

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

In the Matter of

COUNTY OF ESSEX
(ESSEX COUNTY HOSPITAL),

Public Employer,

-and-

COUNCIL 52, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO

DOCKET NO. RO-79-52

Petitioner,

-and-

OVERBROOK EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

The Director of Representation, in agreement with the recommendations of a Hearing Officer, determines that the Overbrook Employees Association does not represent non-medical professional Essex County Hospital employees. The Association is the certified collective negotiations representative of non-professional hospital employees. The certification specifically excludes professional employees from the unit. The Director rejects the claim that professional employees were included in the Association's unit since they voted without challenge in the certification election. The Director notes that if individual employees who were claimed to be professional employees did vote in the election without challenge, these votes may have assisted the Association in establishing its majority status as the representative of nonprofessional employees but would not have established the Association as the negotiations representative for professional employees, contrary to the Commission's determination of the appropriate negotiations unit and the Certification of Representative. The Director further finds that the parties' post-certification conduct confirmed their intent to preserve the unit as defined in the

Certification of Representative and that although certain professional employees have designated the Association to process their grievances, the record does not establish that the County recognized the Association as the exclusive representative of non-medical professional employees in a defined collective negotiations unit. The Director remands the proceeding to the Hearing Officer for further hearings on other outstanding factual issues.

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OVERBROOK EMPLOYEES ASSOCIATION,

Intervenor.

Appearances:

For the Public Employer
Grotta, Glassman & Hoffman, P. A.
(Thomas J. Savage, of Counsel)

For the Petitioner
Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, of Counsel)

For the Intervenor
Love & Randall, Esqs.
(John C. Love, of Counsel)

DECISION

Pursuant to a Notice of Hearing to resolve a question concerning representation, and pursuant to hearings conducted in accordance therewith, Commission Hearing Officer Joan Kane

Josephson, on February 1, 1980, issued an interim Hearing Officer's Report and Recommendations limited to the issue, as agreed by the parties, of whether the Overbrook Employees Association (the "Association") represents non-medical professional employees within a certified negotiations unit comprised of certain employees of the County of Essex at the Essex County Hospital complex (hereinafter, the "County" or "Essex County Hospital"). If the Association represents these claimed professional employees, it is argued that a Petition for Certification of Public Employee Representative filed by Council 52, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") with respect to a proposed unit comprised of non-medical professional employees at Essex County Hospital, has not been timely filed, pursuant to N.J.A.C. 19:11-2.8(c) and must be dismissed. 1/

On May 15, 1970, the Association was certified by the Commission as the majority representative of employees in a unit described as including: "All non-professional employees employed by the County of Essex at Overbrook Hospital at Cedar Grove,

1/ Among the issues in dispute in this proceeding is the question of whether the petitioned-for employees are, in fact, professional employees. While the limited issue presented herein was framed by the parties as follows: "Were the employees in the list attached as Appendix A [i.e., 18 titles] represented by the Overbrook Employees Association as of the date of filing of the Petition in the instant matter?", it is clear from the transcript and the briefs before the Hearing Officer that the parties seek a limited determination at this time on the issue of whether the Association represents professional employees. For the sole purposes thereof, the parties, without prejudice to their later positions, assume the professional status of the petitioned-for employees.

Essex County Hospital at Belleville, and the Sanitorium at Verona but excluding ... professional employees" The Commission Hearing Officer, after reviewing the relationship between the Association and the County in the periods prior to the certification proceeding, during the certification proceeding, and subsequent to the certification, concluded that the Association does not represent professional employees. The Association has excepted to the Hearing Officer's conclusions and recommendations. The undersigned, having reviewed the record, including the Hearing Officer's Report and the exceptions, agrees with the Hearing Officer that the Association does not represent professional employees at the Essex County Hospital.

As noted by the Hearing Officer, the proceedings with respect to the certification petition which ultimately led to an election and certification of the Association as the majority representative of the hospital's nonprofessional personnel is dispositive of any contention that the Association had any prior negotiations relationship with the County concerning professional personnel or that the certification of the Association included professional personnel in the negotiations unit. See In re County of Essex, P.E.R.C. No. 38 (1970). If, as asserted by the County and the Association, some of the petitioned-for employees voted in the election without challenge by the parties or the Commission, this fact merely establishes that certain employees, whose professional status had not been determined by the Commission, may have assisted the Association

in establishing its majority status as the representative of nonprofessional employees. These challenged votes would not establish the Association as the negotiations representative of professional employees, contrary to the Commission's determination of the appropriate negotiations unit and the certification of representative.

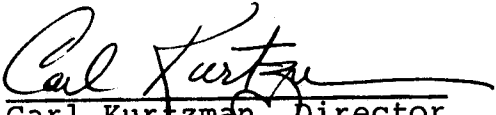
The collective negotiations agreements entered into between the County and the Association subsequent to the certification proceeding confirm the intent of the parties that the unit remain as defined in the Commission's Certification of Representative. While certain professional employees, on occasion, may have designated the Association or its president to process grievances on their behalf, the record does not establish that the County has recognized the Association as the exclusive representative of non-medical professional employees in a defined collective negotiations unit. ^{2/}

For the reasons above, the undersigned concludes in agreement with the Hearing Officer, that the Association does not represent non-medical professional employees at the Essex County Hospital. Inasmuch as this decision is limited to a determination that non-medical professional employees are not currently represented by the Association, the professional status

^{2/} Pursuant to N.J.S.A. 34:13A-5.3, individuals, who are not represented in negotiations units, may process grievances either personally or through a representatives of their choice.

of the petitioned-for employees remains unresolved and is among the issues which are remanded to the Hearing Officer for further disposition in accordance with the previously issued Notice of Hearing.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: March 4, 1980
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX (ESSEX
COUNTY HOSPITAL),

Public Employer,

-and-

COUNCIL 52, AMERICAN FEDERATION
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Docket No. RO-79-52

Petitioner,

-and-

OVERBROOK EMPLOYEES ASSOCIATION,

Intervenor.

SYNOPSIS

A Commission Hearing Officer finds that therapists, counsellors and psychologists are professional employees but that occupational therapy assistants are not professional employees within the meaning of the Act and recommends that an election be directed among all non-medical professional employees. The finding was based on the definition of professional employee in N.J.A.C. 19:10-1.1 and further defined in In re Jersey City Medical Center, D.R. No. 80-9, 5 NJPER 4156 (¶10230, 1979). The case had been remanded to her after the Director found that professional employees were not already included in an existing collective negotiations unit represented by the intervenor.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

H.O. NO. 81-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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Public Employer,

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COUNCIL 52, AMERICAN FEDERATION
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Appearances:

For the Public Employer, Grotta, Glassman & Hoffman, P.A.
(Thomas J. Savage, of Counsel)

For the Petitioner, Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, of Counsel)

For the Intervenor, Love and Randall, Esqs.
(John C. Love, of Counsel)

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

Pursuant to a decision of the Director of Representation proceedings on March 4, 1980 that the Overbrook Employees Association (the "Association" or "OEA") does not represent non-medical professional employees of the County of Essex at the County Hospital complex (the "County" or "Essex County Hospital"), the case was remanded to the undersigned for further hearings to determine the professional status of the petitioned-for employees. (See In re County of Essex (Essex County Hospital). D.R. No. 80-26,

6 NJPER 117 (¶11062 1980).^{1/} Pursuant to a Notice of Hearing, a further hearing was held on May 29, 1980 before the undersigned Hearing Officer at which all parties were given an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally.^{2/} Parties were allowed one month after receipt of the transcript of proceedings in which to file briefs. The transcript was received on June 25, 1980. No briefs were filed.

Upon the entire record, the undersigned finds:

1. The County of Essex is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), is the employer of the employees involved herein, and is subject to the provisions of the Act.

2. Council 52, AFSCME, AFL-CIO and the Overbrook Employees Association are employee representatives within the

^{1/} A Petition for Certification of Public Employee Representative supported by an adequate showing of interest was filed with the Public Employment Relations Commission seeking to represent non-medical professional employees at the Essex County Hospital. After two days of hearings, the parties jointly requested a limited hearing and interim decision as to whether or not the Overbrook Employees Association represented the petitioned-for professional employees.

^{2/} Prior to the bifurcation of these proceedings a previously assigned Commission Hearing Officer held two days of hearings dealing with the professional status of some of the petitioned-for employees. Because of the unavailability of the previously assigned Hearing Officer, the Commission appointed the undersigned Hearing Officer pursuant to N.J.A.C. 19:11-6.4. All three transcripts will be considered in this report. Transcript references will be as follows: October 24, 1978 hearing I - page reference, October 25, 1978 hearing II - page reference and May 29, 1980 hearing III - page reference.

meaning of the Act and are subject to its provisions.

3. The petitioner has filed a petition to represent all non-medical professional employees employed at the Essex County Hospital. The Intervenor represents non-professional employees at the Hospital. The issue placed before the undersigned is whether or not the petitioned-for employees are professional employees as that term is defined in N.J.A.C. 19:10-1.1.

4. N.J.A.C. 19:10-1.1 defines "Professional employee" as follows:

"Professional employee" means any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature in the field of physical, biological, or social sciences, or in the field of learning. The commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The term shall also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person to qualify to become a professional employee as defined herein. The term shall include, but not be limited to, attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.

Accordingly, a dispute exists concerning the status of employees for a collective negotiations unit and the matter is properly before the undersigned for determination.

Positions of the Parties

Council 52, AFSCME, AFL-CIO ("AFSCME") contends that all the petitioned-for titles are professional employees within the

meaning of the Act and that the Commission should direct an election in a unit of Non-Medical Professional Employees including all Music, Art and Dance Creative Art Therapists, (including Seniors), Occupational Therapists (including Seniors), Occupational Therapy Assistants, Horticulture Therapists, Recreational Therapists (including Seniors), Vocational Rehabilitation Counsellors (including Seniors), Physical Therapists (including Seniors) and Staff Clinical Psychologists (including Seniors and Principals).

The Overbrook Employees Association ("OEA") which represents a certified unit of "non-professional" employees at the Essex County Hospital argues that none of the titles are professional titles and that therefore these titles should be included in the non-professional unit they represent. They do not request Intervenor status in the petitioned-for non-medical professional unit.

The County has agreed with AFSCME that the psychologist titles are professional.^{3/} At the hearing prior to the issuance of the initial report, the County argued that the titles petitioned-for by AFSCME were already represented by OEA and participated in the hearing subsequent to the issuance of the report without taking a position as to whether or not the remaining titles were professional.

Background

The public employer, Essex County Hospital, is a psychiatric care facility in Essex County.^{4/} AFSCME has petitioned to

^{3/} This position was posited in a brief filed with the undersigned prior to the issuance of the initial report.

^{4/} There are facilities at three locations: Overbrook Hospital at Cedar Grove, Essex County Hospital at Bellville and the Sanitarium at Verona and they are collectively referred to as "Essex County Hospital."

represent all unrepresented non-medical professionals employed at the Hospital. (Social workers employed at the Hospital are represented in a collective negotiations unit and are not part of this petition). They have petitioned for psychologists, rehabilitation counsellors and numerous types of therapists, all of whom work with the psychiatric patients and treat the patients in the Hospital with a view toward improving their mental health and working out mental conflicts and where return to the community is possible, assist in the transition. They work on staff teams with physicians and social workers to develop treatment plans for patients. Nurses, technicians and aides may also participate in staff meetings. Counsellors and therapists work with patients individually and with groups of patients in their individual specialties or modalities. Psychologists will be discussed below. They develop individual treatment programs and goals within their speciality and evaluate the progress of the patients. For example, a creative art therapist - dance, may work with a group of patients in a specific dance program and thereby treat individual patients with observation of the patient, participation with the patient and explanation to the patient in order to promote the patient's good health and to free the patient from mental conflict in order that the patient can function in society. While there is group participation, there is an individualized course of treatment. (Tr. III - 15). A music therapist might have a group write their own words to a song, and through this modality administer treatment to patients individually to assist their recovery

or adjustment. A horticulture therapist uses the modality of plants and thereby plans and administers treatment for patients using therapy principles and practices to aid patients in their recovery or adjustment. (Tr. III - 47).

Physical therapists plan and administer individual programs of physical therapy. They administer treatment to patients using physical therapy modalities and physical restorative techniques in order to assist them in their recovery or adjustment. The occupational therapist assists patients in recovery or adjustment by prescribing a regulated work program to promote recovery or rehabilitation. (See C-2 D & E in Evidence, job descriptions of Occupational Therapist and Senior Occupational Therapist).

Using the above-described procedures, creative art therapists - use the modality of art, e.g. sculpture, painting and drama, and recreation therapists use recreation activities like gymnasium classes, playroom activities, sports, outdoor and ward recreation, dances and special entertainment to aid patients in recovery or adjustment. The treatment process and job responsibility is basically the same for the different types of therapists, the modality is different. (Tr. III - 49).

Rehabilitation Counsellors test, interview and observe patients in order to develop and put into effect individualized programs of rehabilitation that meet patients' abilities and needs. The counsellors evaluate the patients' vocational choices and qualifications and develop programs designed to help patients be-

come employable. They discuss employment possibilities with prospective employers. (Tr. II - 36). They work with patients who cannot be released to develop work for them within the hospital structure, e.g., the hospital greenhouse. (Tr. II - 52). The therapists and counsellors confer with and make recommendations to physicians and other professional personnel regarding the patients' total treatment.

AFSCME has also petitioned for the title of Occupational Therapy Assistant. While there are other therapy assistant titles in the Hospital, they have only petitioned for the occupational therapy assistant. The occupational therapy assistant works under the direction of an occupational therapist in treating patients using the therapist's planned activities. The work requires a practical but not professional knowledge of the concepts, principles and practices of the specialized therapy and does not involve such "professional functions as evaluating or advising on therapeutic techniques and practices or complex diagnostic testing and evaluation." (See C-2 in Evidence - job description of occupational therapy assistant).

All the therapist titles require a minimum of graduation from a four year course at an accredited college with specific specialization requirements. Some of the titles require additional professional experience or advanced degrees or professional certification. The senior titles require additional experience in their respective fields. In the fields of rehabilitation, creative art, music and recreation, applicants who do not meet the

educational requirement may substitute experience in a therapy program on a year for year basis. There is no college requirement for occupational therapy assistant; only a requirement of one year's work experience in the field.

The Issue

Are the above petitioned-for employees professional employees within the meaning of the Act?

Discussion and Analysis

The Overbrook Employees Association was certified as the majority representative of non-professional employees at the Hospital (Commission Docket No. R-62). This certification was issued following a directed election resulting from a Commission hearing in which the OEA and the County participated. At that hearing all parties stipulated that the titles of (Staff) Clinical Psychologist, Senior Clinical Psychologist and Principal Psychologist were professional employees. I find, therefore, as noted in the record (Tr. III - 2) and in accordance with the stipulation, that the three titles are professional titles within the meaning of the Act.^{5/}

The Act establishes three basic elements in defining professional employees. Those elements are that the work performed is (1) predominantly intellectual and varied in character; (2) requires the consistent exercise of discretion and judgment

^{5/} The title of principal clinical psychologist was not included in the original petition; however, that title was added to the petitioned-for titles at the hearing on October 24, 1978 and the job description covering that title was introduced into evidence (C-2P) with the other job descriptions. On November 8, 1978 all parties formally consented to the titles petitioned-for when they agreed to bifurcation of the proceedings. This list included principal clinical psychologist. (See C-3 in Evidence).

and (3) requires knowledge of an advanced nature in a particular field.^{6/}

The OEA points out that all hospital employees help patients prepare to function in society. They argue that therapists work under the direction of doctors to help patients recover and that hospital attendants and psychiatric technicians basically do the same thing and that the only difference is the therapists have a college degree. (Tr. III - 77).

All hospital employees have a community of interest in that their primary goal is the recovery and adjustment of patients. Some of the employees are professional and some are non-professional as well as many other categories of employees in a labor relations context and within the meaning of the Act. OEA raises community of interest arguments that are not dispositive in determining whether or not the employees are professional within the above criteria. OEA does not represent professional employees. AFSCME has petitioned for an appropriate unit consisting of all professional employees employed at the hospital and the appropriateness of that unit has not been questioned.

I find that all the therapists and the counsellors are professional employees within the meaning of the Act.

All the titles have educational requirements that meet the Act's requirement that professional employees have "knowledge of an advanced nature in the field of physical, biological or social sciences, or in the field of learning..."

^{6/} See In re Jersey City Medical Center, D.R. No. 80-9, 5 NJPER 456 (¶10230 1979)

Their work is predominately intellectual and varied in character in the application of their training and experience to treating patients and evaluating their progress. Their discretion and judgment are called upon in treating patients in a group, in treating patients individually and in dealing with other professionals on their teams.

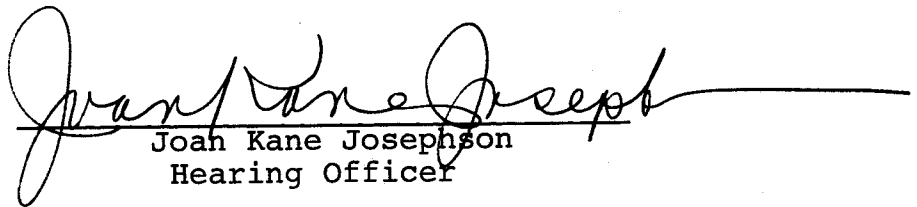
The professional status of therapists and counsellors is particularly clear when their duties are compared and contrasted with the duties of occupational therapy assistants whom I find not to be professional employees within the meaning of the Act. As noted above, the occupational therapy assistants' job description requires the assistant to have a "practical and not professional knowledge of the concepts, principles and practices of the specialized therapy." Furthermore, the assistants' duties do not involve such "professional" functions as evaluation and advising on therapeutic techniques and practices in complex diagnostic testing and evaluation. The job description of the occupational therapy assistant describes the "professional" duties that the assistant does not perform but that the therapists and counsellors do.

Recommendations

For the reasons stated above, the undersigned recommends that an election be directed among: all principal clinical psychologists, senior clinical psychologists, staff clinical psychologists, senior music therapist, music therapists, senior creative art therapists - dance and art, creative art therapist - dance and

art, occupational therapists, senior occupational therapists, horticultural therapists, recreational therapists, senior recreational therapists, senior rehabilitation counsellors, rehabilitation counsellors, senior physical therapists and physical therapists to determine whether the employees desire to be represented by Petitioner for the purposes of collective negotiations.

Respectfully submitted,


Joan Kane Josephson
Hearing Officer

DATED: Trenton, New Jersey
September 4, 1980

STATE OF NEW JERSEY
BEFORE A HEARING OFFICER OF THE
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-and-

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Intervenor.

SYNOPSIS

A Commission Hearing Officer in a representation petition for certification of a collective negotiations unit comprised of professional employees considered the limited issue of whether the petitioned-for employees were already represented in a hospital-wide certified unit of "non-professional" employees represented by the Intervenor. The Hearing Officer recommends that the petition be processed since she found the employees were not previously represented, based on an examination of their representation prior to certification of the "non-professional" unit, the 1970 certification and Commission hearing prior thereto and representation subsequent to certification.

A Hearing Officer's Report and Recommendations is not a final administrative determination of the Public Employment Relations Commission. The Report is submitted to the Director of Representation who reviews the Report, 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. The Director's decision is binding upon the parties unless a request for review is filed before the Commission.

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For the Intervenor
Love & Randall, Esqs.
(John C. Love, Of Counsel)

HEARING OFFICER'S REPORT
AND RECOMMENDATIONS

A Petition for Certification of Public Employee Representative supported by an adequate showing of interest was filed with the Public Employment Relations Commission (the "Commission") by Council 52, AFSCME, AFL-CIO (AFSCME or "Petitioner") on September 8, 1978, seeking to represent certain employees of the Essex County Hospital. ^{1/} The unit claimed to be appropriate for collective negotiations

^{1/} Essex County Hospital as used in this report includes three locations, i.e., Overbrook Hospital, Cedar Grove, Essex County Hospital at Belleville and the Sanitarium at Verona.

by the Petitioner was described on the Petition as:

"INCLUDED: All Non-Medical Professional including all Music, Art, Dance, and Creative Arts Therapists (including Seniors), all Occupational Therapists (including Seniors), Occupational Therapy Assistants, Horticulture Therapists, All Recreational Therapists, (including Seniors), Vocational Rehabilitation Counsellors (including Seniors), and Physical Therapists; and

EXCLUDED: Hospital Attendants and Aides, Housekeeping, Dietary and other non-professional, non-trained service and maintenance employees; all Nurses (RNs and LPNs), Social Workers, Managerial Executives, Craft employees, Policemen, and supervisors within the meaning of the Act."

The Overbrook Employees Association ("OEA" or the "Intervenor") which currently represents a certified unit of "non-professional" employees at the Essex County Hospital requested intervenor status arguing that the designations "non-professional" and "professional" were misnomers at the Essex County Hospital as applied to the OEA unit and that they had represented some of the petitioned-for employees prior to their certification in 1970 and continued to represent them after the certification. They concede that there was no professional option given professional employees in the 1970 election as required under the Act, yet they argue some professionals voted in the election and that their votes were unchallenged. Furthermore, they claim they have represented at least some of these employees following certification as their majority representative. They submitted a current agreement with the employer allegedly covering the employees in question. Intervention is granted to OEA in order that they may participate in the litigation to determine whether the petitioned-for employees are included within the scope of their collective negotiations unit.

The public employer contends that the petition should be dismissed because the OEA allegedly represents the petitioned-for employees in an appropriate unit that should not be disturbed. They raise basically the same arguments to support this claim that OEA posits.

AFSCME points out that the Commission certified the Overbrook Employees Association on May 26, 1970, (Docket No. R-62) as the majority representative for non-professional employees and that the certification which was issued as the result of a directed election following a hearing wherein the issue of representation of professionals was litigated, clearly excluded professional employees.^{2/} They argue there is no evidence of representation of the petitioned-for employees either prior to the certification or subsequent to the certification.

A Commission Hearing Officer was appointed and hearings were held on October 24 and 25, 1978 in Newark, New Jersey, at which all parties were given the opportunity to examine witnesses, present evidence and argue orally. Hearings initially began on individual titles in order to determine whether or not each title was a professional or non-professional title.

The proceedings were adjourned on October 25, 1978, and on November 8, 1978 the parties jointly requested a limited hearing be held on the issue of whether the employees sought by AFSCME were represented by OEA.

Because of the unavailability of the previously appointed hearing officer the Commission appointed the undersigned Hearing Officer pursuant to N.J.A.C. 19:11-6.4 A hearing was held on the limited issue on August 28, 1979 before the undersigned in Newark, New Jersey.

The County submitted a motion to dismiss the petition with supporting brief on August 24, 1979. (The pleadings were not received in the Commission's Trenton offices until after the August 28 hearing.) The Overbrook Employees Association did not submit any post-hearing arguments. AFSCME submitted a response

^{2/} An election was directed by the Commission following a hearing wherein the representation issue of the professionals was litigated. The following unit was certified on May 15, 1970: "All non-professional employees employed by the County of Essex at Overbrook Hospital at Cedar Grove, Essex County Hospital at Belleville, and the Sanitorium at Verona but excluding managerial executives, craft employees, operating engineers, carpenters, painters, electricians, plumbers, brick layers, tin smiths, building laborers, truck drivers, professional employees, registered nurses, policemen and supervisors within the meaning of Act." (Emphasis added)

to the County's motion, together with a brief on October 9, 1979, and submitted a subsequent brief on January 23, 1980, based on a decision issued by the Director of Representation on January 18, 1980.

The sole issue to be considered in this report is whether or not the employees petitioned for in this case were represented by the Overbrook Employees Association at the time of the filing of the instant petition. All parties have consented to the bifurcation of this hearing. ^{3/}

The undersigned has considered the entire record, the County's Motion to Dismiss, the exhibits and the briefs that have been submitted. This recommended report will consider the representation issue in three stages: (1) the period prior to certification; (2) the hearing and certification; and (3) the period subsequent to certification.

The Period Prior to Certification

While the Overbrook Employees Association and the County of Essex have a labor relationship that dates back at least to 1968, the Overbrook Employees Association was clearly not recognized as the majority representative of a defined unit of employees.

The OEA introduced a "Report of Fact Finding Discussions with the Overbrook Employees Association," commonly called the Bray-Kosko Report, of February 28, 1968 (I-12 in evidence) as a purported agreement evidencing bargaining history in which the OEA represented professional and non-professional employees. ^{4/}

^{3/} See consent C-3 in evidence. After the consent was entered into the County appointed new counsel, Thomas Savage, who has agreed to this proceeding.

^{4/} This report was the result of meetings between the Overbrook Employees Association and County Representatives Arthur Bray and John Kosko (Bray-Kosko Report). The report lists salary increments for many titles, some of which are petitioned for herein, and lists many others including, e.g., Assistant Hospital Comptroller, Chief Clinical Psychologist, Director of Music and Art Therapy, Hospital Comptroller, Assistant Personnel Director, and many others.

On May 1, 1969, the OEA filed a petition for certification of public employees (PERC File No. R-62) and attached thereto was a letter dated April 15, 1969, from the Director of the Essex County Board of Freeholders to Berkly Howard, OEA President, denying OEA recognition as bargaining agent of "any given unit of employees within the County." Ultimately a hearing was held on this petition and the Hearing Officer found that the freeholders had dealt with the petitioner on an ad hoc basis but that the petitioner OEA had never been recognized as the majority representative of a unit of employees, a fact to which petitioner OEA stipulated. (See PERC No. 38, Hearing Officer's attached report, p. 3)

Therefore, I do not find that the Bray-Kosko Report represents a prior agreement or an established practice that would meet the statutory exception ^{5/} allowing a mixed professional/non-professional unit without a professional option vote even had there been no subsequent PERC certification.

The Hearing and Certification

Recognition having been denied OEA, a petition was filed with the Commission, a question concerning representation was found to exist and the composition of the negotiations unit was fully litigated including specifically whether or not professionals should be included with the petitioned-for unit of non-professionals.

The Petitioner OEA sought to have professionals vote in a separate election to determine whether or not they desired to be included in the same unit as the non-professionals. The Hearing Officer rejected that proposal and found that the OEA had not attempted to organize the professional employees and recommended that "all professional employees, including but not limited to job titles stipulated by the parties to be professionals, be excluded from the voting." ^{6/} (Emphasis added) No exceptions were filed to the Hearing Officer's Report and Recommendations

^{5/} N.J.S.A. 34:13A-6(a).

^{6/} PERC No. 30, H.O. Report, p. 5.

and his findings and recommendations were accepted completely by the Commission.

The election was held as directed and there was no professional option. All parties had observers at the election and signed the tally of ballots sheet following counting of ballots. No objections to either the conduct of the election or conduct affecting the results of the election were filed. OEA was certified on May 15, 1970, by the Commission as the majority representative of a unit specifically excluding professionals. (See n. 2 above)

At this hearing conducted in 1979 the public employer and the petitioner for the first time raised an objection to the conduct of this election by claiming that certain professionals voted in the election in 1970. Both the County and the OEA argue that if professionals voted in the 1970 election, their titles would then somehow become certified as part of the OEA unit. ^{7/} The certified unit includes specifically the titles set out in the certification (see n. 2 above). I cannot envision any circumstances wherein the Commission would amend a certification thereby significantly changing the unit defined in the decision directing the election based on an election objection filed nine years after the fact. ^{8/} Parties have five days after an election within which to raise election objections and such objections must be timely made and supported by documentation. (N.J.S.A. 19:11-9.2(h)) I am convinced that the certification excluded professionals and that all parties had notice of this exclusion and did not object thereto.

The Period Subsequent to Certification

If either the County or OEA had any questions as to the unit definition contained in the Commission's certification, either party could have filed a clarification of unit petition to resolve such questions. ^{9/} All contracts negotiated

^{7/} County's brief, p. 18 and Tr. 76.

^{8/} The public employer has requested that the undersigned examine the voting eligibility list used in the 1970 election to determine if any of the professionals voted. Assuming arguendo they did vote, that would not alter the certification.

^{9/} Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1977).

between the OEA and the County contain a recognition clause that refers to the PERC certification of May 15, 1970. A clarification of unit petition has never been filed to clarify the unit described in the certification.

Since OEA has not shown an established practice or prior agreement that would negate the need for a professional option, professional employees could be joined with non-professional employees only if the professional employees were given an opportunity to vote on whether or not they wish to be included in a unit with non-professionals. 10/ There is no evidence of such a vote even on an informal basis.

The OEA has presented several grievances on behalf of professional employees; however, presentation of grievances, as voting unchallenged in a PERC election, does not clarify the recognition clause and make these titles part of the bargaining unit, particularly without a professional option.

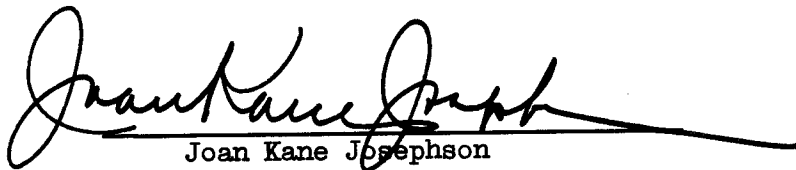
The OEA Constitution provides that the OEA will present grievances for anyone in the hospital (P-2 in evidence). Also Art. I, Para. 19 of the New Jersey Constitution provides that all public employees have the right to present and make known their grievances through representatives of their own choosing and OEA in presenting these grievances was assisting these employees in exercising a constitutional right rather than acting as their majority representative. 11/

Therefore, I do not find that the OEA has become the majority representative of the professional unit since the 1970 certification.

10/ The employer argues that the OEA represents professional employees in an appropriate unit that should not be disturbed. The appropriateness of this unit is not before the undersigned at this juncture since the scope of this hearing is limited to the issue of their representation; however, since they do not meet the statutory exception for a professional/non-professional unit, this claimed mixed unit is most likely inappropriate.

11/ The public employer submitted with his motion to dismiss a letter to him from the OEA evidencing representation of certain professional titles. This material was not received until after the hearing was closed and I will not rely therefore on it as evidence, but I might add that I also would not have considered it had it been properly submitted into evidence since the letter is dated June 25, 1979, long after the petition was filed.

Accordingly, for the reasons stated above, the undersigned recommends that the petition be processed since I do not find that the employees petitioned for herein are represented by the Overbrook Employees Association.

A handwritten signature in cursive script, reading "Joan Kane Josephson", written over a horizontal line.

Joan Kane Josephson
Hearing Officer

DATED: February 1, 1980
Trenton, New Jersey