D.R. NO. 84-13

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

In the Matter of

COUNTY OF WARREN,

Public Employer,

-and-

DISTRICT 1199J, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

DOCKET NO. RO-83-164

Petitioner,

-and-

WARREN COUNCIL NO. 17, NEW JERSEY CIVIL SERVICE ASSOCIATION,

Intervenor.

SYNOPSIS

The Administrator of Representation Proceedings dismisses a certification petition filed by District 1199J seeking a separate unit of employees at the County's Warren Haven facility. The employees are currently included in a unit of all County employees and are represented by Council 17. The Administrator finds, after an administrative investigation, that District 1199J's claims of irresponsible representation are not supported. The investigation revealed that Council 17 secured additional benefits for Warren Haven employees in areas of concern to the affected employees. Further, although it was alleged that Council 17's negotiations team did not include representatives of the nurses at Warren Haven, it appears that no other sub-groups of employees were included on the team which was limited to two Council 17 officials and its attorney. The Administrator, therefore, concludes that District 1199J's claims of irresponsible representation in the most recent negotiations are unsupported.

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Appearances:

For the Public Employer
Harper & Hansbury, attorneys
(John J. Harper of counsel)

For the Petitioner
Fox & Fox, attorneys
(David I. Fox of counsel)

For the Intervenor
Greenberg, Margolis, Ziegler and Swartz, attorneys
(Mark Tabenkin of counsel)

DECISION

On May 20, 1983, a Petition for Certification of Public Employee Representative, accompanied by an adequate showing of interest, was filed with the Public Employment Relations Commission

("Commission") by District 1199J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO ("District 1199J"). District 1199J seeks to represent "all full-time and regular part-time employees, employed at Warren Haven, an Institution operated by Warren County, and including Nurses, Institutional Attendants, Building Service Workers, Laundry Workers, Food Service Workers and Cooks excluding Guards, Police, and Supervisors and Managers as defined by the Act." The petitioned-for unit consists of approximately 137 employees.

Warren Council No. 17, New Jersey Civil Service Association ("Council 17") has intervened in this matter, pursuant to N.J.A.C. 19:11-2.7, based on Council 17's collective negotiations agreement with the County of Warren ("County"), covering a collective negotiations unit of all County employees, inclusive of the petitioned-for employees.

An administrative investigation has been conducted into the matters and allegations concerning the Petition.

The assigned Commission staff agent convened an informal conference among the parties on June 16, 1983, at which the respective positions of the parties were advanced. The parties' positions have been further advanced in subsequent correspondence. Both the County and Council 17 have declined to enter into an agreement for consent election for the petitioned-for employees. The County and Council 17 assert that the instant Petition is not timely filed pursuant to N.J.A.C. 19:11-2.8, and that the petitioned-for unit is inappropriate.

Based upon the administrative investigation to date, the undersigned finds and determines as follows:

1. The disposition of this matter is properly based upon the administrative investigation herein, it appearing that no substantial and material factual issues exist which may more appropriately be resolved after an evidentiary hearing. Pursuant to N.J.A.C. 19:11-2.6(b), there is no necessity for a hearing where, as here, no substantial and material factual issues have been placed in dispute by the parties.

2. The County of Warren 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 this Petition, and is subject to the provisions of the Act.

3. District 1199J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO and Warren Council No. 17, New Jersey Civil Service Association are employee representatives within the meaning of the Act and are subject to its provisions.

4. In the instant Petition, which was filed on May 20, 1983, District 1199J seeks to represent a collective negotiations unit of approximately 137 employees employed by the County at Warren Haven, a county-operated geriatrics facility. The petitioned-for employees are currently included in a county-wide blue and white collar unit which has been represented by Council 17 for approximately 12 years.

The County takes the position that: (a) the Petition is not timely filed in that a memorandum of settlement was entered

into between the negotiators for the County and Council 17 on May 20, 1983; (b) that the previous collective negotiations agreement covering the years 1981 and 1982 continued in effect while negotiations for a successor agreement were continuing; and (c) District 1199J seeks an inappropriate unit because it seeks to sever employees from an existing broad-based appropriate unit.

Council 17 alleges that the petition is untimely in that the memorandum of settlement with the County was executed on May 20, 1983, and therefore the filing of the instant Petition on that date is barred. Additionally, Council 17 claims that the Petition is inappropriate in that it seeks to "carve out" employees from an existing broad-based unit.

District 1199J alleges that its Petition is timely filed pursuant to N.J.A.C. 19:11-2.8 and that the petitioned-for unit is an appropriate one for the purpose of collective negotiations. In addition, District 1199J claims that Council 17 has not provided responsible representation to the petitioned-for employees.

The Commission has previously dealt with matters involving the delineation of what constitutes an "existing written agreement" which would bar the filing of a petition pursuant to N.J.A.C. 19:11-2.8(c). 1/ In In re Cty. of Middlesex, P.E.R.C. No. 81-29,

1/ N.J.A.C. 19:11-2.8(c) provides that: "During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative will not normally be considered timely filed unless ... (2) In a case involving employees of a county or a municipality, or any agency thereof, or any county or municipal authority, commission or board, the petition is filed not less than 90 days and not more than 120 days before the expiration or renewal date of such agreement;..."

6 NJPER 439 (¶ 11224 1980), the Commission held that a memorandum of agreement may constitute an "existing written agreement" for the purpose of barring a petition for certification, pursuant to the above-cited section of the Commission's rules, if it contains substantive terms and conditions of employment and if it has been ratified, where ratification is required by the terms of the memorandum. In the instant matter, the memorandum of settlement, signed by the parties on May 20, 1983, contains a provision that "the parties on this 20th day of May, 1983 and through their duly authorized representatives, execute this settlement agreement, which is subject to ratification by the Association and the Board of Chosen Freeholders." Council 17 states that ratification by the Association occurred sometime during the week following the signing of the settlement agreement, and the County has submitted a copy of a resolution passed by the Board of Chosen Freeholders indicating that the settlement agreement was ratified and approved on June 1, 1983. Therefore, it would appear that inasmuch as the ratification of the memorandum of settlement did not occur as to either Council 17 or the County until sometime after the filing of the instant Petition on May 20, 1983, the memorandum of agreement cannot be relied upon as a bar to the Petition. Additionally, an agreement to extend an expired contract until a successor agreement is achieved does not operate as a bar to a petition. In re Tp. of Franklin, P.E.R.C. No. 64 (1971).

The County and Council 17 each claim that the petitioned-for unit is inappropriate in that the Petition seeks to sever

approximately 137 employees from the existing broad-based county-wide unit, which consists of approximately 330 employees.

At the informal conference conducted by the assigned Commission staff agent, the parties were advised of the Commission's policy enunciated in In re Jefferson Tp. Bd. of Ed., P.E.R.C. No. 61 (1971), concerning the severance of employees from existing broad-based units. Jefferson holds that severance will not be permitted unless the petitioner demonstrates that the existing relationship is unstable or that the incumbent organization has not provided responsible representation to the group of employees being petitioned-for. In Jefferson, supra, the Commission stated:

> The underlying question is a policy one: Assuming without deciding that a community of interest exists for the unit sought, should that consideration prevail and be permitted to disturb the existing relationship in the absence of a showing that such relationship is unstable or that the incumbent organization has not provided responsible representation. We think not. To hold otherwise would leave every unit open to re-definition simply on a showing that one sub-category of employees enjoyed a community of interest among themselves. Such a course would predictably lead to continuous agitation and uncertainty, would run counter to the statutory objective and would, for that matter, ignore that the existing relationship may also demonstrate its own community of interest.

By letter dated July 12, 1983, District 1199J was provided an opportunity to proffer documentary evidence as well as statements of position in support of its claim that the incumbent representative has not provided responsible representation to the petitioned-

for employees. It was stated that unless the evidentiary proffer satisfied the Jefferson standard and raised substantial and material disputed factual issues, the Petition would be dismissed.

On August 2, 1983, District 1199J filed affidavits in support of its contention that the interests of the petitioned-for unit of employees have been ignored by incumbent Council 17. The affidavit of Gloria Leopardi, head nurse at Warren Haven, states that she attended all but one negotiations sessions as a representative of the Warren Haven nurses and that the proposals submitted on behalf of the nurses were never discussed, either with her or the County. The affidavit of Gladys Rowe, a senior building service worker who has been a steward for Council 17 for 23 years, states that in the past Council 17's negotiating team has always consisted of at least five members, one employee from each of the County's departments, Warren Haven included. During the most recent negotiations, however, only the President, Vice President and attorney for Council 17 negotiated with the County. This absence of a negotiating team with members from each department, she states, barred the nurses and other Warren Haven employees from having any real input into the negotiations.

District 1199J's response has been the subject of further investigation. Council 17 and the County have responded to the allegations contained in the above affidavits and have provided documentary materials relating to the most recent contract negotiations. The undersigned has carefully reviewed all materials submitted by the parties.

In analyzing the issues in the instant matter, the undersigned has turned to the case law that has developed relating to the majority representative's duty to represent the interests of unit members "with complete good faith, with honesty of purpose and without unfair discrimination." Lullo v. International Assn. of Fire Fighters, 55 N.J. 409 (1970); N.J. Turnpike Employees Union v. N.J. Turnpike Auth., 127 N.J. Super. 466 (App. Div. 1973). This responsibility, in the context of claims arising from statutory violations, has been referred to as the duty of fair representation, which requires that the majority representative not act arbitrarily, discriminatorily, or in bad faith. Vaca v. Sipes, 386 U.S.M. (1967). Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); In re Council #1, AFSCME, AFL-CIO, P.E.R.C. No. 79-28, 5 NJPER 21 (¶ 10013 1978); Tp. of Springfield, D.U.P. No. 79-13, 5 NJPER 14 (¶ 10008 1978); In re Hamilton Tp. Bd. of Ed., D.U.P. No. 82-24, 8 NJPER 199 (¶ 13083 1982); and In re West Windsor-Plainsboro, D.U.P. No. 80-21, 6 NJPER 174 (¶ 11083 1980). The duty arises in the context of contract administration as well as in the context of negotiations. Futher, the duty arises both in the context of the majority representative's representation of individual unit members as well as in its representation of minority groupings of employees. Therefore, in representation matters before the Commission involving claims relating to the exercise of responsible representation, useful comparisons may be drawn from case discussions in Commission unfair practice decisions or court decisions adjudicating claims of statutory violation which bear

upon the proper exercise of the majority representative's representational responsibilities. The United State Supreme Court has held:

> A wide range of reasonableness must be allowed to a statutory bargaining representative in serving a unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromise on a temporary basis, with a view to long range advantages, are natural incidents of negotiations. Differences in wages, hours and conditions of employment reflect countless variables. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

In McGrail v. Detroit Federation of Teachers, 82 LRRM 2623 (1975), the Michigan Circuit Court observed:

> The law basically says that the unions have broad discretion in negotiating contracts, weighing advantages and disadvantages of different proposals, and that to allow every dissatisfied person to challenge the validity of certain contracts without showing a strong indication of a breach of the duty to fairly represent, would create havoc in the field of labor law.... [at 2624]

The obligations referred to in the Ford Motor case, supra, and the discretion referred to in the McGrail case, supra, have been recognized by the Commission in the Springfield matter, supra, wherein the Director of Unfair Practices stated:

> ... However, given the "wide range of reasonableness allowed to a statutory negotiations representative," the undersigned must analyze the unfair practice charge to assure that sufficient factual allegations, not conclusionary statements, constitute the basis of the charge. The numerous possibilities for litigation against the employer as well, make such an examination particularly necessary....

In the judgment of the undersigned, the analysis which is compelled in evaluating an unfair practice charge is also com-

pelled in evaluating claims of irresponsible representation arising in the representation forum.

Within this framework the undersigned finds as follows: The affidavits submitted by District 1199J first suggest that Council 17 has not listened to the proposals of one group of employees -- nurses -- which it represents in a broad-based unit. 2/ The nurses' proposals were submitted to Council 17 prior to its commencement of its negotiations with the County, and included proposals relating to wages, shift differential, weekend differential, tuition reimbursement, uniform allowance, and vacation pay. (Affidavit of Gloria Leopardi). However, the documentation submitted by Council 17 includes a letter dated September 14, 1982, from Council 17's negotiations chairman and its president to the County Freeholder Director enclosing its 1983-1984 contract proposals for all county employees represented by the Council. The letter states in part:

> As you are aware, there is a real and serious problem in finding and keeping qualified personnel in the County's institutions, especially Warren Haven. Absenteeism is at a critical stage and the quality of service being administered in these institutions is at times questionable. In order to alleviate these problems, four of the [twenty-eight] proposals are directly addressed to the institutions.

The documentation submitted by Council 17 also includes the parties' final memorandum of understanding which was entered into at the

2/ It is noted that the affidavits raise questions solely concerning Council 17's representation of nurses. The unit petitioned-for by District 1199J includes all employees at Warren Haven.

conclusion of their negotiations. The memorandum of understanding includes the following provisions: (1) a separate addendum is to be appended to the formal collective negotiations agreement "covering only nursing personnel working at institutions;" (2) the shift differential for all unit employees is increased. The evening shift differential is increased by five cents to twenty-five cents per hour and the night shift differential is increased by twenty-five cents per hour to fifty cents per hour (Council 17 asserts that virtually all employees at Warren Haven work on shifts); (3) uniform and maintenance allowances are increased from $75 to $80 per year. Additionally, the previous voucher requirement indicating the actual purchase of a uniform is eliminated and replaced by an employee certification of the cost of uniform purchase and maintenance; (4) a tuition reimbursement program is established solely for nursing personnel of the County providing for "reasonsonable tuition reimbursement" for nursing personnel matriculating for an undergraduate degree, but excluding post-graduate programs; (5) a general wage increase is made applicable uniformly to all County employees including an additional step on the wage guide. However, this provision also grants, exclusively for nursing personnel, an additional one step advance commencing with the first year of the agreement in order "to have nursing salaries more closely resembleto to those paid to nurses in comparable hospitals and health care facilities;" and (6) a fifty cent per hour weekend differential for employees at County institutions.

The undersigned notes that the above provisions of the memorandum of understanding grant additional benefits to nursing

employees at Warren Haven in five of the six areas targeted by the nurses own proposals for improvements. District 1199J, although provided the opportunity, has not disputed the factual validity of the materials submitted by Council 17 and the County.

Accordingly, the undersigned,having reviewed District 1199J's allegations of irresponsible conduct by Council 17 in negotiating matters of interest to nurses, finds that these allegations are not supported by the record developed in the investigation of this matter.

The second affidavit submitted by District 1199J suggests that the nurses were not represented on the negotiations committee established by Council 17. The undersigned notes that District 1199J's perception of the extent of representation by Warren Haven nurses in the negotiations conducted by Council 17 has been placed in dispute by Council 17. Nevertheless, the extent of nurse involvement on the negotiations team fielded by Council 17 is not a subject of material concern in the review of this matter. Assuming for the moment that Council 17's negotiations team was solely comprised of three Council 17 agents, as alleged by affiant Rowe, it does not appear that the nurses at Warren Haven were treated any differently than other sub-groups of unit employees in formulating the makeup of Council 17's negotiations team. Absent any true basis for a claim of discriminatory treatment, the internal considerations of Council 17 in constituting its negotiations team are not the subject of appropriate examination by the Commission. Accordingly, the undersigned determines that Council 17 has not

exhibited any degree of irresponsible representation in the formulation of its negotiations team.

For the above reasons, it is determined that District 1199J has not established a basis for its claim that Council 17 has irresponsibly represented the interests of Warren Haven employees. Therefore, in accordance with the standards developed by the Commission in Jefferson Tp. Bd. of Ed., supra, the instant Petition is hereby dismissed.

BY ORDER OF THE ADMINISTRATOR
OF REPRESENTATION PROCEEDINGS

Joel G. Scharff, Administrator

DATED: November 18, 1983
Trenton, New Jersey