

D.R. No. 2019-13

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

In the Matter of

LAWRENCE TOWNSHIP,

Public Employer,

-and-

Docket No. CU-2019-16

AMERICAN FEDERATION OF STATE  
COUNTY AND MUNICIPAL EMPLOYEES,  
COUNCIL 63, LOCAL 2257,

Petitioner.

**SYNOPSIS**

The Director of Representation dismisses a clarification of unit petition (petition) filed by AFSCME Council 63, Local 2257 (AFSCME). The petition sought clarification of a unit of specified white collar employees of Lawrence Township (Township) to include the job title fire prevention specialist. AFSCME's unit was narrowly defined by a recognition provision in the collective negotiations agreement that listed specific titles included in the unit and did not contain generic language encompassing the fire prevention specialist title. Although AFSCME generally asserted that the fire prevention specialist performs duties similar to the fire protection inspector, which is a title specifically included in the recognition provision, AFSCME did not set forth any specific similar duties nor submitted a certification from a person with knowledge identifying any specific similar duties. Thus, the Director dismisses the petition because the recognition provision does not specifically or generically identify or include the fire prevention specialist title as part of the unit.

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Appearances:

For the Public Employer,  
(Kevin P. Nerwinski, Esq.)

For the Petitioner,  
(Ron McMullen, Council President)

**DECISION**

On January 9 and 11, 2019, AFSCME Council 63, Local 2257 (AFSCME) filed a clarification of unit petition (petition), and amended petition,<sup>1/</sup> seeking to clarify its collective negotiations unit of specified white collar employees of Lawrence Township (Township) to include the job title, fire prevention specialist.

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<sup>1/</sup> The petition filed on January 9, 2019 included no attachment. The January 11th amended petition consists of the same petition, with attachments identifying the various titles in the unit and the proposed reason for clarification.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6.

On January 11, 2019, we asked the parties to file position statements. AFSCME did not. On January 16, 2019, the Township filed a letter asserting that the fire prevention specialist has been a non-unit title since 1995 or earlier; that the salary for the title was established by ordinance; that written offers of employment to applicants for the title included the advice that it is a "non-union title;" and that employees in the title agreed to those terms.

The Township also provided a copy of the ordinance setting the fire prevention specialist title salary, and a copy of the current collective negotiations agreement (CNA) with AFSCME extending from January 1, 2017 through December 31, 2019. The recognition provision defines the unit as follows:

[All employees in classifications appended hereto as Appendix A who are employed by the Township, and for such additional classifications as the parties may later agree to include, excluding supervisors, managerial executives and confidential employees.

Appendix A of the CNA consists of a salary schedule for approximately sixty-six separate titles, including fire protection inspector, electrical inspector, senior building inspector, housing inspector, plumbing inspector, fire sub-code

official, building sub-code official, and public safety telecommunicator. It does not list fire prevention specialist.

We asked the parties to provide more information relevant to the proposed clarification. On January 17, 2019, a staff agent conducted an investigatory conference with the parties. AFSCME asserted that the duties of the fire prevention specialist were similar to those of the fire protection inspector, a unit title. On January 29, 2019, AFSCME filed a letter asserting that the duties of the fire protection inspector "may" be similar to the duties of the fire sub-code official, another unit title. AFSCME provided no facts about potentially similar duties among the fire prevention specialist title and either the fire protection inspector title or the fire sub-code official title.

On January 28, 2019, the Township filed a letter/certification by Kevin Nerwinski, the Township's Municipal Manager. In that response, Nerwinski certified that the duties of fire prevention specialist, which have not changed since at least May 18, 2018, are: performing inspections for compliance with the Uniform Fire Code (UFC); performing fire prevention inspections of commercial properties; performing fire safety permit inspections for tents, food trucks, and gatherings; issuing notices of violation for non-compliance with the UFC; performing inspections of fire sprinklers and fire alarms and confirming they are tested and maintained in accordance with the original certification; issuing fire lane parking tickets; and

reinspecting commercial properties that have been issued violations to confirm that the violations have been properly abated. The Township asserts that the duties of the fire protection inspector are: performing inspections and evaluations of new construction for compliance with the fire protection sub-code under the Uniform Construction Code (UCC); signing off on required UCC permits; and preparing recommendations for temporary and final certificates of occupancy. The Township also asserts that the fire protection inspector has duties similar to and reports to the fire sub-code official. The Township also provided Civil Service Commission job descriptions for both fire prevention specialist and fire protection inspector titles.

On February 1, 2019, we again asked the parties to provide additional information relevant to the proposed clarification, including identifying job duties, if any, performed by the fire prevention specialist and fire protection inspector that are the same or similar. AFSCME was specifically asked to provide certified responses, exhibits, and work samples. Both parties elected to rely on their earlier submissions and neither submitted additional information.

I take administrative notice of our having issued a Certification of Representative on August 16, 1985 to "A.F.S.C.M.E. AFL-CIO" for a collective negotiations unit of all "white collar non-professional employees" of the Township, with an attached list of (example) titles, included. The parties'

most recent CNA no longer defines the unit broadly or generically; rather, it defines the unit to include only those titles specifically listed.

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Offers of employment (to individuals) specifying that the title to be held is a "non-unit" title and individual acceptances of employment with that condition neither govern nor figure in our clarification of unit determinations. Our rationale has been:

If an accretion to an existing unit [through a clarification of unit petition] is appropriate, then '. . . no self-determination election is afforded to those employees so accreted . . . as this would be disruptive of a stable bargaining relationship.' [Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389, 390 (1977).] Permitting voter choice provides an opportunity to a minority group of employees to opt out of a unit into which they naturally belong--a privilege (set against the compelling policy reasons that a majority determine the representational status of a unit) that is not available to other minority groups of employees without extenuating reasons. Similarly, employees in newly created titles are entitled to no greater free choice rights than new employees in titles originally placed in the unit. The public interest in preserving stable employment relationships would, in view of the potential disruption to the existing negotiations relationship, mandate that these employees be included in the unit. See Fair Lawn, H.O. No. 77-6, 3 NJPER 44, 47 (1977), cited approv. in D.R. No. 78-22, 3 NJPER 390.

[Essex Cty., H.O. No. 2003-1, 28 NJPER 438 (¶33162 2002)]

Stated another way and in the context of this case, if the fire prevention specialist is already included in the unit or if

the unit would appropriately be clarified to include the fire prevention specialist, employees holding that title are not permitted to choose to be included in such unit and the Township's direct negotiations with these employees regarding their inclusion in the unit is not binding. Cf. Passaic Cty. Reg. H.S. Dist. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976) (holding that the unilateral removal of employees from a unit and directly dealing with them violates the Act unless they are not "public employees," within the Act's meaning, owing to their "confidential" status); Wood-Ridge Boro., P.E.R.C. No. 88-68 n.2, 14 NJPER 130 (¶19051 1988) (" . . . Supervisors are covered by the Act and may only be removed from their current unit with the consent of the majority representative or pursuant to an order of the Commission.")

Agreements reached by a public employer and the exclusive representative of employees are relevant in clarification of unit proceedings. Clarification proceedings, "resolve questions concerning the composition of a unit by interpreting the language which defines the existing unit in order to determine whether particular titles are includable or should be excluded from a unit whose representational status is already established."

Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 250 (1977). The Director in Clearview further explained:

Normally, a negotiations unit is described in generic terms, e.g. all blue collar employees; all white collar employees; all professional personnel. Not infrequently, however, the unit

definition describes the included personnel by job titles. However a unit is described, disputes occasionally arise between the parties to the collective negotiations relationship as to whether a particular title or person is represented in the unit.

\* \* \*

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the scope of the negotiations unit for reasons other than the above. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition and the matter relates primarily to identification. . . .

\* \* \*

. . . If the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. This agreement to include or to exclude certain persons or titles in a contract may have involved concessions by both parties in the negotiation of the final terms and conditions of employment. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed. Thus, the clarification of unit procedure should be designed so as not to encourage avoidance of contractual responsibilities, or to change the benefits and burdens of the bargain. Equally objectionable to the avoidance of contractual responsibilities is an attempt to impose additional negotiations responsibilities upon one party subsequent to the signing of a contract by seeking to include in the unit an



additional title whose terms and conditions were not previously negotiated. It would be patently unfair to require negotiations in a vacuum on behalf of a limited group of employees when one of the parties had not been made aware of the existence of the dispute with regard to the title in the earlier negotiations. [Id., 3 NJPER at 251-252]

Where recognition provisions do not include generic, broad, or "catch-all" phrasing, but instead define the unit by reference to specifically listed titles, we have dismissed clarification of unit petitions where the petitioned-for titles are not listed. City of Newark, D.R. No. 2018-18, 44 NJPER 415 (¶116 2018). In Newark State-Operated Sch. Dist., D.R. No. 2016-9, 43 NJPER 19 (¶6 2016), req. for rev. denied P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016), the Director of Representation declined to clarify the units of the petitioner union and intervener union to include certain titles. The Director held that, even if the titles performed substantially similar duties as existing unit titles, the unit recognition provisions did not provide generic or broad phrasing that would encompass the petitioned-for titles. The Commission denied the request for review, finding that "the parties [in this case] negotiated a contract that includes without reservation certain persons or titles[.]" Id., 43 NJPER at 116.<sup>2/</sup> The Commission further noted that, to the extent the

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<sup>2/</sup> The intervener union subsequently filed a timely representation petition, accompanied by authorization cards, seeking to add one or more of the titles to its unit that were the subject of the dismissed clarification of unit petition. We issued a Certification of Representative for  
(continued...)

unions contended that the District had renamed existing titles or positions in an effort to unilaterally diminish unit size, the issue would be more appropriately raised in an unfair practice charge alleging, for example, the shifting of "unit work" to employees outside of the unit without negotiations. Id., 43 NJPER at n.5. But see Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989) (holding that a shift of work was not a shift of "unit work" where the duties had been historically shared with non-unit employees), mot. for recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989); State of N.J. and Local 195, IFPTE, AFL-CIO, P.E.R.C. No. 94-78, 20 NJPER 74 (¶25032 1994) (finding no transfer of "unit work" where non-unit employees historically performed the duties in conjunction with unit employees), aff'd 21 NJPER 319 (¶26202 App. Div. 1995).

Although AFSCME has generally asserted that the fire prevention specialist performs duties similar to the fire protection inspector, it has not set forth any specific similar duties nor submitted a certification from a person with knowledge identifying any specific duties performed that are similar to those of the fire protection inspector. See Camden Housing Auth., D.R. No. 2014-7, 40 NJPER 219 (¶84 2013) (holding that petitioner did not meet its burden of producing adequate and

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2/ (...continued)  
the proposed expanded unit. Newark State-Operated Sch. Dist., D.R. No. 2018-12, 44 NJPER 195 (¶57 2017), req. for rev. den. P.E.R.C. No. 2018-39, 44 NJPER 383 (¶108 2018).

competent evidence comparing job duties actually performed through work samples or certifications). For this reason, I need not address to what extent the Workplace Democracy Enhancement Act (P.L. 2018, c. 15, effective May 18, 2018) affects or creates an exception to the general rule explained in Newark State-Operated Sch. Dist. See N.J.S.A. 34:13A-5.15 (providing for the inclusion of non-unit employees in the unit who perform "unit work" of unit employees without regard to job title).<sup>3/</sup>

The recognition provision in the parties' CNA, limits inclusion to "all employees in classifications appended hereto as Appendix A who are employed by the Township, and for such additional classifications as the parties may later agree to include. . . ." Appendix A provides salary schedules that list classifications of employees by grade and specific job title. Fire protection inspector is a listed title. Fire prevention specialist is not a listed title. See East Orange Bd. of Ed., D.R. No. 80-25, 6 NJPER 114, 116 (¶11061 1980) ("Given the specificity of the unit inclusionary language, there is no

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3/ See City of Burlington, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001) (holding that the party seeking application of a statutory exemption bears the burden of proving its applicability), citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711-12 (2001) (finding that the Board's burden rule was reasonable and consistent with the National Labor Relations Act because it was supported by the general rule that the burden of proving applicability of a special exception generally rests on the one who asserts it and because practicality favored placing the burden on theasserter where it was easier for the asserter to prove the exercise of the relevant duties).

significance in the absence of language which would specifically exclude summer school teachers." ). Although the provision acknowledges that the parties may agree to include additional titles, the Township has not yet agreed to include the fire prevention specialist title.

Since the recognition provision does not specifically or generically identify or include the fire prevention specialist title as part of the unit, I dismiss AFSCME's clarification of unit petition.

/s/ Jonathan Roth  
Jonathan Roth  
Director of Representation

DATED: February 25, 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 March 7, 2019.**