

P.E.R.C. NO. 2023-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Public Employer,

-and-

Docket No. RO-2023-010

RUTGERS COUNCIL OF AAUP CHAPTERS,
AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS-AMERICAN FEDERATIONS OF
TEACHERS, AFL-CIO

Petitioner.

SYNOPSIS

The Commission denies a request for review filed by Rutgers, the State University of New Jersey, and affirms a decision of the Director of Representation which granted a representation petition filed by Rutgers Council of AAUP Chapters, American Association of University Professors - American Federation of Teachers (AAUP-AFT), seeking to add the employees in another negotiations unit of faculty and librarians (represented by AAUP-BHSNJ) to AAUP-AFT's existing negotiations unit of faculty members, teaching assistants and graduate assistants. The Commission finds no substantial questions of law or fact implicated by the Director's determination of a shared community of interest between the two units, which is fully consistent with the Commission's longstanding preference for broad-based negotiations units. The Commission finds the Director thoroughly considered the job-based distinctions relied upon by Rutgers, but properly found such considerations were outweighed by other significant factors, including that AAUP-AFT sought consolidation not severance, the affected employees expressed interest in the broader unit, and that AAUP-BHSNJ supported the merger. The Commission further affirms the Director's finding that Rutgers did not overcome the presumption of validity of the signed authorization cards submitted by AAUP-AFT in support of its petition.

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, (Andy Jong, Assistant General
Counsel)

For the Petitioner, Weissman & Mintz, LLC (Ira W.
Mintz, Esq.)

DECISION

On December 22, 2022, Rutgers, the State University of New Jersey (Rutgers) filed a request for review of a decision of the Director of Representation (Director), D.R. No. 2023-7, 49 NJPER 291 (¶67 2022), which granted a representation petition filed by Rutgers Council of AAUP Chapters, American Association of University Professors - American Federation of Teachers (AAUP-AFT). On January 6, 2023, AAUP-AFT filed a statement in opposition to Rutgers' request for review. Supplemental briefing was completed on February 6, 2023. We deny review.

By way of background, AAUP-AFT is the majority representative of faculty members, teaching assistants and graduate assistants employed by Rutgers. Effective July 1, 2013, certain schools, centers and institutes of the former University of Medicine and Dentistry of New Jersey (UMDNJ) were incorporated into Rutgers pursuant to the New Jersey Medical and Health Sciences Education Restructuring Act (Restructuring Act), N.J.S.A. 18A:64M-1, et seq. The American Association of University Professors - Biomedical and Health Sciences of New Jersey (AAUP-BHSNJ), then called AAUP-UMDNJ, represented a unit of faculty and librarians employed at UMDNJ, and continued to represent those employees after UMDNJ's integration with Rutgers. However, the employees represented by both AAUP-AFT and AAUP-BHSNJ now have a single employer, Rutgers.

AAUP-AFT's petition sought to add the employees in AAUP-BHSNJ's negotiations unit of faculty and librarians, referred to in the Director's decision as the "legacy unit," to AAUP-AFT's existing negotiations unit of faculty members, teaching assistants and graduate assistants, referred to in the Director's decision as the "non-legacy unit." AAUP-BHSNJ did not oppose the merger, provided AAUP-AFT became the majority representative of the merged unit either through voluntary recognition by Rutgers or by certification by the Commission. D.R. at 2 and n.1.

Rutgers opposed the petition based upon "two main objections," as the Director put it: "(1) that the sought combined unit is inappropriate because it disrupts negotiations history and because the employees in the separate units do not share a community of interest with each other, and (2) that the website used by the petitioner to collect electronic signatures for the showing of interest contains false information that misled signers." D.R. at 3.

After addressing each of Rutgers' objections in turn and explaining at length his reasons for rejecting them based upon relevant Commission precedent as applied to the factual record, D.R. at 3-17, the Director concluded AAUP-AFT had submitted an adequate showing of interest to be certified without an election as the majority representative of the petitioned-for unit; adding all clinical, teaching, and/or research faculty and staff librarians employed by Rutgers in legacy UMDNJ positions to AAUP-AFT's existing unit. Id. at 17-18.

With regard to Rutgers' objection that the units did not share a community of interest, the Director found that denying the petition would subdivide the teaching staff, giving controlling significance to differences in the types of courses taught by faculty and other job-related differences flagged by

Rutgers.^{1/} D.R. at 11. The Director found that this would be against Commission policy favoring broader units. D.R. at 11. In finding that policy applicable here, the Director acknowledged Commission precedent (relied upon by Rutgers) stating that in the determination of unit composition, significant job-related differences should be considered if the balance of all relevant factors so indicated. D.R. at 10. But the Director found the following factors in this matter tipped the balance in favor of a broad-based unit: the petitioner seeks consolidation, not a separate unit; the affected employees have expressed interest in the broader unit; and the incumbent of the legacy unit supports the merger. D.R. at 10, 11. The Director found that under such circumstances, differences between individual employees are of lesser significance in the determination of unit composition. Id. at 10.

The Director further found that tenured employees and those with calendar-year appointments who are added from the legacy unit will share a community of interest with non-legacy employees, as the non-legacy unit already includes employees who

^{1/} These include differences in: compensation; supervision; job responsibilities; work locations and settings; skills and training; tenure and tenure-track status or lack thereof; academic or calendar-year appointment status; professional licensing status; and appointment, reappointment and promotion processes and criteria.

are tenured and non-tenured, as well as those with academic-year and calendar-year appointments. D.R. at 4.

The Director also observed that many of the other differences between the legacy and non-legacy employees that, Rutgers contends, preclude merger are the result of negotiated terms and conditions of employment in the separate contracts with AAUP-AFT and AAUP-BHSNJ. D.R. at 8. The Director found a determination that the units should not be combined that is based upon such differences would be problematic. In this regard, the Director reasoned that a disparity in such terms between contracts may be why some employees seek to consolidate with other negotiations units. The Director further considered that negotiations, generally, may be hampered if majority representatives feared either that a negotiated distinction between titles in a contract could result in unit severance, or that differences in negotiated terms between separate contracts could preclude future unit consolidation. D.R. at 8-9.

The Director further noted AAUP-AFT does not seek to include, in the petitioned-for combined unit, any employees who were not previously in each of the separate units at issue, nor does it seek to exclude from the combined unit any employees who were already in each of the separate units. D.R. at 5. The Director also found Rutgers failed to establish the supervisory or confidential status of any employees, and that in any case the

removal of such employees from the non-legacy unit or a merged unit could be accomplished through a clarification of unit petition, without affecting the propriety of including the employees of the legacy unit. D.R. at 5-6.^{2/}

Addressing Rutgers' concerns that the merger would disrupt current negotiations for successor agreements for the separate units, the Director noted that employees have a right to seek a new collective negotiations representative during contractual open periods, which may result in the employer starting negotiations anew, even if the unit structure remained the same. D.R. at 12.

With regard to Rutgers' allegations about false or misleading information on the website used by the petitioner to collect signatures, the Director noted that authorization cards to support certification without an election are presumed valid absent substantial, reliable evidence that raises a legitimate and substantial doubt. D.R. at 14. The Director found Rutgers provided no such evidence, and that standing alone, Rutgers' contention that it was "likely" that erroneous information impaired signers' free choice did not constitute substantial and reliable evidence of impairment, and was speculative. D.R. at 14, 15-16.

^{2/} In support of review, Rutgers does not argue that conflict of interest or statutory exclusion apply here.

The Director also noted the allegedly false or misleading statements appeared not on the web page employees used to sign authorizations but on a "frequently asked questions" (FAQ) section of the website. D.R. at 15. The FAQ page statements flagged by Rutgers as misleading are as follows (emphases added):

While at this time we seek to merge the faculty contracts, we are not merging the unions. If the two organizations were merged, further discussions would need to take place first. After such discussions, any internal reforms would need to go to a vote of the membership.

For the purpose of this contract, all the same procedures will apply to ratification (a.k.a approval of a tentative contract by the membership). This means that members will vote for the tentative deal separately and apart from the legacy Rutgers faculty, just as they do now.

[D.R. at 16.]

The Director rejected Rutgers' argument that the above statements constituted "irrefutable evidence of erroneous information" when contrasted with the fact that the representation petition sought to add the AAUP-BHSNJ "unit" to the AAUP-AFT "unit." D.R. at 16. The Director found the statement, "we are not merging the unions," was not false, as a negotiations "unit" is not the same as an employee "union" or "organization" that might be the majority representative of the unit; and AAUP-BHSNJ will continue to exist if AAUP-AFT is issued

a Certification of Representative for its proposed broader unit. D.R. at 16-17.

Regarding the statement about "ratification," the Director noted the Act does not prescribe any ratification procedures, the selection of which is considered an internal union matter. The Director otherwise found no evidence in connection with the ratification procedures of a merged unit to support that the website statement was erroneous. D.R. at 17.

The grounds for review are set forth in N.J.A.C. 19:11-8.2(a), which states, in pertinent part:

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.

A request for review may not raise any issue or allege any facts not timely presented to the Director, unless the facts alleged are newly discovered and could not with reasonable diligence have

been discovered in time to be so presented. N.J.A.C. 19:11-8.3(c).

In support of review, Rutgers first contends the Director's decision raises a substantial question of law concerning the interpretation and administration of the Act, and/or presents an important Commission rule or policy that should be reconsidered. On this point, Rutgers argues the Director did not give "due regard for the community of interest among the employees concerned," as required by section 5.3 of the Act. Rutgers argues the Director's decision contradicts the legislative intent that "due regard" requires consideration of differences in compensation, supervision, job responsibilities, etc. (see n.1, supra), among the employees involved. Rutgers also relies on decisions of the National Labor Relations Board (NLRB) which place greater focus on such distinctions when considering the community of interest. Rutgers faults the Director's decision for "summarily" dismissing the significance of those distinctions in this case. Rutgers further suggests that Commission precedent relied upon by the Director establishes a "rule or policy" to the effect that the "only" factors to bar an employee from joining a unit (which the Director found inapplicable here) are a conflict of interest (among employees sought to be included in the unit), or a statutory exclusion (such as the provisions in section 5.3 pertaining to managerial executives and confidential employees).

Rutgers further argues that this rule or policy is inconsistent with the Act and with other Commission precedent, and should be reconsidered.^{3/}

Next, Rutgers contends the Director's decision was clearly erroneous in its rejection of Rutgers' arguments about factually inaccurate information on the union's website, and that such error prejudicially affects the rights of the party seeking review. Rutgers contends the Director erred in finding that the website statements, alone, were insufficient to establish that employees were misled in signing authorizations, and in finding that the claim was speculative absent other substantial and reliable evidence of impairment.

Rutgers complains the Director's decision itself engaged in speculation by considering the possibility that many employees never saw the FAQ page (D.R. at 15); and avers that given the

^{3/} Rutgers also raises an issue it did not raise to the Director below. As evidence the units here lack the requisite community of interest, Rutgers points to AAUP-BHSNJ's ongoing and continuing participation in separate negotiations pertaining to the impact on AAUP-BHSNJ unit members of Rutgers' affiliation with RWJBarnabas Health, a private sector employer. Rutgers argues that these negotiations are entirely unique to AAUP-BHSNJ members and do not affect members in the AAUP-AFT unit. We will not consider these facts or argument, as Rutgers does not claim they are newly discovered and could not with reasonable diligence have been discovered in time to be presented to the Director. N.J.A.C. 19:11-8.3(c). Moreover, AAUP-AFT in its reply brief states that it is also participating in these negotiations, and that any memorandum of agreement that results will be between Rutgers and AAUP-AFT.

prohibition in the Workplace Democracy Enhancement Act (WDEA),^{4/} against employers from encouraging or discouraging employees' engagement in union activity, it could not obtain other evidence, such as from individual signatories or their certifications. Rutgers further contends, again relying on NLRB decisions, that such evidence is not essential in any case, and that the website evidence alone establishes a tendency to mislead and create ambiguity, giving rise to a legitimate and substantial doubt as to the validity of the showings of interest.

In a footnote, Rutgers also alleges a fact it contends was unknown at the time of Rutgers' initial filing in this matter: AAUP-BHSNJ continues to participate, "as a union," in negotiations between Rutgers and AAUP-AFT concerning the merged unit, despite the Director's order certifying AAUP-AFT as the exclusive representative of the merged unit. Rutgers suggests this is evidence that AAUP-BHSNJ is continuing to seek to represent AAUP-AFT members as a separate unit at Rutgers, in further support of its arguments about false or misleading website information.

In its February 1, 2023 supplemental brief, Rutgers makes similar allegations based upon "new facts" that it asserts were not known at the time of its initial filing. Specifically, Rutgers contends a January 3, 2023 email from AAUP-BHSNJ's

^{4/} P.L. 2018, c. 15, § 1, N.J.S.A. 34:13A-5.11-5.15.

Executive Director to Rutgers' Assistant Vice President for Labor Relations, and the participation of AAUP-BHSNJ leadership in a negotiations sessions on January 18, 2023, is evidence that AAUP-BHSNJ seeks to "maintain its current status as both a separate union and separate unit," even after the Director certified the combined unit. As further evidence, Rutgers points to the fact that since the certification of the merged unit, the information on the unions' website "does not appear to have changed at all."

AAUP-AFT replies, in opposition to Rutgers' request for review, that it is just as capable of being the single majority representative of the merged unit as Rutgers is to be the single employer of the two groups of employees at issue since 2013. As a result of the merger of UMDNJ with Rutgers, AAUP-AFT argues, more and more differences in the applicable policies and terms and conditions of employment have narrowed through several cycles of negotiation; and the Director's decision in this case has already resulted in AAUP-AFT representing the merged unit of employees in successor contract negotiations.

AAUP-AFT further replies that employee choice is the key factor in determining whether employees with a community of interest will be represented in one negotiations unit or separate units, and here employees have expressed a preference for one broad-based unit. Having to negotiate comparable contract language at two faculty negotiations tables is inefficient, AAUP-

AFT argues, and does not reflect employee free choice in this case. The fact that AAUP-AFT unit members and former AAUP-BHSNJ unit members work in different schools and departments, have distinct skills and training and minimal interchange also does not preclude merger, AAUP-AFT argues, as the same was true of the AAUP-AFT negotiations unit prior to this petition. AAUP-AFT reiterates that its negotiations unit also already included non-tenure track faculty and both calendar-year and academic-year faculty, as well as many licensed health care professionals.

AAUP-AFT further argues that having different terms and conditions of employment for different groups of employees in the same collective negotiations contract should be no more difficult than it is for Rutgers to have different terms and conditions of employment for such groups in its own internal Policies as reflected in those it submitted to the Director below. AAUP-AFT also argues that Rutgers' reliance on NLRB precedent is misplaced as the NLRB does not have a preference for broad-based negotiations units, unlike the Commission and the New Jersey courts. AAUP-AFT distinguishes a Commission case relied upon by Rutgers as involving statutory exclusions not present here.

AAUP-AFT disputes, as false, Rutgers' allegation that AAUP-BHSNJ, as a union, is still participating at negotiations with Rutgers and AAUP-AFT concerning the merged unit. AAUP-AFT explains that prior to the certification of the merged unit,

AAUP-BHSNJ submitted successor contract proposals, but since then AAUP-AFT is continuing the negotiations but properly in the name of the merged majority representative, AAUP-AFT.

AAUP-AFT argues the Director properly rejected Rutgers' claims about false information, as the website statements at issue were "unequivocally true" and accurate. AAUP-AFT also distinguishes an NLRB case relied upon by Rutgers, as it involved allegations that union literature gave the false impression its organizing campaign was supported by the NLRB, a misuse of NLRB processes; whereas the instant matter involves no similar allegations of a misuse of Commission processes.

AAUP-AFT further argues that the exception for newly-discovered evidence does not apply to the January 2023 events discussed in Rutgers' supplemental brief, as those events occurred after the issuance of the Director's decision. Substantively, AAUP-AFT reiterates that union representatives have reaffirmed at all post-certification negotiations sessions that they are negotiating as a single unit; and AAUP-BHSNJ's Executive Director confirmed with Rutgers' counsel that the negotiations are between Rutgers and AAUP-AFT. AAUP-AFT also contends other post-certification email correspondence between the Executive Director and Rutgers' counsel, not mentioned in Rutgers' supplemental brief, supports that AAUP-BHSNJ does not seek to maintain separate status.

Rutgers has the ability and obligation to negotiate with and treat the units as merged, AAUP-AFT further asserts, while the need for separate discussions about how to integrate terms and conditions of former BHSNJ members into the merged unit gives AAUP-AFT the right to have BHSNJ leadership attend and play a lead role at such negotiations.

Finally, AAUP-AFT contends the fact that the website has not yet been updated, post-certification, reflects nothing more than the time and effort involved in doing so, while the current website continues to display information about the explicit goal to have AAUP-AFT be the representative of the merged units.

Analysis

We find no substantial questions of law or fact implicated by the Director's determination of a shared community of interest between the legacy unit and the existing non-legacy unit. We find this conclusion to be fully consistent with our longstanding preference for broad-based negotiations units. State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974) (reinstating Commission decision that implicitly found the inclusion of employees in a unit of all professionals sharing a broad occupational objective was more appropriate than allowing the attributes of a particular profession to control).

We are also satisfied that in finding the requisite community of interest here, the Director cited pertinent

precedent applicable to educational settings, including, among others,^{5/} Union Cty. College, P.E.R.C. No. 2019-35, 45 NJPER 319 (¶84 2019), aff'd, 47 NJPER 70 (¶19 App. Div. 2020), wherein we explained:

That precedent provides that a community of interest exists among virtually all non-supervisory educational employees and that a community of interest can be found among professional educational personnel who instruct students regardless of whether they are considered regular teachers or are employed in special programs. It further provides that divisions based on whether employees could or could not obtain tenure have been discounted, and that even non-

^{5/} The Director also cited, inter alia: State of New Jersey, D.R. No. 97-5, 24 NJPER 295, 297 (¶29141 1996) ("Varying degrees of expertise in an area, varying levels of training, and different job duties are traditionally not significant community of interest factors when compared to shared goals, the central authority which controls their working conditions and work environment."), req. for rev. den. P.E.R.C. No. 97-81, 23 NJPER 115 (¶28055 1997); Essex Cty. College, D.R. No. 93-15, 19 NJPER 131 (¶24064 1993) (noting that occupational differences between professionals and non-professionals, for which the Commission has approved combined units, are at least as great as differences between blue collar and white collar employees, and thus determining that the factors relevant in determining appropriate unit structure were sufficiently in balance to permit the desires of the employees to control); Bergen Community College, D.R. No. 2006-14, 32 NJPER 72 (¶37 2006) (finding community of interest despite differences in educational background, working conditions, funding sources, and contractual provisions, and that differences did not outweigh policy favoring broad-based units); Morris Cty. Voc. Sch. Bd. of Ed., P.E.R.C. No. 2002-58, 28 NJPER 219 (¶33075 2002) (noting that Director explained why there was community of interest despite Board's argument that employees had highly-defined and different duties, different training, different work locations, different supervisors, and little to no interaction with each other). See, D.R. at 7 and n.4.

instructional professional employees who perform services related to the educational mission may share a community of interest for purposes of unit inclusion under our Act.

[Union Cty. College, 45 NJPER at 321.]

In affirming the Commission's decision in Union Cty. College, the Appellate Division found the Commission "appropriately exercised its expertise and relied on its own precedent" in making the above-quoted determination. 47 NJPER at 73. The court also found it was "consistent with the policy favoring broad-based negotiation units, which the Supreme Court has found is implicit" in our Act. Id., citing, State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. at 250-252.

In light of such longstanding and directly pertinent Commission and court precedent, we are unpersuaded by Rutgers' reliance on NLRB decisions which may have placed a greater focus on job-related differences among employees in the making of determinations regarding community of interest. While we may use NLRB decisions as guidance, the Commission is not bound by NLRB precedents. Lullo v. International Assn. of Firefighters, 55 N.J. 409 (1970).

We also note that Rutgers' request for review does not challenge the Director's finding that exclusions based on conflict of interest or statutory prohibition were not presented here. And we otherwise reject Rutgers' characterization of Commission precedent relied on by the Director as establishing

any "rule or policy" to the effect that conflict of interest and statutory exclusion are the "only" factors to bar an employee from joining a unit; as well as its contention that same should be reconsidered. We are satisfied the Director did not "summarily dismiss," but rather thoroughly considered the job-based distinctions relied upon by Rutgers; but he properly found that such considerations were outweighed by other significant factors in this case, including that the petitioner sought consolidation not severance, the affected employees expressed interest in the broader unit, and the incumbent of the legacy unit supported the merger.

Finally, we affirm the Director's finding that Rutgers has not overcome the presumption of validity of the signed authorization cards. In this regard, N.J.A.C. 19:11-2.6(b) states, in pertinent part:

Absent the submission of substantial, reliable evidence that raises a legitimate and substantial doubt, executed authorization cards are presumed valid.

Generally, to overcome the presumption of validity requires evidence based upon personal knowledge. Paterson Charter Sch., P.E.R.C. No. 2016-4, 42 NJPER 99 (¶27 2015); Mt. Ephraim Bd. of Ed., D.R. No. 2007-3, 32 NJPER 293 (¶121 2006). Rutgers has provided no such evidence here; and we agree with the Director that Rutgers' exclusive reliance on the website statements, standing alone, does not constitute substantial, reliable

evidence raising a legitimate and substantial doubt that calls into question the validity of the cards.

Under N.J.A.C. 19:11-8.3(c), we may not consider, as such evidence, the alleged post-certification conduct of BHSNJ representatives discussed in Rutgers' brief and supplemental brief, or the post-certification state of the website discussed in its supplemental brief. Such facts arose after the Director issued his decision, and thus could not have been discovered, with or without reasonable diligence, in time to be presented to the Director. In any case, we would not find that such evidence meets the high standard required to raise a legitimate and substantial doubt as to the validity of the signed authorization cards. The alleged post-certification conduct of BHSNJ representatives appears to have been taken out of context, while the fact that the website has not yet been updated would not constitute substantial, reliable evidence that card-signers were misled.

We are also not persuaded by Rutgers' contention that provisions of the WDEA prevented it from obtaining any additional evidence. Rutgers cited no authority, nor are we aware of any, indicating the passage of the WDEA in 2018 somehow altered the required burden of proof in challenges to the validity of authorization cards under N.J.A.C. 19:11-2.6(b).

The Director's decision is affirmed.

ORDER

The request for review filed by Rutgers, the State University of New Jersey, is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Papero voted in favor of this decision. None opposed. Commissioner Voos recused herself.

ISSUED: February 23, 2023

Trenton, New Jersey