionals "Professional Employees?"

The School maintains that if we find a unit of professionals to be appropriate, that unit should include the three para-professionals and the teacher assistant. N.J.A.C. 19:10-1.1 defines "professional employee":

'Professional employee' means any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature in the field of physical, biological, or social sciences, or in the field of learning. The commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The term shall also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person to qualify to become a

professional employee as defined herein. The term shall include, but not be limited to, attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.

The paraprofessionals and teaching assistant do not meet this definition. Their work does not require "knowledge of an advanced nature." In fact, the School requires only a high school education and, while it prefers some experience in an educational setting, it does not require it. In addition, their responsibilities appear to be primarily to assist teachers, not to teach. I therefore find that teaching assistants and paraprofessionals are not professional employees within the meaning of the Act.

DIRECTION OF ELECTION

Based upon all of the above, I direct an election in the petitioned-for unit as follows:

Included: All regularly employed professional employees employed by the Trenton Community Charter School, including classroom teachers, unit leaders, substitute teachers, family services coordinators, and school nurses.

Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, nonprofessional employees, police employees, casual employees and all other employees.

The 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. Employees must appear in person at the polls in order to be eligible to vote.^{3/}

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


Stuart Reichman, Director

DATED: March 10, 2000
Trenton, New Jersey

^{3/} N.J.A.C. 19:11-10.3 gives me discretion to determine whether the secret ballot election should be conducted manually or by mail ballot.