

D.R. NO. 99-12

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

In the Matter of

STATE OF NEW JERSEY
(WILLIAM PATERSON UNIVERSITY),

Public Employer,

-and-

Docket No. RO-98-122

LOCAL 248, A.F.M.

Petitioner.

SYNOPSIS

The Director of Representation dismisses a petition filed by the American Federation of Musicians, Local 248, which sought to represent a separate unit of part-time musicians employed by William Paterson State University. The Director finds, under all the circumstances, that the negotiations unit sought by the petition is inappropriately narrow in scope, and that the musicians are employed too infrequently do not possess sufficient regularity and continuity of employment to warrant collective negotiations rights.

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Appearances:

For the Public Employer
Peter J. Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Petitioner
Balk, Oxfeld, Mandell & Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

DECISION

On May 7, 1998, the American Federation of Musicians, Local 248, ("AFM") filed a representation petition with the Public Employment Relations Commission ("Commission"). The AFM seeks to represent a separate negotiations unit of musicians who perform with the William Paterson State University's Wayne Chamber Orchestra ("University"). The University opposes the petition and refuses to consent to a secret ballot election. The University argues that the

petition seeks an inappropriately narrow negotiations unit.^{1/} The University also asserts that the musicians who are the subject of the petition are not "employees" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") either because they work too casually or they are independent contractors. The University further asserts that the orchestra is a non-profit organization and not a public employer subject to the Act.

We have conducted an administrative investigation into the petition. N.J.A.C. 19:11-2.2. The parties submitted facts and argument at an investigatory conference on June 10, 1998, and further written submissions on July 23, 1998, and August 20, 1998. By letter dated October 1, 1998, we informed the parties of our tentative factual findings and our intention to dismiss the petition and invited their responses. On October 22, 1998, the AFM filed a response objecting to our findings. The University did not respond. We hereby incorporate Petitioner's position and modify our original findings as follows.^{2/}

^{1/} It asserts that the most appropriate unit would be the existing state-wide adjunct faculty unit. We make no finding concerning the University's suggestion as to the most appropriate unit. As noted below, a state-wide unit of non-faculty professional employees also exists.

^{2/} By letter dated February 23, 1999, we informed the parties of our modified findings and conclusions and invited their responses. Neither party responded.

The Wayne Chamber Orchestra is a program of the William Paterson University Foundation.^{3/} The Foundation is an entity within the control of the University via its 19-member Board of Directors. Richard Reiss, Vice President for Institutional Advancement for the University is the Foundation's executive director. The purpose and mission of the Foundation is to operate exclusively for the benefit of the University. It is funded through charitable donations, ticket sales and University grants. The Board members are appointed by the University. In the past, the University has provided a small grant, but this grant is not available for the 1998-99 season. The Board's Secretary/Treasurer oversees the Foundation's fiscal affairs. The University paid the musicians for the first performance in the 1997-98 season; the remaining performances were paid by the Foundation.

I take administrative notice of the formation of the state-wide unit of adjunct faculty in 1997, which includes the University's adjunct faculty.^{4/} Further, I take administrative notice that there are approximately nine other broad-based state-wide units which include the University's employees -- the higher level supervisory unit, the primary supervisory unit, the

^{3/} The University has requested that a finding concerning the identification of the proper employer be deferred until after we decide whether the musicians are statutory employees.

^{4/} See State of New Jersey, D.R. No. 97-5, 24 NJPER 295 (¶29141 1996), req. for rev. den. P.E.R.C. No. 97-81, 23 NJPER 115 (¶28055 1997).

professional unit, the administrative/clerical unit, the full-time faculty unit, a rank-and-file law enforcement unit, a supervisory law enforcement unit, the operations, maintenance services and crafts unit, and the inspection and security unit. All units are state-wide, that is, there are no University-only collective negotiations units.

The executive director of the orchestra is hired through the University's search process. The executive director and a staff of two are paid by the University. William Houston III is the orchestra's executive director in charge of strategic planning and the daily operation of the orchestra.

Workyear

Musicians work a maximum of approximately 52 hours annually, including rehearsals and performances. The orchestra's season coincides with the University's academic year. The executive director sets the schedule of performances and rehearsals, determines the programs, and determines the number and type of performers needed. In 1997-98 there were four performances.

The musicians

The musicians perform on a freelance basis, with a variety of employers in the course of a calendar year and their total income is derived from multiple employers. Thus, a majority of each musician's work (rehearsals and performances) is performed for employing entities other than the University.

According to the AFM, the transient nature of musicians' employment is recognized throughout the industry. In other jurisdictions (outside of New Jersey) where the AFM represents musicians, musicians are required to attend 60 to 65 percent of all concerts to maintain tenure in their "home" orchestra. Thus, musicians play elsewhere 35 to 40 percent of the time, and yet maintain tenure with their "home" orchestra. The AFM also asserts that it is industry practice that if a musician is available to perform but is not offered a contract, the service is considered fulfilled. Thus, musicians are credited with playing at concerts for which they were available but not offered employment. Petitioner argues that we should adopt a standard here in which any musician who attended at least fifty (50) percent of the concerts available to him/her in either 1996-97 or 1997-98 should be eligible for the proposed unit. Under this standard the AFM identified a list of approximately 47 musicians who would be included in the proposed unit.

The AFM asserts that a constancy rate exists among the musicians. Specifically, it asserts that the orchestra offers 40 positions. It asserts that in 1996-97, 35 musicians played in 75 percent of the concerts, or 87 percent of the workforce was constant. It asserts that in 1997-98, 28 musicians played in 75 percent of the concerts, or 70 percent of the workforce was constant.

Initially, the University identified the number of musicians who were described by the petition as fifty-three (53) for

the 1997-98 season and fifty-nine (59) for the 1996-97 season. It asserted, however, that only ten musicians performed in all four concerts in the 1997-98 season, and worked the maximum possible number of hours per year in 1997-98. The University argues that only these 10 are eligible for unit membership if the musicians are found to be employees. Approximately five (5) musicians are also faculty, and, as such, are members of the state-wide adjunct faculty negotiations unit represented by the Council of New Jersey State College Locals, American Federation of Teachers, AFL-CIO ("CNJSCL, AFT").

The musicians are hired by Executive Director William Houston III to play in specific performances.^{5/} The conductor or the executive director can dismiss a musician, though there is no evidence that either has ever done so. In the past, the conductor determined and notified the executive director of the instrumental needs for each concert. Musicians provide their own instruments. They are selected according to ability and availability and the requirements for personnel for each concert. All orchestras strive for consistency in selection to enhance musical ensemble.

The University determines pay rates based on AFM's wage scale. The AFM asserts that all musicians are AFM members. The musicians are paid by accounts-payable checks with no deductions for

^{5/} Eleanor Schiller, one of the musicians, formerly acted as the contractor for the Orchestra. She contacted musicians for performances according to the conductor's instructions.

FICA, state or federal income taxes, etc. They do not participate in the New Jersey pension system, and are not entitled to fringe benefits such as health insurance, vacation, sick or administrative leave. At the end of the calendar year, the musicians receive IRS 1099 forms and not W-2 forms.

ANALYSIS

The issues presented by this petition are:

1. Whether the employer is a public employer subject to the Act.
2. Whether the musicians are employed too casually to be appropriate for inclusion in any unit.
3. Whether, under all the circumstances, a negotiations unit comprised solely of musicians is appropriate.
4. Whether the subject musicians are independent contractors and not employees subject to the Act.

Whether the employer is a public employer subject to the Act

The University established the Foundation's board of directors which employs the musicians. The Foundation exists solely for the benefit of the University; the orchestra program is a program of the Foundation. The University appointed all of the board members. A University vice-president is the board's executive director. The orchestra's non-musician employees, the executive director and staff, were hired and are paid by the University. Some of the funding for the program comes from the University. Based on all these facts, I find that the identity of the putative employer is the University, which is a public employer, and is subject to the Act.

Musicians' employment too casual for inclusion in any unit

The University argues that the musicians are too casual and should not be included in any unit. The AFM argues that the constancy rate of musicians is sufficiently regular to establish an employment relationship. It argues that the Commission should adopt a standard recognized in the performing arts industry: the percent of potential employment offers (a percent of all potential performances) for which a musician was available to accept and/or would have accepted employment.

Our decisions have distinguished between "casual" employees hired on a limited, non-recurring basis and those employees possessing a sufficient degree of regularity and continuity of employment to warrant collective negotiations rights. Casual employees are not afforded collective negotiations rights; employees who have a continuity and regularity of employment are eligible for representation in collective negotiations units. See Rutgers Univ. v. Rutgers Univ. Coll. Teachers Ass'n, E.D. No. 76-35, 2 NJPER 176 (1976), aff'd P.E.R.C. No. 76-49, 2 NJPER 229 (1976), D.R. No. 77-5, 3 NJPER 12 (1976) [dism. elec. objections], aff'd. App. Div. Dkt. No. A-1652-76 (1/26/78), certif. den. 76 N.J. 243 (1978); Tp. of North Brunswick and North Brunswick Employees Organization, D.R. No. 85-16, 11 NJPER 155 (¶16068 1985) (a part-time welfare interviewer had requisite regularity and continuity of employment to be eligible to vote in white-collar unit).

The Commission has also determined that employees who work less than one-sixth of the number of hours worked by regular full-time employees are "casual" employees and do not qualify for representation rights under the Act. In East Orange Bd. of Ed., D.R. No. 81-7, 6 NJPER 481 (¶11244 1980) evening school teachers did not have sufficient regularity of employment to be public employees where they taught adults rather than children; had evening hours; were not evaluated; were not eligible for tenure; were paid hourly, and received no benefits. In Mt. Olive Bd. of Ed., P.E.R.C. No. 82-66, 8 NJPER 102 (¶13041 1982), the Commission upheld and approved the Director of Representation's determination that substitute bus drivers who worked more than one-sixth of the average number of hours worked by regular full-time and part-time bus drivers were sufficiently regular employees to qualify for representational rights under the Act. See also, Cranford Tp., D.R. No. 86-26, 12 NJPER 566 (¶17214 1986) (Applying one-sixth test, Director finds a challenged voter was regular part-time employee and eligible to vote in election); and, Lakewood Bd. of Ed., P.E.R.C. No. 87-166, 13 NJPER 603 (¶18227 1987) (Commission directs an election among substitute bus drivers who worked more than one-sixth (135 hours) of the 810 hours worked annually by regular bus drivers).

Continuity in employment runs to the relative "permanency" of the employment position, and the degree of stability within the unit. See State of New Jersey (State Colleges adjunct faculty teaching for at least their second semester in a regular recurrent

position are unit eligible);^{6/} City of Rahway, D.R. No. 83-9, 8 NJPER 538 (¶13247 1982) (crossing guards laid off and rehired each school year, with 85 percent return rate, are eligible for representation where they occupied permanent, on-going positions); Orange Bd. of Ed., D.R. No. 92-37, 18 NJPER 373 (¶23165 1992) (no basis to distinguish between "substitute custodians" who work on a daily, continuing basis from permanent unit employees).

Applying the above standards, I find that the musicians' workyear of 52 hours maximum at four performances does not establish an ongoing relationship with the employer and is too infrequent to meet the regularity and continuity tests set forth in the Commission's caselaw. Fifty two hours per year is well below one-sixth of a full-time schedule -- even assuming a minimal, full-time workweek of 30 hours per week, I find that these musicians' hours do not approach the traditional one-sixth test. At most, they work 26 hours per semester. The one-sixth test has been consistently applied to part-time non-teaching employees for more than 15 years. I am not persuaded by the AFM's argument in favor of creating a standard similar to that in the music industry which I understand would include a musician's mere availability, among other factors. I decline to carve out an exception to the standards set forth above.

^{6/} No facts were presented which indicate the musicians have any instructional responsibilities, consequently the regularity and continuity analysis applied to faculty employees is inapposite. The appropriate test is one applied to non-teaching employees.

Therefore, I find that the petitioned-for employees' workyear of 52 hours does not establish a sufficiently regular employment relationship for them to be entitled to collective negotiations rights under the Act.

Appropriateness of musicians-only unit

The University asserts that a unit composed solely of musicians is inappropriately narrow for purposes of collective negotiations. Even if we found that the musicians had sufficient regularity of employment to be public employees, we would find that the petition seeks to create an inappropriately narrow unit. The petition seeks a musicians-only unit of approximately 50 unit members.

The Commission is charged with determining in each instance what negotiations unit is appropriate. N.J.S.A. 34:13A-6. N.J.S.A. 34:13A-5.3. The Commission favors structuring negotiations units along broad-based lines and has been reluctant to find appropriate units structured along occupational or departmental lines. The New Jersey Supreme Court first articulated this policy early in the Commission's history in State v. Professional Association of N.J. Dept. of Ed., 64 N.J. 231 (1974) ("Professional Ass'n."). The Court directed that a balance be struck between the rights of public employees to collective negotiations and the public employers' rights not to be burdened with undue proliferation of negotiations units. Prior decisions have consistently found narrowly-defined units of one occupational group to be inappropriate. See, e.g.,

Jersey City, D.R. No. 84-6, 9 NJPER 556 (¶14231 1983) (Director dismissed petition seeking unit composed exclusively of sanitary inspectors; unit found inappropriately narrow); NJIT, D.R. No. 88-29, 14 NJPER 148 (¶19060 1988) (petition dismissed which sought overly narrow unit of security guards; College had consistently sought to maintain broad-based unit structure); Warren Cty., D.R. No. 95-14, 21 NJPER 43 (¶26026 1994) (proposed unit of 15 dispatchers inappropriate); Wall Tp., D.R. No. 94-24, 20 NJPER 209 (¶25101 1994) (proposed unit of six or seven dispatchers inappropriate).

The University negotiates with approximately nine other broad-based, state-wide units. Further, there are no University-only units. Moreover, some of the musicians were also employed as adjunct faculty. Permitting a single title to organize separately would upset the existing employee relations structure of broad-based generic units at the University. No argument has been presented here that would warrant deviating from our policy favoring broad-based units as set forth in Professional Ass'n.

The two examples of musicians' units provided in the AFM's position statement are distinguishable: it appears that in both the Green Bay (Wisconsin) Symphony Orchestra and Lehigh Valley (Pennsylvania) Chamber Orchestra, the employer did not object to the formation of the unit. In both instances, the parties entered into agreements for elections to be conducted. In the Lehigh Valley Chamber Orchestra case, the musicians unit also included all other professional employees.

Based on the above, I find that the unit sought by the petition is too narrow in scope and would unduly burden the University with unit proliferation.

Whether the subject musicians are independent contractors and not employees subject to the Act

While we acknowledge that arguments were previously raised about independent contractor status, we do not rely on that theory as a basis for dismissing the petition. We have found the musicians-only unit inappropriately narrow, and the musicians' work schedule too infrequent to be considered sufficiently regular for unit membership.

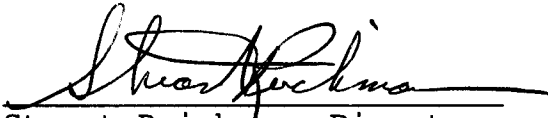
Finally, the AFM argues that the Act is remedial and entitled to liberal construction in order to afford collective representation to all employees who desire it. Where the issue is raised, our cases have held that certain part-time or occasional employees may be too casual as measured by their work schedule and hours of work in relation to full-time employees to be appropriate for any unit. Approval of a unit of employees who work a maximum of 52 hours per year would radically construe our prior definitions of casual employee and appropriate unit, and would require extraordinary circumstances, which are not present here. Compare, UMDNJ, P.E.R.C. No. 91-2, 16 NJPER 431, 432 (¶21183 1990) (unit of registered nurses appropriate, where the Commission "...depart[ed] from our normal pattern of finding that units based on a single profession are not the most appropriate.")

Accordingly, based upon all of the above, I find that the negotiations unit sought is overly narrow; that the musicians who are the subject of this petition are employed on too casual a basis to be entitled to collective negotiations rights and I dismiss the petition.

ORDER

The Petition for Certification is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Stuart Reichman, Director

DATED: March 15, 1999
Trenton, New Jersey