

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

Docket Nos. RO-76-141 and
CU-193

RUTGERS COUNCIL OF THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Petitioner.

SYNOPSIS

The Director of Representation Proceedings denies a Motion to Dismiss a Petition for Certification of Public Employee Representative. The petition was filed subsequent to the filing, and pending the investigation, of a Clarification of Unit Petition filed by the same employee organization and involving the same employees. The Director finds that the dual filings are not mutually exclusive, even though the possible end result of an "RO" petition - a direction of election - would be dependent upon a final determination respecting the "CU" petition. Further, the Director orders that both matters immediately proceed on a consolidated basis to an investigatory hearing insofar as factual issues relevant to both petitions are substantially similar and that a consolidation might avoid the possible necessity of potential duplicative testimony.

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Appearances:

For the Public Employer, Pitney, Hardin & Kipp, Esqs.
(Mr. S. Joseph Fortunato, on the Brief)

For the Petitioner, Sterns and Greenberg, Esqs.
(Mr. Michael J. Herbert, on the Brief)

DECISION ON MOTION

On May 12, 1976, Rutgers Council of American Association of University Professors Chapters (hereinafter the "Council") filed with the Public Employment Relations Commission a Petition for Certification of Public Employee Representative seeking a secret ballot election to determine the representation of approximately thirty (30) counselling personnel employed by Rutgers, The State University (hereinafter the "University"). The intent of the Council's petition is to add employees in the titles of Senior Counsellor, Supervising Counsellor, Counselling Intern, and Counsellors, Special Programs to a unit of approximately 3500 faculty and other academic support personnel at the University.

On July 9, 1976, the University moved pursuant to N.J.A.C. 19:14A-3.6^{1/} to dismiss the Petition for Certification of Public Employee

1/ The University's motion incorrectly cites N.J.A.C. 19:14-3.6. This technical error is deemed as without prejudice to the consideration of the motion.

Representative (commonly referred to as an "RO" petition).^{2/} All parties have been given full opportunity to present briefs and/or affidavits with respect to the above motion. Simultaneous with and in support of its motion, the University provided a brief and supporting affidavit. A brief in opposition to the motion was filed by the Council on August 19, 1976. Although the Council's brief was not filed within the five (5) days provided by the above rule section, consideration of the brief would not substantially prejudice the moving party.^{3/} However, the University's motion may be decided upon the face of its motion papers, and the undersigned need not consider the brief filed by the Council.

Accordingly, a motion to dismiss pursuant to N.J.A.C. 19:14A-3.6 having been filed, the matter is appropriately before the undersigned for determination.^{4/}

Stated in the simplest terms, the University by its motion basically argues that it is inappropriate for a petitioner to file an RO petition while a Clarification of Unit Petition ("CU") previously filed by the same

2/ N.J.A.C. 19:14A-3.6(a) provides:

All motions, other than those made during a hearing, shall be made in writing to the Executive Director, shall state the relief sought, and shall be accompanied by affidavits setting forth the grounds for such motion.

At the time of the filing of the motion the RO petition was under Commission staff investigation, and no determination had been made as to whether a hearing should be directed pursuant to N.J.A.C. 19:11-1.12.

- ^{3/} The Council did not request an extension of time within which to file its brief. However, in oral communication with the Deputy Director of Representation Proceedings shortly after the receipt of the moving papers, Council's counsel indicated opposition to the motion.
- ^{4/} On June 22, 1976 the Executive Director, Jeffrey B. Tener, was sworn in as full-time Commission Chairman. See N.J.S.A. 34:13A-5.2, as amended by Section 3 of P.L. 1974, c. 123. Effective immediately thereafter, the Commission approved the elimination of the Executive Director position, and named the Director of Representation Proceedings as its designee to perform those functions in representation proceedings which the Executive Director had theretofore performed. See N.J.S.A. 34:13A-6(f).

petitioner on behalf of the same employees is currently pending before the Commission. The University refers in its motion to a CU petition filed by the Council on June 5, 1975, and still under Commission processing at the time of the filing of the RO petition.

The facts are undisputed and the undersigned takes administrative note that the Council filed a CU petition on June 5, 1975 (Commission Docket No. CU-193) respecting the same employees who are the subject of the RO petition. The Council's statements of position in the CU matter allege generally that the job titles of the employees in dispute were created subsequent to the formation of its faculty and academic support unit, and that the community of interest of these "new" employees warrants a determination that they be placed in the already established unit.^{5/} On the other hand, the RO petition filed by the Council seeks an election among the "new" employees in question to determine whether they choose to be included in the Council's negotiating unit.

The University claims that the processing of the RO petition concurrently with the CU petition is untenable. It refers to the contents of the Commission's petition form to the effect that an RO petition institutes a proceeding whereby "A substantial number of public employees wish to be represented for purposes of collective negotiations by Petitioner and Petitioner desires to be certified as majority representative of the employees", and that a CU petition institutes a proceeding whereby "An

^{5/} The Clarification of Unit Petition would, if successful, have the effect of requiring the inclusion of the employees in question in the already established unit without an election among these employees to determine their desire. For one discussion of the usage of the Clarification of Unit petition involving newly created job titles, see Abodelee, The NLRB and the Appropriate Bargaining Unit, p. 119.

employee organization is currently recognized or certified by public employer, but Petitioner seeks clarification of the negotiating unit." The University asserts from this comparison that the "purposes of the two petitions are mutually exclusive" and that while PERC rules do not prohibit the filing of an RO petition while a CU petition is pending, such filing is improper. The University contends that if, in fact, the employees are "already represented by the AAUP, as suggested by the CU petition, then an election in that unit for purposes of determining whether the employees wish to be represented by the AAUP clearly would be improper."

Secondly, based upon the above, the University argues that "there is simply no way PERC can proceed with an investigation of the RO petition filed by the AAUP until its investigation with respect to the CU petition is concluded and a final determination rendered. In these circumstances, the RO petition must be dismissed and not merely held in abeyance pending the disposition of the CU petition. This is because, assuming arguendo that the RO petition is presently supported by an adequate showing of interest and that the CU petition ultimately will be dismissed, the RO petition may not be supported by an adequate showing of interest on the date on which the CU petition is dismissed thereby permitting PERC to proceed with its investigation of the RO petition." ^{6/}

Lastly, the University "suggest(s) that a petition filed during the pendency of another is untenable and harassing when it relates to the

^{6/} The undersigned notes that the Council requested the Commission to utilize a showing of interest previously submitted in support of the CU petition in order to satisfy the showing of interest requirement for the RO petition. Under Commission rules, a CU petition does not have to be supported by a showing of interest. On August 18, 1976 the Council provided an updated showing of interest to the Commission explaining by cover letter that the updated showing was submitted to "resolve any doubt on this issue [i.e. staleness]." The undersigned has determined that the Council's showing of interest is adequate.

same unit of employees with respect to the same employer." No reason for the adoption of this suggested per se rule is given by the University except for a statement culled from a National Labor Relations Board case, Associated Shoe Industries, 81 N.L.R.B. 224, 225 (1949), wherein the Board stated: "A petition filed during the pendency of another is tenable and not harassing when it seeks a different unit" (emphasis added by the University). The University has not made any evidentiary offer that the filing of the RO has had a harassing effect.

Based upon the submission of the University in both its brief and affidavit, and for the following reasons, the undersigned concludes that the University's motion to dismiss is insufficiently grounded.

Both unit certification proceedings and unit clarification proceedings are among the procedures that have been adopted by the Commission in fulfillment of its responsibilities under the New Jersey Employer-Employee Relations Act. The Act empowers PERC to resolve questions concerning representation by the conduct of secret ballot elections, and empowers PERC to determine the composition of appropriate negotiating units.^{7/} The procedures adopted by the Commission are designed to most fairly and expeditiously effectuate the right of employees to choose representation in an appropriate negotiating unit and, at the same time, to protect the legitimate interests of public employers and interested employee organizations.

Unit certification and unit clarification proceedings reflect different circumstances wherein a representation issue arises. In the first instance, the petitioning organization asserts that a group of employees are

^{7/} N.J.S.A. 34:13A-1 et seq. and, in particular, N.J.S.A. 34:13A-5.2, 5.3, and 6(d). See also N.J.A.C. 19:11-1.1 et seq. and N.J.A.C. 19:14A-1.1 et seq. See also Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970).

not represented but desire an election to choose representation. Often the certification of unit proceeding involves questions as to whether the petitioned for group of employees share a requisite community of interest to constitute an appropriate negotiating unit. On the other hand, a clarification of unit petition involves an existing negotiating unit, and the petitioner requests the Commission to determine whether certain individual employees, or categories of employees, find representation within the description of the established unit. Unit clarification proceedings as well often require, as in the instant CU case, determinations as to whether the individual employees or categories of employees share a community of interest among themselves and among the employees in the unit who are not the subject of a dispute.

The University is correct in noting that a determination directing a secret ballot election in the RO case is dependent upon a finding and determination in the CU matter, insofar as an election cannot under the circumstances presented herein be directed if the employees are found in the CU proceeding to be includible in the Council's unit. The impropriety of directing an election upon the happening of that possible end result, however, does not mean that the filing of an RO petition during the pendency of a CU petition is improper or that the concurrent processing of the two petitions is improper. Nor are the dual filings mutually exclusive. In the instant matters the Council seeks a determination of clarification of unit, which determination must necessarily include a finding of community of interest among the concerned employees and sufficient reason to include the petitioned for employees within the larger unit without a secret ballot election. In the absence of such a determination, the Council seeks in the certification proceeding a finding of appropriate community of interest and a decision directing the conduct of an election. Very plainly, under each of the petitions presented herein, the goal of the Council is the same, that is, to represent the interests of the petitioned for employees.

Although the Council has chosen two different procedures through which it is attempting to reach its goal, and although a final determination to direct an election in one must await the ultimate disposition of the other, it certainly cannot be said that the simultaneous processing of both is improper, or that they are mutually exclusive.

Either the CU petition or the RO petition may terminate with the end result that the Council seeks. Then again, neither petition may end with that result. Whichever, there is nothing to indicate that the purposes of the Act would be frustrated by their mutual processing. To the contrary, under the circumstances presented herein, in both the CU and the RO proceedings, there is a strong likelihood that substantially similar if not identical legal issues and factual evidence relative to community of interest will be raised.^{8/} To isolate the processing of the two petitions, as the University suggests, might lead to an unnecessary duplication of effort on the part of the University, the Council and the Commission in the event of a refiling of the RO petition.^{9/} The prospect of litigating at a later time substantially similar issues which could have been raised and disposed of in earlier proceedings would result in a monumental waste of time. The undersigned therefore concludes that rather than frustrating the purposes of the Act, a consolidation of the CU and RO proceedings would serve the purposes of the Act and would most efficiently

^{8/} To date, in the investigation of the CU matter, the University has objected to the appropriateness of the CU petition, in part raising community of interest questions. The University has not provided a statement of position, as requested by the Commission, with respect to the appropriateness of the RO petition. In the absence of a statement, the undersigned, under the circumstances herein and especially in light of the instant motion to dismiss, assumes objection.

^{9/} If the Motion to Dismiss is granted, and subsequently, the CU petition is dismissed, the Council could file an RO petition at that time supported by a showing of interest.

and expeditiously resolve the parties' dispute as to representation.^{10/} If at the conclusion of consolidated proceedings, the appropriate disposition is to dismiss the Council's CU petition, that may be ordered and an appropriate determination with respect to the RO petition may be immediately and simultaneously made. If the CU petition, on the other hand, warrants a determination that the employees are includible in the unit, the RO petition may be immediately dismissed.^{11/}

Accordingly, the undersigned shall order the proceedings in the above CU and RO petitions consolidated. At the same time the undersigned shall order the conduct of a hearing in the consolidated matters, it appearing to the undersigned pursuant to N.J.A.C. 19:11-1.12(c) that substantial and material factual issues exist which may be more appropriately resolved after a hearing.

^{10/} By consolidating proceedings at this time the University is not prejudiced. First, the University's fears that the unit certification petition may be processed upon a "stale" showing of interest are quelled. Consideration of the RO petition in the consolidated proceedings will be given the same prompt treatment as accorded to RO proceedings where there is no other concurrent petition. As the Commission's Executive Director has stated, the showing of interest requirement serves to satisfy the Commission's internal requirements for the initial processing of representation matters. The ultimate test of employees' desires is through a secret ballot election conducted by the Commission wherein a majority of voters select an employee representative. See In re City of Jersey City, E.D. No. 76-19, 2 NJPER 30, pp. 31-32 (1976). Secondly, as noted above, under the circumstances presented herein substantially similar issues and the facts related thereto are relevant to both petitions and may be argued in one proceeding.

^{11/} In a representation matter recently decided by the Executive Director, In re Board of Education of the City of Camden, E.D. No. 76-32, 2 NJPER 123 (1976), aff'd P.E.R.C. No. 76-50, 2 NJPER 228 (1976), proceedings involving a CU petition filed by the Board, and an RO petition filed subsequently by an employee organization were consolidated for hearing and, ultimately, for decision. The CU petition sought the inclusion of school psychologists in a unit of classroom teachers. The RO petition filed by the psychologists sought a unit limited to psychologists. The Executive Director found both petitions inappropriate and, accordingly, both matters were dismissed.

Order and Notice of Hearing

For the reasons above-stated, the Director of Representation Proceedings orders as follows:

1. The motion to dismiss filed by the University is hereby denied pursuant to N.J.A.C. 19:14A-3.6(d);
2. The Petitions docketed with the Commission in CU-193 and RO-76-141 are hereby consolidated for purposes of hearing;
3. A consolidated hearing shall be conducted before Charles A. Tadduni , a hearing officer of the Public Employment Relations Commission, at the time, date, and place so indicated on the attached Notice of Hearing.

BY ORDER OF THE DIRECTOR OF
REPRESENTATION PROCEEDINGS



Carl Kurtzman Director
Representation Proceedings

DATED: October 13, 1976
Trenton, New Jersey



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DOCKET NOS. RO-76-141 and
CU-193

NOTICE OF HEARING

The Petitioner, above named, having heretofore filed a Petition concerning a claim of representation pursuant to Chapter 303, N. J. Public Laws of 1968, copy of which Petition is attached hereto, and it appearing that a question exists concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that, pursuant to the Act and the Commission's Rules and Regulations, on the
24th day of November, 1976, at 10:00 A.M. in the Health and
Agriculture Bldg., Training Room B, John Fitch Plaza, Trenton, New Jersey,

a hearing will be conducted before the hearing officer named below, designated hearing officer of the Commission for that purpose with all the duties and powers conferred upon him by the Commission's Rules and Regulations. Parties will have the right to appear in person or otherwise, and give testimony and offer exhibits.

A pre-hearing conference will be conducted on November 18, 1976 at 10:00 A.M. in the Health & Agriculture Bldg., Training Room A, John Fitch Plaza, Trenton, New Jersey.

DATED: October 13, 1976

Trenton, New Jersey

HEARING OFFICER OF THE COMMISSION:

Charles A. Tadduni

A handwritten signature in cursive script, reading "Carl Kurtzman".

Carl Kurtzman

Director of Representation Proceedings

Attachments