

P.E.R.C. NO. 2023-53

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CUMBERLAND COUNTY UTILITIES AUTHORITY,

Public Employer,

-and-

Docket No. CU-2021-010

COMMUNICATIONS WORKERS OF AMERICA,  
AFL-CIO, LOCAL 1085,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the Cumberland County Utilities Authority's request for review, remanding for an evidentiary hearing the Director of Unfair Practices' decision in D.R. No. 2023-11, 49 NJPER 412 (¶101 2023). The Director's decision granted a clarification of unit petition filed by the CWA seeking to include the position of Business Administrator in its already existing unit of supervisory employees. The Director found that the Authority did not establish sufficient facts demonstrating that the Business Administrator actually performed confidential duties and that the position formulates policy or directs its effectuation. The Commission finds that review of the Director's decision is warranted because a substantial question of law remains unresolved due to the insufficient establishment of facts by the parties. The Commission further finds an evidentiary hearing is needed to establish the extent of the Business Administrator's involvement in labor relations matters and employee discipline to determine whether she is considered a confidential employee or a managerial executive.

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, Chance & McCann, attorneys  
(Matthew Weng, of counsel)

For the Petitioner, Weissman & Mintz LLC, attorneys  
(Annmarie Pinarski, of counsel)

DECISION

On March 6, 2023, the Cumberland County Utilities Authority (Authority) filed a request for review of a decision of the Director of Representation (Director), D.R. No. 2023-11, 49 NJPER 412 (¶101 2023), which granted a clarification of unit (CU) petition filed by the Communications Workers of America, AFL-CIO, Local 1085 (CWA) seeking to include the position of Business Administrator in its already existing unit of supervisory employees. The Director found that the Authority did not establish sufficient facts demonstrating that the Business Administrator actually performed confidential duties and that the position formulates policy or directs its effectuation.

Therefore, the Director found that the Business Administrator is not a confidential employee or a managerial executive within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), and thus, the position can be included within the CWA's bargaining unit of supervisory employees. The Authority filed a letter brief in support of its request for review, and the CWA did not file any opposition.

By way of background, the Authority and CWA Local 1085 are parties to a collective negotiations agreement (CNA) with a term of January 1, 2021 through December 31, 2023. On March 29, 2021 the Director issued a "Certification of Representative Based Upon Authorization Cards" (Docket No. RO-2021-044) creating a "supervisory unit" under the CWA. The Certification provided the following bargaining unit definition:

Included: All regularly employed supervisory employees of the Cumberland County Utilities Authority.

Excluded: Managerial executives and confidential employees within the meaning of the Act; nonsupervisory employees; craft employees, professional employees, police, casual employees; and all other employees of the Cumberland County Utilities Authority.

The Business Administrator position has existed at the Authority for at least 23 years. In detailing the Business Administrator's duties, the Authority provided the Business Administrator's job description, as well as a draft of a new job description, which summarizes the position's duties as managing

"the Authority's overall business and human resource operations."

The Authority also submitted an Organizational Chart, which places the Executive Director reporting directly to the Board of Chosen Freeholders, with the Business Administrator and Deputy Director, who are both above several supervisor titles, reporting to the Executive Director.

On May 7, 2021, the CWA filed its CU petition to include the Business Administrator, only stating that "[t]he employer seeks to exclude the title Business Administrator from the newly created negotiations unit." The parties met for one negotiations session on May 12, 2021, and the issue of the Business Administrator being included in the bargaining unit was not raised. In the Authority's position statement responding to the CU petition, it claims that the CWA's CU petition is not supported by sufficient reasoning or evidence in accordance with N.J.A.C. 19:11-1.5. Additionally, the Authority claims the Business Administrator is both a confidential employee and a managerial executive. In the CWA's position statement in support of its CU petition, the CWA claims that the Authority fails to proffer specific proof that the Business Administrator is a confidential employee or managerial executive. The CWA argues that the job description for the Business Administrator position does not establish any duties that intersect with collective negotiations. Further, the CWA maintains that, due to the then-

ongoing collective negotiations between the parties, there is no indication that the Business Administrator has participated in formulating collective negotiations proposals or that the position has access to confidential information.

On August 9, 2021, an investigatory conference was held. On February 24, 2022, a Commission staff agent sent a letter to the Authority and CWA requesting responses to a series of questions as to the Business Administrator's job duties and related matters, specifically concerning the Business Administrator's involvement in labor relations, collective negotiations and processing of grievances. In the February 24 letter, the staff agent advised the parties of the following:

In your responses, 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. The 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.

On April 1, 2022, the Authority filed a letter without a certification<sup>1/</sup> providing its responses to the February 24

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1/ On July 8, 2022, in response to CWA's answers to the staff agent's February 24 letter, the Authority submitted a certification from Robert Carlson (Carlson), the Authority's Executive Director. Carlson certified that after reviewing the Authority's April 1 letter "all of the information" contained in the letter was "true and correct to the best" of his "ability and knowledge."

letter. The following are some of the responses, in pertinent part:

7. The Business Administrator does assist in the formulation of polices for the CCUA. The BA has the authority to rewrite job descriptions to more closely fit the desired role for that position within the organization. They also plan and administer all policies related to human resources management. Currently, the BA is in the process of reviewing the employee handbook to update all job positions to more closely fit the goals of the organization.

9. As noted above, the Business Administrator has purview over all human resource management decisions. They maintain and update all personnel files.

10. The BA does participate in labor relations activities. As noted, they have purview over all human resource management decisions. They also assist the Executive Director in all phases of work, including labor negotiations. Most recently the BA participated in the discussions regarding the formation of the current collective bargaining agreement.

11. The BA has purview over all human resource management decisions, and as such is intimately involved in issues of employee discipline. The BA is consulted on all discipline decisions and is present during all investigations and interviews involving personnel.

12. As a confidential assistant to the Executive Director, the BA has intimate knowledge of management's positions regarding collective bargaining negotiations. All phases of management policy and decision making are shared with the BA through the Executive Director and Deputy Director.

[Emphases added.]

On May 11, 2022, CWA filed a letter responding to the February 24 stating that it "was unable to secure the assistance of the employee in the Business Administrator title to respond to your questions because that employee is not recognized as included in the supervisory unit. Accordingly, CWA Local 1085 was unable to respond to the questions presented with evidence in the form of certifications or sworn affidavits." Additionally, the CWA noted that the Authority failed to provide certifications or exhibits in support of its responses. Thus, the CWA requested that "PERC schedule this matter for a hearing, pursuant to N.J.A.C. 19:11-2.6(f). A hearing is necessary to adduce the facts of the scope of the work of the Business Administrator title from witnesses who can be examined and cross examined by the Union."

On February 4, 2023, the staff agent issued a 7-day letter to the parties advising of them of tentative findings that the Business Administrator was not a confidential employee or managerial executive within the meaning of the Act. The parties were invited to respond if they believed the tentative findings were incorrect or required additional evidentiary material to be reviewed. The parties were asked to respond by February 14, 2023; however, neither party filed a response to the 7-day letter. Following the administrative investigation to determine the facts in accordance with N.J.A.C. 19:11-2.2, the Director

determined that there were no substantial or material factual issues requiring an evidentiary hearing pursuant to N.J.A.C. 19:11-2.6.

On February 24, 2023, the Director issued his decision on the CWA's CU petition, determining that the Authority failed to establish that the Business Administrator was a confidential employee and managerial executive, and thus, the position could be included in the CWA's bargaining unit of supervisory employees. The Director found that, despite the staff agent's repeated attempts to have the Authority establish the facts supporting its position, the Authority failed to provide any specific examples of confidential duties actually performed by the Business Administrator. Although the Authority certified that the Business Administrator oversees all human resources decisions, including being consulted on all disciplinary decisions; being present during all investigations and interviews involving personnel; and maintaining and updating all personnel files, the Director found that knowledge of personnel or security matters unrelated to advance knowledge of grievances or collective negotiations strategies is not sufficient to designate a position confidential. The Director further found that the Authority failed to provide sufficient material facts to establish that the Business Administrator is a managerial executive. The Director found no facts that suggest that the



Business Administrator actually formulates policy or directs its effectuation, and thus, it appears that the Business Administrator is simply acting at the behest of the Authority's Executive and Deputy Directors.

The grounds for granting a request 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.

The Authority argues that the Commission should grant its request for review because the Director's decision to not hold an evidentiary hearing resulted in prejudicial error. The Authority asserts that had a hearing been held it could have provided additional information with specific examples to demonstrate that the Business Administrator was both a confidential employee and managerial executive. However, even without a hearing, the Authority maintains that the factual evidence it did present to

the Director was sufficient to establish that the Business Administrator was a confidential employee and a managerial executive. The Authority contends it established that the Business Administrator participates in collective bargaining with management, participates in discussions of strategy and tactics with management, and has intimate knowledge of management positions during negotiations; all of which render the position confidential. The Authority claims that the Business Administrator having these duties and level of participation in collective negotiations make the position incompatible with being a member of the bargaining unit. Further, the Authority asserts that it established sworn, uncontroverted facts that the Business Administrator formulates and implements Authority policy, and thus, is a managerial executive. The Authority notes that the Business Administrator has the authority to rewrite job descriptions, plans and administers all policies related to human resource management, and participates in the employee discipline process.

The Commission is responsible for determining the appropriate collective negotiations unit when questions concerning representation of public employees arise. N.J.S.A. 34:13A-6(d). 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 (Office of Employee Relations), D.R. No. 2023-3, 49 NJPER 135 (¶30 2022), request for rev. denied, P.E.R.C. No. 2023-25, 49 NJPER 353 (¶84 2023). Competent evidence may include certifications or affidavits from individuals with personal knowledge of the duties performed by the petitioned-for employees and relevant unit employees, inclusive of specific examples of work demonstrating the duties actually performed by the petitioned-for employees. Ibid. (internal citations omitted). “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.” Id. at 56; N.J.A.C. 19:11-2.6(f). “Hearings under this section [Representation Procedures] of these rules are considered investigatory and not adversarial. Their purpose is to develop a complete factual record upon which the Director of Representation or the Commission may discharge the duties under N.J.S.A. 34:13A-6.” N.J.A.C. 19:11-6.2(c).

Here, we find review of the Director’s decision is warranted because a substantial question of law remains unresolved due to the insufficient establishment of facts by the parties in order

to properly determine whether the Business Administrator is a confidential employee or managerial executive.

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 by the petitioner listing and explaining fully the reasons for the proposed clarification. N.J.A.C. 19:11-1.5(b) (1), (2), and (3). Here, the petitioner is the CWA, who seeks to include the Business Administrator in its unit of supervisory employees. It is clear from the record that the CWA did not provide the required information in support of its CU petition.

In its May 11, 2022 response to the Director's February 24 inquiries and request for information, the CWA explained why it could not provide the required certification and information to support its CU petition. The CWA requested a hearing to establish the facts that support its contention that the Business Administrator should be included in the unit. We find that the CWA's request for a hearing should have been granted.

While the Authority had ample opportunity to provide the additional specific examples of work that would support its claim that the Business Administrator is both a confidential employee and managerial executive, it maintains that the facts that it did proffer should have been sufficient, particularly when the CWA did not meet its burden of establishing that the position should

be included in the bargaining unit. The Authority certified that the Business Administrator assists in the formulation of the Authority's policies, which includes planning and administering all human resources polices; rewriting job descriptions; updating the employee handbook; maintaining all personnel files; participating in labor relations including collective negotiations and disciplinary investigations/decisions. Further, the Authority's organizational chart indicates that the Business Administrator occupies a position below the Executive Director, but on par with the Deputy Director, and above various supervisors who report directly to the Deputy Director. The Business Administrator's duties and position in the Authority's organizational hierarchy stands in contrast to the administrative employees, found to be non-confidential in the cases relied upon in the Director's decision, that had mere access to information regarding personnel and labor relations matters.

In Middletown Tp. Bd. of Ed., H.E. No. 2004-17, 30 NJPER 243 (¶90 2004), a consolidated case involving various unfair practice allegations and representation matters, a Hearing Examiner, following an investigation and hearing, granted the Board's unit clarification petition, finding that the secretary to the business administrator performs confidential job functions. The Hearing Examiner found that the job duties of the secretary to the Board's business administrator was to support the business administrator who was undisputedly involved in

collective negotiations, and that his secretary was privy to and involved in many of the business administrator's duties relating to labor relations. If the Authority's Business Administrator performs duties similar to the Board's business administrator in Middletown, or even her secretary, it may render the Business Administrator's inclusion in the CWA's bargaining unit inappropriate. Thus, as in Middletown, an evidentiary hearing is needed to establish the extent of the Business Administrator's involvement in labor relations matters and employee discipline to determine whether she is considered a confidential employee or a managerial executive.

Accordingly, we grant the Authority's request for review and remand the CU Petition to the Director for an evidentiary hearing.

ORDER

The Cumberland County Utilities Authority's request for review is granted. The Director's decision is reversed and remanded for an evidentiary hearing pursuant to N.J.A.C. 19:11-2.6.

BY ORDER OF THE COMMISSION

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

ISSUED: May 25, 2023

Trenton, New Jersey