

D.R. NO. 2023-14

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

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2021-011

WEST ORANGE ADMINISTRATORS ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation clarifies a supervisors unit to include the newly created title of Director of Assessment, Accountability and Intervention (AAI Director). The Director finds that the AAI Director title shares a community of interest with other Association unit members and falls within the recognition clause of the parties' collective negotiations agreement. Further, the Director finds that there is no conflict of interest (Wilton conflict) which would exclude the AAI Director from inclusion in the Association's unit.

The Director denies the Association's request to clarify its unit to include the Director of Diversity, Equity and Inclusion title as the position is vacant.

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Appearances:

For the Respondent,
Cleary, Giacobbe, Alfieri, Jacobs LLC, attorneys
(Gregory Franklin, of counsel)

For the Petitioner,
Oxford Cohen, P.C., attorneys
(Samuel Wenocur, of counsel)

DECISION

On May 18, 2021, the West Orange Administrators Association (Association) filed a clarification of unit petition (petition) seeking to clarify its collective negotiations unit of employees of the West Orange Board of Education (Board) to include the newly created job titles, Director of Assessment, Accountability and Intervention (AAI Director) and Director of Diversity, Equity and Inclusion (DEI Director), in the Association's unit. The Board opposes the petition because the titles are not set forth in the recognition provision of the parties' collective negotiations agreement. The Board also argues that the titles do

not share a community of interest with the employees in the Association's unit. The Association disagrees.

On July 6, 2021, a Commission staff agent sent correspondence to the Association and Board requesting certifications and other documents in support of their respective positions.

On August 6, 2021, the Board filed and served on the Association a certification with exhibits from Dr. Joseph Vespignani (Vespignani), the Executive Director of Personnel and Special Projects for the Board.

On August 6, 2021, the Association filed and served on the Board a certification with exhibits from Marie DeMaio, Principal of Washington Elementary and President of the Association.

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. Based upon our administrative investigation, I make the following:

FINDINGS OF FACT

The Association and Board signed a collective negotiations agreement (CNA) extending from July 1, 2019 through June 30, 2022. Article I of the CNA sets forth a recognition provision that defines the Association's collective negotiations unit. The unit is defined as follows:

(i) Principals, (ii) Assistant Principals;
(iii) Directors whose position requires a
principal's or other appropriate certificate;
and (iv) Ten (10) Month and (12) Month
Department Supervisors, but Excluding the
position of Assistant Superintendent, Director
of Special Services, Director of Technology and
Director of Human Resources

See Exhibit D of Vespignani Certification.

On or about March 22, 2021, the Board approved the newly created titles AAI Director and DEI Director. On June 21, 2021, the Board approved the hiring of Dr. Tamika Polins (Dr. Polins) as its AAI Director. On or about August 2, 2021, Dr. Polins began her employment with the Board. The DEI Director position was not funded for the 2021-2022 school year, and therefore, the Board has not filled the position. Vespignani Certification, ¶2.

AAI Director position

The Board's table of organization has not been updated to include the AAI Director Position. See Exhibit 3 of DeMaio Certification. However, according to the Board, (though not shown on the table of organization) the AAI Director reports directly to the Assistant Superintendent of Curriculum & Instruction. Vespignani Certification, ¶5. The Assistant Superintendent of Curriculum of Instruction reports to the Superintendent who reports to the Board. See Exhibit 3 of DeMaio Certification.

The AAI Director works in the Central Office. While the majority of Association members work in individual schools, there

are some Association unit members whose offices are located in the Central office, including Supervisor of WL/ESL, Supervisor of K-5 math, Supervisor of K-5 ELA, Supervisor of Grants, Accountability and Testing and the Director of K-12 Fine and Performing Arts. Vespignani Certification, ¶10.

The AAI Director holds a school administrator certificate. No other position in the Association requires such a certification. Vespignani Certification, ¶10. As defined in Article 1 of the CNA, Directors are required to hold a principal's or other appropriate certificate. See Exhibit D of Vespignani Certification.

The starting salary for the AAI Director is \$160,000.00. Vespignani Certification, ¶10. Pursuant to the CNA, the starting salary for an Association Director is \$120,000.00. See Exhibit D of Vespignani Certification. However, due to "compounded annual incremental increases and length of service", \$160,000.00 is similar to the current salaries of Association directors. Vespignani Certification, ¶10.

All Board employees share the goal of providing the best educational experience to the District students. Vespignani Certification, ¶10.

The AAI Director interacts with all school-level administrators who make up the Association membership. Vespignani Certification, ¶10. The job description for the AAI

Director specifies that the AAI Director performs the following core duties: assessment data coordination and reporting, ensure compliance with the Every Student Succeeds Act^{1/} (ESSA) and oversees district intervention and the gifted and talented program. See Exhibit B of Vespignani Certification.

The Association contains 3 director titles^{2/} that are each responsible for more specialized student services. The AAI Director position is "more involved in establishing a general curriculum and instructional approach for K-12 students separated into the Intervention and Gifted and Talented programs." Vespignani Certification, ¶10.

Additionally, the AAI Director is involved in principal observations and is responsible for recommending corrective action plan (CAP) terms for principals. The Superintendent is ultimately responsible for evaluating the educational performance of a building principal, but will place weight on the AAI Director's CAP recommendations. Vespignani Certification, ¶6 and ¶8.

^{1/} The ESSA was signed by President Obama on December 10, 2015. The Acts purpose is to provide high-quality education to all children in the U.S., better prepare students for life after high school, and address barriers for disadvantaged children. See www.ed.gov

^{2/} The Director of Audio & Visual Arts, Director of Athletics, and the Director of K-12 School Counseling.

ANALYSIS**DEI Director**

A clarification of unit petition is appropriately filed where the majority representative has identified and petitioned for newly-created titles or positions during the contract period in which the new title was established and prior to the execution of the next succeeding contract. New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370, (¶30160 1999); Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984).

However, the Commission will not ordinarily clarify units to include vacant positions. This long-standing policy prevents reliance on a job description alone, and avoids speculation about what duties an employee will actually perform once the position is filled. See N.J. Turnpike Auth. and AFSCME, P.E.R.C. No. 94-24, 19 NJPER 461 (¶24218 1993), rev'd and rem'd 289 N.J. Super. 23 (App. Div. 1996), aff'd as mod. 150 N.J. 331 (1997) (Commission declines to decide vacant titles where former incumbents retired); Tp. of Bordentown, D.R. No. 2006-3, 31 NJPER 263 (¶104 2005) (Director declines to decide status of vacant deputy court administrator); Trenton Bd. of Ed., D.R. No. 2001-009, 27 NJPER 197 (¶32066 2001) (Director dismisses petition seeking to include newly created vacant paralegal assistant position into clerical unit).

Here, while the Board has apparently adopted a job

description for the DEI Director, it would be inappropriate to decide the unit status of that unfilled position based solely upon the Board's assertion of intended job responsibilities. No extraordinary circumstances exist in this case which warrant an exception to our longstanding policy of refraining from ruling upon the unit status of vacant positions. See Trenton Bd. of Ed., D.R. No. 2001-009, 27 NJPER 197 (¶32066 2001). Accordingly, the unit eligibility of the DEI Director will not be determined at this time.

AAI Director

Community of Interest/Recognition Provision

The Commission has a "preference for broad-based units and is reluctant to form units along occupational or departmental lines" Gloucester Cty., P.E.R.C. No. 2011-69, 37 NJPER 141 (¶42 2011) (citing State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974)). In Somerset Cty., D.R. No. 2014-14, 40 NJPER 527 (¶172 2014), the Director of Representation wrote:

The Act mandates that the Commission define the negotiations unit "with due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3. To determine whether the requisite community of interest exists in a proposed unit, the Commission examines a number of factors, such as common employer, shared goals, common supervision, location of employment, job duties, and similarity in wages, hours and terms and conditions of employment. See State of New Jersey (State College Locals), D.R. No. 97-5, 24 NJPER 295, 297 (¶29141 1996); West Milford Bd. of Ed., P.E.R.C. No.

56, NJPER Supp. 218, 219 (¶56 1971). '[T]he importance of any one factor in a particular case depends upon how it interrelates with other factors.' Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272, 273 (¶15134 1984).

* * *

The Commission has explained that broad-based units streamline negotiations by reducing the potential for such problems as 'competing demands, whipsawing, and continuous negotiations . . .' that could result from negotiations with numerous smaller units. Id. at 241 (quoting State of New Jersey (Prof'l Ass'n), P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972)). The Commission also examines whether a proposed unit would lead to undue unit fragmentation or proliferation. Id. See also New Jersey State Coll. of Medicine & Dentistry, D.R. No. 77-17, 3 NJPER 178 (1977); Teaneck Tp., P.E.R.C. No. 88-20, 13 NJPER 721 (P18270 1987). Additionally, the Commission considers the history of the negotiations units, the extent of organization of the petitioned-for titles, the desires of the parties and the Act's purpose. See Passaic Cty., P.E.R.C. No. 87-123, 13 NJPER 298 (¶18125 1987) recon. den. P.E.R.C. No. 87-141, 13 NJPER 483 (¶18179 1987); State of New Jersey (Human Services), D.R. No. 95-1, 20 NJPER 308 (¶25154 1994); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12228 1981).

Accord Newark State Operated School Dist., D.R. No. 2018-12, 44 NJPER 195 (¶57 2017), adopted P.E.R.C. No. 2018-39, 44 NJPER 383 (¶108 2018).

The requisite community of interest exists among Association members and AAI Director. Specifically, Association members and the AAI Director are employed by the Board; share the goal of providing the best educational experience to the District's

students; are supervised by the Assistant Superintendent of Curriculum and Instruction; work in Board buildings or campuses; is responsible for more specialized student services, just like the other Directors in the unit; are paid similar wages (e.g. the AAI Director earns a salary of \$160,000.00, which is within the range paid to other Directors under the CNA.); and have similar hours and terms and conditions of employment.

Moreover, it is clear from the parties' submissions that the educational and experience requirements for the AAI Director are similar to, and fall within the range of, unit members' educational and experience requirements. See Exhibit D to Vespignani Certification; see also Burlington Cty. College, D.R. No. 2004-6, 29 NJPER 426 (¶145 2003) (finding that an academic advisor title was appropriate for inclusion in a unit based, in part, upon the fact that the title had similar educational and experience requirements as other unit members).

The Board argues that AAI Director position is specifically "excluded" from the unit descriptions set forth in parties' CNAs. However, the unit description in the parties' recognition provision is sufficiently generic or broad enough to encompass the AAI Director. The Commission has held that ". . . [n]ewly created titles will be clarified into a unit only if they fall within the definition of the scope of the existing recognition clause of the parties' collective negotiations agreement."

Irvington Housing Auth., D.R. No. 98-15, 24 NJPER 244 (¶29116 1998). The Board and Association could have negotiated a restrictive recognition provision specifying the inclusion of “only” certain titles or types of employees (i.e., language that was literally consistent with the titles or types of employees included). They did not, however, and instead defined the unit as including “. . . directors whose positions require a principal’s or other appropriate certificates”. Cf. City of Newark, D.R. No. 2018-18, 44 NJPER 415 (¶116 2018) (noting, conversely, that the parties “could have agreed to more encompassing or generic terms in the recognition provision that could have contemplated the inclusion of all employees performing communication work or all white collar employees within the police department not represented by other employee organizations” but “did not do so and instead defined the unit by . . . specifically-identified titles”); contrast Newark State-Operated School Dist., D.R. No. 2016-9, 43 NJPER 19 (¶6 2016), adopted P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016) (dismissing a clarification of unit petition because the titles sought were not identified in narrowly-defined recognition clauses which specifically included approximately 157 and 40 job titles, respectively, and lacked generic language covering the titles); East Orange Bd. of Ed., D.R. No. 80-25, 6 NJPER 114 (¶11061 1980) (“[g]iven the specificity of the unit inclusionary language,

there is no significance in the absence of language which would specifically exclude summer school teachers”).

Similarly, the parties could have agreed to a recognition provision that specified the exclusion of certain titles or types of employees (e.g., employees with a certificate higher than a principal certificate). But no exclusions appear in the recognition provision. I do not find that the AAI Director must be excluded based upon the title’s certification.

Accordingly, I find that clarifying the existing unit to include the AA&I Director conforms with the Commission’s “preference for broad-based units” and is appropriate.

Wilton Conflict

Under N.J.S.A. 34:13A-5.-3, public employees are granted the right to join an employee organization provided however:

. . . except where established practice, prior agreement, or special circumstances dictate the contrary . . . any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same [shall not] have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to membership.

The section further directs that the a negotiating unit “shall be defined with due regard for the community of interest among the employees concerned” N.J.S.A. 34:13A-5.3.

In West Orange Bd. of Ed. v. Wilton, 57 N.J. 404, (1971), the Supreme court articulated the grounds for determining whether

a conflict of interest exists between various levels of supervisory and administrative employees. The factual backdrop of Wilton is closely analogous to the one herein. In Wilton, the Board had recognized the Association as the majority representative for principals, assistant principals, subject matter directors, and administrative assistants but excluded the Director of Elementary Education (Wilton) and the Director of Secondary Education. Rejecting the concept that all supervisors should be included in the same unit irrespective of their relation to each other, the Court stated:

Ordinary considerations of employer-employee relations make it sensible to say that if performance of assigned duties by a particular supervisor bespeaks such an intimate relationship with the management and policy-making function as to indicate actual or potential substantial conflict of interest between him and other supervisory personnel in a different or lower echelon of authority, such supervisor should not be admitted to the same negotiating unit. Admission would not be fair either to the other supervisory employees or to the employer. Obviously no man can serve two masters. Id. at 416.

In reversing the Commission's construction of N.J.S.A. 34:13A-6(d) and remanding the case back to the Commission for specific factual findings consistent with its statutory analysis, the Court noted that Wilton's responsibilities as the Director of Elementary Education included reviewing the budget proposals of all principals, playing an integral role in the hiring process, and evaluating elementary school principals for purposes

of recommending tenure and salary increments.

The Commission has "consistently held that supervisor's evaluations must be closely tied to a personnel action or disciplinary decision in order to find a Wilton conflict." State of New Jersey (Montclair State University), D.R. No. 2018-15, 44 NJPER 244, 250 (¶70 2018), adopted P.E.R.C. No. 2018-42, 44 NJPER 398 (¶111 2018). "Evaluations alone, however, do not necessarily create a conflict of interest sufficient to exclude the evaluator from a unit of non-supervisors." New Jersey Turnpike Auth., P.E.R.C. No. 98-28, 23 NJPER 511, 516 (¶28249 1997). "Recommendations for another's evaluations which might then serve as recommendations for another's personnel decisions are too far removed from the personnel decisions to create a conflict of interest substantial enough to remove [a] title[] from the unit." Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635, 644 (¶18237 1987).

Here, as certified to by Vespignani, "the AAI Director will be recommending corrective action plan ("CAP") terms for principals rated less than effective in accordance with N.J.A.C. 6A:10-2.5^{3/}, including recommending additional work

3/ N.J.A.C. 6A10-2.5(a) states: For each teaching staff member rated ineffective or partially effective on the annual summative evaluation, as measured by the evaluation rubrics. A corrective action plan shall be developed by the teaching staff member and the teaching staff member's designated supervisor.

responsibilities that these principals must fulfill to implement the CAP as it relates to school improvement.” However, the Board admits that “the Superintendent is ultimately responsible for evaluating the educational performance of elementary school principals” The Board argues that the AAI Director’s evaluations “will effectively color all Superintendent recommendations for administrative employment actions” However, the Board has failed to demonstrate how the AAI Director has authority to hire, discharge, discipline, or effectively recommend those actions. The Board has acknowledged that evaluations conducted by AAI Director are provided to the Superintendent for consideration in “administrative employment actions”. Further, the Board has not provided any document or specific example of evaluations of unit members or how those evaluations are used by the Superintendent^{4/}. Because the AAI Director’s recommendations are subject to independent review by the Superintendent there would be no conflict of interest which would exclude the AAI Director from the Association’s unit. See Westfield Bd. of Ed.

^{4/} At the time the petition was filed the AAI Director had not yet begun her employment with the Board and therefore, no specific examples of CAP evaluations were provided. However, the Board failed to provide any examples showing how the Superintendent has relied on CAP evaluations conducted by other supervisors.

ORDER

I clarify the West Orange Administrators' Association unit to include the job title, Director of Assessment, Accountability, and Intervention, effective immediately. I also deny the Association's request to clarify its unit to include the Director of Diversity, Equity and Inclusion title.

/s/Ryan M. Ottavio
Ryan M. Ottavio
Director of Representation

DATE: June 30, 2023
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 July 11, 2023.