

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

In the Matter of

UNION COUNTY REGIONAL HIGH
SCHOOL DISTRICT #1,

Public Employer,

-and-

DOCKET NO. CU-83-9

UNION COUNTY REGIONAL FEDERATION
OF TEACHERS, LOCAL 3417, AFT/AFL-CIO,

Petitioner.

SYNOPSIS

Effective with the issuance of this decision, the teachers unit represented by the Federation is clarified to include compensatory education teachers and title I teachers. The dispute as to the inclusion of these personnel in the unit arose in recently concluded certification proceedings, and the dispute was left unresolved since the number of employees involved was not of such substantiality as to warrant a delay of an election. Had the dispute then been resolved, the determination would have been, as it is now, to include these employees in the unit. Since the unit placement question was raised in the certification proceeding, and the dispute continued to exist in subsequent negotiations, immediate effect is accorded to the clarification determination notwithstanding the fact that a contract has been concluded by the parties as to the undisputed unit employees. The parties must now negotiate as to the above personnel.

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Appearances:

For the Public Employer
Weinberg & Manoff, attorneys
(Irwin Weinberg & Richard Kaplow of counsel)

For the Petitioner
Sauer, Boyle, Dwyer & Canellis, attorneys
(George W. Canellis of counsel)
John Fallan, Staff Representative

DECISION

On September 30, 1982, a Petition for Clarification of Unit was filed with the Public Employment Relations Commission ("Commission") by the Union County Regional Federation of Teachers, Local 3417, AFT/AFL-CIO ("Federation") raising a question concerning the composition of a collective negotiations unit comprised of certain employees of the Board of Education of the Union County Regional High School District #1 ("Board"). The Federation is the

exclusive negotiations representative of a unit of teachers/professional employees of the Board, having been certified by the Commission as the majority representative on January 5, 1982.

The Federation has raised a question as to whether Compensatory Education and Chapter I (a/k/a Title I) teachers are included or includable in its negotiations unit. The Board disputes the claim that the Federation either represents the Compensatory Education and Title I teachers or that these personnel may be included in the teachers unit.

An administrative investigation has been conducted into the matters and allegations involved in the Petition. Pursuant to the investigation, an informal conference was convened among the parties with the assigned Commission staff agent. On January 5, 1983, the parties were advised to submit supplementary materials in further investigation of certain issues implicated in the proceeding.

On the basis of the administrative investigation, the undersigned finds and determines as follows:

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

2. The Board of Education of the Union County Regional High School District is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), is the employer of the employees who are the subject of the Petition and is subject to the provisions of the Act.

3. Union County Regional Federation of Teachers, Local 3417, AFT/AFL-CIO is an employee representative within the meaning of the Act and is subject to its provisions.

4. The Federation was selected as the majority representative of employees in the teachers unit as the result of a representation proceeding before this Commission which concluded with the issuance of a Certification of Representative on January 5, 1982. The instant matter is an outgrowth of disputes which were raised but not resolved in the certification proceeding.

Prior to the Federation's certification as public employee representative, the unit was represented by the Union County Regional High School Teachers Association ("Association"). The Federation filed a Petition for Certification of Public Employee Representative in October 1981 (Docket No. RO-82-80) seeking to represent a unit of "all nonsupervisory, nonconfidential employees" employed by the Board of Education. The Federation asserted that its Petition contemplated the inclusion of Compensatory Education and Title I teachers in the teachers unit. The investigation of that matter revealed that the 12 individuals in those titles had

not previously been represented within the teachers unit by the Association. Although the Association and Federation agreed to an election in a unit which would include the Compensatory Education and Title I personnel, the Board objected and declined to agree to an election if these personnel were included in the unit.

Consistent with Commission policy, a decision, D.R. No. 82-27, was issued on December 4, 1981, finding that the limited dispute concerning 12 employees was not substantial in the context of a representation proceeding involving approximately 360 employees who were not subject to dispute. N.J.A.C. 19:11-2.6. An election was therefore directed among employees, and the Compensatory Education and Title I employees were permitted to vote subject to challenge. The Director noted that:

If challenge ballots are determinative of the results of the election, the status of these employees' eligibility will be resolved in accordance with the Commission's usual post-election challenge procedure. If challenges are not determinative, the status of these employees may be resolved through initiation of appropriate proceedings by either the Board or the majority representative, assuming a certification of representative issues.
(Footnote omitted)

The challenge ballots in the election directed were not determinative of the results of the election. Therefore, the Federation, having received a majority of ballots cast in the election, was certified the majority representative of the teachers unit. The dispute concerning the Compensatory Education and Title I

teachers was not resolved and the Board and the Federation were free to resolve the unit placement of those individuals through "initiation of appropriate proceedings."

5. In re Township of North Brunswick, D.R. No. 78-4, 3 NJPER 260 (1977), holds that the filing of a Petition for Clarification of Unit is an appropriate proceeding to resolve disputed unit placements subsequent to an election proceeding in which such issues were not totally resolved. Accordingly, the instant Petition for Clarification of Unit is an appropriate vehicle to determine the unit placement of the disputed employees.

6. The undersigned is satisfied, for the reasons stated below, that had the Commission been required to resolve the unit placement issue of Compensatory Education and Title I teachers during the recently concluded certification proceedings, these personnel would have been placed in the teachers unit.

The Board asserts that the Compensatory Education and Title I teachers do not share a community of interest with other unit employees. In a statement dated October 10, 1982, the Board asserts that the employees are temporary, arguing, "The programs in which these employees are involved are paid for by Federal and State Fund Grants and it was understood at the time of their employment, and continues to be understood, that their employment will continue only so long as grant monies continues." [sic] The Board further stated, "Those employed in the programs do not have the same working conditions, the same benefits, or rate of pay

that teachers regularly employed by the Board of Education enjoy or have."

However, contrary to the Board's assertion, and notwithstanding certain variations in their terms and conditions of employment, a community of interest has been found to exist among those professional educational personnel who instruct pupils that comprise the normal student body, whether these personnel are considered "regular" teachers or are employed in special programs. In re Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977) (support teachers); In re Hamilton Tp. Bd. of Ed., D.R. No. 80-23, 6 NJPER 299 (§ 11051 1980) (supplemental teachers); and most recently, In re Ridgewood Bd. of Ed., D.R. No. 81-41, 7 NJPER 297 (§ 12132 1981), aff'd. P.E.R.C. No. 82-14, 7 NJPER 462 (§ 12204 1981) (Instructional Associates, Compensatory Education Teachers, Title I Teachers, English as a Second Language Teachers, Gifted and Talented Coordinator, Administrative Assistant). ^{1/}

In the Hamilton Tp. matter, supra, the Director noted the Commission's preference for the avoidance of fragmentation of negotiations units, particularly as it might involve Board instructional staff, and stated:

After giving due regard to all relevant statutory factors, the undersigned finds that supplemental teachers are most appropriately included in the unit of full time personnel. They are engaged in providing specialized and

^{1/} The Commission's determinations of community of interest among professional educational personnel have extended as well to noninstructional professional Board employees who perform services related to the educational mission of a Board of Education. For example, see In re Newark Bd. of Ed., D.R. No. 80-1, 5 NJPER 314 (§ 10170 1979) (part-time psychiatrists).

individualized instruction to regular classroom students, a function which is immediately related and necessarily adjunct to the education functions performed by the full time classroom teachers.

The Commission in the Ridgewood matter, supra, endorsed the Director's analysis. Ridgewood involved the addition of non-represented "supplemental teachers" which was a group of personnel including Compensatory Education and Title I teachers, in a unit of regular teaching personnel. ^{2/} The Commission stated:

The essence of these prior determinations is applicable herein, namely that the professional character of the employees in connection with their instructional roles in furtherance of the educational mission of the employer is the controlling factor in a unit determination which outweighs the specific distinctions which exist between the regular instructional teachers and supplemental teachers....

Moreover, in previous matters, the Director has discounted claims that a community of interest could not be demonstrated among employee groups because some groups could not attain tenure, Hamilton Tp., supra, or were involved in programs supported exclusively by federal funds, In re Tp. of Mine Hill, D.R. No. 79-4, 4 NJPER 294 (¶ 4148 1978), aff'd P.E.R.C. No. 78-8, 4 NJPER 416 (¶ 4186 1978) (CETA Employees). In the instant proceeding the Board has raised the claim that Title I teachers are temporary. In the prior certification proceeding involving

^{2/} The decision inaccurately refers to the Compensatory Education teachers as comprehensive education teachers.

these parties, the Board raised similar claims, asserting that Title I teachers could not achieve tenure. With regard to this claim, the undersigned notes the Supreme Court's decision in Rita Spiewak, et al. v. Rutherford Bd. of Ed., 90 N.J. 63 (1982) in which certain instructional personnel employed with Federal funds under the Title I program were found to be eligible to achieve tenure under Title 18A provided that the necessary requirements under the tenure statute were met.

Accordingly, it appears to the undersigned, after giving due regard to differences in the terms and conditions of employment applying to Compensatory Education and Title I teachers, that a community of interest exists among these personnel and regular teaching personnel arising from the professional character of the employees in connection with their instructional roles in furtherance of the educational mission of the employer. The unit is hereby clarified to include these personnel.

7. The final issue that remains relates to the effective date of the instant clarification of unit determination. The Federation asserts that the clarification should be effective immediately. The Board argues that the clarification of unit determination should not be effective until the conclusion of the recently negotiated first contract with the Federation. As noted above, the parties have submitted additional documentary material and positional statements in the further investigation of this issue.

The documentary material submitted by the parties reveals that, upon entering into negotiations, the Federation submitted proposals adding the Title I and Compensatory Education teacher titles to the unit recognition clause. The Board declined to negotiate as to these employees. The Federation again raised the issue when the parties were in mediation, and the Board again declined to negotiate on the subject. The Board states that during fact-finding it was advised by the fact finder that the Federation "had dropped the issue." This apparently occurred on the fourth or fifth day of the nine day fact-finding session. The Board does not assert that the Title I/Compensatory Education issue was dropped by the Federation in exchange for any specific concession by the Board on any other issue. Rather, both parties acknowledge that if the issue of inclusion remained outstanding an economic settlement of the contract would not have been achieved.

On the above facts, the Board argues that In re Clearview Reg. H/S Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) requires that the unit clarification be effective at the conclusion of the negotiated agreement.

Clearview, supra, sets forth certain guidelines regarding the effective implementation of clarification of unit determinations. These guidelines reflect policy considerations which place the rights of the parties to obtain clarification of the composition of collective negotiations units in balance with the overall goal of achieving stability and predictability of contractual relationships

and negotiations relationships. This objective is in part reflected in the following passage:

... the Commission's clarification of unit procedure should not be utilized in a manner disruptive of either contractual or negotiations responsibilities. Thus, a change in unit composition mandated by a clarification of unit determination should not be permitted to alter the parties' contractual commitments. If the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. This agreement to include or to exclude certain persons or titles in a contract may have involved concessions by both parties in the negotiation of the final terms and conditions of employment. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed. Thus, the clarification of unit procedure should be designed so as not to encourage avoidance of contractual responsibilities, or to change the benefits and burdens of the bargain. Equally objectionable to the avoidance of contractual responsibilities is an attempt to impose additional negotiations responsibilities upon one party subsequent to the signing of a contract by seeking to include in the unit an additional title whose terms and conditions were not previously negotiated. It would be patently unfair to require negotiations in a vacuum on behalf of a limited group of employees when one of the parties had not been made aware of the existence of the dispute with regard to the title in the earlier negotiations.

The Clearview guidelines which implement the above objective, are expressed in six general principles of application. For example, general principle number three precludes an immediate

clarification which would add previously nonrepresented employees to a unit where the issue of the disputed titles was not raised in recently concluded negotiations. This principle, which is not implicated in the present instance since the Federation raised the clarification issue in negotiations, prevents abuses to a party which has in good faith negotiated under the belief that the contractual agreement will represent the totality of agreement as to all unit members.

General principle number five applies to the present matter, where the unit issue is raised in negotiations and where there is a dispute as to unit composition. In order for the unit clarification determination to have immediate effect general principle number five requires either that the clarification issue be presented to the Commission prior to contract execution or that the dispute be reserved by formal agreement of the parties. This requirement ensures that both parties to the agreement are aware prior to contract execution that the totality of agreement as to all unit members might not be embodied in the contract. Thus, the parties enter agreement with their eyes open as to the potential for further negotiations and consequences of having reached agreement. General principle number five provides:

(5) In all cases where the clarification of unit question is raised before the Commission prior to the execution of the parties' most recent contract, or where the dispute is reserved and referred to the Commission in the parties' negotiations agreement or other joint written agreement, the clarification of unit determination shall be effective immediately.

It should be noted that because the standards set forth in Clearview are intended to implement basic policy considerations, and have general applicability, they were not designed to rigidly apply in every circumstance, particularly where such application would defeat underlying policy considerations. Clearview states:

The above general principles of application express, in basic and plain language, the circumstances under which the Commission will not, absent exceptional circumstances, permit a clarification of unit determination to affect the parties' contractual or negotiations responsibilities until the expiration of their contractual agreement and the circumstances under which the Commission's clarification of unit determinations will be effective immediately. When used above, the term "execution of the parties' most recent contract" means the last act which would formally bind both parties to a negotiations agreement. It should be noted that the above general principles are not meant to be applied mechanically in all cases. In no event will the application of such principles be permitted to reach a result that is internally inconsistent or not consonant with the above-stated overall policy objectives.

In reference to general principle five, the Board argues:

In fact, the Federation negotiators were informed by the District negotiator that the Federation should file a clarification of unit petition prior to the execution of the contract in order to preserve the potential eligibility of the additional titles to share in the benefits conferred by the 1982-1984 contract. Instead, however, the Federation waited until September 30, 1982, some two weeks after final notification [sic] of the contract to first file the present petition. By not competently raising the clarification of unit issue before the Commission or otherwise reserving the dispute, the Federation has waived implementation of the determination until after August 31, 1984.

Under the circumstances of this matter, the undersigned concludes that the policy considerations underlying the Clearview decision require that the clarification determination be accorded immediate effect. Significantly, principle number five does not require that the clarification of unit question be presented to the Commission solely in the form of a clarification of unit petition. Unit composition issues may arise in other formal contexts, such as in unfair practice proceedings ^{3/} or, as in the present circumstance, through the certification proceeding which gave rise to the parties' negotiations obligation. When the unit composition issue raised in a certification proceeding is not so substantial as to require a delay in an election, the unit question may be left unresolved and pended for a later day. ^{4/} Such disputes may be mutually acknowledged in an agreement for consent election which identifies the dispute, and which thus constitutes a joint written agreement between the parties for the purposes of principle five, or, in the absence of a consent agreement, are "raised" and formalized before the Commission in a decision directing an election which reserves judgment on the unit composition issue. The latter circumstance is implicated in the present matter, and is encompassed within the intendment of general principle five.

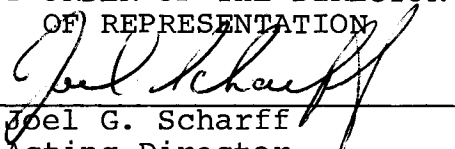
^{3/} See In re Passaic Cty. Reg. H/S Dist. #1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976).

^{4/} An election to resolve the question of the negotiations representative may thus proceed expeditiously. The few disputed voters may vote subject to challenge. See In re Tp. of North Brunswick, D.R. No. 78-4, 3 NJPER 260 (1977).

The parties' conduct at all times subsequent to the election and the Federation's certification as representative confirms that their dispute as to the unit inclusion of Title I/Compensatory Education personnel remained outstanding. Neither party deviated from its position during the election proceeding. The Federation raised the unit definition issue subsequently in direct negotiations, in mediation, and in fact-finding. The Board specifically advised the Federation that the latter would have to press its claims before the Commission in a formal proceeding. Under all the facts of this matter, the undersigned concludes that in order to assert a claim as to waiver, the Board would have been required to secure from the Federation, by either written agreement or through clear and unequivocal evidence of conduct, that the latter agreed not to pursue its claim to achieve immediate contractual inclusion of the disputed personnel in the parties' agreement. The cessation of the Federation's attempt to achieve this goal through the negotiations process is not sufficient evidence of such a waiver.

Accordingly, the unit represented by the Federation is clarified to include Chapter I teachers and Compensatory Education teachers. This determination is effective immediately. The terms and conditions of employment applicable to employees in these categories must now be negotiated.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Joel G. Scharff
Acting Director

DATED: March 24, 1983
Trenton, New Jersey