E.D. NO. 76-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,
Public Employer,

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO,
Petitioner,

Docket No. RO-935

-and-

NEW JERSEY CIVIL SERVICE ASSOCIATION, CUMBERLAND COUNCIL NUMBER 18,
Intervenor.

SYNOPSIS

In accordance with the Hearing Officer's Report and in the absence of exceptions to the Report, the Executive Director dismisses a representation petition as untimely under the Commission's contract bar rule. The petitioner sought a unit of professional employees, and argued that the existing contract could not serve as a bar as it covered a mixed unit of professionals and non-professionals which had been recognized by the public employer without according the professional employees a "professional option". The Executive Director adopts the Hearing Officer's findings and recommendations that, under the facts of this case, the interests of the professional employees were sufficiently protected by the public employer having satisfied itself, prior to according voluntary recognition, that a majority of the professional employees desired to be included in the mixed unit.

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Intervenor.

Appearances:

For the Public Employer, Lawrence Pepper, Jr., Esq.
First Associate Solicitor

For the Petitioner, Mr. Mark Neimeiser, Associate Director

For the Intervenor, Joseph Adamo, Esq.

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning the representation of certain public employees of the City of Vineland, a hearing was held on March 13 and May 5, 1975 before Hearing Officer Joel G. Scharff, at which all parties were given the opportunity to present evidence, to examine and cross-examine witnesses, to argue orally and to file post-hearing briefs. Thereafter on September 26, 1975, the Hearing Officer issued his Report and Recommendations (H.O. No. 76-6), a copy of which is attached hereto and made a part hereof. No exceptions to the

Hearing Officer's Report and Recommendations were filed. The undersigned has carefully considered the entire record herein and the Hearing Officer's Report and Recommendations and, on the basis of the facts in this case, finds and determines as follows:

1. The City of Vineland ("City") is a public employer within the meaning of the Act and is subject to its provisions.

2. The American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME") and the New Jersey Civil Service Association, Cumberland Council Number 18 ("CSA"), are employee representatives within the meaning of the Act and are subject to its provisions.

3. AFSCME seeks to represent a unit of specified professional employees employed by the City. The City and the CSA contend that the specified professional employees are included in a pre-existing recognized CSA unit. The City has accordingly denied voluntary recognition with regard to the proposed AFSCME unit. By virtue of the foregoing, a question concerning the representation of public employees exists and this matter is properly before the undersigned for decision.

4. The Hearing Officer recommends the dismissal of AFSCME's petition as it was filed during the period of an existing written agreement between the City and the CSA, within the meaning of N.J.A.C. 19:11-1.15, covering inter alia the proposed AFSCME unit. Although AFSCME argued that the agreement between the City and the CSA, covering both professional and non-professional

employees, cannot serve as a contract bar because the professional employees were not accorded a "professional option", the Hearing Officer found and recommended that on the basis of all of the evidence presented, the interests of the professional employees were sufficiently protected by the City having satisfied itself, prior to according recognition to the CSA, that a majority of the professional employees desired to be included in the recognized mixed unit. The Hearing Officer thus concluded that the existing contract should serve as a bar.

Upon a careful review of the record, and noting particularly the absence of exceptions to the Hearing Officer's findings of fact upon which he bases his conclusions of law and recommendations, the undersigned determines that the Hearing Officer's findings of fact are amply supported by competent record evidence and are hereby adopted. The Hearing Officer's conclusions of law and recommended disposition, also unexcepted to, are consistent with the policies of the Act under the instant factual circumstances and are hereby adopted substantially for the reasons cited by the Hearing Officer.

5. On the basis of the foregoing, the instant petition is hereby dismissed as untimely, pursuant to N.J.A.C. 19:11-1.15.

BY ORDER OF THE EXECUTIVE DIRECTOR

Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
April 8, 1976

H.O. NO. 76-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Public Employer

and Docket No. RO-935

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO

Petitioner

and

NEW JERSEY CIVIL SERVICE ASSOCIATION, CUMBERLAND COUNCIL NUMBER 18

Intervenor

Appearances:

For the Public Employer: Lawrence Pepper, Jr., Esquire
First Associate Solicitor
For the Petitioner: Mark Neimeiser, Associate Director
For the Intervenor: Joseph Adamo, Esquire

REPORT AND RECOMMENDATIONS

A petition was filed with the Public Employment Relations Commission on November 11, 1974 requesting a Certification of Public Employee Representative in a unit described as follows: Included: nurses, engineers, social workers, doctor; Excluded: police and supervisors under the Act, blue-and white-collar workers, and Vineland electric utility employees. Pursuant to a Notice of Hearing and subsequent orders rescheduling and scheduling hearings, hearings were held on March 13, 1975 in Trenton, New Jersey and on May 5, 1975 in Vineland, New Jersey, at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. A brief has been filed by the City of Vineland by May 27, 1975, the established date for presentation of briefs. The City's brief has been concurred with and adopted by the

Intervenor,[1] New Jersey Civil Service Association, Council #18. The Petitioner, The American Federation of State County and Municipal Employees, did not file a brief; nor has the Petitioner requested an extension of time to do so.

Upon the entire record in the proceeding, the Hearing Officer finds:

1. The City of Vineland is a public employer within the meaning of the New Jersey Employer-Employee Relations Act and is subject to the provisions of the Act.

2. The American Federation of State, County and Municipal Employees, AFL-CIO, and the New Jersey Civil Service Association, Council #18 are employee representatives within the meaning of the Act.

3. On October 7, 1974, A.F.S.C.M.E.("Petitioner") filed a Petition for Certification of Public Employee Representative with the Public Employment Relations Commission in which it sought to represent a unit of nurses, graduate nurse, and public health nurse in the City of Vineland.[2] On October 15, 1974, the City, while disclaiming any knowledge of a prior request for recognition as alleged in the petition, informed the Petitioner that it would not grant recognition inasmuch as it had previously recognized C.S.A. Council #18 as the exclusive representative of a unit of personnel which included the nurses. The Petitioner in subsequent action, withdrew the Petition before the Commission and submitted another Petition, the subject of which is the present proceeding, seeking certification of representative for a unit of nurses, engineers, social workers,

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1/ N.J.C.S.A., Council #18 is an intervenor by virtue of a current collective negotiations agreement with the City in a unit including nurses. See N.J.A.C. 19:11-1.13(a)

2/ Commission Docket No. RO-904

and doctors.[3] The City has reiterated its position denying recognition with regard to the proposed unit for the same reasons set forth in the abovementioned October 15 communication. Accordingly, a question concerning representation exists and is properly before the Hearing Officer for Report and Recommendations.

POSITIONS OF THE PARTIES

Petitioner:

A.F.S.C.M.E. concedes that the nurses have been included in the recognized unit represented by Council #18. It contends, however, that in granting recognition to a unit of employees including both professional and non-professional employees, the City had an obligation to inform the nurses that they could exercise an option to be included or excluded in the recognized unit. The Petitioner argues that this professional option was not accorded. In the words of Petitioner's representative, "As to my statement, we see the issue as being very narrowly construed to be whether professionals were, in fact, in any of the documents given the option or told that they had an option."[4]

3/ The purpose of the second submission was to expand the scope of the proposed unit to include all professional employees. However, the Petitioner has taken the position on the record that the engineers hold supervisory positions and that the doctor serves on a contractual consulting basis. (T.2 p.3) It would appear, then, that the Petitioner has limited the scope of its petitioned for unit of professionals to nurses and to medical social workers. There is no dispute that nurses and medical social workers are professionals.

(Transcript references refer to transcript and page. T.1 refers to the March 13 transcript. T.2 refers to the May 5 transcript.)

4/ T.1 p.22

In further particularizing its argument the Petitioner stated for the record that it was not arguing for a severance of professionals from the unit on the grounds of unfair representation. Moreover, with regard to the appropriateness of the recognized unit the transcript reveals the following position:

> "Hearing Officer: Would you argue that the professionals do not share a community of interest with other employees of the City of Vineland?"
> Mr. Neimeiser: Yes
> Hearing Officer: Do you intend to bring this out in evidence?
> Mr. Neimeiser: No, as I said, I think it's pretty much moot from the standpoint that even in the contract that was entered into from (sic) Council 18 of the CSA, they and the City, they especially note professionals and include or exclude, as the case may be." (T.2 P.5)

Public Employer and Intervenor:

Both the Public Employer and Intervenor argue that the petition is not timely filed under the recognition bar and contract bar provisions of Commission Rule Section 19:11-1.15. In addition, they argue that the nurses effectively exercised an option by participating in Council #18's showing of interest. Lastly, they contend that the nurses should not be severed from the existing unit since in their view the petition is motivated solely because of disatisfaction with the negotiated contractual agreement.

RELEVANT STATUTE PROVISIONS AND RULES

The following are relevant provisions of the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq).

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

> The Commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method designed to ascertain the free choice of the employees. 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 nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit[5/] or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit. All powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and not inconsistent with it, are to that extent hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings. (emphasis mine)

N.J.S.A. 34:13A-5.3:

> 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, nor, except where established practice, prior agreement or special circumstances, dictate the contrary,

5/ Subsection (d) (2) sets forth the Act's sole reference to a professional option.

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, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations; and provided further, that, except where established practice, prior agreement, or special circumstances dictate the contrary, no policeman shall have the right to join an employee organization that admits employees other than policemen to membership. The negotiating unit shall be defined with due regard for the community of interest among the employees concerned but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission as authorized by this act shall be exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit....(emphasis mine)

Chapter 11 of the Commission's Rules sets forth the following relevant provisions:

N.J.A.C. 19:11-1.14 Recognition as exclusive representative

(a) Whenever a public employer has been requested to recognize an employee organization as the exclusive representative of a majority of the employees in an appropriate collective negotiating unit, the public employer and the employee organization may resolve such matters without the intervention of the Commission.

(b) The Commission will accord certain privileges to such recognition as set forth in Section 1.15 (Timeliness of petitions) of this Chapter provided the following criteria have been satisfied prior to the written grant of such recognition by a public employer:

(1) The public employer has satisfied himself in good faith, after a suitable check of the showing of interest, that the employee representative is the freely chosen representative of a majority of the employees in an appropriate collective negotiating unit;

(2) The public employer has conspicuously posted a notice on bulletin boards, where notices to employees are normally posted, for a period of at least ten consecutive days advising all persons that it intends to grant such exclusive recognition without an election to a named employee organization for a specified negotiating unit;

(3) The public employer shall serve written notification upon any employee organizations that have claimed, by a written communication within the year preceding the request for recognition, to represent any of the employees in the unit involved, or any organization with which it has dealt within the year preceding the date of the request for recognition. Such notification shall be made at least ten days prior to the grant of recognition and shall contain the information set forth in paragraph (b)2 of Section 1.14 (Recognitions as exclusive representative) of this Chapter;

(4) Another employee organization has not within the ten-day period notified the public employer of a claim to represent any of the employees involved in the collective negotiating unit and has not within such period filed a valid petition for certification of public employee representative with the Executive Director;

(5) Such recognition shall be in writing and shall set forth specifically the collective negotiating unit involved.

N.J.A.C. 19:11-1.15 Timeliness of petitions

(a) .....

(b) Where there is a certified or recognized representative, a petition will not be considered as timely filed if during the preceding 12 months an employee organization has been certified by the Executive Director or the Commission as the majority representative of employees in an appropriate unit or an employee organization has been granted recognition by a public employer pursuant to Section 14 of this Subchapter.

(c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representive or a petition for decertification of public employee representative normally will not be considered timely filed unless:

(1) In a case involving employees of the State of New Jersey, any agency thereof, or any State authority, commission or board, the petition is filed not less than 240 days and not more than 270 days before the expiration or renewal date of such agreement;

(2) In a case involving employees of a county or a municipality, any agency thereof, or any county or municipal authority, commission or board, the petition if filed not less than 90 days and not more than 120 dyas before the expiration or renewal date of such agreement;

(3) In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15, inclusive, within the last 12 months of such agreement.

(d) For the purposes of determining a timely filing, an agreement for a term in excess of three years will be treated as a three year agreement; an agreement for an indefinite term shall be treated as a one year agreement measured from its effective date.

GENERAL BACKGROUND

Based upon the entire record the undersigned gleans the following facts. In October, 1973, Council #18 approached the City requesting recognition as exclusive representative of all City employees, excluding police, confidential employees, managerial employees and supervisors. Council #18 presented the City with a typed list of employee designations. The City expressed reservations with regard to the broad unit request, inasmuch as certain groups of employees were already organized, and that certain employees included were felt to be supervisors. After some discussion the City agreed to recognize a unit consisting of blue and white collar employees excluding certain categories of employees already represented and excluding certain other categories of employees. Professional employees were to be excluded from the unit; however, after being informed by Council #18 that nurses desired to be in the unit notwithstanding their status as professionals the City agreed to include the nurses in the unit. The City asked Council #18 to provide it with petitions signed by a majority of the employees to be included in the unit designating Council #18 as their exclusive representative.

According to the testimony of the City's Business Administrator, Alfred Biondi, Council #18 eventually provided the City with petitions signed by employees. After a check of the petitions, the City was satisfied that a majority of employees desired to be represented by Council #18. Futhermore, virtually all, if not all, of the nurses signed the petitions. 6/

6/ Mr. Biondi's testimony reveals that there were eight nurses employed by the City at the time petitions were circulated (T.1P.36) However, the petitions contain signatures of nine nurses (PE - 4).

The City thereafter posted the following notice to its employees:

NOTICE TO ALL EMPLOYEES

Take Notice that the City of Vineland, a municipal corporation of the State of New Jersey, pursuant to Rule 2.10 (sic) entitled "Recognition as Exclusive Representative" of the Rules and Regulations of the New Jersey Public Employment Relations Commission does hereby state its intention to grant exclusive recognition without an election to the New Jersey Civil Service Association, Cumberland Council No. 18, as the exclusive representative of all full time employees of the City of Vineland included within classifications set forth on Exhibit A attached hereto and made a part hereof specifically excluding employees of the Vineland Police Department represented by the Fraternal Order of Police, Cumberland Lodge #8, employees of the Vineland Police Department represented by the Vineland Police Superior Officers Association, employees of the City of Vineland Electric Utility represented by the Local Union 210, I.B.E.W., employees of the City of Vineland Fire Department, confidential, professional (except Graduate Nurse and Public Health Nurse), and part-time employees, and supervisors within the meaning of the Act.

This Notice is dated January 18, 1974, and shall remain posted for ten (10) consecutive days up to and including January 28, 1974.

The City disclaims any knowledge of any employee or employee organization requesting intervention during the crucial ten day posting period or at any other time prior to recognition. None of the nurses who testified indicated that they communicated with the employer about their inclusion in the unit. While the nurses testimony indicated that they were confused about what unit inclusion meant (and their individual testimony appears contradictory on this issue) and that they conveyed their thoughts to Council #18's representatives, the record indicates that they never approached the City on this point.

There is testimony, however, that prior to Council #18's organizing efforts, the nurses did discuss the possibility of organizing a unit exclusively of nurses. While the nurses did testify as to hearsay knowledge that the City was apprised of their efforts, they had no direct knowledge that a request for recognition was communicated to the City. The City denies any formal or informal knowledge of the nurses' organizational activity. I credit the testimony of the City.

After the expiration of the ten day posting period, the City informed Council #18 of recognition and they commenced negotiations. On May 14, 1974, the City and Council #18 entered into an agreement, incorporating into the recognition clause of the agreement the unit description language as it appeared in the Notice to Public Employees. All parties have stipulated that the agreement is a three year contract that expires on December 31, 1976.

DISCUSSIONS OF ISSUES

The public employer and intervenor argue that A.F.S.C.M.E.'s petition was not timely filed pursuant to the recognition bar (N.J.A.C. 19:11-1.15(b)) and contract bar (N.J.A.C. 19:11-1.15(c)) provisions of the Commission's rules. These provisions set forth timely periods for the filing of petitions involving employees in recently recognized units and employees covered under an existing written agreement.[7/] Having extended recognition in good faith after ascertaining the majority status of the intervenor, posting appropriate notices and according written recognition, it would appear that the public employer satisfied the requirements of N.J.A.C. 19:11-1.14(b) and would normally be entitled to assert the timeliness privileges accorded in N.J.A.C. 19:11-1.15.

However, the Petitioner submits that its petition should not be barred by the timeliness rules. It argues that the recognition was invalid with respect to the nurses because the Act required the public employer to affirmatively accord the nurses a professional option.

The undersigned views the key elements of the petitioner's argument as follows: (1) N.J.S.A. 34:13A-6 provides that no unit shall be appropriate that includes professional employees with non-professional employees without a

7/ Insofar as the public employer and intervenor have entered into a collective negotiations agreement, the recognition bar principal is no longer applicable. See E.D. No. 5, Deptford Township Board of Education

a professional option; and (2) N.J.A.C. 19:11-1.14(b)(1) requires that the recognition be extended in an appropriate collective negotiations unit in order to be accorded the protection of the time bar privilege. The type of professional option the petitioner perceives might not necessarily have to be a separate vote, but would at least have to incorporate an affirmative act by the employer notifying the professionals that they have an option to be included or excluded from the unit. The petitioner argues that because the professionals were not specifically told that they had an option, the unit is inappropriate and, accordingly, the timeliness requirements of N.J.S.A. 19:11-1.15 are not applicable.

For the reasons given below, the undersigned recommends that the Petitioner's position should be partially accepted and partially rejected. It is the undersigned's belief that a professional option is required in voluntary recognition situations but that the form in which it is extended need not necessarily involve an affirmative act as proposed by the Petitioner. This recommendation is based upon the undersigned's analysis of the concepts of voluntary recognition, P.E.R.C. certifications of unit, and the Act's professional option requirement.

(A) The nature of voluntary recognition and of certification of exclusive employee representative.

The New Jersey Employer-Employee Relations Act, in the relevant provisions set forth above, establishes two general methods by which an employee organization may become an exclusive representative of a unit of employees. An appropriate unit may be accorded voluntary recognition by the public employer or it may be certified as exclusive representative through a P.E.R.C. proceeding. Thus, Section 7 of the Act (N.J.S.A. 34:13A-5.3) which generally sets forth the guidelines of appropriately constituted units, speaks in terms of representatives

designated or selected by a majority of employees in an appropriate unit and in terms of representatives designated or selected by a majority of employees voting in an election conducted by the Commission as authorized by the Act. The term "recognition" actually appears only once, where Section 7 provides that "(T)he negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute."

The Act is more specific with respect to Commission certification procedures than it is with respect to voluntary recognitions. Section 6 of the Act (N.J.S.A. 34:13A-6) empowers the Commission to conduct a secret ballot election or to utilize any other appropriate and suitable means to ascertain the employees' free choice. It also empowers the Commission to conduct formal hearings on questions concerning representation. And, significantly, it sets forth some additional unit appropriateness requirements which the Commission must consider in unit determinations that are not found in Section 7 of the Act. One of these requirements is that the Commission may not find a mixed unit of professionals and non-professionals appropriate without allowing the professional employees a separate option to "vote for inclusion in such unit...." The language of Section 6(d) is limited to P.E.R.C. certification proceedings. It makes no reference to voluntary unit recognition.

The fact that the Act does not set forth a specific voluntary recognition procedure does not mean that the Act is without direction. The above cited sentences of Section 7 require that an employee organization cannot be an exclusive representative unless designated or selected by a majority of employees in an appropriate unit. The Commission has given substance to these basic

considerations in creating a specific procedure in Rule 19:11-1.14 by which a grant of voluntary recognition in an appropriate unit will be accorded certain privileges under Rule 19:11-1.15. These procedures include a requirement of satisfaction as to majority status, as well as a requirement of notice to employees and any other employee organization that might wish to intervene in the proferred recognition. However, neither the Act nor the Rule require employees to vote in a voluntary recognition situation. 8/

(B) Appropriateness of units including both professional and non-professional employees, and the relationship of the professional option requirement

It is noteworthy that the Act does not render a mixed unit of professional and non-professionals inappropriate per se. Many such units exist in the public sector through both P.E.R.C. certification and voluntary recognition.

The key issue involved here revolves around the special consideration of an option accorded to professional employees (as with craft employees) under Section 6 of the Act. Inasmuch as the professional option has its counterpart in federal legislation under the Labor Management Relations Act, 9/ a look at the

8/ Other procedures for granting voluntary recognition arenot precluded by Rule 19:11-1.14. However, the privileges of Rule 19:11-1.15 may only be asserted when recognition is granted pursuant to Rule 19:11-1.14.

9/ Section 9(b) of the L.M.R.A. provides:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, that the Board shall not (1) decide that any unit appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such profesional employees vote for inclusion in such unit... .

National Labor Relations Board's history with respect to the option might prove illuminating.

(1) Policy Considerations

The professional option requirement was incorporated into the L.M.R.A. by the Taft-HartleyAmendments of 1947.

It's purpose has been summarized as follows:

> "Prior to the passage of the Taft-Hartley Act, the Board treated professional employees in the same fashion as other employees. Evidencing a concern that the professionals were different from other employees, and that their legitimate interests could be submerged if they were grouped with other employees, Congress provided in Section 9(b)(1) that a unit including both professionals and other employees was inappropriate unless a majority of such professional employees vote for inclusion in such unit."[10/]

> "A premise underlying this provision is that professional employees should not be automatically included in bargaining units with non-professional employees against their wishes since they usually have distinct professional standards, and are frequently paid on a different basis than non-professional employees."[11/]

(2) Application of Section 9(b)(1)

The Board originally took the position that as the policy behind the

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10/ Morris, Charles J., The Developing Labor Law, B.N.A., Wash., D.C., 1971, page 222

11/ Smith, Russel A., Labor Relations in the Public Sector, Bobbs-Merrill Co., Inc., 1974, page 235

professional option was to protect the professionals' interests from being submerged by the majority vote of non-professional employees, the professional option requirement was inapplicable where the clear majority of employees in a proposed unit were in fact professionals. The United State Supreme Court reversed the Board in Leedom v. Kyne, 358 US 184 (1958), and read Section 9(b)(1) strictly to require a professional option in cases where the professionals were in the majority as well as in the minority.

The Board has similarly applied a strict reading to the provision. In Retail Clerks Union Local No. 324 and Vincent Drugs No. 3, Inc., 144 NLRB No. 108, 54 LRRM 1226 (1963), the Board refused to invalidate a contract in a unit combining professional and non-professional employees where the employees argued that the unit was inherently inappropriate due to the original joinder of professionals and non-professionals without a professional option. The unit had been voluntarily created by the parties ten years before the institution of the proceedings before the Board, and several contracts had been entered into by the parties prior to the one challenged.

In the Vincent Drugs case the Board had framed the issue as follows:

> "Quite clearly, Section 9(b)(1) precludes the Board in a certification proceeding under Section 9 of the Act from itself establishing an appropriate unit containing professional employees among others, unless the self-determination election requirement of Section 9(b)(1) has first been met. The Act does not however, require prior resort to a Board determination whenever the parties establish an appropriate bargaining unit. The specific question in this case is whether Section 9(b)(1) compels a contrary result where professional employees are one of the groups involved; and whether the Board in a Section 10 complaint proceeding involving the validity of a contract, is required to find inappropriate for the purposes of collective bargaining, simply because no self-determination election has been held, a unit combining professional and nonprofessional employees where as here, the contract unit was initially established not by the Board, but by parties themselves and maintained without challenge for many years before the making of the contract sought to be invalidated.12/ (emphasis the Board's)

12/ 54 LRRM, at 1227-28

The Board stated that its refusal to invalidate the historically established contract unit pursuant to Section 9(b)(1) was consistent with earlier Board precedents limiting the application of Section 9(b)(1) only to "situations where a representation election is sought in a unit including professional employees among others."[13/] The Board then cited a prior matter where it dismissed a decertification petition premised on Section 9(b)(1) which was filed with respect to a professional segment of a larger unit.

In International Telephone and Telegraph Corp. and Local 400, I.U.E.R. and M.W., AFL-CIO, 159 NLRB No. 145, 62 LRRM 1339 (1966), the Board, in a refusal to bargain proceeding, stated:

> "We believe this case to be governed by the same considerations that guided our decision in Vincent Drugs, 144 NLRB 1247, 54 LRRM 1226. In that case it was argued that the Board under no circumstances could consider a combined unit of professionals and non-professionals to be appropriate unless the professionals at some time had been afforded an opportunity to vote for exclusion as provided in Section 9(b)(1). In rejecting that argument, we noted, inter alia, that nothing in the statute either condemns such a unit as illegal or declares it inherently inappropriate. On the basis of our analysis of the legistive history we concluded that Section 9(b)(1), although precluding the Board itself from initially establishing such a mixed unit in a representation proceeding without a self-determination election, does not preclude an employer and a union from voluntarily establishing and maintaining such a unit as one appropriate for collective bargaining. We reiterate and reaffirm here what we stated in Vincent Drugs on this subject."[14/] (emphasis the Board's)

Upon review of the I.T.T. case, the Third Circuit Court of Appeals cited Vincent Drugs, and stated:

> "Though Section 9(b)(1) prohibits the Board from designating a mixed unit without holding the requsite election of professionals, nothing in the language of the Act prohibits the parties from maintaining and recognizing such a unit consenually."[15/]

13/ 54 LRRM, at 1228
14/ 62 LRRM, at 1343
15/ 65 LRRM, at 3004 (1967)
See also California Licensed Vocational Nurses Assn., Inc. v. N.L.R.B., 82 LRRM 2995 (1973)

While none of the above federal cases are specifically directed to the issue of whether professional option voting requirement of Section 9(b)(1) is applicable to voluntary recognition agreements, they do establish that the failure to provide a professional option vote where a unit is consensually established and maintained cannot be used in a later Section 9(b)(1) action to challenge the validity of a unit. Notwithstanding the factor of the long bargaining relationships involved therein, these decisions are quite strongly influenced by the underlying premise, as stated in the I.T.T. case, that Section 9(b)(1) precludes the Board from establishing a mixed unit without a self-determination election, but that it does not preclude an employer and a union from establishing and maintaining a mixed unit without a professional option vote.

C. The Application of New Jersey's Professional Option Requirement

To analyze New Jersey's professional option requirement in the light of the federal interpretation of the L.M.R.A. would not seem to be in error. Both Section 9(b)(1) of the L.M.R.A. and Section 6(d)(2) of the so called "PERC Act" speak expressly in terms of certification proceedings. The professional option requirements in both sections require a "vote" for inclusion in a mixed unit.

It is clear that whatever the PERC Act requires an actual "vote" it is with reference to a Commission certification proceeding. Section 6(d), requiring the professional option vote, refers to a Commission certification utilizing a secret ballot election or suitably designed alternative procedure. Section 7 refers to a "majority of employees voting in an election conducted by the Commission."

In contrast to certification proceedings, the striking feature of voluntarily recognition is that an employee vote is not required. That the legislature has not required an election process in voluntarily recognition situations reflects a policy consideration that enables employees and employers to mutually establish harmonious relations in an appropriate unit without the necessity of an election.

It is the undersigned's view that the statutory imperative of the PERC Act with regard to a professional option vote is as clear, if not clearer, than the apposite federal requirement. It is his opinion that the necessity of an actual vote to exercise the option is compulsory only in a PERC certification proceeding.

This is not, however, to say that the professional option requirement does not apply to voluntary recognitions. Its purpose, the protection of the interests of professional employees, is equally relevant to PERC certifications and voluntary recognitions. An argument that the legislature intended to protect the interests of professional employees in certification proceedings but that those same interests do not need or merit protection in voluntary recognition situations would be extremely shortsighted. The interests of professional employees can be as equally submerged by a majority of employee designations in a voluntary recognition situation as they can be submerged by a majority vote in a secret ballot election. In view of the policy in the Act protecting the interests of professionals, it is the opinion of the undersigned that the legislature could not have contemplated an arbitrary swallowing of professionals into a unit by a simple overall majority designation of employees.

Inasmuch as an employer may recognize an employer organization after being satisfied that the latter represents a majority of employees in a proposed unit, a majority designation in a recognition situation is in a real sense the equivalent of a majority vote in a secret ballot election. Considering a designation in that light, the procedure by which the professional option policy consideration finds its proper application in unit recognition situations is readily apparent i.e. by the employer satisfying itself that a majority of professional employees have offered designations to be within the proposed mixed unit.

CONCLUSION

In the instant proceeding, there is no question that the employer was satisfied that a majority of nurses desired to be included within the recognized unit. As stated earlier, virtually all, if not all, of the nurses signed a petition designating Council #18 as their exclusive representative. The City posted appropriate notices clearly setting forth the composition of the unit. At no time during the posting period (and throughout negotiations as well) did any of the nurses ever approach the City expressing reluctance at being in the proposed unit or even requesting any explanation of the notices.[16/] Such a request would have obligated the employer to look further into the matter before it could have extended recognition in good faith. As it stands, the City acted in good faith and, therefore, should be entitled to assert the protection of the contract bar.

RECOMMENDATION

For the above reasons, the undersigned is of the view that there is a professional option requirement applicable to voluntary unit recognitions and that the requirement is met by the employer being satisfied in good faith that a majority of professional employees desire to be included in the proposed unit.[17/] Further, the under-

16/ As stated in footnote 3, the Petitioner stipulated the professional unit to be limited to nurses and medical social workers. The findings and recommendations herein as to nurses are dispositive as to medical social workers. The record indicates that the one medical social worker then employed signed the showing of interest. While the recognition clause does not specifically include the title medical social worker, various provisions in the current contract specifically provide certain benefits to employees in this position. Base upon the record, the undersigned concludes that the absence of the title on the recognition clause was inadvertant and that the medical social worker was always intended to be within the unit.

17/ Such a requirement would not necessarily invalidate currently recognized units where the professional option was not extended. The Commission, by statutory directive, does not intervene in voluntary recognition matters in the absence of a dispute. Futhermore, a history of compatible negotiating relationships may serve to mitigate an imperfectly granted recognition (See in this regard the National Labor Relations Board and Federal cases embodied in this report, and In re Board of Education Township of Cranford, E.D. No. 74, I NJPER 23).

signed believes that the N.J.A.C. 11-1.14(b)(1) requirement of majority status in an appropriate unit inherently embodies a requirement that the employer be satisfied that a majority of professional employees desire such inclusion.

Upon the entire record and the findings and conclusions predicated thereon and set forth heretofore, the Hearing Officer respectfully submits that the petition submitted by A.F.S.C.M.E. is barred by the contract bar privilege pursuant to N.J.A.C. 11-1.15(c).

RESPECTFULLY SUBMITTED

Joel G. Scharff
Hearing Officer

Dated: September 26, 1975