P.E.R.C. NO. 97-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-96-74

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, AFT, AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the State of New Jersey's request for review of the Director of Representation's interlocutory decision directing an election. The Council of New Jersey State College Locals, AFT, AFL-CIO petitioned to represent a negotiations unit of adjunct faculty employed at seven State Colleges and one State University. The State did not consent to an election among the employees in the petitioned-for unit. The Commission finds that the State has not met the standards for granting a request for review. In light of this decision, the Commission does not need to consider the employer's request for a stay of further proceedings.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Peter Verniero, Attorney General (Mary L. Cupo-Cruz, Senior Deputy Attorney General)

For the Petitioner, Dwyer & Canellis, attorneys (Brian Miller Adams, of counsel)

DECISION AND ORDER

On December 7, 1995, the Council of New Jersey State College Locals, AFT, AFL-CIO, filed a petition seeking to represent a negotiations unit of approximately 2,300 adjunct faculty employed at seven State Colleges and one State University: Rowan College of New Jersey, Jersey City State College, Kean College of New Jersey, William Paterson College of New Jersey, Ramapo College of New Jersey, Richard Stockton College of New Jersey, the College of New Jersey (formerly Trenton State College) and Montclair State University. Adjuncts are currently unrepresented. The employer, the State of New Jersey, did not consent to an election among the employees in the petitioned-for unit.

After a lengthy investigation during which the parties were given opportunities to present facts and arguments, the

Director of Representation notified the parties of his preliminary finding that the petitioned-for unit was appropriate and that there should be an election among adjunct faculty to determine whether they wished to be represented by the Council. The Director invited the parties to submit argument and supporting evidence challenging his preliminary findings. The State submitted a letter challenging the Director's conclusions, but did not submit any additional supporting evidence.

On December 6, 1996, the Director directed an election among adjunct faculty. D.R. No. 97-5, 23 NJPER ___ (¶_____ 1996). He found that there are approximately 2,500 adjunct faculty in the proposed statewide unit; they are public employees, not independent contractors or consultants; and regularly employed adjuncts share a statewide community of interest. He ordered that an election be scheduled in a unit defined as:

> All adjunct faculty employed by the State of New Jersey at the State Colleges (including Montclair University) who commenced employment for at least their second semester within the past two academic years, and who express a willingness to be rehired to teach either the Spring 1997 semester or during the 1997-98 academic year.

The first ballot question was to be, "Are you willing to accept employment as an adjunct with the State of New Jersey for either the spring 1997 semester or a semester during the 1997-98 academic year?" Employees who answered yes would vote on a second ballot question:

> Do you wish to be represented for purposes of collective negotiations by the Council of New Jersey State College Locals, AFT, AFL-CIO?

The Director rejected the employer's request for an evidentiary hearing. He found that the employer had not articulated any significant community of interest factors that had not been developed through affidavits and other submissions, or identified any disputed and material issues of fact which, if resolved in the employer's favor, would demonstrate a lack of community of interest among employees in the petitioned-for unit. The Director specifically accepted as true all facts proffered by the employer and found no material facts in dispute.

On December 16, 1996, a conference was held with a Commission staff agent to discuss implementing the direction of election. The parties then entered into a Memorandum of Agreement setting the election date and the date for providing voter eligibility lists. They also agreed to revise the definition of those eligible to vote. The agreed-upon eligibility definition now provides:

> All adjunct faculty teaching credit courses during the Spring 1997 semester, employed under at least their second contract of employment since the fall of 1995, with Rowan College, Jersey City College, Kean College, William Paterson College, Ramapo College, Stockton College, The College of New Jersey (formerly Trenton State College) and Montclair State University.

The parties further agreed that by entering into the Memorandum of Agreement, the employer did not waive its right to seek Commission review of D.R. No. 97-5.

On December 19, 1996, the employer requested review of the Director's decision. It has also requested a stay of all proceedings pending consideration of the request. On December 31, the Council filed a statement opposing the requests for review and for a stay.

N.J.A.C. 19:11-8.1 provides that the filing of a request for review does not automatically stay a direction of election. Accordingly, this case has continued to be processed pending these requests.

Under N.J.A.C. 19:11-8.2, a request for review will be granted only for one or more of these compelling reasons:

> 1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
>
> 2. 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. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
>
> 4. An important Commission rule or policy should be reconsidered.

The employer argues that the standards for eligibility to vote and for inclusion in the petitioned-for unit are erroneous and should be reconsidered. The employer further argues that the second ballot question is improper because a voter may wish to be represented for purposes of negotiations but may not wish to be represented by the Council. Finally, the employer argues that it

was prejudicial error for the Director to refuse to convene a hearing to develop a complete record regarding the status of adjuncts at the eight individual State colleges; and that based on an incomplete record, the Director has erroneously concluded that adjuncts are eligible to organize and may form a statewide negotiations unit.

The Council responds that the employer agreed on the December 16 Memorandum of Agreement to modify voter eligibility and thus its concerns have been mooted. As for the second ballot question, the Council asserts that the employer did not object to the language at the December 16 conference. Finally, the Council contends that the employer has not identified any substantial and material factual issues requiring a hearing. It notes that the employer was afforded an opportunity to refute the Director's preliminary findings.

In order to address the employer's concerns, the parties entered into an agreement modifying the eligibility standards in the original direction of election. The employer is arguing against standards that both parties agreed in the December 16 Memorandum of Agreement would no longer apply. Eligibility is no longer based on having taught at least one previous semester within the last two years and being willing to teach one of the next three semesters. Voters will now have to have taught at least two semesters since the fall of 1995 and one of those semesters must be during the spring of 1997. To the extent the

employer is still arguing that the modified standards do not guarantee sufficient continuity of employment, we note that the broader standards initially used by the Director were approved by the Supreme Court in Somerset Cty. College, P.E.R.C. No. 87-129, 13 NJPER 361 (¶18150 1987), aff'd NJPER Supp.2d 185 (¶164 App. Div. 1988), aff'd S. Ct. Dkt. No. A-60 (1/24/89).

We also reject the employer's objection to the second ballot question. This agency has conducted elections since 1968 and asked public employees whether they wish to be represented for purposes of collective negotiations by a petitioning employee organization. That ballot language is identical to that used by the National Labor Relations Board, which has been conducting representation elections since 1935. Where there is only one petitioning organization, employees are given a clear choice. They may indicate that they choose to be represented for purposes of collective negotiations by the petitioning organization or they may indicate that they do not choose to be represented for purposes of collective negotiations by that organization. We have discerned no voter confusion from the traditional ballot choice. To ask voters separately whether they desire collective negotiations in the abstract might create confusion where it has not existed.

We now address the issue of an evidentiary hearing. The public interest requires that representation petitions be processed as quickly as possible so as to reduce the uncertainty

and potential instability that may result when representation questions remain undecided. See State of New Jersey (NJSEA), P.E.R.C. No. 81-127, 7 NJPER 256 (¶12115 1981), aff'd NJPER Supp.2d 123 (¶104 App. Div. 1982)(denying request for hearing where no material facts in dispute); cf. Crown Cork & Seal Co. v. NLRB, 659 F.2d 127, 108 LRRM 2224 (10th Cir. 1981)(public policy favors expeditious processing of representation petitions and justifies practice of conducting administrative investigations); NLRB v. Golden Age Beverage Co., 415 F.2d 26, 71 LRRM 2924, 2928 (5th Cir. 1969)(post-election hearing to be held only where substantial and material factual issues so as to resolve expeditiously questions preliminary to establishment of bargaining relationship and to preclude protracted delay). Accordingly, questions in representation cases will be decided by administrative investigation unless substantial and material factual issues exist which must be resolved after a hearing, or where the Director believes, within his or her discretion, that a hearing will best serve the interests of administrative convenience and efficiency. N.J.A.C. 19:11-2.6. Compare Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995)(guidelines for determining whether there exists genuine issue with respect to material fact warranting denial of summary judgment). Because the public interest protected by the Employer-Employee Relations Act would be compromised by permitting unnecessary delay, there is no

basis for scheduling a hearing now, over one year after the filing of the petition, if there are no substantial and material factual issues in dispute.

This petition was filed on December 7, 1995. A conference with a Commission staff agent was scheduled for January 10, 1996 and both parties were invited to submit statements of position. On February 28, the employer filed a statement of position and requested the right to augment its position that adjuncts are not public employees. On March 11, the Council filed its statement of position. On April 9, the employer filed a letter brief and supporting certification. On May 22, the Director asked the employer for further information and documentation about the entire State college system. On June 7, the employer requested an extension of time to respond because of the "extensive" information requested and because of the "breadth of the data requested." On June 11, over the Council's objection, the Director granted the request. On July 19, the employer responded to five of the nine categories of questions asked by the Director. On August 19, the employer responded to the remaining categories.

On October 2, 1996, the Director sent the parties his preliminary findings and conclusions. He invited the parties to submit documents, affidavits or other evidentiary materials and a letter brief in support of their positions. On October 16, over the Council's objection, the Director granted the employer's request for an extension of time to file a response. On November

7, the employer filed its response. On December 6, the Director issued his decision and direction of election. D.R. No. 97-5. At no point did the employer identify any substantial or material facts in dispute and in its request for review the employer has not identified any factual errors in the Director's opinion.

The employer argues that the administrative investigation did not permit it to disclose all legitimate facts and pertinent deviations which it maintains will ultimately demonstrate that adjuncts at the State colleges are not eligible for collective negotiations under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and that a single statewide unit is inappropriate. We disagree.

Both parties were given numerous opportunities to submit certifications and other documents in support of their factual positions. Only the employer made written factual submissions and the Director accepted all of its facts as true. There are no substantial or material facts in dispute.

The employer cites Somerset Cty. College, P.E.R.C. No. 82-68, 8 NJPER 106 (¶13043 1982), rev'd and rem'd NJPER Supp.2d 131 (¶112 App. Div. 1983), for the proposition that a hearing is required. In that case, the then Director of Representation applied Rutgers, the State Univ., P.E.R.C. No. 76-49, 2 NJPER 229 (1976), aff'd NJPER Supp.2d 42 (¶30 App. Div. 1978), certif. den. 76 N.J. 243 (1978) (coadjuntant faculty are employees within

meaning of Act and could constitute appropriate negotiations unit) and ordered an election among adjunct faculty. We denied review, finding that the parties had not placed in dispute any factual issues warranting a hearing. The Appellate Division reversed and ordered a hearing. The Court stated that unlike Rutgers, the community of interest requirement was in dispute, had not been addressed adequately, and could not be addressed adequately on the record that had been developed. A hearing was held and we issued another decision. P.E.R.C. No. 87-129, 13 NJPER 361 (¶18150 1987). We examined each of the factors deemed relevant by the Appellate Division and reaffirmed the earlier community of interest determination. That decision was affirmed by both the Appellate Division and the Supreme Court. NJPER Supp.2d 185 (¶164 App. Div. 1988), aff'd S. Ct. Dkt. No. A-60 (1/24/89).

Much has transpired since the 1983 decision relied on by the employer. The issues of employee status and community of interest for adjunct faculty have been heard and decided by this agency, the Appellate Division, and the Supreme Court. The issues are no longer novel. While the facts in this case are undoubtedly different, the parties were given numerous opportunities to present those facts and to explain why the mode of analysis developed in the precedents is distinguishable.

On the issue of employee status, the employer points out that the adjuncts at the State colleges are not formally

evaluated, do not participate in faculty meetings, and are not compensated differently based upon their educational level or length of service. These facts are undisputed and in the record. A hearing is not needed to place them in the record. The Director considered the facts as submitted by the employer and found that adjunct faculty nevertheless are employees within the meaning of the Act. His determination accords with the appellate decisions in Somerset and there are no compelling reasons for interrupting the election process to review that determination.

On the issue of community of interest, the employer asserts that with the dissolution of the Department of Higher Education in 1994, the operation and management of the State colleges differs substantially from the time when faculty negotiations units at each College were joined into a statewide unit. The Director considered the longstanding policy of the Courts and this Commission favoring broad-based negotiations units. State v. Prof. Ass'n, 64 N.J. 231 (1974); In re Matters of State, 114 N.J. 316, 323-324 (1989). He also considered the statewide unit structure of regular faculty at the State colleges. The 1994 dissolution of the Department of Higher Education may ultimately affect aspects of governance at the State colleges. At this time, however, the Legislature has declared that:

> [t]he Governor shall continue to function as the public employer under the "New Jersey Employer-Employee Relations Act," ... and through the Office of Employee Relations act

> as the chief spokesperson on behalf of the State colleges with respect to all matters under negotiation. One representative of the State college sector shall be designated by the Governor as a member of the negotiating team, upon recommendation by the State colleges. [N.J.S.A. 18A:64-21.1]

Thus, the statewide faculty unit remains intact and it is consistent with that unit structure to have a statewide adjunct unit. The Director's preliminary decision explained why he believed a statewide unit is appropriate and invited the parties to submit additional facts or argument. The employer's response was limited to its assertion that the 1994 legislative changes that enhanced the autonomy and individuality of the State colleges required an evidentiary hearing. We disagree. It would be contrary to the purposes of the Act to delay a representation election because one party or the other asserts that a hearing is needed to present certain facts when both parties had numerous opportunities to place facts in the record by way of documents and certifications and neither party has identified disputed issues of fact requiring a hearing. We have no basis to find that this is a situation where facts could not come into a record through documentary submissions.[1/]

1/ The employer asserts that the Director relied on information that it did not submit to him as part of the investigation. However, all facts relied on were presented to both parties by way of the Director's preliminary findings. Both parties thus had the opportunity to dispute the accuracy of those facts and neither party did do.

The standards for granting a request for review have not been met. Accordingly, we deny review of the Director's interlocutory decision ordering an election. In light of this decision, we need not consider the employer's request for a stay of further proceedings.

ORDER

The request for review is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: January 30, 1997
Trenton, New Jersey
ISSUED: January 30, 1997