

P.E.R.C. NO. 2023-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS),

Public Employer,

-and-

Docket No. CU-2022-014

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the CWA's request for review of the Director of Representation's decision to dismiss its clarification of unit petition seeking to include 49 State employees in one or more of several collective negotiations units currently represented by CWA. The Commission finds that, even after the Director provided it with multiple opportunities during his investigation of the petition, the CWA 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. The Commission also finds that the CWA did not specifically identify which petitioned-for employees should be placed in which of the CWA's four existing units. The Commission therefore denies the CWA's request for review without prejudice to it refiling after complying with the regulatory requirements.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Matthew J. Platkin, Acting
Attorney General (Eric A. Zimmerman, Deputy Attorney
General)

For the Petitioner, Weissman & Mintz LLC, attorneys
(Patricia A. Villanueva, of counsel)

DECISION

On September 19, 2022, the Communications Workers of
America, AFL-CIO (CWA) filed a request for review of D.R. No.
2023-3, 49 NJPER 135 (¶30 2022). In that decision, the Director
of Representation dismissed the CWA's clarification of unit
petition which sought to include 49 employees of the State of New
Jersey (State) into one or more of several collective
negotiations units represented by CWA.^{1/} The Director found that

1/ The petitioned-for employees include the following titles:
Government Representative 1; Communications Manager;
Government Representative 2; Legislative Liason; Members of
The Board of Review; Executive Assistant 3; Executive
(continued...)

the CWA's petition does not satisfy the pleading requirements under N.J.A.C. 19:11-1.5 because it does not provide "a description of the present negotiations unit" represented by the CWA. Specifically, the Director found that the CWA did not describe which of the four separate CWA units^{2/} the petitioned-for employees should be placed in. The Director also found that the petition does not comply with N.J.A.C. 19:11-1.5(c)(2)(i) because it does not provide a description of the negotiations unit work performed by the petitioned-for employees or explain why that work is negotiations unit work.^{3/}

Facts and Procedural History

In response to the CWA's May 9, 2022 clarification of unit petition, the State on June 1 asserted that the petition was deficient because it failed to describe how the petitioned-for employees are performing job duties similar to those of job titles already in the CWA's units. The Director's administrative

1/ (...continued)

Assistant 4; Legal Specialist; Coordinator NJ EAP Coordinator; Personnel Assistant and Coordinator NJSP Northern Regional Manager.

2/ Article 1 of the July 1, 2019 through June 30, 2023 collective negotiations agreement (CNA) between the State and CWA identifies four separate negotiations units: Professionals; Administrative and Clerical Services; Primary Level Supervisors; and Higher Level Supervisors.

3/ Because the Director dismissed the CWA's petition, he did not need to decide on the State's objections to the inclusion of certain employees in the unit based on alleged confidential employee or managerial executive status.

investigation included a June 16, 2022 letter from a Commission staff agent requesting information from both parties in order to determine the facts pursuant to N.J.A.C. 19:11-1.5(d). The letter directed the parties to respond to 11 questions/requests for information including, in pertinent part, the following:

(1) Please provide the names, dates of hire and job titles of all the petitioned-for employees.

(2) What job duties and responsibilities do the petitioned-for employees actually perform? Include in your response the petitioned-for employee's official job description, as well as a detailed explanation as to which job duties/responsibilities in the job description(s) the petitioned-for employees actually perform.

(3) Do the petitioned-for employees perform similar work to the employees in the CWA's unit? Please provide a detailed explanation of the work performed by the petitioned-for employees that is similarly performed by CWA unit employees.

(4) Please provided a detailed explanation of whether petitioned-for employees' work is negotiations unit work.

(5) Where do the petitioned-for employees fit within their department's organizational hierarchy? Please provide a detailed explanation and organizational chart for each department that clearly defines what role each petitioned-for employee plays within the organizational hierarchy.

The letter also advised the parties the following regarding supporting their factual assertions with competent evidence:

In your responses, all facts **must be supported by competent evidence, such as certifications or sworn affidavits from individuals with personal knowledge of the facts attested to, and include attached exhibits and sample work performed, where applicable.** The failure to provide competent evidence in support of a claim or defense may result in dismissal of the petition or rejection of a position taken in opposition of the petition. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013). (emphasis provided.)

On June 28, 2022, the State and CWA filed responses to the June 16 letter. The CWA filed a certification indicating that the State had provided it with job descriptions and organizational charts for the petitioned-for employees. The CWA attached those descriptions and charts as exhibits. The State submitted eight certifications from directors and administrators of various State departments and agencies, along with exhibits, explaining the job duties of the petitioned-for employees.

On July 1, 2022, the Director sent the parties a letter indicating his determination that the CWA's petition and June 28 response to his June 16 investigative letter were deficient and that the petition would be dismissed if the defects are not cured. The letter set forth the statutory and regulatory requirements for a clarification of unit petition under the Act and the WDEA and found, in pertinent part:

[T]he CWA's petition and certification in response to our June 16 letter does not address the central question in this case: whether the petitioned-for employees perform

negotiations unit work. The petition does not provide a statement of reasons or explanation as to why the petitioned-for employees perform negotiations unit work, and the petition does not identify which of the four units (Professionals Unit, Administrative and Clerical Unit, Primary Level Supervisors Unit; or Higher Level Supervisors Unit) the petitioned-for employees should be included in. Moreover the CWA's certification does not set forth facts explaining whether negotiations unit work is performed by the petitioned-for employees and describe specifically what negotiations unit work the petitioned-for employees perform (information specifically requested in our June 16 letter).

The Director permitted the CWA to file a supplemental submission "addressing whether the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15." On July 8, 2022, the CWA submitted a letter with exhibits asserting that the CSC's ERG groupings already indicate the petitioned-for employees perform negotiations unit work because the V, W, and Y ERGs are the exempt counterpart to the A, P, R, and S ERGs in the CWA unit. The CWA also asserted that the State did not provide it with all of the substantive job descriptions necessary to fully explain what negotiations unit work the petitioned-for employees perform. On July 15, 2022, the State disputed the CWA's assertion that it did not provide the CWA with documents showing the job duties of the petitioned-for employees. The State argued that the CWA still failed to identify how any of the petitioned-for employees perform negotiations unit work.

Arguments

The CWA asserts that the Director wrongly imposed a burden on it to prove that the petitioned-for employees perform negotiations unit work. It argues that a clarification of unit petition is investigatory and N.J.A.C. 19:11-1.5(d) requires the employer to supply relevant information about the job duties of the petitioned-for employees, not the union. It argues it complied with N.J.A.C. 19:11-1.5 because the negotiations units are identified in the CNA's recognition clause and classified by the Civil Service Commission (CSC) into employee relations groups (ERG) V, W, X, or Y. The CWA asserts that the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1, et seq. (Act), including N.J.S.A. 34:13A-5.15 of the Workplace Democracy Enhancement Act (WDEA),^{4/} and Commission regulations do not require certifications to support clarification of unit petitions. The CWA contends it submitted a certification with exhibits from the State which supplied the Director with competent and credible evidence to determine that the petitioned-for employees perform negotiations unit work.

The State asserts that the CWA's petition did not comply with N.J.A.C. 19:11-1.5(b) because it did not provide a description of the present negotiations unit or the proposed

^{4/} The "Workplace Democracy Enhancement Act," P.L.2018, c.15, enacted May 18, 2018, supplemented our Act with new sections at N.J.S.A. 34:13A-5.11 through 5.15.

clarification of unit and did not fully explain the reasons for the proposed clarification. It argues that the CWA filed its petition under N.J.A.C. 19:11-1.5(b) (3) (vi) and failed to provide a statement describing the negotiations unit work allegedly performed by the petitioned-for employees and an explanation of why that work is negotiations unit work as required by N.J.A.C. 19:11-1.5(c) (2) (i). The State asserts that the CWA also failed to identify which of the CWA's existing four units the petitioned-for employees should be included in. It argues that under N.J.S.A. 34:13A-5.15 of the WDEA, negotiations unit work is work performed by employees regardless of job title or classification, so the CWA should have explained how the job duties of the petitioned-for employees are consistent with unit work rather than relying on the CSC's ERG classifications.

Standard of Review

Pursuant to N.J.A.C. 19:11-8.2(a), "a request for review will be granted only for one or more of these compelling reasons:"

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;

3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or

4. An important Commission rule or policy should be reconsidered.

Analysis

The CWA's clarification of unit petition stated that it was filed "under N.J.S.A. 34:13A-5.15." N.J.S.A. 34:13A-5.15(a) of the WDEA provides that: "All regular full-time and part-time employees of the public employer who perform negotiations unit work shall be included in the negotiations unit represented by the exclusive representative employee organization."

Negotiations unit work is defined as "work 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 classification or number of hours worked" and excludes certain employees such as confidential and managerial executives. N.J.S.A. 34:13A-5.15(b).

Pursuant to N.J.S.A. 34:13A-5.15(e), the Commission promulgated rules to effectuate the provisions of N.J.S.A. 34:13A-5.15 by amending its preexisting clarification of unit rules, N.J.A.C. 19:11-1.5. All clarification of unit petitions "shall contain": a description of the present negotiations unit; a description of the proposed clarification of the unit; and a statement listing and explaining fully the reasons for the proposed clarification. N.J.A.C. 19:11-1.5(b)(1), (2), and (3).

For clarification of unit petitions filed pursuant to N.J.S.A. 34:13A-5.15 of the WDEA, the reason for the proposed clarification is: "A dispute concerning the addition to a certified or recognized unit for collective negotiations of employees who perform negotiations unit work." N.J.A.C. 19:11-1.5(b)(3)(vi). For such petitions seeking to clarify an existing unit based on the assertion that an employee not currently in the unit is performing negotiations unit work, N.J.A.C. 19:11-1.5(c) provides the following specific requirements:

(c) A petition for clarification of unit filed pursuant to (b)3vi above shall:

1. Not seek the addition of any employees of the same public employer who are included in an existing unit for collective negotiations;

2. Identify the positions/titles the petitioner seeks to include in an existing negotiations unit, along with a statement explaining fully the reasons for the proposed inclusion.

i. The reasons for the inclusion of the positions/titles identified in the petition shall include a description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform, and an explanation of why that work is negotiations unit work.

ii. Along with the petition, the petitioner shall provide a copy of the most recent collective negotiations agreement between the petitioner and the employer and any documents upon which petitioner relies in support of its petition.

The rules also require the Director to investigate the petition to determine the facts, issue a written request to the employer for relevant information, and resolve the dispute within 60 days. N.J.A.C. 19:11-1.5(d) and (e).

In this case, the State provided the CWA with exhibits and certifications concerning the job duties and organizational charts applicable to the petitioned-for employees. The CWA additionally relied on the CSC ERG classifications (V, W, X, or Y) of the petitioned-for employees, and the four types of units (Professional, Administrative and Clerical Services, Primary Level Supervisors, and Higher Level Supervisors) identified in the CNA's recognition clause. However, rather than just provide the job titles and classifications of current unit employees alongside the job duties, titles, and classifications of the petitioned-for employees, the CWA, as the petitioner seeking to clarify additional titles into the unit, was required by N.J.A.C. 19:11-1.5(c)(2)(i) to "include a description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform, and an explanation of why that work is negotiations unit work." Further, N.J.A.C. 19:11-1.5(c)(2)(ii) made it the CWA's burden to provide "any documents upon which petitioner relies in support of its petition."

The CWA's submissions to the Director did not include the required explanation of how the work performed by the petitioned-

for employees is negotiations unit work. The CWA also did not specifically identify which petitioned-for employees should be placed in which of the CWA's four existing units based on their performance of negotiations unit work. Following the parties' initial responses to the Director's clarification of unit investigative letter, the Director notified the CWA of the defects in its petition and submissions and provided it with an additional opportunity to address the issue of what negotiations unit work is performed by the petitioned-for employees. However, the CWA's final submission only offered a comparison of the broad CSC ERG classifications in the existing units to the broad ERG classifications of the petitioned-for employees. The CWA failed to sufficiently explain what work performed by the petitioned-for employees is substantially similar to work performed by titles already in the CWA's unit so as to constitute "negotiations unit work" under N.J.S.A. 34:13A-5.15 and N.J.A.C. 19:11-1.5. We therefore concur with the Director that the CWA's explanation of why the unit should be clarified to include the petitioned-for employees was deficient and failed to comply with the requirements of N.J.A.C. 19:11-1.5(c)(2).

Finally, we note that the Act and our rules do not necessarily require that the petitioner submit a certification or affidavit in order to qualify as competent evidence in support of a clarification of unit petition. The June 16, 2022

investigative letter and the Director's July 1, 2022 supplemental letter suggested but did not require certifications as examples of competent evidence. The Director's decision likewise allowed for "otherwise competent evidence" besides just certifications or affidavits to be considered in support of the CWA's petition. D.R. No. 2023-3 at 19. Depending on the nature of the disputed facts and probative value of the documentary submissions in a particular clarification of unit case, it may be appropriate for the Director to request certifications in support of certain claims and to dismiss a petition for failure to provide such evidence. See, e.g., Lawrence Tp., D.R. No. 2019-13, 45 NJPER 295 (¶76 2019) (Director dismissed clarification of unit petition under WDEA where petitioner failed to provide an adequate certification regarding whether the petitioned-for employee performs negotiations unit work); Camden Housing Auth., D.R. No. 2014-7, 40 NJPER 219 (¶84 2013) (Director dismissed clarification of unit petition where employer failed to produce competent evidence of confidential job duties such as certifications or work samples). Here, the CWA did provide a certification; however, whether through certification or other submissions, the CWA failed to provide sufficient competent evidence to support its claim that the petitioned-for employees perform negotiations work and failed to specify which negotiations units those employees should be clarified into and why.

In sum, the Director's June 16 and July 1, 2022 letters carefully identified the regulatory deficiencies in the CWA's petition and supplementary submissions and gave the CWA multiple opportunities to cure them. As described in D.R. No. 2023-3 and summarized above, the CWA did not provide the necessary information to satisfy the regulatory requirements for the clarification of unit that it sought. Accordingly, we deny the CWA's request for review as it has not advanced any compelling reasons to review the Director's findings or conclusions. The CWA is not precluded from re-filing a clarification of unit petition that complies with the regulatory requirements.

ORDER

The request for review is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 26, 2023

Trenton, New Jersey