

D.R. NO. 97-5

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

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-96-74

COUNCIL OF NEW JERSEY STATE COLLEGE  
LOCALS, AFT, AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation orders an election among approximately 2,300 adjunct faculty employed by seven State Colleges and 1 State University.

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Appearances:

For the Public Employer,  
Peter Verniero, Attorney General  
(Mary L. Cupo-Cruz, Senior Deputy Attorney General)

For the Employee Organization,  
Dwyer & Canellis, attorneys  
(George W. Canellis, of counsel)

DECISION AND DIRECTION OF ELECTION

On December 7, 1995, the Council of New Jersey State College Locals, AFT, AFL-CIO, filed a Petition for Certification of Public Employee Representative supported by an adequate showing of interest, seeking to represent a negotiations unit of approximately 2,300 adjunct faculty employed at seven State Colleges and one State University: Rowan College, Jersey City College, Kean College, William Paterson College, Ramapo College, Stockton College, the College of New Jersey (formerly Trenton College) and Montclair State

University.<sup>1/</sup> Adjuncts are currently unrepresented. The petitioned-for negotiations unit is described as all adjunct faculty who, as of the 1995 fall semester, were teaching a second semester within the past two academic years, or expressed a willingness to be rehired to teach at least one semester in the next academic year. The State does not consent to an election among the employees in the petitioned-for unit.

We have conducted an administrative investigation to determine the facts in this matter. N.J.A.C. 19:11-2.2. The parties were given several opportunities to present their positions with evidentiary support. Further, in response to the Director's request for supplemental facts, the State submitted additional information and documents on July 19 and August 19, 1996.

On October 2, 1996, the parties were notified of the Director's preliminary findings and were given an opportunity to argue why the decision is incorrect and supply evidence in support of its argument. The State did so on November 1, 1996.

I find the following.

Approximately 2,500 adjunct faculty in the proposed unit taught at least two semesters between fall 1994 and spring 1996. They taught courses not being taught by the approximately 3,221 full-time and part-time faculty employed at eight State colleges. Full-time and part-time faculty are included in a State-wide collective negotiations unit represented by the Council.

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<sup>1/</sup> Thomas Edison State College does not employ teaching or adjunct faculty.

A review of the materials submitted by the State indicates the following. Adjuncts are given a written agreement to teach specific course(s) for one semester at a fixed fee. They are selected by a department chair or his or her equivalent,<sup>2/</sup> based on an adjunct's expertise in a discipline. Their expertise may have been acquired through education or experience. Although they are not required to have a terminal degree, the State considers adjuncts professionals. They teach core curriculum courses or specialized courses such as independent study or nursing and student teaching practicums that are over-enrolled or are not within the expertise of a College's regular full-time and part-time faculty. They usually teach no more than two courses per semester, although a small number of adjuncts at each college teach three or more courses per semester.<sup>3/</sup>

Adjuncts perform their duties in accordance with college policies and a course syllabus. Adjuncts are normally assigned

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<sup>2/</sup> At Ramapo and Stockton Colleges, where department chairpersons are not designated, a convener of a major/program and a dean hire adjuncts.

<sup>3/</sup> Three colleges limit an adjunct's teaching load to a maximum number of credit hours per semester: six credit hours per semester at William Paterson and Ramapo Colleges and eight credit hours at Stockton. At other colleges, an adjunct's total credit hour load depends upon the number and type of courses taught. Consequently, between the fall 1994 and the spring 1996 semesters, adjuncts taught from a fraction of a credit hour (for specialty courses) to a maximum of 10 credit hours in a semester. However, the total credit hour load is not evidence of the total number of hours that an adjunct spends per semester performing instructional duties.

classrooms and class schedules. Many adjuncts teach on campus and are provided with mailboxes and office space for their use.<sup>4/</sup> Other than occasional classroom observations by regular faculty, adjuncts are not formally evaluated. Student course evaluations may be reviewed at the end of the course or when an adjunct is being considered for reemployment. At the end of the semester, adjuncts submit their students' final grades. Just over 50% of the adjuncts participate in the State Public Employees Retirement System,<sup>5/</sup> are entitled to workers compensation and the State withholds State and local taxes, FICA, disability and unemployment insurance from adjuncts' pay checks.

The State asserts that adjunct faculty are independent contractors or consultants and not public employees under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. N.J.S.A. 34:13A-3(d) defines a public employee as: "any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees." Adjuncts qualify as employees under this statutory definition. Adjuncts hold their position by virtue of individual contracts. Their rights pursuant to the Act cannot be waived. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 151 N.J. Super. 435 (App. Div. 1977), aff'd 78 N.J. 122 (1978).

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<sup>4/</sup> Some adjuncts may teach at a satellite campus or other college locations away from the main campus. Regular full-time or part-time faculty may also teach at these locations.

<sup>5/</sup> In order to participate in the system, an adjunct must teach three successive semesters.

There is no evidence that adjuncts have ever been notified that they are considered independent contractors nor do their individual contracts so state.<sup>6/</sup>

Adjuncts may qualify for, and participate in the State Public Employees Retirement System, are entitled to workers compensation and are treated as employees for payroll purposes.

It is evident that the State has sufficient control of the employment status of adjuncts so that it cannot claim they are not employees.<sup>7/</sup>

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6/ Contrast, Big East Conference, 282 NLRB No. 50 (1986), 124 LRRM 1372 (1986) where those claiming employee status had individual contracts stating they were independent contractors and the contracts were with a third party; and Cardinal McClusky Children's Services, 298 NLRB No. 55 (1990), 134 LRRM 1057 (1990), where individually licensed day care providers who provided day care in their own homes and controlled the manner and means of operation, were private contractors.

7/ See generally, County of Morris, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985); Ocean County Prosecutor, D.R. No. 82-29, 8 NJPER 60 (¶13024 1981); Bonnie Bray Child Care Counselors Assn., D.U.P. No. 80-7, 5 NJPER 457 (¶10231 1979); Newark Housing Development and Rehabilitation Authority, D.R. No. 80-2, 5 NJPER 328 (¶10175 1979); Bergen County Freeholders Bd. v. Bergen County Prosecutor, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super 363 (App. Div. 1980); Mercer Cty Freeholders Bd. and Mercer County Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd. 172 N.J. Super 411 (App. Div. 1980); Mercer County Superintendent of Elections, D.R. No. 78-37, 4 NJPER 147 (¶4069 1978), aff'd P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978); Passaic County Board of Chosen Freeholders, D.R. No. 78-29, 4 NJPER 8 (¶4006 1977); Cape May County Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977); and ARA Services, Inc., E.D. No. 76-31, 2 NJPER 112 (1976).

The Commission, as affirmed by the Courts, has consistently have found adjuncts to be public employees who may be represented in negotiations units, provided that their rate of return is sufficient to insure stability within the negotiations unit. Rutgers Univ. and Rutgers Univ. Coll. Teachers Ass'n., E.D. No. 76-35, 2 NJPER 176 (1976), aff'd P.E.R.C. No. 76-49, 2 NJPER 229 (1976), D.R. No. 77-5, 3 NJPER 12 (1976) [dism. elec. objections], aff'd NJPER Supp.2d 42 (¶30 App. Div. 1978), certif. den. 76 N.J. 243 (1978) [App. Div. Dkt. No. A-1652-76 (1/26/78)] (Rutgers); Somerset Cty. Coll. and Somerset Cty. Coll. Faculty Fed., Loc. 2375, AFT, P.E.R.C. No. 82-68, 8 NJPER 106 (¶13043 1982), rev'd and rem'd NJPER Supp.2d 131 (¶112 App. Div. 1983) [App. Div. Dkt. No. A-3629-81T2 (5/11/83)], (Somerset I) (where the Appellate Court confirmed the Commission's finding that adjuncts are public employees. NJPER Supp.2d at 132.); Somerset Cty. College and Somerset Cty. College Faculty Fed., Loc. 2375, AFT, P.E.R.C. No. 87-129, 13 NJPER 361 (¶18150 1987) (Somerset II), aff'd NJPER Supp.2d 185 (¶164 App. Div. 1988), aff'd (S. Ct. Dkt. No. A-60) (1/24/89) [unpublished]; Ocean Cty. College, D.R. No. 83-4, 8 NJPER 476 (¶13222 1982). See also, Union Tp., P.E.R.C. No. 96-38, 22 NJPER 22 (¶27009 1995). Contrast, State of New Jersey and New Jersey Civil Service Association, 1 NJPER 2 (1975) where the Commission found consulting physicians lacked such regularity of employment.

These cases affirm that an appropriate unit of adjuncts is defined as those adjuncts who return to teach a second semester and

who express a continuing interest in their employment by indicating their willingness to be rehired in the coming year. Somerset II, supra; Ocean Cty. College, supra.

Here, the petition seeks to include (1) those adjuncts who, as of fall 1995, were employed for a second semester within the past two academic years; or (2) those adjuncts who were employed in the fall 1995 semester only but are willing to be rehired. The State contends that this unit definition is defective. It argues that the AFT's use of the disjunctive "or" substitutes an adjunct's willingness to be rehired for employment in a second semester. I agree.

The appropriate unit definition for the petitioned-for employees must be those adjuncts who, (a) as of fall 1996, have worked their second semester and those who (b) express a willingness to be hired for the coming semester.<sup>8/</sup>

The State argues that even though adjuncts may be regularly employed, circumstances vary among the eight colleges. Therefore, adjuncts at different colleges do not share a community of interest.

In determining the most appropriate unit for negotiations, the Commission gives due regard to community of interest. N.J.S.A.

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<sup>8/</sup> The State contends that it cannot effectively challenge a voter's statement of intent to be rehired. Our experience indicates that a voter's eligibility in this regard may be challenged by presenting evidence at the ballot count indicating that, at the time the ballot was cast, the voter had rejected an offer to teach during the coming semester. See Rutgers D.R. No. 77-5, 3 NJPER 12 (¶1977).



34:13A-5.3. However, the Commission also weighs other factors in determining the appropriate unit: is the composition of the petitioned-for unit consistent with the requirements of the Act; is the unit broad-based and employer-wide in scope; and what are the number, size and composition of the employer's existing negotiations units.

In State of N.J. and Professional Ass'n of N.J. Dept. of Education, P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972), rev'd NJPER Supp.2d 14 (¶7 App. Div. 1973), rev'd 64 N.J. 231 (1974), the Supreme Court endorsed the Commission's adoption of the concept of broad-based, employer-wide, functional negotiations units. In upholding the Commission's decision in State Prof., the Supreme Court quoted the gravamen of the Commission's decision -- its concern about unit fragmentation and attendant proliferation:

Given the policy considerations of this statute, the Commission believes that the characteristics of a particular profession should not be the determinant in establishing units for negotiations. If community of interest is equated with and limited to such characteristics, the stability and harmony which this Act was designed to promote are in jeopardy. Potentially, every recognized professional group would be segregated, presenting the Employer with multiplicity of units and the likelihood of attendant problems of competing demands, whipsawing, and continuous negotiations which, disregarding the Employer's inconvenience, are not judged to be in the public interest. Fragmentation to that degree cannot be justified.... State of N.J. and Professional Ass'n of N.J. Dept. of Education quoting In re State of New Jersey (State Nurses Ass'n), P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972) at 275.

The Commission has rejected arguments favoring units at institutional or departmental levels; instead, the Commission has opted for employer-wide negotiations units. State of New Jersey Public Broadcasting Auth., E.D. No. 76-21, 2 NJPER 35 (1976).

The Commission has identified a variety of factors as indicators of community of interest. In given cases, some factors are emphasized over others; the Commission weighs the facts of each case in deciding which factors should be emphasized to serve the statutory policy of determining the most appropriate unit.

In Bd. of Ed. of West Orange v. Wilton, 57 N.J. 404 (1971), the Supreme Court set forth certain relevant factors in making a community of interest determination:

In the private sector, the cases regard unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations as pointing to common interest. They regard similarity of obligation to the employer as a factor; likewise similarity of working conditions; they consider the possible disruptive effect on employer-employee relations if the employees involved are admitted to one unit. They decide whether the group involved will operate cohesively as a unit; whether the unit will probably be effective in the public quest for industrial peace. [Id. at 420-421]

A community of interest may be indicated by such factors as a common employer, common goals among the petitioned-for employees, employees' compensation, fringe benefits, hours of work, work facilities, educational requirements, supervision and evaluation. Based upon the above, it appears that adjuncts share many similarities in their terms and conditions of employment. They are

required, as are regular faculty, to have subject-area expertise. They are hired for one semester, based on the instructional needs of the college. They perform the same work -- teaching College courses that cannot be taught by regular faculty. None receive tenure or increments. None are involved in the governance of the State colleges. Adjuncts may participate in the State Public Employees Pension System.

Other aspects of their employment and work conditions are also similar. They are hired by department chairs or their equivalent and work with minimum supervision. They are not formally evaluated. They work at college-assigned sites, either on campus or off-campus.

No facts submitted by the State suggest that any of the differences existing among adjuncts are sufficient to overcome these similarities. Moreover, the fact that most adjuncts' primary employment is outside the State colleges, does not, by itself, negate the commonality of their employment with the State college system.<sup>9/</sup>

Varying degrees of expertise in an area, varying levels of training, and different job duties are traditionally not significant community of interest factors when compared to shared goals, the

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<sup>9/</sup> There is great diversity in any collective negotiations unit. Given a potential great diversity of outside income, such diversity does not remove the common interest about their College employment which they share with other unit members. See generally, Leaders Nameski, Inc., 237 NLRB 202, 99 LRRM 432 (1978).

central authority which controls their working conditions and work environment.

Affording employees who have similar titles and goals an opportunity for unified employee representation promotes labor stability, since unified employee representation may permit negotiations with an already centralized and unified employer to proceed more smoothly. State of New Jersey and Prof. Nurses; Piscataway Twp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984); West Milford, P.E.R.C. No. 56, NJPER Supp. 218 (¶56 1971).

Therefore, I conclude that a community of interest exists among adjuncts who are regularly employed. See Somerset II.

The State further contends that a system-wide negotiations unit is not appropriate. It is well-settled that Commission policy generally favors broad-based negotiations unit that are structured along employer-wide lines, rather than small units of separate employment groupings. Broad-based units streamline negotiations by reducing the potential for such problems as "competing demands, whipsawing and continuous negotiations..." that result from negotiating with numerous smaller units. State of N.J. at 64 N.J. 240; see discussion at pp. 8-9, supra.

In making unit structure determinations, we must consider the general statutory intent to promote stable and harmonious labor relations. The totality of circumstances, including the desire of the employees and the extent of organization of the employer's other

employees, must be considered. State (Human Services), D.R. No. 95-1, 20 NJPER 308 (¶25154 1994).

Historically, negotiations units for employees employed at the nine State colleges and university have been established either as State-wide or system-wide (i.e., a system of nine institutions) units. For example, regular faculty are included in a system-wide negotiations unit represented by AFT, which also includes department chairs, research faculty, librarians and administrative and academic support professionals employed at the nine State colleges. Here, the AFT has requested a similar system-wide unit for adjuncts. In light of the history of negotiations units at the State colleges, we find the petitioned-for unit to be appropriate.

The State also argues that the facts relied upon herein are incomplete and that there is not a sufficient record of community of interest factors before the Director's office to render a decision; it argues that such a record can be made complete only through a hearing. The evidence relied upon in the preliminary findings and in this decision was supplied by the AFT and the State. The State asserts this information is incomplete. Yet it did not articulate any significant community of interest factors which were not developed through affidavits or other submissions.<sup>10/</sup> The State

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<sup>10/</sup> Specifically, the State disputes that there are 3,221 full and part-time faculty at the State colleges. Yet it does not provide the proper correct number; rather, it argues that it

does not indicate what factors can only be established through testimony or issues which cannot be reliably determined through documentary submissions, given credibility is not in issue here.

Neither public employers nor public employee representatives have an absolute right to a hearing. N.J.A.C. 19:11-2.6 provides that a hearing should be conducted if "substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing." The Commission has consistent policy of resolving disputes over representation issues to prevent labor discord and of not requiring hearings unless appropriate under this rule.

The State has not raised substantial and material issues sufficient to warrant convening a hearing. Nor has it provided examples of such issues which would, after a hearing, demonstrate a lack of a community of interest.<sup>11/</sup> The State argues that it is entitled to hearing pursuant to Somerset I where the Court found

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10/ Footnote Continued From Previous Page

is necessary to convene a hearing to establish the correct number. Similarly, the State takes issue with a statement in my preliminary finding that "most" adjuncts have access to mailboxes and office space, although many do. Rather, it argues that a hearing is needed to establish such facts. Such facts may be effectively established by documentation. Moreover, this is not a significant factor in reaching a determination here.

11/ Compare Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). A motion for summary judgment will be granted if there is not a genuine issue with respect to a material fact.

§5.3 of the Act requires due regard be given for community of interest factors. However, the then Director's decision failed to consider such factors and the Court remanded the matter for a hearing. Here, I have given the State every opportunity to provide evidence of significant community of interest factors which would materially effect the finding in this matter. It has not done so. Moreover, I have accepted all facts proffered by the State as true.

Accordingly, I see no reason to convene a hearing absent any indication that there are substantial and material factual issues that require resolution.

As in Somerset County College II, the common experience of adjuncts -- who have taught for at least their second semester, who express a willingness to be rehired for the coming semester, who have advanced knowledge in a specified subject -- establishes a community of interest among these employees. The diversity in adjuncts' outside employment and work experience as adjuncts does not overcome the community of interest among adjuncts.

Accordingly, for the reasons stated above, I find the following unit to be appropriate.

Included: All adjunct faculty employed by the State of New Jersey at the State Colleges (including Montclair University) who commenced employment for at least their second semester within the past two academic years,<sup>12/</sup> and who express a willingness to be rehired to teach either the a subsequent semester in the current or next academic year.

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<sup>12/</sup> That is, either the current year 1996-97 or the 1995-96 academic year.

Excluded: Managerial executives, confidential employees, supervisory employees within the meaning of the Act, police employees, firefighters, craft employees, full-time and part-time faculty, librarians, administrators, all employees in other negotiations units and all other State employees when they are not otherwise specifically employed as adjunct faculty.

Those eligible to vote are: All adjunct faculty members who are employed for at least their second semester during the 1996-97 academic year, and who express their willingness to be rehired to teach either the Spring 1997 semester or during the 1997-98 academic year.

The mail ballot shall include two questions. The first question will ask the employee, "Are you willing to accept employment as an adjunct with the State of New Jersey for either the spring 1997 semester or a semester during the 1997-98 academic year?" Employees who are not willing to accept employment as an adjunct for either the spring 1997 semester or a semester during the 1997-98 academic year will be ineligible to vote on the question of AFT representation. The second question will ask, "Do you wish to be represented for purposes of collective negotiations by the Council of New Jersey State College Locals, AFT, AFL-CIO?" The question of representation will be decided by a majority of the valid ballots counted.

The election shall commence no later than forty-five (45) days from the date of this decision.

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 unit, 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 twenty (20) days from the date of this decision. 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



Edmund G. Gerber, Director

DATED: December 6, 1996  
Trenton, New Jersey