P.E.R.C. NO. 94-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHILDREN'S AID AND ADOPTION SOCIETY,

Respondent,

-and- RO-94-50

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1037,

Petitioner.

SYNOPSIS

A Complaint filed in Superior Court by the Communications Workers of America, Local 1037 against Children's Aid and Adoption Society was referred to the Public Employment Relations Commission by the Honorable John M. Boyle, J.S.C. for a determination of whether the non-professional employees CWA seeks to represent are employed by a public employer, a private employer or by a joint public-private employer; and whether the negotiations unit sought by the CWA is an appropriate unit for purposes of collective negotiations. The parties entered into a Recognition Agreement preserving their right to raise jurisdictional claims, but asking the Commission to decide the appropriate unit and conduct an election. The Director of Representation determined that an election should be conducted in a unit of professional and non-professional employees. CWA requested review. The Commission grants review and concludes that the negotiations unit sought by CWA is an appropriate unit for purposes of collective negotiations and remands this matter to the Director of Representation to conduct an election among the petitioned-for employees.

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Docket No. RO-94-50

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AFL-CIO, LOCAL 1037,

Petitioner.

Appearances:

For the Respondent, Grotta, Glassman & Hoffman, attorneys (Mark Tabakman, of counsel)

For the Petitioner, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel)

DECISION AND ORDER

On August 2, 1993, the Communications Workers of America, AFL-CIO, Local 1037 ("CWA") filed a Complaint in Superior Court against the Children's Aid and Adoption Society ("CAAS"). The Complaint seeks an order compelling CAAS to participate in a representation election so that its non-professional employees can vote on whether they wish to have CWA represent them for purposes of collective negotiations.

On September 28, 1993, the Honorable John M. Boyle, J.S.C. transferred the case to us for a determination of the following issues:

> 1. Whether the employees CWA seeks to represent are employed by a public employer, a private employer or by a joint public-private employer.

> 2. Whether the negotiations unit sought by the CWA is an appropriate unit for purposes of collective negotiations.

In the course of processing the transferred case, the parties entered into this "Recognition Agreement":

> The parties in the above-captioned matter agree to permit the Public Employment Relations Commission to conduct an election pursuant to the Commission's rules, N.J.A.C. 19:11-9, among the appropriate unit of Children's Aid and Adoption Society employees. The parties agree to permit the Commission to determine the scope of the appropriate collective negotiations unit, the procedures for the election, the eligibility of any challenged ballots, and the resolution of any post-election objections. Further, both parties retain their rights to challenge employees' unit eligibility in the election on the basis of alleged supervisory status.
>
> Following the election, P.E.R.C. will issue a Tally of Ballots. If a majority of valid ballots are cast in favor of representation by CWA and if no objections to the election are filed within five days of the issuance of the Tally, the Children's Aid and Adoption Society will voluntarily recognize CWA as the majority representative of the unit of employees found appropriate.
>
> The parties understand that, by execution of this settlement agreement, both parties preserve their rights to assert the statutory and/or constitutional jurisdiction question at some later time.

Pursuant to their agreement, the parties submitted statements of position to the Director of Representation on the question of the appropriate unit. CAAS argued that the only appropriate unit is a mixed professional and non-professional one composed of child care workers, social workers and coordinators at its six group homes. CWA argued that the petitioned-for unit, one

composed of only non-supervisory, non-professional childcare workers is an appropriate unit.

On March 4, 1994, the Director issued a Decision on Agreement for Election. He found:

> In both the private and public sectors, a mixed, professional employee/non-professional employee unit will not be found appropriate unless the professionals consent to the mixed unit through a professional-option election. 29 U.S.C. §159(b); N.J.S.A. 34:13A-6(d). Both the LMRA [Labor Management Relations Act] and this Commission's Rules (N.J.A.C. 19:10-1.1; U.S.C. Subsection 2(12)) similarly define professional employee.
>
> Here, there are countervailing reasons for finding either the non-professional unit or a mixed unit of non-professional and professional employees as the most appropriate unit. Under these circumstances, where there is no clear preferable unit configuration, the professional employees could effectively determine the appropriate unit themselves. See Piscataway Township Bd. of Ed.[,] P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984); Fairview Bd. of Ed., D.R. No. 80-7, 5 NJPER [427] (¶10222 1979). [Slip op. at 3; footnote omitted]

The Director therefore ordered a mail ballot election for a unit of professional and non-professional employees, but professional employees would first vote on whether they wish to be included in a unit with non-professional employees.

On March 7, 1994, CWA requested review of the Director's unit determination. On March 16, CAAS filed a statement opposing review. Both parties agreed that no further briefs would be filed.

The employer argues that the Recognition Agreement does not contemplate a request for review. Yet on its face, that agreement provides that we will conduct an election pursuant to our rules and that "the Commission" will determine the scope of the appropriate negotiations unit. Requests for review are authorized by our rules and we will therefore entertain this request.

Under N.J.A.C. 19:11-8.2, review will be granted only upon one or more of these grounds:

> 1. That a substantial question of law is raised concerning the interpretation or administration of the act or these rules;
>
> 2. That the director of representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
>
> 3. That the conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
>
> 4. That there are compelling reasons for reconsideration of an important commission rule or policy.

The exact issue in this case appears to be one of first impression. Substantial questions of law and Commission policy are implicated and review is therefore warranted. These facts appear.

CAAS operates a network of six state-funded residential group homes which prepare children for adoption. CAAS employs 2 coordinators, 7 social workers and 40 child care workers. Each home has 1 social worker and 5-6 child care workers assigned to it. Each coordinator is assigned responsibility for three homes, and visits

the homes on a rotating basis. Child care workers and coordinators are supervised by the assistant director of group homes. Social workers are supervised by the social worker supervisor.

The parties agree that only the social workers and coordinators are professional employees. The parties disagree over whether the petitioned-for unit of non-professional employees only is appropriate. They have asked us to determine the scope of the appropriate unit and to conduct an election pursuant to our rules.

N.J.S.A. 34:13A-5.3 requires us to make unit determinations with "due regard for the community of interest among the employees concerned." We also consider factors such as undue fragmentation and proliferation of units, employee choice, and history of negotiations.[1/]

Either proposed unit would contain employees who share a community of interest. Either configuration would be an appropriate unit. We have often certified units containing non-professionals alone as well as units containing professionals and non-professionals. Because of the statutory requirement that

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1/ Neither our decision in State of New Jersey, P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972), nor the Supreme Court's affirmance, 64 N.J. 231 (1974), dictate a finding that all employees of an employer constitute in every instance the appropriate unit. State of New Jersey, P.E.R.C. No. 50, NJPER Supp. 176 (¶50 1971), cited with approval by the Supreme Court in its review of P.E.R.C. No. 68, found separate units of non-professional employees to be appropriate.

permits professional employees to choose not to be included in a unit with non-professional employees, N.J.S.A. 34:13A-6(d),[2/] it is always possible that either non-professionals or professionals will have to be in a separate unit. Thus, separate units could never be deemed inappropriate.

There is no history of negotiations. Nor is there an existing unit structure that the petitioner seeks to disturb. Contrast Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981) (history of separate units makes proposed consolidation of professional and non-professional employees inappropriate). There is no real danger of undue fragmentation or proliferation of units. It appears that the petitioned-for unit is one of only two possible units.

We will not ignore the employer's preference for a single unit. But we must balance that against the desires of the petitioning non-professional employees. The employer's proposal asks us to impose on the petitioner a unit broader than the one it petitioned for, even though the petitioned-for unit is appropriate. It also would give to the professional employees, who have not petitioned for representation, a voice in deciding the negotiations

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2/ N.J.S.A. 34:13A-6(d) provides, in part, that:

> except where dictated by established practice, prior agreement, or special circumstances, no unit shall be appropriate which includes ...(2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit....

unit structure, not only for themselves, but for the non-professional employees as well.

The lead case cited by the Director is instructive, not only for its similarities but for its differences. In Piscataway Tp. Bd. of Ed. P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984), the majority representative of the teachers petitioned to add to its unit of professional employees the Board's non-professional employees whom its affiliates already represented in separate units. The Board opposed the petition claiming that the employees did not share a community of interest and because they had previously been represented in separate units. Finding no compelling reasons for denying the employees the opportunity to express their desires for or against unified representation, we permitted the non-professional employees to vote on whether they wished to be represented in the proposed unit. In addition, the professional employees were given the option of being or not being in the same unit with the non-professional employees.

Piscataway is similar to this case in that different unit structures were appropriate -- separate professional and non-professional units or a combined unit of professionals and non-professionals. But Piscataway is different from this case in

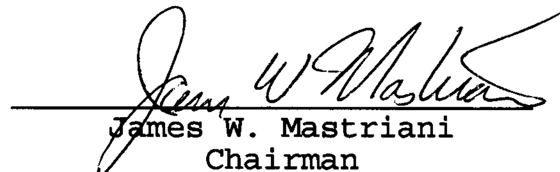
that the professional employees here are not currently represented nor have they petitioned to be represented.[3/]

For all the reasons set forth in this decision, we conclude that the question Judge Boyle asked must be answered in the affirmative: the negotiations unit sought by CWA is an appropriate unit for purposes of collective negotiations. This result is consistent with N.J.S.A. 34:13A-6(d) and our well-established case law concerning the appropriateness of negotiating units. We remand to the Director to conduct an election consistent with this opinion.

ORDER

Review is granted. This matter is remanded to the Director of Representation to conduct an election among the petitioned-for employees.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino was not present.

DATED: March 29, 1994
Trenton, New Jersey
ISSUED: March 30, 1994

3/ In Franklin Tp., P.E.R.C. No. 75, NJPER Supp. 326 (¶75 1973), we rejected the employer's argument that an earlier brief period of representation in a mixed unit of blue and white collar employees should prevent an election among a petitioned-for unit of blue collar employees only. As in this case, no organization sought to represent the broader unit of employees that the employer was urging to be appropriate.