

P.E.R.C. NO. 82-55

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

Docket No. RO-79-187

ASSOCIATION OF RESIDENCE  
COUNSELORS OF RUTGERS COLLEGE,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a representation petition filed by the Association of Residence Counselors of Rutgers College. While holding that Residence Counselors are employees and the Association is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, the Commission concludes that Residence Counselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations in a separate unit.

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Appearances:

For the Public Employer, Carpenter, Bennett &  
Morrissey, Esqs.  
(Edward F. Ryan, of Counsel)

For the Petitioner, Mr. Jack LeClair, President,  
Association of Residence Counselors

DECISION AND ORDER

On March 26, 1979, the Association of Residence Counselors of Rutgers College ("Association" or "Petitioner") filed a Petition for Certification of Public Employee Representative. The Association sought certification as the exclusive representative of a negotiations unit comprising all Residence Counselors employed by the Rutgers College Dean of Students ("Rutgers"). Rutgers, relying on several alternative arguments, objected to holding an election among the employees covered by this petition.

Pursuant to a Notice of Hearing, hearings were held before a Commission Hearing Officer on January 21, 22, 23, 1980 and February 22, 1980. At the outset of these hearings, the parties agreed that the Hearing Officer would initially determine

whether or not Residence Counselors were employees within the meaning of the Act. If necessary, a separate hearing would then be held to determine the appropriate unit question. Prior to the commencement of the hearing, the parties entered into a Stipulation of Agreement with respect to many of the pertinent facts. Both parties were given opportunities to examine witnesses, present relevant evidence and argue orally. In addition, both parties submitted post-hearing briefs. After the original Hearing Officer resigned from the agency, the Director of Representation designated another Hearing Officer to issue a Recommended Report and Decision. The Hearing Officer did so on October 31, 1980, H.O. No. 81-6, 6 NJPER 575 (¶11291 1980).

In his report, the Hearing Officer concluded that Residence Counselors are "employees" within the meaning of the Act since they possess all the normal indicia of employee status. Furthermore, the Hearing Officer found that Petitioner is a "representative" of public employees within the meaning of N.J.S.A. 34:13A-3(e). The Hearing Officer reserved judgment on the issue of whether a unit of Residence Counselors would effectuate the purposes of the Act, indicating that this issue might be more appropriately addressed as part of a second hearing on the appropriate unit question. On December 1, 1980, Rutgers filed exceptions to the Hearing Officer's Report.

On August 7, 1981, the Director of Representation issued his decision, D.R. No. 82-6, 7 NJPER 546 (¶12243 1981).

After reviewing the entire record, including Rutgers' exceptions, the Director adopted the Hearing Officer's findings of fact and recommended conclusions that the Residence Counselors are employees within the meaning of the Act. The Director declined to adopt the remainder of the Hearing Officer's recommendations. Instead, he concluded that Residence Counselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations under the Act and thus an election based on this petition would not effectuate the purposes of the Act. Accordingly, the Director dismissed the instant petition.

The Association filed a Request for Review dated August 27, 1981 pursuant to N.J.A.C. 19:11-8.2. On September 2, 1981, Rutgers filed a Statement in Opposition to the Request for Review pursuant to N.J.A.C. 19:11-9.4. In a letter to the parties dated September 16, 1981, the Chairman of the Commission granted review of the Director's decision pursuant to N.J.A.C. 19:11-8.2 to enable the full Commission to review the substantial questions of law involved in this proceeding. Pursuant to N.J.A.C. 19:11-8.6 (b), the parties were given until September 28, 1981 to file additional briefs with the Commission if they so desired. The Association's copy of the above-mentioned letter was returned to the Commission's office twice. After a new law firm was appointed to represent Rutgers and after counsel furnished the Commission with the Association's new address, the Chairman of the Commission, at the

request of Rutgers' newly appointed representative, agreed to extend the date for submission of additional documents until October 16, 1981. A letter dated October 1, 1981 was sent to both parties concerning this extension. On October 20, 1981, Rutgers submitted a brief in support of the decision of the Director. The Association did not submit any additional documents.

The Commission has considered the entire record, the Request for Review and the submitted brief. Based upon this review, we affirm the Director's decision except as modified below.

We agree that the Residence Counselors are "public employees" within the meaning of the Act. While the Director did not pass upon the Hearing Officer's recommendation that the Association is an employee "representative" within the meaning of N.J.S.A. 34:13A-3(e), we conclude that the Association falls within the statutory definition of "representative." However, we also conclude, as did the Director, that based on the facts on the record, it would not effectuate the purposes of the Act to grant the Residence Counselors of Rutgers College the right to collective negotiations pursuant to the Act, as requested in the instant petition.<sup>1/</sup>

<sup>1/</sup> We emphasize that we do not adopt a per se rule that student employees are ineligible for collective negotiations under the Act. The facts and circumstances of each case should be reviewed in determining whether extending collective negotiations rights to student employees, either as a separate unit or as part of a unit containing non-student employees, would effectuate the purposes of the Act. See, generally, Malin, Student Employees and Collective Bargaining, 69 KY. L.J. 1 (1980).

The position of Residence Counselors is imbued with the essential characteristics ordinarily associated with employee status. The Residence Counselors are hired by a public employer. Their specific duties and responsibilities are set forth in the Stipulations of Agreement. They average 17 hours per week for a period that will last ten months per year and for as many as three years. The performance of the Residence Counselors is evaluated by the Dean of Students Office and, if necessary, the Residence Counselors are subject to discipline.<sup>2/</sup> In return for their services, the Residence Counselors receive a yearly stipend from which Rutgers deducts federal income tax and social security payments. In addition, they receive tuition remission for up to 24 credit hours per year, and they receive rent-free dormitory living accommodations, in which they must reside, and a campus telephone.

As discussed by the Director, the statutory definition of employee is very broad and its exceptions are very specific.<sup>3/</sup> Residence Counselors clearly do not fall within any of the statutory exceptions. The Commission agrees with the Director's conclusion that the term "student" and "employee" are not mutually exclusive. Accordingly, the Commission agrees that Residence Counselors are employees within the meaning of the Act.

As indicated, the Director did not pass upon the Hearing Officer's recommended conclusion that the

<sup>2/</sup> Transcript of January 22, 1980, at page 10; Transcript of January 21, 1980, at pages 102-103.

<sup>3/</sup> See, N.J.S.A. 34:13A-3(d).

Association is an employee "representative" within the meaning of N.J.S.A. 34:13A-3(e). Since the parties have continued to press for a determination of this issue, we conclude that the Association is a "representative" within the statutory definition.

N.J.S.A. 34:13A-3(e) provides, in part:

(e) The term "representative" shall include labor organizations....This term shall include any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.

In interpreting the Act, the New Jersey Supreme Court has suggested that the experience and adjudications under the National Labor Relations Act, 29 U.S.C.A. §151 et seq., should serve as a guide. See, e.g., Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409, 424 (1970). The definition of "labor organization"<sup>4/</sup> has been interpreted very broadly by the NLRB since the Supreme Court's decision in NLRB v. Cabot Carbon, 360 U.S. 203 (1959). Employee committees which have no formal structure, no constitution or by-laws, and no collection of dues have been held to be labor organizations within the meaning of the NLRA. See, e.g., Lane Aviation Corp., 211 NLRB 824 (1974); Butler Manufacturing Co., 167 NLRB 308 (1967). While the definitions of labor organization and representative under the NLRA and under our Act<sup>5/</sup> are not precisely the same, both

<sup>5/</sup> 29 U.S.C.A. §152(4) and (5) provide: "(4) The term 'representative' includes any individual or labor organization. (5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

<sup>6/</sup> The Act does not define "labor organization" but includes that term in the definition of "representative" in N.J.S.A. 34:13A-3(e).

statutory provisions are written in very broad language. The Hearing Officer found that the Association was established, in part, to represent the interests of Residence Counselors as employees. Accordingly, we conclude that the Association is an employee representative within the meaning of N.J.S.A. 34:13A-3(e).

We now turn to the remaining question in this case: whether a unit of Residence Counselors would effectuate the purposes of the Act. The Hearing Officer reserved judgment on this question. The Director, however, found that under all the circumstances, the Residence Counselors do not possess sufficient interest in their employment relationship with Rutgers so that affording them the right to collective negotiations would effectuate the purposes of the Act. We agree. <sup>6/</sup>

The Director relied on two cases to illustrate circumstances under which statutory "employees" are not entitled to negotiate. In State of New Jersey, E.D. No. 67, 1 NJPER 2 (1975), the Commission's Executive Director considered the negotiations rights of part-time consulting physicians employed by the State. While finding that these physicians were "employees," he concluded that their employment relationship with the State was

<sup>6/</sup> In conjunction with footnote 1, we point out that we do not decide the appropriateness of including Residence Counselors within a unit of university faculty and/or staff or any other larger unit. We do decide, however, that in light of the insufficient interest of Residence Counselors in their employment relationship to be represented in a separate unit, it would be futile to remand for further proceedings on this petition.



too tangential to warrant including them within a larger unit of professional employees. Although State of New Jersey involved a different issue than the instant case, it is sufficiently analogous to warrant comparison. The priority of these part-time consulting physicians remained their private practice; they had flexible, inconsistent hours which they scheduled around their private practices. The Executive Director concluded:

Their services to the State are ancillary to their private practices which are their primary means of livelihood. In sum, their employment relationship is too ephemeral to carry with it the rights and obligations of the Act.  
State of New Jersey, 1 NJPER at 8.

The Director also relied on a NLRB case which presented issues similar to those under consideration herein. In San Francisco Art Institute, 226 NLRB 204, 93 LRRM 1505 (1976), the Petitioner sought to represent a separate unit of student janitors. Whether this unit was appropriate turned on whether the student janitors "[manifested] a sufficient interest in their conditions of employment..." Id., 93 LRRM at 1506. The Board stressed "the brief nature of the students' employment tenure...and...the fact that students are concerned primarily with their studies rather than with their part-time employment." Id. Further, the student janitors tailored their work schedules to accommodate their academic commitments, received semester-only appointments, and experienced a relatively high turnover rate. Based on these factors, the Board concluded that the "students' campus employment

at the institution they are attending [was] incidental to their academic objectives..." and that the purposes of the Act would not be served by directing an election in a separate unit.

In the instant case, the record shows that in order to receive an appointment as a Residence Counselor, the student must enroll as a graduate student at the College. The average work week is 17 hours. Residence counselors are appointed on a year-to-year basis for a maximum of three years. The record also shows that the annual turnover rate is between 45 and 50%. The Assistant Dean of Students testified that it is possible to receive academic credit for work as a Residence Counselor.<sup>7/</sup> Additionally, while it is not a requirement that a Residence Counselor's course of study be related to his position, over the last five years 50% of the Residence Counselors have pursued degrees related to the position.<sup>8/</sup> In fact, when considering applicants for the position, Rutgers gives preference to persons pursuing related courses of study.<sup>9/</sup> Moreover, the Dean of Students recognizes that the Residence Counselor's responsibilities as students take precedence over their obligations as Residence Counselors; thus, the requirements of the Residence Counselors' position may be waived or relaxed when in conflict with academic obligations.

Based on the above factors, we agree with the Director's conclusion that the "totality of these circumstances indicates

<sup>7/</sup> Transcript of January 21, 1980 at pages 107-108.

<sup>8/</sup> Transcript of January 21, 1980 at pages 87-88.


<sup>9/</sup> Transcript of January 22, 1980 at p. 7.

that the Residence Counselors do not possess sufficient interest in their employment relationship with Rutgers to warrant the right to collective negotiations under the Act."<sup>10/</sup> Accordingly, it would not effectuate the purposes of the Act to direct an election and the petition should be dismissed.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Petition herein be dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Newbaker, Parcels and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: December 15, 1981  
Trenton, New Jersey  
ISSUED: December 17, 1981

<sup>10/</sup> Notwithstanding our conclusion that the Residence Counselors should not be entitled to negotiate collectively in a separate unit, it is important to point out that they are entitled to limited protection under the Act. The NLRB has consistently drawn the distinction between an employee's status with respect to an appropriate bargaining unit and his or her status as an "employee" within Section 2(3) of the Act. See, e.g., Oak Apparel, Inc., 218 NLRB 701 (1975). The Board emphasized that were this distinction forgotten, employers could discriminate with impunity against temporary or casual employees who are not members of any appropriate bargaining unit. Id. Consistent with NLRB precedent, Residence Counselors, although they may not collectively negotiate, are entitled to the protections of this Act and can avail themselves of the unfair practice jurisdiction of the Commission when their rights are violated. See, N.J.S.A. 34:13A-5.4(a)(1) et seq. Similarly, the Association, though not entitled to negotiate on behalf of these employees, may represent them in asserting other protections guaranteed by the Act.