

D.R. NO. 2023-5

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

In the Matter of

UNION COUNTY VOCATIONAL-TECHNICAL
SCHOOLS BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2019-002

UNION COUNTY VOCATIONAL-TECHNICAL
EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation grants a clarification of unit petition filed by Union County Vocational-Technical Education Association (Association) to include part-time teachers into a collective negotiations unit represented by the Association, consisting of all personnel, including coordinators of cooperative education/placement/apprenticeship, counselor, guidance counselors/recruiter, nurses, school-to-work coordinator, secretaries, office staff, social workers and teachers employed by Union County Vocational-Technical Schools Board of Education.

The Director found that, based on the fact that part-time teachers perform unit work and have a community of interest with the rest of the unit, and pursuant to the Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.11 et seq., the clarification of unit petition should be granted to include part-time teachers into the negotiations unit represented by the Association.

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Appearances:

For the Respondent,
LaCorte, Bundy, Varady and Kinsella, attorneys
(Robert Varady, of counsel)

For the Petitioner,
Oxfeld Cohen, LLC attorneys
(Randi Doner April, of counsel)

DECISION

On July 11, 2018, Union County Vocational-Technical Education Association (Association) filed a clarification of unit petition (petition), seeking to clarify its collective negotiations unit of all personnel, including coordinators of cooperative education/placement/apprenticeship, counselors, guidance counselors/recruiter, nurses, school-to-work coordinator, secretaries, office staff, social workers and teachers of Union County Vocational-Technical Schools Board of Education (Board) to include part-time employees.

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 July 17, 2018, we asked the parties to file position statements by August 10, 2018. Neither party complied. An in-person investigatory conference was scheduled for August 17, 2018, but it was adjourned at the parties' request, and rescheduled and conducted on October 30, 2018 with the staff agent. At the conference, the parties asserted that the "part-time employee" at issue in the petition was a part-time teacher. On February 13, 2019, we asked the parties to provide more facts relevant to the proposed clarification by March 6, 2019. The parties requested additional time to respond, and that request was granted through March 27, 2019.

On March 27, 2019, both the Association and the Board submitted responsive letters. On May 24, 2019, we again asked the parties to provide additional information relevant to the proposed clarification. Specifically, we wrote that although the petition seeks to include a "part-time employee" in the unit, "[d]uring the conference on October 30, 2018, the parties discussed that the 'part-time employee' at issue was a part-time teacher." Our earlier (February 13, 2019) letter to the parties requesting information was ". . . focused on the position of

part-time teacher, not a more general part-time employee." The parties were specifically asked, ". . . to advise by June 6, 2019 if there is any other part-time position that should be the focus of this matter," because otherwise, the staff agent would "continue to focus on the part-time teacher position." The Association responded on June 4, 2019 that it "is focused on the position of part-time teacher." The Board did not respond.

The find these facts:

The parties' most recent collective negotiations agreement (CNA) at the time of the filing of the petition extended from July, 2014 through June, 2017.^{1/} The recognition provision in that CNA defines the negotiations unit as;

[A]ll personnel, whether under contract or leave, presently employed or employed by the Board in the future, including: Coordinators of Cooperative Education/Placement /Apprenticeship; Counselors; Guidance Counselors/Recruiter; Nurses; School-to-Work Coordinator; Secretaries; Office Staff; Social Workers; Teachers.

The recognition provision also specifies that "Teacher" includes "all professional personnel as above defined, and referenced to male employees shall include female employees." In the same recognition provision, "Professional Personnel" is defined as "Coordinators of Cooperative Education/Placement/Apprenticeship,

^{1/} Since the filing of the petition, the parties have executed a successor CNA extending from July, 2017 through June, 2020 that contains identical language in all relevant provisions to its predecessor CNA.

Counselors, Guidance Counselor/Recruiter, Nurses, School-to-Work Coordinator, Social Workers and Teachers.”

The Board’s job description for the title, “teacher” provides:

[t]he teacher is responsible for the instructional planning, implementation and development of the curriculum, student supervision and evaluation. He/she will maintain an environment that is conducive to learning and provide for the health and safety of the students.

The job description for teacher is silent regarding any number of hours to be worked, or any reference to part-time or full-time. The sole mention of time or hours in the job description is that a teacher “[a]rrives at school and classes on time,” but no additional language specifies what constitutes “on time.” The Board hasn’t generated a separate job description for part-time teacher or full-time teacher. Part-time teachers are not managerial, supervisory, confidential, craft or casual employees.

During the pendency of this clarification of unit petition, the parties executed their most recent CNA, but had not discussed the inclusion of part-time teachers in the unit in negotiations for any predecessor CNA.

ANALYSIS

The Association argues that part-time teachers should be included in the unit because the Board “. . . has historically made no determination between full-time and part-time staff,” and

because "the recognition clause of the contract includes 'teachers'." The Association argues that "[t]he duties of the part-time teacher do not differ from those of the full-time teachers," and "[t]he only difference is the hours worked." The Association further argues that, "[a]s part-time teachers are in fact teachers and are further professional personnel, it is purely a matter of semantics on the [Board's] part in seeking to exclude them."

In response, the Board argues that part-time teachers should not be included in the unit because they are employed at the Board's Raymond J. Lesniak School, which ". . . is for persons who have problems with alcohol or drug addiction," and the Board "does not require a full-time position because of the aspect of virtual learning."

The Board's latter argument would amply justify its decision not to make the teaching position at issue in this case full-time, rather than an argument justifying why part-time teachers should not be included in the unit (where the terms of such teachers could be collectively negotiated). Inasmuch as full-time teachers are assigned to the Board's Raymond J. Lesniak School, (and to other buildings and locations) and have not been excluded from the recognition provision, I infer that the only basis for the Board's distinct treatment of part-time teachers is their part-time status, i.e., the number of hours worked.

Before passage of the Workplace Democracy Enhancement Act (WDEA) (P.L. 2018, c. 15, effective May 18, 2018), N.J.S.A. 34:13A-5.11 et seq., clarification of unit proceedings were generally limited to resolving questions regarding the inclusion or exclusion of employees from a unit based on the existing unit definition in a Certification of Representative or the fairly attributable mutual intent of the parties reflected in their conduct and understanding as set forth in a recognition provision of a CNA, and based on the applicability of statutory provisions of the Act that might warrant exclusion. Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

Our cases concerning the propriety and "timeliness" of clarification of unit petitions were premised on two concepts. First, such petitions were meant to clarify whether a title was within the mutually-intended definitional scope of the recognition clause to which the parties already agreed. See Wayne Bd. of Ed., D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979). Next, we analyzed whether the union had subsequently abandoned or waived its right to represent particular titles that otherwise would have fallen within that initially-intended scope, such that a question concerning representation was raised that, back then, could only be resolved through a representation petition. Id. As discussed in Wayne Bd. of Ed.;

[T]he initial determination to be made . . . is whether there was a mutual

intent . . . to include the classification within the recognition clause of their agreement. . . . Where it is found that the parties intended the inclusion of the title, an examination will be made to determine whether the . . . later conduct of the majority representative constitutes an abandonment or waiver of the claim that such employees are represented by the majority representative In those cases where it is found that there has been . . . a waiver on the part of the majority representative it . . . raises a question concerning representation . . . [and] that portion of the Clarification Petition . . . will be dismissed.

[Id., 5 NJPER at 423, (emphasis added), aff'd as modified, P.E.R.C. No. 80-94, 6 NJPER 54 (¶ 11028 1980)]

See also Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61

(¶11034 1980) (“[A] representative must exercise due diligence in searching out employees who are within the definitional scope of its collective negotiations unit. The “waiver” analysis . . . is premised upon this responsibility”).

Initially, I note that the CNA refers to “all personnel” including “teachers,” and does not explicitly exclude part-time teachers. Thus, the mutually intended meaning of those words when the parties first decided upon them would have been fairly assumed to encompass part-time teachers, absent contemporaneous extrinsic evidence that the parties intended to otherwise depart from the plain meaning of their recognition provision’s words.

However, the part-time teaching position(s) at issue here were established after that language was initially ratified.

Under our earlier precedent, whether the unit should be clarified to include the part-time teachers would depend on whether the Association filed its clarification of unit petition or otherwise reserved its dispute over inclusion before executing another CNA. Otherwise, the execution of similar recognition language would be fairly understood to mean the parties did not intend for it to include the newly-created part-time teaching positions.

The Board maintains that the positions were created when the Raymond J. Lesniak School was organized in September 2006. The Association indicates that its leadership was only informed in or around September, 2017 of the employment of the part-time teachers. If the Board is correct, it would be likely that due diligence by the Association would have made it aware that part-time teachers were employed by the Board during predecessor CNAs, and thus, the recognition provision in the subsequently-executed 2014-2017 CNA would fairly be understood to not encompass the part-time teachers. The Association's clarification of unit petition was not filed until July 11, 2018.

I find it unnecessary to determine exactly when the part-time teaching positions in their current form were created; or when the Association could have, in the exercise of due diligence, discovered the existence of such positions; or whether the Association had reserved the dispute before signing a successor CNA. Those determinations are obviated because the

Association argues that the part-time teacher(s) should be included in the unit because they perform unit work under the WDEA, thereby providing a separate basis to assess the appropriateness of including a petitioned-for title in a unit.

Under the WDEA, all regular full-time and part-time employees who perform "unit work" performed by any unit employees shall be included in the unit regardless of job title, job classification, or the number of work hours previously required under the CNA. N.J.S.A. 34:13A-5.11(a), (b), (d); Hamilton Tp., D.R. No. 2022-4, 49 NJPER 49 (¶10 2022).

In the absence of any statutory reason to exclude part-time teachers from the unit, the only possible reason to exclude them is that the parties failed to specifically negotiate about them, implying that the recognition provision applies only to full-time teachers, i.e., the number of hours they work. But even this reason must yield to the WDEA mandate of requiring part-time employees (meeting the new "hours" requirement) to be included on the basis of unit work. N.J.S.A. 34:13A-5.11(d).

The CNA's recognition provision is only relevant under the WDEA to the extent that it describes unit work. Here, unit work includes at least non-supervisory teaching and professional work.^{2/}

^{2/} Though the recognition provision refers to "all personnel" employed by the Board; uses the term "including" before a
(continued...)

Other evidence of unit work (apart from the CNA provisions) is also apparent. The Board's job description for the title of teacher is silent regarding the issue of number of hours to be worked by teachers, or any reference to, or distinction between part-time teachers and full-time teachers. Both full-time and part-time teachers share the same "teacher" job description. Part-time teachers are clearly performing unit work. See Park Ridge Bd. of Ed., D.R. No. 2020-4 n.9, 46 NJPER 82 (¶15 2019) (noting WDEA supports clarifying the inclusion of the data systems analyst into the unit in a case where the certification included computer secretary and professionals, unit included certificated and non-certificated titles, there was community of interest and shared mission, and the position was found to perform "technology-related" duties performed by secretaries); Union Cty. College, D.R. No. 2019-9, 45 NJPER 184 (¶49 2018)

2/ (...continued)
title list, which is usually interpreted as providing a non-limiting example list of titles; and lists other non-professional titles such as secretaries and office staff which shows that the work of the unit is broader than just teaching and professional work, I will focus on the non-supervisory teaching and professional unit work in this decision, as I note that there have been separate units of cafeteria workers, custodians and maintenance personnel, and supervisors. In the event that an unrepresented employee is arguably performing unit work of more than one unit represented by interested organizations, other factors may determine to which unit the employee will be added. The Board has not argued in this matter that there is a more appropriate unit for the part-time teachers than the Association's unit.

(finding WDEA provided alternative legal basis for inclusion of academic specialists because they performed classroom instruction unit work, albeit in less hours than other unit instructional staff), reg. for rev. den. P.E.R.C. No. 2019-35, 45 NJPER 319 (¶84 2019) (agreeing with Director's application of WDEA to the facts, though noting that decision did not rely on WDEA), aff'd App. Div. Dkt. A-3625-18T2 (July 28, 2020) (declining to address WDEA as it was not relied on); Franklin Tp., D.R. No. 2019-14, 45 NJPER 333 (¶89 2019) (finding flex clerks should be included under the WDEA as they performed secretarial and clerical work, such as answering phones, like other employees in a unit previously defined by the CNA as those employees in classifications listed in the CNA Appendix).

The inclusion of part-time teachers in the unit that includes full-time teachers is also consistent with past decisions that emphasize that regular part-time employees who have a community of interest with full-time employees should not be excluded from the full-time employees' negotiations units. See Kearny Bd. of Ed., P.E.R.C No. 2005-42, 30 NJPER 504 (¶171 2004) ("[t]his agency does not approve negotiations units that exclude regular part-time employees who have a community of interest with full-time employees"); Monmouth Cty. Voc. Reg. Bd. of Ed., D.R. No. 79-31, 5 NJPER 179 (¶10097 1979) ("[i]n determining appropriate unit structure . . . the Commission does

not distinguish between full-time and part-time personnel"); Randolph Tp., D.R. No. 97-8, 23 NJPER 145 (¶28070 1997) (part-time status alone is insufficient to destroy a finding of community of interest and force a separate negotiations unit for part-time employees).^{3/} The facts show that part-time teachers perform unit work and have a community of interest with the rest of the unit. The Board does not raise any conflict of interest or statutory exclusion arguments. Accordingly, I agree with the Association and find that the unit shall be clarified to include part-time teachers.^{4/}

^{3/} Prior to the WDEA, we did not certify de novo units limited to full-time employees. But parties could voluntarily recognize units limited to full-time employees, which sometime later might have required the filing of a representation petition and confirmation of majority status before adding unrepresented part-time employees to the unit. The WDEA now allows a clarification of unit petition to be used to add part-time employees into the unit on the basis of unit work without regard to the limiting language in the CNA. N.J.S.A. 34:13A-5.11(d).

^{4/} To the extent the Board's assertion that part-time teachers perform their work virtually is meant to be a separate argument as to why they should not be included in the Association's unit, I find teaching in general to be unit work, and thus, that the part-time teachers are performing unit work and share a community of interest with the unit regardless of the manner and location in which the teaching is done. Cf. Hamilton Tp. (different work locations and lack of interaction do not detract from community of interest). Moreover, as explained above, the work of the unit is even broader, as it includes non-supervisory professional work.

ORDER

The Association's unit is clarified to include part-time teachers.

/s/ Jonathan Roth
Jonathan Roth
Director of Representation

DATED: September 9, 2022
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 September 19, 2022.