

D.R. NO. 2023-13

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Public Employer,

-and-

Docket No. CU-2020-005

AMERICAN ASSOCIATION OF UNIVERSITY  
PROFESSORS, BIOMEDICAL AND HEALTH  
SCIENCES OF NEW JERSEY,

Petitioner.

**SYNOPSIS**

The Director of Representation dismissed a clarification of unit petition filed by the AAUP-Biomedical and Health Sciences of NJ (AAUP) seeking to add 173 employees of Rutgers to AAUP's unit. The petition was filed pursuant to N.J.S.A. 34:13A-5.15. The Director found the petition did not satisfy the pleading requirements under N.J.A.C. 19:11-1.5 and did not satisfy the burden to produce competent evidence in support of the petition under Commission precedent.

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Appearances:

For the RESPONDENT,  
(Farrah Gold Henry, Esq.)

For the PETITIONER,  
Weissman & Mintz, LLC, attorneys  
(Ira W. Mintz, of counsel)

**DECISION**

On December 4, 2019, the American Association of University Professors, Biomedical and Health Sciences of New Jersey (AAUP or Petitioner), filed a clarification of unit petition (petition) seeking to add one hundred seventy three (173) individuals who worked within Rutgers Biomedical and Health Sciences, to a unit that includes all full time and part time (50% or more) teaching and/or research legacy UMDNJ faculty and librarians who are employed by the University in legacy UMDNJ positions. The petitioned-for employees hold a range of job titles including but

not limited to, various Director titles, Vice Chair, Professor, Assistant Professor, and Associate Professor. AAUP maintains that Rutgers has improperly excluded these individuals because they do not perform supervisory work and are performing bargaining unit work pursuant to the Workplace Democracy Enhancement Act (WDEA).

AAUP filed this petition pursuant to N.J.S.A. 34:13A-5.15 and N.J.A.C. 19:11-1.5. N.J.A.C. 19:11-1.5(b)(3)(vi) permits an exclusive majority representative to petition to add employees who perform "negotiations unit work" to a certified or recognized unit. "Negotiations unit work" is defined under the WDEA, N.J.S.A. 34:13A-5.11 through 5.15, as:

[W]ork that is performed by any employees who are included in a negotiations unit represented by an exclusive representative employee organization without regard to job title, job classifications or number of hours worked, except that employees who are confidential employees or managerial executives, as those terms are defined by [N.J.S.A. 34:13A-3], or elected officials, members of boards and commissions, or casual employees, may be excluded from the negotiations unit. Casual employees are employees who work an average of fewer than four hours per week over a period of 90 calendar days.

[N.J.S.A. 34:13A-5.15(b)]

N.J.A.C. 19:11-1.5 also sets forth specific pleading requirements for this type of petition. It requires the petitioner to "identify the positions/titles the petitioner seeks to include in

any existing negotiations unit, along with a statement explaining fully the reasons for the proposed inclusion." N.J.A.C. 19:11-1.5(c)(2). The petitioner must also include in the petition "a description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform, and an explanation of why the work is negotiations unit work." N.J.A.C. 19:11-1.5(c)(2)(I).

On August 3, 2020, a Commission staff agent sent the parties a letter containing a series of questions about the petitioned-for titles. The letter also stated, "**all facts must be presented in certification(s) or sworn affidavit(s) from individuals with personal knowledge of the facts attested to, and include attached exhibits and sample work performed, where applicable.**" (Emphasis in original). The letter further stated that failure to provide competent evidence in support of a claim may result in dismissal of the petition or rejection of a position taken in opposition to the petition.<sup>1/</sup> Responses were originally due October 1, 2020, but after two extension requests from Rutgers, the final due date was December 10, 2020.

On December 10, 2020, counsel for Rutgers submitted a letter and an affidavit from Meredith Mullane, Vice Chancellor for Academic Affairs. Rutgers' asserted that many of the petitioned-

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<sup>1/</sup> See City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

for titles were supervisory and/or confidential, and that they are specifically excluded pursuant to the Recognition clause of the parties' collective negotiations agreement. Also on December 10, counsel for AAUP submitted a letter, unaccompanied by any certifications or affidavits, that did not respond to any question in the August 3, 2020 letter. AAUP asserted it was unaware of what duties the petitioned-for employees were performing, and did not have access to such information. Absent such information, AAUP's position is based upon information and belief that the individuals in the petitioned-for titles are "generally holding positions that are only nominally supervisory in nature, but are not actually supervising anyone and are in fact performing the duties of negotiations unit members."

On December 11, 2020, a Commission staff agent spoke to both parties by phone, explained that the submissions did not provide enough information for the Director to make a determination regarding the petitioned-for titles, and instructed both parties to meet and confer about each title in an attempt to narrow down the list of titles in dispute. The parties spent the following year meeting regularly about the petitioned-for titles, and did in fact make some progress with narrowing down the list of titles in dispute.

On February 14, 2022, the Commission staff agent sent another letter to the parties, seeking specific information about

the remaining titles in dispute. This letter also stated that all facts must be presented in certification(s) or sworn affidavit(s) from individuals with personal knowledge of the facts attested to and that failure to provide competent evidence may result in the dismissal of the petition. Responses were originally due April 1, 2022, but after a few extension requests made by Rutgers, the final due date for both parties was June 6, 2022.

On June 6, Rutgers submitted a comprehensive response to the February 14 letter, along with a certification and exhibits from Andrea West, Chief Operating Officer at Rutgers School of Dental Medicine; Karen Shapiro, Associate Dean for Administration/Chief Operating Officer at Rutgers School of Health Professions; Larissa Varela, Director of Faculty Recruitment and Affairs at Rutgers Cancer Institute of New Jersey; Maria Soto-Greene, Professor and Executive Vice Dean at Rutgers New Jersey Medical School; Meredith Mullane, Vice Chancellor of Academic Affairs; Paris Mourgues, Chief of Staff to the Dean of Rutgers School of Public Health; Rhonda Smith, Associate Dean for Faculty and Staff Affairs at Rutgers Robert Wood Johnson Medical School; and Susan Salmond, Executive Vice Dean and Professor at Rutgers School of Nursing. Rutgers' certifications provide a detailed explanation of the job duties performed by the petitioned-for employees. Rutgers also maintains in its letter brief that several of the

petitioned-for employees are confidential or managerial executives under the Act and should therefore be excluded from the unit. AAUP did not respond to the February 14, 2022 letter.

Based on our review of the parties' submissions, no substantial or material factual issues require us to convene an evidentiary hearing.<sup>2/</sup> N.J.A.C. 19:11-2.6. I make the following:

#### **FINDINGS OF FACT**

Rutgers and AAUP are parties to a collective negotiations agreement extending from July 1, 2018 through July 31, 2022 (Agreement). Article II of the most recent Agreement defines the unit as the exclusive negotiating agent for "all teaching and/or research faculty and staff librarians employed by the University in legacy UMDNJ positions, but specifically excluding all faculty members and staff librarians who, in addition to their professorial or librarian titles, hold any title which carries managerial, administrative, or supervisory responsibility (among titles so excluded are President, Vice President, Chancellor, Senior Vice Chancellor, Vice Chancellor, Provost, Dean, Vice Dean, Associate Dean, Associate Vice President, Assistant Dean, Assistant to the Dean, Director, Department Chairperson, Section Chief, Division Chief, Division Director, University Librarian,

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<sup>2/</sup> The only certified facts about the petitioned-for employees' duties are presented in the State's submissions.

Assistant University Librarian, Campus Library Director, Personnel Administration Librarian, Supervising Librarian), all faculty members or staff librarians who work on average of fewer than four hours per week over a period of 90 days, persons otherwise employed by the University who are presently represented for purposes of collective negotiations by another employee organization and all other employees not employed as faculty or staff librarians, for the purpose of negotiations regarding the terms and conditions of employment and in the settlement of grievances.”

Rutgers has submitted eight certifications from administrators and/or supervisors employed in the following entities: Rutgers School of Dental Medicine; Rutgers School of Health Professions; Rutgers Cancer Institute of New Jersey; Rutgers New Jersey Medical School; Academic Affairs; Rutgers School of Public Health; Rutgers Robert Wood Johnson Medical School; and the Rutgers School of Nursing. The certifications explain in detail the duties performed by the petitioned-for employees. AAUP did not submit certifications or affidavits explaining the job duties that are performed by either AAUP unit employees or the petitioned-for employees.<sup>3/</sup>

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<sup>3/</sup> Since AAUP has not met its burden of pleading and proving that the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15, we need not summarize Rutgers’ submissions explaining the duties performed by the  
(continued...)



**ANALYSIS**

I dismiss AAUP's petition for two principal reasons: (1) the petition does not satisfy the pleading requirements under N.J.A.C. 19:11-1.5; and (2) AAUP has not produced competent evidence in support of its claim that the petitioned-for employees perform negotiations unit work. Given this determination, I need not address whether the petitioned-for employees are confidential, supervisors, or managerial executives within the meaning of the Act.

***Pleading Requirements***

AAUP's petition does not conform with the pleading requirements for unit clarification petitions under N.J.A.C. 19:11-1.5. These requirements apply both generally to all unit clarification petitions and specifically to petitions seeking to add employees to a negotiations unit pursuant to N.J.S.A. 34:13A-5.15.

All unit clarification petitions must contain "a description of the present negotiations unit", a "description of the proposed clarification of the unit", and a "statement by petitioner listing and explaining fully the reasons for the proposed clarification." N.J.A.C. 19:11-1.5(b) (1), (2) and (3). Petitions

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3/ (...continued)  
petitioned-for employees. We find here the AAUP's petition is deficient under N.J.A.C. 19:11-1.5 and should be dismissed.

seeking to add employees to a unit under N.J.S.A. 34:13A-5.15 must also "explain fully the reasons for the proposed inclusion." N.J.A.C. 19:11-1.5(c) (2). Those "reasons" must include "a **description of the negotiations unit work** the petitioner alleges the employees in the disputed positions/titles perform and an **explanation why that work is negotiations work.**" N.J.A.C. 19:11-1.5(c) (2) (i) (emphasis added).

Here, AAUP's petition should be dismissed because it does not comply with the pleading requirements under N.J.A.C. 19:11-1.5. The petition does not "explain fully the reasons for the proposed inclusion," and is devoid of any description of the negotiations unit work the petitioner alleges the petitioned-for employees are performing, as required by N.J.A.C. 19:11-1.5(c) (2) (i).

### ***The Burden of Production in Unit Clarification Proceedings***

In unit clarification cases, the party asserting a claim for inclusion (or defense against inclusion) of an employee in a unit bears the burden of producing competent evidence in support of that claim or defense. State of New Jersey, 11 NJPER at 510 (Burden of producing competent evidence of confidential status of an employee is on the party "seeking to place an employee outside the Act's protection"); Lawrence Tp., D.R. No. 2019-13, 45 NJPER 295 (¶76 2019). Competent evidence includes, but is not limited to, certifications or affidavits from individuals with personal

knowledge of the duties performed by the petitioned-for employees and relevant unit employees. Lawrence Tp.; City of Camden

Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).<sup>4/</sup>

And it may also include specific work samples or examples of work supported by certifications demonstrating the duties actually

performed by unit or petitioned-for employees. City of Newark,

D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), req. for rev. den.

P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J.

Super. 460 (App. Div. 2002); Tp. of Eastampton, D.R. No. 2000-5,

26 NJPER 43 (¶31014 1999); Evesham Tp. Fire Dist. #1, D.R. No.

99-4, 24 NJPER 503 (¶29233 1998).<sup>5/</sup>

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4/ The New Jersey Supreme Court has also emphasized the importance of providing an adequate certification to establish a record upon which a claim can be adjudicated in the labor relations context. In re State & School Employees Health Benefits Commissions' Implementation of Yucht, 233 N.J. 267 (2018) (Supreme Court holds that the record is insufficient to establish union's claim that the State provided inadequate notice of erroneous reimbursement rates for counseling services since the union did not produce certifications from unit members explaining whether they in fact received notice of the erroneous rates)

5/ It is true that, at the *hearing* stage of a unit clarification case, the process is ". . . considered investigatory and not adversarial" and "neither party has the burden of proof." N.J.A.C. 19:11-6.2(c); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339, 340 (¶19128 1988). However, "neither public employers nor public employee representatives have an absolute right to a hearing" in representation cases. County of Somerset, P.E.R.C. No. 2014-88, 41 NJPER 55, 56 (¶15 2014). The Commission has ". . . a consistent policy of resolving representation questions after administrative investigations unless substantial and material facts are in dispute."

(continued...)

The burden of production in unit clarification cases has been applied to both petitioning unions and petitioning employers. Lawrence Tp.; Camden Housing Authority. In Lawrence Tp., the American Federation of State, County and Municipal Employees, Council 63, Local 2257 (AFSCME) filed a clarification of unit petition seeking to clarify its collective negotiations unit of white collar employees of Lawrence Township (Township) to include the job title, fire prevention specialist. 45 NJPER 295. In response to an investigative letter requesting certifications or other competent evidence in support of the petition, AFSCME filed a letter asserting “. . . that the duties of the fire prevention specialist were similar to those of the fire protection inspector, a unit title.” 45 NJPER at 296. Based on this assertion, AFSCME contended the fire prevention specialist should be included in the white collar unit under N.J.S.A. 34:13A-5.15. The Director of Representation disagreed, concluding that the evidence submitted was insufficient to support that claim:

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5/ (...continued)  
Somerset Cty., 41 NJPER at 56; County of Burlington, P.E.R.C. No. 2019-25, 45 NJPER 237 (¶62 2019); N.J.A.C. 19:11-2.6(f) (A hearing may be conducted “if it appears to the Director of Representation that substantial and material factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearings”). Here, AAUP has not produced competent evidence establishing any facts that raise a substantial material factual issue. N.J.A.C. 19:11-2.6(f)(1).

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.

[45 NJPER at 297].

Also, a Hearing Officer decision and a National Labor Relations Board decision were cited to support the application of the burden of production in the case. 45 NJPER at 298 (fn. 3).<sup>6/</sup>

In Camden Housing Authority, the Director dismissed a clarification of unit petition filed by the City of Camden Housing Authority (Authority) which sought to exclude property managers from a unit represented by AFSCME Council 71, Local 3974 (AFSCME). 40 NJPER 219. The Authority contended the property managers were managerial executives and confidential employees within the meaning of the Act. Id. The Director rejected these arguments and dismissed the petition, finding the Authority's certifications were inadequate to support its claims. 40 NJPER at 222. The Director further concluded that "absent a proffer of specific duties property managers actually perform and competent evidence, such as work samples, sworn affidavit(s) or

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<sup>6/</sup> See City of Burlington, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001), citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711-12 (2001).

certification(s) attesting to the confidential job duties property managers perform, I find that property managers are not confidential employees." Id.

And most recently, the Commission denied a petitioner's request for review of the Director of Representation's decision to dismiss its clarification of unit petition seeking to include forty nine (49) State employees in one or more of several collective negotiations units currently represented by the petitioner. State of New Jersey (Office of Employee Relations), D.R. No. 2023-3, (¶30 2022), request for review denied at P.E.R.C. No. 2023-25, 49 NJPER 353 (¶84 2023). The Commission found that, even after the Director provided it with multiple opportunities during his investigation of the petition, the petitioner failed to comply with the Commission's regulations requiring it to include a description of the negotiations unit work the employees in the disputed titles perform, and to explain why that work is negotiations unit work. Also the petitioner did not produce competent evidence of what unit work they performed. Id.

Here, AAUP has not satisfied its burden of production. In its December 11, 2020 response, AAUP states that its position is based upon "information and belief" that the individuals in the petitioned-for titles are "generally holding positions that are only nominally supervisory in nature, but are not actually

supervising anyone and are in fact performing the duties of negotiations unit members.” This assertion is not supported by a certification, affidavit, or other competent evidence. When provided a second opportunity to submit certifications and affidavits in response to the February 14, 2022 letter from the staff agent, AAUP failed to respond at all. As such, AAUP has not produced sufficient, competent evidence in support of its claim that the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15. For this additional reason, the AAUP’s petition is dismissed.

In Bergen Community College, a Commission Designee ordered Bergen Community College (BCC) to provide information needed by the Bergen Community College Administrators Association (Association) to process the Association’s clarification of unit petition. 40 NJPER at 576. The Association, an exclusive majority representative of mid-level managerial employees of BCC, filed the petition to add 22 other administrators to its unit. To support its petition, the Association prepared questionnaires and certifications for the petitioned-for employees to respond to and the questionnaires, among other topics, covered the issue of what job duties the petitioned-for employees perform. 40 NJPER at 575. When BCC interfered with this process and directed the petitioned-for employees not to respond to the Association’s information requests, the Association filed an unfair practice

charge with an application for interim relief. The Commission Designee granted the Association's application and ordered BCC not to interfere with the petitioned-for employees responding to the questionnaires and certifications presented by the Association. 40 NJPER at 576.

The same tools available to the Association in Bergen Community College for acquiring information about employees' job duties are available to AAUP. It could have prepared certifications to review or questionnaires seeking responses for both its unit employees and the petitioned-for employees. Armed with that information, it could have then provided us a factual basis for defining negotiations unit work and determining whether the petitioned-for employees belong in the unit. It did not. AAUP failed to satisfy the burden of production under our Act.



**ORDER**

The clarification of unit petition is dismissed.

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

DATED: March 15, 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 March 27, 2023.**