

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

In the Matter of
EAST ORANGE BOARD OF EDUCATION,
Public Employer,

-and-

DOCKET NO. CU-77-29

EAST ORANGE EDUCATION ASSOCIATION,
Petitioner.

SYNOPSIS

The Director of Representation, on the basis of an administrative investigation, clarifies the composition of a collective negotiations unit comprised of teaching personnel as excluding summer school teachers but including certain home instruction teachers. Preliminarily, the Director observes that the Petitioner's argument, that the latter two groups employees may be included in the collective negotiations unit on a basis of a shared community of interest, raises a question concerning representation rather than a question concerning the composition of an existing collective negotiations unit. The Director further determines that where the employees may not be identified within the inclusionary language of a unit description, there is no significance in the absence of language which would identify the personnel as specifically excluded. Since the summer school teaching position was in existence at the time the unit was formed and was not included in the unit, and since the parties have not negotiated regarding the terms and conditions of employment for summer school teachers, the Director concluded that summer school teachers are not represented by the Petitioner. Regarding home instruction teachers, the Director cites a Commission decision, In re Wayne Board of Education, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980), which held that home instruction is an extra, educationally related activity and which provided that under certain circumstances individuals assigned to instruct extra, educationally related activities are identified as included within a unit of classroom teaching personnel. Applying the Wayne standards, the Director finds that regular classroom teachers who perform home instruction and part-time home instruction teachers who meet a test of regularity of employment are identified within the scope of the Petitioner's collective negotiations unit.

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Appearances:

For the Public Employer
Love & Randall
(Melvin Randall, of Counsel)

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

DECISION

A Clarification of Unit Petition was filed with the Public Employment Relations Commission (the "Commission") by the East Orange Education Association (the "Association") seeking a clarification concerning the composition of a collective negotiations unit consisting of certain professional personnel employed by the East Orange Board of Education (the "Board"). The Association, which represents a unit of teaching personnel, seeks a determination that summer school teachers and home instruction teachers are included or should

be placed in the teachers unit.

The undersigned has caused an administrative investigation to be conducted into the matters and allegations involved in the Petition. All parties have been advised of their obligations pursuant to N.J.A.C. 19:11-2.6 and have been afforded the opportunity thereunder to present documentary and other evidence as well as statements of position relating to the Petition.

Based upon the administrative investigation herein, 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 disputed factual issues exist which may more appropriately be resolved at a 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.

2. The East Orange Board of Education 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 who are the subject of this Petition, and is subject to the provisions of the Act.

3. The East Orange Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

4. The Association is recognized by the Board as the exclusive representative of professional employees in a collective negotiations unit more specifically described as follows:

... all personnel under contract or on leave, employed by the Board, including: Classroom Teachers, Nurses, Guidance Counselors, Librarians, Social Workers, Reading Resource Teachers, Vocational Counselors, Psychologists, Speech Correctionists, Learning Disability Teacher Consultant, Department Heads, Administrative Assistants, Supervisors, Coordinators and Continually Employed Certified Substitutes; but excluding: Superintendent of Schools, Secretary-Business Manager, Assistant Superintendents, Assistant to Secretary-Business Manager, Principals, Directors, Assistant Principals, Assistant Directors and Assistant to the Directors. 1/

There are approximately 750-800 employees in this unit.

5. The Association asserts that summer school teachers and home instruction teachers may be included in the above unit. The Association contends that the petitioned-for employees share a close community of interest with the employees in the Association's professional unit. The Association states that the petitioned-for employees and the employees presently included in the professional unit share the same employer and generally the same supervision, and they share the same overall employment goals -- to provide educational services to the community. The

1/ See Agreement between East Orange Board of Education and East Orange Education Association, for 1975-77, Article I, "Recognition."

Association notes that the contractual recognition clause does not specifically exclude the titles sought herein.

The Association also urges that the clarification sought would not result in the illegitimate disenfranchisement of unrepresented employees because many of the employees sought also hold other titles with the Board of Education, in which capacity they are represented by the Association.

Finally, the Association argues that it has never abandoned its claim to represent the personnel which it seeks herein. The Association claims that it has "continually tried to solve the clarification problem at the collective negotiations table, and has turned to the filing of a clarification of unit petition only because these negotiations efforts have been fruitless."

6. The Board contends that the petitioned-for employees do not share a community of interest with unit employees. The Board cites differences between the two groups in the nature of the services provided, the conditions of employment, the work assigned, and the training and experience of the employees.

7. The two employment categories at issue herein -- summer school and home instruction -- existed at the time the professional unit was formed.

Summer school staffing requirements are determined by enrollment; generally, summer school staffing runs between 27-75 teachers.

Home instruction teachers are assigned from an availability list of about 100 persons. The list includes some regular district teaching personnel as well as some individuals who are maintained on the Board's list of per diem personnel. Most home instruction is provided by a nucleus of 25 persons taken from the home instruction teachers availability list.

8. In addition to its negotiations relationship with the Association's professional employee unit, the Board negotiates with representatives of several other employee units:

- (a) Administrators -- approximately 61 employees; affiliated with NJEA
- (b) Secretaries -- approximately 87; affiliated with NJEA
- (c) Paraprofessionals -- approximately 100; affiliated with NJEA
- (d) Maintenance workers -- approximately 35; affiliated with NJEA
- (e) Custodians -- approximately 100; affiliated with the AFL-CIO
- (f) Cafeteria Aides -- approximately 95; affiliated with the AFL-CIO
- (g) Cafeteria Workers -- approximately 95; affiliated with the AFL-CIO

9. The Association was first recognized by the Board for the purpose of collective negotiations in 1968. ^{2/} The

2/ The Board has submitted a copy of the minutes of a Board meeting which took place on November 19, 1968, at which meeting the Board recognized the Association as the exclusive representative for collective negotiations for the following groups of employees: Classroom Teachers, Nurses, Guidance

parties entered into a first collective negotiations agreement (1969-70) covering the employees in the recognized unit (set forth in n.2) on September 1, 1969. Since that time the Association and the Board have negotiated and executed four more contracts covering the period from 1970 through 1977. 3/

Only two changes to the original unit structure have been effectuated by the parties: (1) In the parties' third agreement, covering 1971-73, the parties specifically excluded Assistant Superintendents, Principals, Assistant Principals, Directors, Assistant Directors and Assistants to Directors from the Association professional unit; (2) In the parties' fourth agreement, covering 1973-75, the parties specifically added "contracted substitutes" to the Association professional unit.

No changes other than changes in nomenclature were made in the definition of the Association professional employees unit in any of the parties' five agreements covering 1969-77; nor has any party alleged that any other structural changes have occurred in this negotiations unit.

Basically, the Association's position is that it represents summer school teachers and home instruction teachers because these employees share a close community of interest with the

2/ (Cont'd)

Counselors, Librarians, Social Workers, Helping Teachers, Vocational Counselor, Psychologists, Speech Correctionists, Learning Disability Specialists, Department Heads, Administrative Assistants, Supervisors, Coordinators, Assistant Principals, Principals, Directors, Assistant Superintendent.

3/ The Petition was filed during the pendency of the 1975-77 Agreement.

employees enumerated in the recognition clause of the agreement. However, while it is axiomatic that employees who do not share a community of interest may not be intermingled in a collective negotiations unit, it does not follow that employees who do share a community of interest are, by necessity, identified as being included in one collective negotiations unit. Thus, while the factor of community of interest must be present in any matter in which employees are identified as included within a negotiations unit, the community of interest factor alone is not sufficient to demonstrate that the employees actually have been represented within the negotiations unit and/or may be identified as part of the negotiations unit. See In re Wayne Board of Education, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980) aff'g and mod'g D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979); In re State of New Jersey, P.E.R.C. No. 80-65, 5 NJPER 538 (¶ 10277 1979) aff'g D.R. No. 80-8, 5 NJPER 454 (¶ 10229 1979); In re Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER ____ (¶ ____ 1980); In re Fair Lawn Board of Education, D.R. No. 78-22, 3 NJPER 389 (1977); and In re Clearview Regional High School Board of Education, D.R. No. 78-2, 3 NJPER 248 (1979).

In the Clearview matter, supra, the undersigned, noting the misuse of unit clarification petitions, stated that the clarification of unit procedure is intended to resolve questions concerning the composition of an existing negotiations unit. On the other hand, a certification proceeding (RO petition) is intended to resolve questions concerning representation by ascertaining

the free choice of employees to select or reject an exclusive negotiations representative in an appropriate collective negotiations unit. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge the scope of a collective negotiations unit to include nonrepresented employees who, nevertheless, share a community of interest with represented employees. Thus, in Clearview, the undersigned determined that the petitioner's attempt to utilize a clarification of unit petition to include nonprofessional personnel in an existing unit of professional personnel -- based upon an asserted community of interest -- was misplaced and that the appropriate mechanism was the filing of a certification petition.

The Association also asserts that summer school teachers and home instruction teachers are represented by the Association because these employment categories are not specifically described in the exclusionary language of the unit recognition clause. ^{4/} However, the identification of employees as included or excluded from a collective negotiations unit requires an examination of the entire unit definition. It is unlikely that the exclusionary language of a recognition clause can be more than of minimal significance where the inclusionary language cannot support the identification of an employee classification as within the recognized unit.

^{4/} In the Clearview matter, supra, the undersigned noted that where a question of identification is raised concerning whether titles are encompassed within the inclusionary or exclusionary language of the unit description as contained in the contract, a clarification of unit petition may be filed.

In Clearview, supra, the undersigned observed that negotiations units may be defined by generic terms or by specific delineation of titles. In the instant matter, the recognized unit has been defined by specific reference -- either by title or by employment category. Summer school teachers have not been identified within the classifications of personnel which are specifically delineated in the inclusionary language of the recognition clause. Therefore, it is clear that the negotiations unit has not been described to embrace summer school teachers. Given the specificity of the unit inclusionary language, there is no significance in the absence of language which would specifically exclude summer school teachers.

Further,, although the summer school teaching position was a category in existence at the time the instant unit was formed the Association does not claim that it has engaged in negotiations with the Board regarding terms and conditions of employment of all summer teachers. ^{5/}

For the above reasons, it appears to the undersigned that the negotiations unit herein may be clarified as excluding summer school teachers.

5/ In the Wayne matter, supra, the Association claimed that it had negotiated with the Board concerning summer school teachers. The undersigned, after reviewing the evidence relating to the claimed negotiations, concluded that the Association did not negotiate on behalf of all summer school teachers but instead had focused on the concerns of ten month teachers vis-a-vis summer school employment.

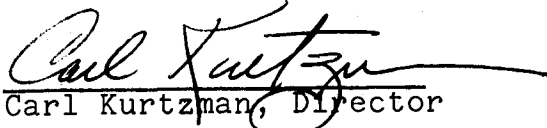
By contrast, certain home instruction personnel may be identified within the scope of the collective negotiations unit represented by the Association. The Commission has identified the performance of extra-curricular duties as a part of the professional responsibilities of teachers. See In re Rutherford Board of Education, P.E.R.C. No. 77-22, 3 NJPER 37 (1976). Subsequently, the Commission identified coaches of extra-curricular activities as within a collective negotiations unit comprised of classroom teaching personnel. See In re Long Branch Board of Education, D.R. No. 78-24, 3 NJPER 392 (1977). In the Wayne matter, supra, the Commission, finding that certain activities are an integral part of the classroom students' educational process, expanded upon its identification of unit personnel by adopting a three part standard which may, under certain circumstances, result in the inclusion of those individuals assigned to instruct extra, educationally related activities. The Commission identified bedside instruction (i.e., home instruction) as an extra, educationally related activity. Therefore, as the home instruction activity herein meets the three part standard established by the Commission in Wayne, ^{6/} it appears that regular

6/ The standard established by the Commission provides for clarification where the following conditions are present: (a) the extra, educationally related activity has been performed or is being performed by a regular classroom teacher or by statute or regulation is required to be performed by a certificated teacher, and (b) the extra, educationally related activity can be performed by a regular classroom teacher in addition to his/her regular classroom teaching assignment and, (c) the extra, educationally related activity is performed during the regular ten month school year, on regular school days, either during or after normal school hours.

classroom teachers who perform as home instruction teachers in accordance with the standard are identified as being within the classroom teachers unit. In addition, those part-time home instruction teachers who, although not regular classroom teachers, meet a test of regularity of employment by virtue of their assignment to a regular course of instruction during the regular school year, are identified as within the scope of the Association's collective negotiations unit.

Accordingly, based upon the administrative investigation herein, 7/ the undersigned determines that the professional employee unit represented by the Association does not include summer school teachers. However, the professional employee unit includes those home instruction teachers described above.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: February 27, 1980
Trenton, New Jersey

7/ On February 1, 1980, the undersigned advised the parties of the facts obtained in the investigation to date and provided the parties with the analysis of the issues contained above. An additional opportunity was provided to the parties to proffer additional evidence and/or statements of position. No further evidentiary proffer or statement of position has been submitted.