

D.R. NO. 2001-12

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

In the Matter of

THE VILLAGE CHARTER SCHOOL, INC.,

Public Employer,

-and-

Docket No. RO-2001-39

NEW JERSEY EDUCATION ASSOCIATION,

Employee Representative.

**SYNOPSIS**

The Director of Representation directs an election in a unit of petitioned-for professional employees of the Village Charter School. The non-professional employees were not petitioned-for and the Director finds that the financial precariousness of the School does not create "special circumstances" within the meaning of section 34:13A-6(d) of the Act which could require a determination that the appropriate unit would include the school's professional and non-professional employees.

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Appearances:

For the Public Employer  
Farrell & Thurman, attorneys  
(James Farrell, of counsel)

For the Employee Representative  
Maureen Cronin, NJEA Field Representative

**DECISION AND DIRECTION OF ELECTION**

On October 26, 2000, and December 6, 2000, the New Jersey Education Association (NJEA) filed a petition for certification and an amended petition with the Public Employment Relations Commission seeking to represent all certificated employees employed by The Village Charter School, Inc. (School). The petition was timely and accompanied by an adequate showing of interest.

The School refuses to consent to an election and asserts that the petitioned-for professional unit is not the most appropriate unit since the exclusion of non-professional employees from the unit would leave the School vulnerable to "undue [unit] fragmentation." The School recognizes that the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) prohibits mixed professional/non-professional units absent a vote for inclusion by the professional employees. However, the School contends that we should consider the School's financial stability as "special circumstances" which trigger an exception to the statutory requirement for a professional option vote.

We have conducted an administrative investigation into the petition. N.J.A.C. 19:11-2.2 and 2.6. Both parties submitted facts and argument in support of their positions. By letter dated March 2, 2001, we advised the parties of our understanding of the relevant facts and our intention to direct an election. The parties were given an opportunity to contest our factual and legal determinations.

On March 12, 2001, the School filed a response, reiterating its position concerning the interpretation and proposed application of the "special circumstances" exception contained in N.J.S.A. 34:13A-6(d). Additionally, the School argues that case law relied upon in my tentative conclusions did not materially address the alleged special circumstances in the case at hand. Based upon its interpretation of Commission case law and language in the Act, the School asserts that my conclusions are not adequately supported and that undue emphasis has been placed on the Act's language granting professionals the right to vote on the unit inclusion question, rather than emphasizing the statute's "special circumstances" language. The School further argues that it is inappropriate to rely on the lack of existing Commission precedent addressing special

financial circumstances as support for my initial conclusion that there are no special circumstances in the instant case which require that the appropriate unit should include both professional and non-professional employees.

I find that there are no substantial and material factual issues in dispute which require a formal hearing. N.J.A.C. 19:11-2.6(b) and (d). Accordingly, the disposition of the petition is properly based on our administrative investigation which has found the following facts.

#### FINDINGS OF FACT

The Village Charter School is a public school located in Trenton operating under a charter granted by the New Jersey Commissioner of Education pursuant to the Charter School Program Act, N.J.S.A. 18A:36A-1 et seq. John Conley is the School's Executive Director. Conley reports to a Board of Trustees. All of the school's approximately 142 students come from the Trenton school district.

Funding for the School is based in part on the local (Trenton) levy budgeted per pupil for each specific grade level. While the Trenton school district receives education funding from the local levy, it also receives additional State funding as an Abbott district. See Abbott v. Burke, 153 N.J. 480 (1988). Unlike the Trenton school district, the Charter School is not eligible to receive Abbott funding and, therefore, receives only about 68% of the State per-student funding that the Trenton district receives.

The School must also cover its facilities costs with no State funding. It is not eligible to receive State bond financing, as is the Trenton school district. Beyond the 68% State funding, the School relies heavily upon voluntary contributions. It does not have the authority to raise money through taxation or to charge its students tuition fees.

As of November 3, 2000, the School employed 17 certificated professional employees and eight non-professional employees. The administrative staff, consisting of two managers and one secretary, are responsible for managing the business and academic operations of the School.

The Association originally petitioned for a unit of "all full and part-time teachers and teaching assistants, secretary, nurse, and custodian." The amended petition reduced the petitioned-for unit to "all certificated personnel employed by Village Charter School" and specifically excluded supervisors and non-certificated personnel. The parties agree that "certificated" employees are professional employees while "non-certificated" employees are "non-professionals."

#### **ANALYSIS**

The issue in this matter is whether the proposed unit of only certificated employees is appropriate under the circumstances here.

The Village Charter School is a public employer within the meaning of our Act. The Charter School Program Act provides at

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

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

Therefore, we have jurisdiction over these employees.

The School argues that its financial situation constitutes a "special circumstance" which mandates a combined professional/non-professional unit under the Act. The School maintains that if it were required at some future time to negotiate with two separate units, one professional and one non-professional, its overall financial well-being would be gravely jeopardized in what could be an expensive and protracted dual negotiations process. The School asserts that an all-inclusive unit is a more appropriate unit for its employees, regardless of the unit sought by the Association or the preference of the employees. It asks that we reject the Association's petition.

N.J.S.A. 34:13A-6(d) empowers the Commission to decide the appropriate unit for collective negotiations and to conduct an election to determine whether unit employees desire representation. Section 6(d) further provides in pertinent part:

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 (1) both supervisors and non-supervisors; (2) both professional and nonprofessional employees...unless a majority of such professional employees vote for inclusion in such unit....

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...."

In this matter, the Association seeks only to represent the School's professional employees which includes regularly employed teachers and the school nurse. The School contends that a unit of professionals alone is inappropriate because it would leave non-professional staff outside of the unit, resulting in potential unit fragmentation. It further asserts that based on the potential for future negotiations with more than one unit, the need to engage in such additional negotiations with another, separate unit could exacerbate its special financial circumstances. Therefore, the School asks that we consider its unique financial status as the type of "special circumstances" under the Act which require the finding that a single unit of professional and non-professional employees is the most appropriate. The School argues that in this case the "special circumstances" exception under the Act eliminates the need for the School's professional employees to vote on whether they wish to be represented in a mixed unit with non-professional employees.

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. While in State Professionals, the Supreme Court endorsed our policy of generally favoring broad-based units, 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 the appropriate unit to be one of only 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), 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 this case, either proposed unit would contain employees who share a community of interest. Either configuration would be an appropriate unit. However, here only professionals have sought representation. Professionals have a statutory right not to be in a unit with non-professional employees. N.J.S.A. 34:13a-6(d).

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. [Id. at 187.]

In this case, expanding the petitioned-for negotiations unit to include the non-professional employees, whom the Association does not now seek to represent, would give professionals a voice in the representational status of non-professional employees who have not been sought in the petition. See also Trenton Community Charter School, D.R. No. 2000-10, 26 NJPER 187 (¶31076 2000) (we declined to expand the proposed professional unit to include non-professional support staff). Further, it would also result in the professional employees foregoing their statutory right to determine by a secret ballot vote whether they wish to be represented in the same unit with non-professional employees. N.J.S.A. 34:13a-6(d). Absent facts which compel a finding in favor of a unit which combines

professionals and non-professional employees, I will not impose such an inclusionary unit on the School's employees.

The School argues that because of its "special circumstances," compelling facts exist in this case which require a finding that the most appropriate unit is a single unit for professional and non-professional employees, not subject to the statutory right of professional employees to vote on the unit structure. The School's rationale for finding special circumstances focuses on the lower level of financial funding it receives as compared to the funding received by the Trenton Public School District. The School argues that if the Association represents a unit of professional employees through the instant petition, and if at sometime in the future the non-professional employees are organized, the School would be placed in the position of having to negotiate with two separate units. The School asserts that this negotiation process would be so costly and time consuming for its limited managerial staff as to create an even more precarious financial situation than the one which now exists. On the other hand, according to the School, if it is required to negotiate with one inclusive unit, its special financial circumstances and staffing limitations would not be impacted to as great a degree.

I find that there is no real danger here of undue fragmentation or proliferation of units, since it appears the petitioned-for unit is one of only two possible units. The

application of "special circumstances" which creates an exception to the statutory requirement that supervisors and non-supervisors, or (absent a vote) professional employees and non-professional employees, not be included in a single unit has been given limited application by the Commission. In Rutgers University, P.E.R.C. No. 90-69, 16 NJPER 136 (¶21053 1990), adopting H.O. No. 89-2, 14 NJPER 599 (¶19255 1988), the Commission upheld a hearing officer's recommendation that certain supervisors should be removed from a mixed supervisors/non-supervisors unit. The employee representative in that case, AAUP, argued that the existing collegiality between supervisors and non-supervisors created a "special circumstance" which permitted maintaining the existing mixed unit. The Commission found that their collegiality, as evidenced by participation in governance, was not so unique as to require preservation of the mixed unit. In Tp. of Mine Hill, D.R. No. 79-4, 4 NJPER 297 (¶4148 1978), req. for rev. denied, P.E.R.C. No. 79-8, 4 NJPER 416 (¶4186 1978), the Director of Representation found no "special circumstance" in the fact that a supervisor who had been included in a unit with non-supervisory employees, had no other unit in which he could be represented. The Director removed the supervisor from that unit.<sup>1/</sup> We have never approved the conduct of an election in a new unit of professional and non-professional employees without professional employees having

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<sup>1/</sup> See also Tp. of Maple Shade, D.R. No. 79-10, 4 NJPER 440 (¶4199 1978).

been given the option to vote on the issue of whether they wish to be included in a non-professional unit.

In its March 12, 2001 response, the School raises various points in support of its position. It argues that its weak financial condition constitutes a special circumstance within the meaning of the Act so as to justify the dismissal of an otherwise appropriate petition seeking to represent only professional employees. It disagrees with the rationale and conclusions which I draw from the case cited above. It urges that I not ignore the unique facts in this case. I do not.

I disagree with the School's legal conclusions. I understand that the School urges me to find that its poor financial condition constitutes a special circumstance and warrants that we divert from a standard application of precedent as detailed above. However, I find that other than its interpretation of the Act, the School has proffered nothing concrete which justifies a different result. The School's argument is founded upon the speculation that having employees included in one unit is less costly than having two units. As a practical matter, this supposition does not necessarily prove true. The length of time parties engage in collective negotiations is generally a function of the parties ability to resolve issues in dispute. It may be easier and quicker to reach a settlement in a collective negotiations unit comprised of a homogeneous group of employees, e.g. professionals, than in a

heterogeneous unit comprised of professionals and non-professionals. In a mixed unit, issues reflective of potentially competing interests among the different groups contained in the single unit may complicate the negotiations process and delay final resolution. While certainly this is not always the case, and many factors come into play regarding the achievement of a final resolution in negotiations, it is a possibility which undermines the School's assertions. Further, there is no reason to believe that contract administration will be any less time consuming or costly in a mixed unit of professional and non-professionals rather than two single units, for example. Thus, I find that more than mere conjecture is needed to diminish rights granted to employees under the Act and make out a finding that a special circumstance exists. The argument that employee rights should be abrogated based on the assertion of a financial limitation has not been found to be persuasive. See City of Atlantic City v. Laezza, 80 N.J. 225 (1979); PBA Local 29 v. Town of Irvington, 80 N.J. 271 (1979).

Given the speculative nature of the School's argument that at some undefinable future time it might be required to engage in what might be costly or prolonged negotiations with more than one negotiations unit, the Commission's strict application of the "special circumstances" exception to the Act, the express statutory right of professional employees to initially vote on whether they wish to be represented with non-professionals in a

single unit, and the lack of precedent applying the "special circumstances" exception to include financial circumstances, I find that there are no special circumstances in this case which require a finding that the appropriate unit should include both professional and non-professional employees.

Consequently, for all of the reasons set forth above, I find that the petitioned-for unit is appropriate for collective negotiations. I direct an election in the petitioned-for unit as follows:

Included: All regularly employed non-supervisory certificated professional personnel employed by Village Charter School including teachers and school nurse.

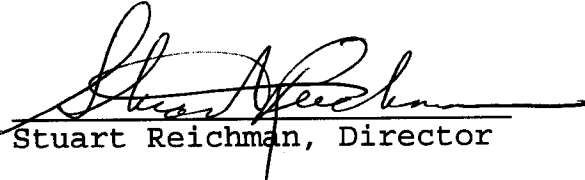
Excluded: Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, nonprofessional employees, police employees, casual employees and all other employees.

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. 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: April 3, 2001  
Trenton, New Jersey