D.R. NO. 2020-7

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

In the Matter of

CITY OF JERSEY CITY,

Public Employer,

-and-

Docket No. CU-2016-027
CU-2016-028
CO-2016-221
CO-2016-236

JERSEY CITY PUBLIC EMPLOYEES, INC.,
LOCAL 245,

Petitioner,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION,
LOCAL 641,

Intervenor.

SYNOPSIS

The Director of Representation dismisses two clarification of unit petitions and two unfair practice charges filed by the Jersey City Public Employees Inc., Local 245 (Local 245). Local 245 maintains that when the former Jersey City Incinerator Authority (JCIA) ceased operations and its employees were transferred to the City's Department of Public Works, it should have become the majority representative of the former JCIA employees. The Director found that a representation petition, not a clarification of unit petition, would be the appropriate way to add employees to Local 245's unit. The Director also dismisses two related unfair practice charges.

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Appearances:

For the Employer,
Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys
(Arthur R. Thibault, of counsel)

For the Petitioner,
Castronovo & McKinney, LLC, attorneys
(Thomas A. McKinney, of counsel)

For the Intervenor,
Kroll, Heineman, Carton, LLC, attorneys
(Raymond G. Heineman, Jr., of counsel)

DECISION

On April 11, 2016, the Jersey City Public Employees Inc., Local 245 (Local 245) filed a Clarification of Unit Petition

seeking to clarify its collective negotiations unit of employees in all divisions of the City of Jersey City Department of Public Works (City or DPW) to include "the newly added employees from the former Jersey City Incinerator Authority (JCIA) and seasonal employees." On April 28, 2016, Local 245 filed a second Clarification of Unit Petition withdrawing its request to include seasonal employees in its unit. Local 245 relies on the recognition provision of its current CNA with the City specifying that it is the exclusive representative for all employees within all divisions of DPW.

International Brotherhood of Teamsters Union Local No. 641 (Local 641) opposes the petition, contending it is and has been the exclusive representative of the former JCIA employees. The City also opposes the petition, arguing that Local 245's recognition provision excludes the petitioned-for employees, and that former JCIA employees cannot be added to Local 245's unit without an election.

On April 18 and 28, 2016, Local 245 filed two unfair practice charges against the City (Dkt Nos. CO-2016-221, 236, respectively). The charges allege that the City unlawfully signed memoranda of agreement with Local 641, violating section 5.4 a(1), (2), (5) and (7)[1/] of the New Jersey Employer-Employee

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, (continued...)

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). A discussion of these charges may be found at page 14 of this decision.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On June 22, 2018, a Commission staff agent issued a letter to the parties requesting information about the duties of employees in both units, the structure and make-up of the former JCIA and DPW, the negotiations history of the units, and differences in the terms and conditions of employment among employees of both units. The parties were required to submit facts in certifications or sworn affidavits from individuals with personal knowledge of those facts. The City filed a certification of Crystal Fonseca (Fonseca), its supervising administrative analyst.[2/] Local 641 filed a certification of James Kilkenny (Kilkenny), a vice president. Local 245 did not file a certification or affidavit.

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization.(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ Fonseca previously held the position of Executive Assistant to the Director of Public Works with the City, as well Executive Assistant to the CEO of the former JCIA for thirteen years.

No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I find the following facts.

Before April 1, 2016, the JCIA was an autonomous "body,"[3/] separate from the City, and final decisions were made by its CEO. While the City historically approved the JCIA's budget, it did not exercise control over its day-to-day operations. Local 641 has been the majority representative of all blue collar JCIA employees since 1980. The collective negotiations agreement (CNA) in effect between Local 641 and the JCIA immediately preceding the JCIA's dissolution ran from January 1, 2014 through December 31, 2016.

On October 14, 2015, the City approved an ordinance dissolving the JCIA and transferring all of its functions, responsibilities, and employees to the City, commencing April 1, 2016. In anticipation of the merger, Local 641 and the City signed a memorandum of agreement (MOA) to ensure the continuation of the CNA under the City's auspices and to extend the

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3/ See City of Jersey City, P.E.R.C. No. 84-53, 9 NJPER 679 (¶14297 1983), inferentially adopting a Hearing Examiner's recommended finding that the JCIA is an autonomous body.

agreement's terms.[4/] This MOA was approved by the City Council on May 25, 2016. The MOA's recognition clause provides:

> The City hereby recognizes the Union as the exclusive bargaining representative of all blue-collar employees as set forth in Article I and assigned to the Division of Neighborhood Improvement and Sanitation in the Department of Public Works of the Agreement and excluding those employees identified in Article 1 of the Agreement.[5/]

Article 1, Sections A and B of the current CNA between the City and Local 245[6/] provides:

> A. The City hereby recognizes the Union as the exclusive representative on behalf of the following employees in the City's employ, in accordance with the designated jurisdiction of said Union.
>
> 1. Department of Public Works; all Divisions;
> 2. Department of Water, but excluding the Division of Billing and Collections;
> 3. Department of Recreation; all divisions

4/ This MOA adopted the terms of the CNA between Local 641 and the JCIA and extended the term from December 31, 2016 until December 31, 2018.

5/ Article I of the CNA between the JCIA and Local 641 recognizes Local 641 as the exclusive representative of all blue-collar employees employed by the JCIA at its Jersey City location and excludes casual employees, confidential employees, managerial executives, craft and professional employees, supervisors, foremen, office clericals, white-collar employees and guards.

6/ Their agreement extends from January 1, 2015 through December 31, 2019.

> B. Excluded from this unit shall be employees statutorily excluded by the New Jersey Employer/Employee Relations Act, **those represented in other bargaining units**[7/], and all employees working less than (20) hours per week. (Emphasis added).

Local 641 had represented about eighty (80) JCIA employees in about fifteen (15) titles[8/] in its JCIA collective negotiations unit from 1980 until the 2016 dissolution (Kilkenny certification para. #6-7; Fonseca certification, para. #8). Local 641 continues to represent about (eighty) 80 employees in the titles, laborer, equipment operator, heavy equipment operator, sanitation inspector, and senior sanitation inspector. Local 641 employees' work, workload, and supervision have not changed since JCIA's dissolution. Former JCIA employees' supervisors continue their supervision at DPW.

7/ In addition to Local 641 and Local 245, the City also employs in the DPW employees represented by the Jersey City Supervisors Association and International Union of Operating Engineers, Local 68-68A-68B, AFL-CIO (representing DPW's Boiler Operators). Inasmuch as this exclusionary provision could contemplate JCIA employees represented by Local 641 (for whom the City was the funding source), it would, independently of any other legal justification, render this petition inappropriate. See Wayne Tp. Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980); Warren Tp., D.R. No. 82-10, 7 NJPER 529 (¶12233 1981); page 9, infra.

8/ 1)heavy equipment operator, 2)heavy equipment operator/bulldozer, 3)lead mechanic, 4)mechanic, 5)welder, 6)lead utility mechanic, 7)utility mechanic, 8)sweeper operator, 9)equipment operator trailer, 10)equipment operator, 11)maintenance, 12)demo laborer, 13)laborer, 14)lead yard attendant, and 15)yard attendant.

Employees represented by Local 641 are required to possess a commercial driver license (CDL). Certain Local 641 employees are required to receive and maintain specialized training and certifications to operate heavy equipment and certain work tools (Fonseca certification, para. #16). It is uncontested that the vast majority of Local 245 unit members are not licensed or certified to perform Local 641 functions, nor are they required to possess such qualifications (Fonseca certification, para. #19). Also, Fonseca and Kilkenny certify that Local 641 members are "essential" employees, i.e., during an adverse weather event or other type of emergency, they must report to work within 30 minutes of being so advised. Local 245 unit employees have no similar obligation. Some unspecified JCIA Local 641 employees who failed to report when called in emergencies were fired (Kilkenny certification, para. #13). Local 641 members are also subject to random drug testing and to mandatory drug testing after an accident (Kilkenny certification, para. #14). Local 245 unit employees are not subject to drug testing.

About 180 employees in dozens of different titles are included in the unit represented by Local 245. Among those titles are laborers, equipment operators, heavy equipment operators, and sanitation inspectors--titles that are also represented by Local 641. Although the job descriptions for these shared titles are identical, there are significant

differences between the two separately represented groups of employees.

The average salary for all Local 641 unit members is $47,902.02 while the average salary for all Local 245 members is $42,477.70. Fonseca and Kilkenny certify that although Local 641 and Local 245 employees report to the same building, they work different shifts. Local 245 employees all work a standard daytime shift, five days per week. Local 641 employees work either a ten (10) hour shift, four (4) days per week, or they work overnight shifts. Fonseca and Kilkenny certify that absent unusual circumstances, employees represented by Local 245 and Local 641 do not work together on any tasks or projects. Employee functions among the two units have not been integrated.

ANALYSIS

A threshold issue in this matter is whether a unit clarification petition is the appropriate mechanism by which former JCIA employees may be included in Local 245's collective negotiations unit. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977), explains the circumstances under which a unit clarification petition is appropriate:

> Clarification of unit petitions are designed to resolve questions concerning the exact composition of an existing unit of employees for which the exclusive representative has already been selected . . . . Occasionally a change in circumstances has occurred, a new title may have been created . . . [or] the employer may have created a new operation or

> opened a new facility [which would make] a clarification of unit proceeding appropriate . . . . Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or diminish the scope of the negotiations unit for reasons other than the above.
> [3 NJPER at 251]

See also Rutgers, The State University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984).

The clarification of unit process is intended to resolve uncertainties concerning the composition of an existing negotiations unit as it relates to the identification of titles within a general classification of employees. The clarification of unit process is also appropriate where a title's job functions have changed or a new title has been created, from which we might find that the changed or new title could be identified within the parties' described unit. Clearview Reg. Bd. of Ed. However, absent changed circumstances, where the parties specifically agree to exclude titles from a unit, a clarification of unit petition is inappropriate to add those titles to that unit, and it will be dismissed. Wayne Tp. Bd. of Ed.; Warren Tp. Finally, if a clarification of unit petition is not appropriate or timely, employees may be added by the Commission to an existing unit only through the filing of a representation petition. See N.J.A.C. 19:11-1.1.

"Changed circumstances" may be described as an occurrence that alters an employee's job functions and may result in the

inclusion of such function within the intent of the unit description. Similarly, an employer may create a new operation or open a new facility, and then staff the operation or facility with employees who function similarly to currently represented employees. Clearview Reg. Bd. of Ed. Here, no circumstances have changed because no title's job functions have changed; no new facility has opened and no new operation has been created. Former JCIA employees have continued uninterruptedly to perform (as City employees) their unchanged job duties, without overlap or intermingling of work with Local 245 unit employees.

Many situations may require us to re-examine the appropriateness of existing collective negotiations units and proposed consolidation of units. Employers sometimes consolidate or regionalize operations, leading to a re-examination of the appropriate unit. See, e.g., School District of the Chathams, D.R. No. 89-2, 14 NJPER 525 (¶19223 1988) (consolidation of support staff of two previously separate districts into a single unit). Although we consider the community of interest among the groups to be consolidated, that is not the only factor. We also consider the history of representation of the respective units; whether the incumbent representatives are different organizations and whether the organizations seek to preserve their units; the negotiated differences in their terms and conditions of employment; and whether the proposed combined entity is virtually

required because the employees have functionally been so intermingled that their separate identities are lost. We also consider whether the maintenance of separate units will interfere with the employer's ability to run its operations effectively. Gloucester Cty., D.R. No. 2007-10, 33 NJPER 45 (¶18 2007). Even if the dissolution of the JCIA were to be considered a "changed circumstance," the consolidation of the former JCIA employees into Local 245's unit would not be appropriate.

The facts demonstrate that the former JCIA employees should remain in a separate collective negotiations unit represented by Local 641. Notwithstanding that both groups of employees are now working in the City's DPW, little or no community of interest exists among the employees represented by Local 641 and those represented by Local 245. Local 641 employees are responsible for the City's garbage collection, recycling collection, snow plowing, and demolition -- the same functions they performed while employed at the JCIA. Local 245 employees do not perform those functions, do not work on the same tasks or projects as Local 641 employees, and do not operate the same equipment as Local 641 employees.

Differences in their terms and conditions of employment also reveal a differing community of interest. Local 641 unit members receive an average of at least $5,500 more per year in wages than Local 245 employees; Local 641 employees are required to possess

certain licenses and certifications that are not required of Local 245 employees; Local 641 employees are exclusively subject to random drug testing; and they are required to report to work during adverse weather events and other emergencies and Local 245 employees are not.

Also, the Commission has consistently held that absent agreement by the incumbent representative to a consolidation of its existing unit into another unit, negotiations units with long and stable negotiations histories will not normally be disturbed if their separate identities can be maintained. See Passaic County, P.E.R.C. No. 87-123, 13 NJPER 298 (¶18125 1987); and Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12229 1981).

In Sussex Cty., D.R. No. 91-11, 16 NJPER 572 (¶21251 1990), the Communications Workers of America (CWA) sought to represent an existing collective negotiations unit of all blue collar employees and white collar employees of the Sussex County Board of Freeholders. The County abolished the County Welfare Board as part of a structural reorganization. The Welfare Board employees, who were represented by CWA, were transferred to the Welfare Division within the County Department of Human Services. Their duties remained unchanged. The County refused to adhere to the terms of CWA's existing collective negotiations agreement covering the Welfare Division employees and attempted to

establish new salary ranges for the Welfare Division employees. CWA then filed an unfair practice and requested interim relief. The Commission Designee determined that the County would likely be found to be a successor employer and ordered the County to abide by the terms of CWA's contract with the former Welfare Board and to continue to recognize CWA as the exclusive representative of the former Welfare Board employees. County of Sussex, I.R. No. 90-12, 16 NJPER 122 (¶21046 1990). The Director determined that because the Welfare Board employees enjoyed a community of interest among themselves, as well as a long and stable history of negotiations in a separate unit, their consolidation into another unit would be inappropriate. 16 NJPER 573.

In Gloucester Cty., D.R. No. 2007-10, 33 NJPER 45 (¶ 18 2007), the Director of Representation dismissed a clarification of unit petition filed by Gloucester County seeking to add employees formerly employed by the Gloucester County Board of Social Services, which had been abolished, into other existing County units. Local 1085, which represented the former Board of Social Services employees, opposed the petition. The Director determined that after the Board of Social Services was shut down, the unit appeared to continue to be a separate identifiable unit; that the employees' functions were not fungible with those of other County jobs; and maintaining separate units would not

interfere with its rationale for reorganization, which was common supervision. Id.

Local 641 and Local 245 have historically represented separate negotiations units; Local 641 has represented the former JCIA employees since 1980, and Local 245 has represented its members since the 1970's. Local 641 and the City oppose consolidation. No facts suggest that maintaining separate units interferes with the City's ability to effectively run its operation. Functionally, the employees of the respective units are not intermingled, thereby preserving each unit's separate identity.

Local 245 has filed two unfair practice charges against the City (Dkt. Nos. CO-2016-221/236). The charges allege that the City's signing of two MOAs effectively recognizing Local 641 as the majority representative of the former JCIA employees, repudiates Local 245's contractual recognition article designating it as the exclusive representative for "Department of Public Works, All Divisions," violating section 5.4a(1), (2), (5), and (7) of the Act. The two charges, filed ten days apart, are virtually identical; the only difference is that the first charge alleges that the City unlawfully signed an initial MOA with Local 641 and the second charge alleges that the City unlawfully signed a second MOA with Local 641. As a remedy, both

charges request that the former JCIA employees be placed in Local 245's unit.

Local 245 has not accounted for pertinent language in its CNA with the City that excludes "those represented in other bargaining units." As I noted in the context of reviewing the clarification of unit petitions filed by Local 245, it is reasonable to infer that the City, as the funding source for the JCIA, contemplated the exclusion of those employees from Local 245's unit when negotiating the latter's recognition article.

Also, the City may have been obligated to continue to recognize Local 641 as the majority representative after it absorbed the former JCIA employees. See Sussex Cty.; Weiner v. Essex Cty., 262 N.J. Super. 270 (App. Div. 1992). Local 245 has not alleged facts (beyond the parameters of the clarification unit determination in this case) that implicate any unfair practice section set forth in its charges. Accordingly, I find that further processing of the unfair practice charges is unwarranted and dismiss them.

Finally, the result in these matters is consistent with the strong policy of the Act favoring employee free choice in determining what, if any, employee organization should represent employees. N.J.S.A. 34:13A-5.3. If Local 245 seeks to represent the former JCIA employees, they may do so by obtaining the

requisite showing of interest and filing a timely representation petition. See N.J.A.C. 19:11-1.1, 1.2.

ORDER

The clarification of unit petitions and unfair practice charges are dismissed.

/s/Jonathan Roth
Director of Representation

DATED: October 1, 2019
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by October 11, 2019.