

P.E.R.C. NO. 85-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COMMUNITY COLLEGE,

Public Employer,

-and-

Docket No. CU-84-24

ATLANTIC COMMUNITY COLLEGE
FACULTY ASSOCIATION, NJEA,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a clarification of unit petition which the Atlantic Community College Faculty Association, NJEA filed. The Association sought to add culinary educators to its negotiations unit of full-time teachers, counselors, librarians, and area coordinators employed by Atlantic Community College. A Hearing Officer found that the Association waived its right to add the culinary educators to its negotiations unit through a clarification of unit proceeding. The Commission, in the absence of exceptions, adopts that recommendation.

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Appearances:

For the Public Employer, Donio, Greco & Donio, Esqs.
(Louis Greco, of Counsel)

For the Petitioner, New Jersey Education Association
(Jerry Veldof, Field Representative)

DECISION AND ORDER

On October 12, 1983, the Atlantic Community College Faculty Association/NJEA ("Association") filed a Clarification of Unit Petition with the Public Employment Relations Commission. The Association sought to add culinary educators to its negotiations unit of full-time teachers, counselors, librarians and teachers with area coordinator responsibilities employed by Atlantic Community College ("College").

The College asserted that the Association waived its claim to add culinary educators to its unit by clarification of unit petition, and that culinary educators do not share a community of interest with employees in the Association's unit.

On February 28, 1984, the Administrator of Representation Proceedings issued a Notice of Hearing.

On May 3 and 14, 1984, Hearing Officer Mark A. Rosenbaum conducted a hearing. The parties examined witnesses, introduced exhibits, and waived oral argument. Both parties filed post-hearing briefs.

On September 21, 1984, the Hearing Officer issued his report and recommended decision. H.O. No. 85-5, 10 NJPER ____ (¶ ____ 1984) (copy attached). He concluded that the Association had failed to exercise due diligence in its pursuit of the culinary educator title.

The Hearing Officer served a copy of his report on the parties and informed them that exceptions, if any, had to be filed on or before October 4, 1984. Neither party has filed exceptions.

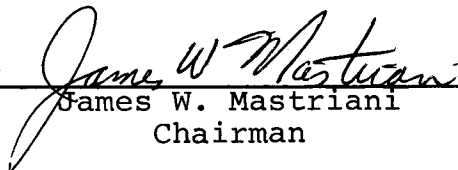
We have reviewed the record. The Hearing Officer's findings of fact are accurate. We adopt and incorporate them here. We hold that the Hearing Officer correctly concluded that the Association waived its right to add the culinary educators to its negotiations unit through a clarification of unit proceeding.^{1/} Accordingly, the Clarification of Unit Petition shall be dismissed.

^{1/} In the absence of exceptions, we need not and will not resolve the question of whether a case-by-case analysis or a strict contractual waiver analysis should be applied in cases like this one. Under either approach, the finding of waiver in this case is the same.

ORDER

The Clarification of Unit Petition is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioner Hipp abstained. Commissioners Graves and Wenzler were not in attendance.

DATED: Trenton, New Jersey

November 29, 1984

ISSUED: November 30, 1984

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DOCKET NO. CU-84-24

ATLANTIC COMMUNITY COLLEGE
FACULTY ASSOCIATION, NJEA,

Petitioner.

Synopsis

A Commission Hearing Officer recommends that the Commission dismiss a Clarification of Unit petition filed by the Atlantic Community College Faculty Association. The Association sought to add a new title to its existing negotiations unit of faculty, librarians and counselors employed by Atlantic Community College. Finding that the Association did not exercise due diligence in petitioning for the new title, the Hearing Officer recommends that the petition be dismissed.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommendations, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Officer's findings of fact and/or conclusions of law.

STATE OF NEW JERSEY
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-and-

DOCKET NO. CU-84-24

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FACULTY ASSOCIATION, NJEA,

Petitioner,

Appearances:

For the Public Employer
Donio, Greco & Donio, Esquires
(Louis Greco of counsel)

For the Petitioner
New Jersey Education Association
(Jerry Veldof, Field Representative)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

On October 12, 1983, the Atlantic Community College Faculty Association/NJEA ("Association") filed a Clarification of Unit petition with the Public Employment Relations Commission ("Commission") seeking a determination that Culinary Educators at Atlantic Community College ("College") should be included in the negotiations unit represented by the Association. The College asserts that the Association waived its right to seek to add Culinary Educators to their unit through a Clarification of Unit petition, and that Culinary Educators do not share a community of interest with employees represented by the Association.

Pursuant to a Notice of Hearing ^{1/} issued by the Administrator of Representation Proceedings on February 28, 1984, hearings were held before the undersigned Hearing Officer on May 3 and 14, 1984, at which time all parties were given opportunities to examine and cross-examine witnesses, present evidence and argue orally. Both parties filed post-hearing briefs, and the College filed a reply brief by July 27, 1984.

Based upon the entire record in these proceedings, the Hearing Officer finds that:

1. Atlantic Community College is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), is the employer of the employees who are the subject of the Petition, and is subject to its provisions.

2. The Atlantic Community College Faculty Association/NJEA is an employee representative within the meaning of the Act and is subject to its provisions.

3. The Association seeks a clarification of the collective negotiations unit of "...all full-time teachers, counselors, librarians, and teachers with area coordinator responsibilities..."

(Exhibit J-1, p. 1) represented by the Association. The parties have been unable to agree upon the placement of the Culinary Educator title in the unit. Therefore, a question concerning the composition of a collective negotiations unit exists, and the matter is appropriately before the undersigned for Report and Recommendations.

^{1/} By letter of December 29, 1983, an Assistant to the Administrator of Representation Proceedings summarized existing case law and indicated that the petition might be dismissed in the absence of distinguishing factual allegations. By letter of January 11, 1984, the Association alleged distinguishing facts, to be reviewed infra, and the Notice of Hearing followed.

4. Since the Fall of 1966, Atlantic Community College has served the educational needs of Atlantic and Cape May Counties. The College offers both credit and noncredit courses leading to certificates and Associates (two year college) degrees. In addition to its main campus in Mays Landing, the College maintains academic facilities in Atlantic City and Cape May Court House. The College has five academic divisions: Allied Health, Business, Communications and Arts, Developmental Studies, Science and Mathematics, and Social Science. In 1978, the College created the Casino Career Institute. The Institute is located in Atlantic City and trains students for employment in the Casino industry. The Institute does not grant degrees. In 1981, the College opened the Academy for Culinary Arts ("Academy"). Located on the main campus in Mays Landing, the Academy offers a two year program leading to an Associate of Applied Science degree. The Academy and its students operate at a full-time gourmet restaurant under the guidance of Culinary Arts Educators (P-4).

5. The Atlantic Community College Faculty Association represents a mixed unit which includes four categories of employees:

a) Teachers - The teachers are ten month employees who can be required to teach at any College location either on a semester or eight week block format for a total of thirty contact hours per academic year. Teachers must maintain office hours, counsel students, and participate on at least one major college committee. Teachers may participate in the Faculty Assembly, which makes recommendations to College officials. All teachers have Bachelor's degrees, and

most have advanced degrees. (T 1 at pp. 47-65; J-1 at pp. 25-28; P-4 at pp. 125-26; and R-22). ^{2/}

b) Counselors - The counselors are twelve month employees who work 37-1/2 hours per working week, including a meal period of one hour per day. Counselors earn two vacation days per month of service, and receive twelve paid holidays and overtime pay when applicable (J-1 at pp. 28-29 and 44-45).

c) Librarians - The librarians have terms and conditions of employment identical to those of the counselors noted above.

d) Teachers with area coordinator responsibilities - These employees have terms and conditions of employment identical to those of the teachers noted above. In addition, they receive a stipend of \$675 per annum, additional pay for any summer hours, and may have their teaching loads reduced "...in consultation with the Chief Academic Officer with the approval of the President." (J-1 at p. 30).

6. Culinary Arts Educators ("Culinary Educators") are twelve month, 40 hour per week employees who teach in academic buildings at the Mays Landing campus. Together with Academy students, the Culinary Educators operate Careme's, a gourmet restaurant. Educators also participate in food shows held off campus, and assist in College catering and cafeteria operations. Culinary Educators receive overtime pay for work beyond 40 hours per week. Culinary Educators serve on College committees, and may participate in Faculty Assembly and its committees. All Culinary Educators have either

^{2/} T1 refers to the Transcript of May 3, 1984; T2 refers to the Transcript of May 14, 1984.

culinary school or Bachelor's degrees, and some have advanced degrees (T1 at pp. 104-109 and 123-125; P-1 and 2; P-4 at pp. 125-126; and R-22).

7. At the time of the creation of the Academy of Culinary Arts, the Association and the College were parties to a collective agreement covering the 1980-81 and 1981-82 academic years. Negotiations for a successor agreement were initiated by the Association in November, 1981 (R-2), whereafter the parties conducted approximately 16 negotiations sessions spanning ten months (R3-19). At the fourth session on January 28, 1982, the Association raised the issue of adding the Culinary Educators to their negotiations unit, and the College rejected that request (R-6; T1 at pp. 44 and 83). The topic was discussed at several subsequent negotiations sessions, with the parties unable to reach agreement (R-14, 17, and 18; T1 at pp. 44-45 and 93-99).

8. On August 3, 1982, the parties had their final negotiations session. Agreement was reached on all items with the exception of the unit status of the Culinary Educators. The Association representatives suggested that the matter should be taken to the Public Employment Relations Commission for a determination of the proper unit status of the Culinary Educators. William Workman, Chief Negotiator for the Association, testified that "...at that particular time that we thought that PERC was the appropriate agency to bring this to, and it was my feeling that they [the College] had felt as though their case was probably strong enough so there would be no difficulty from either side." (T2 at p. 8). Wilfred Parsons, the Association President and member of the

negotiations team, testified that the College agreed that the matter should be taken to PERC (T1 at pp. 6-7). Donald Huff, now President of the Association and negotiations team member, testified that the College's chief negotiator responded to the suggestion of taking the issue to PERC by saying "...so you go to PERC...." (T1 at p. 45). Robert Goudie, chief negotiator for the College, testified that "...all the way through there were various times when comments were made that they don't agree upon this and will take it to PERC....we said that we can't control them. Take it to PERC. But as far as saying that we'll go jointly or that we'll deal with that, that never became an issue." (T1. at p. 102). Goudie's notes for the final negotiations session indicate that, with respect to the unit determination question, the union agreed to "drop without prejudice." (R-19).

9. By September 28, 1982, both the Association and the College had ratified the tentative agreement reached in August. On November 19, 1982, the conformed agreement was signed by the parties.

Analysis

I. Propriety of the Clarification of Unit Filing

The College urges the dismissal of the petition as an improper Clarification of Unit filing. Citing Commission case law, the College argues that, under the facts presented, the Association waived its right to seek to add the Culinary Educators to its negotiations unit. Consideration of this argument requires a review of the boundaries of Clarification of Unit practice before the Commission.

In Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977), the Commission's Director of Representation reviewed the ambit of Clarification of Unit proceedings. Generally, the Director stated, "[t]he Commission's clarification of unit process is intended to resolve confusion concerning the composition of an existing bargaining unit." Id. at 250. In Clearview, the Director refused to clarify an existing unit of professional employees by adding non-professional employees. Noting the prior existence of the non-professional titles and the prior failure of the majority representative to seek those titles, the Director found that no "confusion" existed; instead, the titles were clearly not in the unit, and the Clarification of Unit petition was improper: "Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or diminish the scope of the negotiations unit...." Id. at 251. See also Wayne Board of Education, P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980). At the same time, the Director observed that disputes over newly created titles are properly resolved by a Clarification of Unit petition. Clearview at 252.

Subsequently, in Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980), the Director reviewed another Clarification of Unit petition seeking to add titles to an existing, albeit relatively new negotiations unit. The Director dismissed the petition because the majority representative had failed to "...exercise due diligence in searching out employees who are within the definitional scope of the collective negotiations unit." The Director determined that "due diligence" requires that a majority representative identify

unit titles prior to execution of a second collective agreement with the public employer. Id. at 63. Accord, Barnegat Township Board of Education, D.R. No. 84-15, 10 NJPER 54 (¶ 15029 1983) and Rutgers, The State University, D.R. No. 84-19, 10 NJPER 284 (¶ 15140 1984).

In a footnote to Bergen Pines Hospital, supra, the Director of Representation suggested a specific due diligence standard for majority representatives seeking to add newly created titles to an existing unit:

Similarly, in an accretion proceeding, where employees in newly created programs or acquired enterprises or facilities are sought to be clarified as included in a previously existing unit, the representative must search out these employees and file a petition prior to its execution of a successor collective negotiations agreement. [Id. at 65.]

However, in several Clarification of Unit cases involving waiver defenses by employers, the Commission and the Director of Representation have eschewed a strict standard based solely on contractual waivers.

For example, in Wayne, supra at 255, the Commission inferred that evidence of "...an ongoing dispute between the parties as to the claim representational status..." of a title is also a relevant factor when considering a waiver claim. More recently, the Commission's Acting Director of Representation specifically rejected a strict contractual waiver standard in Union County Regional High School District #1, D.R. No. 83-22, 9 NJPER 228 (¶ 14106 1983). There the petitioning majority representative sought to add two titles to its newly created negotiations unit after it agreed to a contract which did not include the titles. The majority representative had vigorously sought to include the titles throughout the negotiations process, but ceased

those efforts without receiving any concession, when the issue became an impediment to settlement of the contract. The majority representative filed the Clarification of Unit petition two weeks after the contract was concluded. Under the facts presented, the Acting Director concluded:

...in order to assert a claim as to a waiver, the Board would have been required to secure from the [majority representative], by either written agreement or through clear and unequivocal evidence of conduct, that the latter agreed not to pursue its claim to achieve immediate contractual inclusion of the disputed personnel in the parties' agreement. The cessation of the [majority representative's] attempt to achieve this goal through the negotiations process is not sufficient evidence of such a waiver. [Id. at 231.] 3/

While none of the cited cases involved a new operation or title, the spirit of the cases is clear: to add titles to an existing unit through a Clarification of Unit petition, a majority representative must demonstrate due diligence in searching for, identifying and petitioning for the titles in question.

Under the facts presented, the Association clearly demonstrated due diligence in its search for and identification of the Culinary Educator title as potentially within its unit of "full time educators." (J-1, p. 3). The title was created at mid-term of the 1980-82 collective agreement between the Association and the College. (See Finding of Fact Number 4). The Association identified the title and vigorously sought the accretion of the Culinary Educators to their unit during

3/ The Acting Director previously found that the Clarification of Unit petition was appropriate to resolve the disputed title in the context of a recent election proceeding involving the parties. Id. at 229. Given the analysis cited above, it is clear that the promptness of the Clarification of Unit filing guaranteed its propriety.

negotiations for the successor agreement. (See Finding of Fact Numbers 7 and 8).

Although the Association ultimately entered into an agreement which did not include the Culinary Educator title, the undersigned does not believe that this fact, standing alone, supports the College's waiver defense. Like the majority representative in Union County, supra, the Association did not receive a particular concession in return for dropping the unit composition issue; instead, it dropped the issue, "without prejudice" to future litigation, in order to conclude the collective agreement. (Finding of Fact Number 8). Consistent with Union County, the Association did not waive its claimed representation of Culinary Educators at the moment it signed an agreement which did not include the title. ^{4/}

However, unlike the majority representative in Union County, the Association did not file its Clarification of Unit petition shortly after the conclusion of the collective agreement. Instead, the Association allowed eleven months to pass, then filed with the Commission. Those efforts do not indicate "due diligence" by the Association in pursuit of the Culinary Educator title. To the contrary, the eleven month gap indicates "clear and unequivocal evidence of conduct" that the Association had waived its right to seek the Culinary Educator title through a Clarification of Unit petition. Union County, supra, at 231.

In so ruling, the undersigned is mindful of the policy considerations implicit in the above discussion. A majority representative should not have to negotiate under the pressure of potential

^{4/} While the College also relies on a specific, contractual waiver clause (J-1 p. 50), the clause does not reflect an agreement to waive the Culinary Educator title. Union County, supra, at 231.

waiver of newly created titles. Under such pressure, a majority representative might refuse to agree to an otherwise complete collective agreement. Similarly, an absolute requirement for a majority representative to file a Clarification of Unit petition prior to reaching agreement might lead to filings which disrupt the collective negotiations process. These scenarios are surely inconsistent with the purposes of the Act, which provides, inter alia, "...that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes...." N.J.S.A. 34:13A-2. Instead, a due diligence standard which measures majority representative conduct on a case-by-case basis best serves the interests of the parties, employees and the public.

Under the facts presented, the Association was not duly diligent when it filed its Clarification of Unit petition eleven months after the collective agreement was concluded. Nor did the Association prove that it had reached an agreement with the College to seek a clarification from the Commission as to the Culinary Educators. With the exception of one Association witness, all Association and College witnesses testified to the following effect: The Association wanted the title in its recognition clause; the College would not agree; negotiations neared a close with no movement on this issue by either party; the Association said it would take the issue before the Commission; and College representatives said "...go ahead." (See Finding of Fact Numbers 7 and 8). Accordingly, the undersigned recommends that the Commission dismiss the instant petition.

II. Community of Interest

Assuming arguendo that the Commission determines that the Clarification of Unit petition was properly filed, the undersigned considers whether or not the Culinary Educators share a community of interest with employees presently represented by the Association.

The collective agreement between the parties (J-1) includes the following recognition clause:

The [College] hereby recognizes the Association as the exclusive and sole representative for collective negotiations concerning grievances and terms and conditions of employment for all full-time educators presently employed or hereinafter employed by the [College]. The term educator, as herein used, shall apply to all full-time teachers, counselors, librarians and teachers with area coordinator responsibilities, except those having administrative and supervisory responsibility such as: department chairpersons, division chairpersons, director of counseling, and deans.

On its face, the recognition clause indicates a diverse negotiations unit. Indeed, documents and testimony reveal that the existing unit includes both ten and twelve month employees with varying levels of education, responsibilities, and terms and conditions of employment. (See Finding of Fact Number 5). The existing unit thus comports with the Commission's preference for broad-based, functional negotiating units rather than distinct occupational groupings. ^{5/}

^{5/} In State of New Jersey v. Professional Association of New Jersey Department of Education, 64 N.J. 231 (1974), the Supreme Court endorsed the Commission's adoption of the concept of broad-based, functional negotiating units. See also, In re State of New Jersey (Neuro-Psychiatric Institute, et al), P.E.R.C. No. 50 (1971), In re Board of Chosen Freeholders of the County of Burlington, P.E.R.C. No. 58 (1971), In re Bergen County Board of Chosen Freeholders, P.E.R.C. No. 69 (1972), In re State of New Jersey (Prof. Assoc. of N.J. Department of Education, et al), P.E.R.C. No. 68 (1972), and Essex County Board of Chosen Freeholders, D.R. No. 78-16, 3 NJPER 336 (1977).

On a functional level, the Culinary Educators appear to share a community of interest with employees in the existing unit. Like most teachers presently in the unit, the certificated or degreed Culinary Educators lecture and test students in a comprehensive program leading to an Associates degree. While the Culinary Educators may teach in different time blocks and methods than most unit teachers, similar distinctions may be drawn between current unit teachers (e.g., between Nursing, Computer Information and History teachers). Moreover, the differences in day-to-day responsibilities as between different unit titles (e.g., between teachers and librarians) are significant, but do not vitiate the community of interest shared by those employees. Indeed, the critical factor in the community of interest among current unit employees is the shared commitment to the provision of quality education to the residents of Atlantic and Cape May Counties. Culinary Educators share this commitment, both in the classroom and through participation in College and Faculty Assembly Committees. (See Finding of Fact Number 6).

Given the Commission's preference for broad-based units, the wide span of the existing unit, and the College's broad educational mission in Atlantic and Cape May Counties (Finding of Fact Number 4), the undersigned concludes that the Culinary Educators share a community of interest with existing unit employees. ^{6/}

^{6/} In so ruling, the undersigned rejects the College's emphasis on the legion of differences between Culinary Educators and existing unit members as to salaries, promotions, meal breaks and sabbaticals. These distinctions do not negate community of interest; instead, they merely indicate differences in terms and conditions of employment unilaterally set by the College as opposed to negotiated obligations for unit employees.

RECOMMENDATION

The undersigned recommends that the Commission dismiss the instant Clarification of Unit petition.



Mark A. Rosenbaum
Hearing Officer

DATED: September 21, 1984
Trenton, New Jersey