

P.E.R.C. NO. 2024-1

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. CU-2020-005

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

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the AAUP's request for review of the Director of Representation's (Director) decision to dismiss its clarification of unit petition seeking to include certain Rutgers employees in a collective negotiations unit of biomedical health sciences faculty currently represented by the AAUP. The Commission finds that the Director's dismissal improperly relied on the amended clarification unit rules based on the Workplace Democracy Enhancement Act that were not yet in effect at the time the AAUP filed its petition. The Commission further finds that, under either the old or amended clarification of unit rules, the AAUP's petition satisfied the basic filing requirements and should not have been dismissed based on a pleading deficiency or for failing to satisfy the burden of production. Finding that clarification of unit proceedings are investigatory, non-adversarial proceedings in which neither party bears a traditional burden of proof, the Commission finds that the case should be remanded to the Director to evaluate Rutgers' asserted statutory exclusions for the remaining disputed petitioned-for employees based on the record evidence produced by both parties. The Commission also grants the AAUP's request to receive, and respond to, a copy of Rutgers' responses to a Director's investigatory letter which had not been previously served on the AAUP, finding such disclosure to be the preferred practice in clarification of unit proceedings.

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, Farrah Gold Henry, Associate
Vice President and Deputy General Counsel

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

DECISION

On March 28, 2023, the American Association of University Professors, Biomedical and Health Sciences of New Jersey (AAUP) filed a request for review of D.R. No. 2023-13, 49 NJPER 424 (¶104 2023). In that decision, the Director of Representation dismissed the AAUP's clarification of unit petition which sought to include 173 employees of Rutgers, the State University of New Jersey (Rutgers) into the AAUP negotiations unit. During the pendency of the clarification of unit investigation, the parties successfully resolved the status of 88 employees. As of Rutgers' last response to the Director of Representation's (Director)

staff agent's (Staff Agent) request for information, there were 85 petitioned-for employees to be considered for unit inclusion.

The Director dismissed the AAUP's petition on the basis that it did not satisfy the pleading requirements of N.J.A.C. 19:11-1.5(c)(2), because it 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)." D.R. at 9. The Director found that the "AAUP has not satisfied its burden of production" because its assertions that the petitioned-for employees "are not supervising anyone and are in fact performing the duties of negotiations unit members" were not supported with competent evidence. D.R. at 13-14. Although the Director found that "Rutgers' certifications provide a detailed explanation of the job duties performed by the petitioned-for employees," he determined:

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 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.

[D.R. at 7-8, n.3.]

Because the Director dismissed the AAUP's petition, he also did not decide on Rutgers' objections to the inclusion of certain employees in the unit based on alleged supervisory, confidential

employee, or managerial executive status. D.R. at 3-6.

Facts and Procedural History

At the start of this clarification of unit proceeding, Rutgers and the AAUP were parties to a collective negotiations agreement (CNA) for the period of July 1, 2013 to June 30, 2018. During the course of this proceeding, the parties reached a memorandum of agreement (MOA) for a successor CNA for the period of July 1, 2018 to July 31, 2022.^{1/} The AAUP's December 4, 2019 clarification of unit petition (CU petition) provided the following description of the AAUP collective negotiations unit, which is consistent with the CNA's recognition clause:

Included: All full-time teaching and/or research legacy UMDNJ faculty and librarians, all part-time teaching and/or research legacy UMDNJ faculty and librarians who are employed at 50% or more of full-time by the University in legacy UMDNJ positions.

Excluded: All faculty members and librarians employed by the University at less than 50% of full-time, all faculty members and librarians who in addition to their professional titles hold any title which carries managerial, administrative, or supervisory responsibility (among titles so excluded are President, Vice-President, Dean,

^{1/} The AAUP-BHSNJ "legacy UMDNJ" unit that is the petitioner in this case has recently been merged via a representation petition into the broader AAUP-AFT unit representing Rutgers' faculty members, teaching assistants, and graduate assistants. See Rutgers University, P.E.R.C. No. 2023-35, 49 NJPER 395 (¶97 2023). "AAUP-AFT may take over processing pending clarification of unit petitions filed by AAUP-BHSNJ regarding the previously separate legacy unit." Rutgers University, D.R. No. 2023-7, 49 NJPER 291 (¶67 2022).

Vice-Dean, Associate Dean, Associate Vice President, Assistant Dean, Assistant to the Dean, Director, Department Chairperson, Section Chief, Division Chief, Division Director, University Librarian, Assistant University Librarian, Campus Library Director, Personnel Administration Librarian.

The CU petition stated the following under "Reasons for the proposed clarification of unit:"

Rutgers has improperly excluded faculty who are performing bargaining unit work as per the WDEA. These faculty do not perform supervisory duties to warrant exclusion.

The CU Petition enclosed a 6-page spreadsheet listing the first and last names of the 173 petitioned-for employees, along with the school within Rutgers Biomedical Health Sciences (RBHS) in which they were employed, their department, and their job title. The CU petition also included an August 9, 2019 letter from AAUP Executive Director Diomedes Tsitouras to Rutgers Interim Executive Director of Academic Labor Relations, Harry Agnostak, requesting that the attached list of individuals be included in the AAUP because "they are wrongly excluded from the unit." The letter provided the following reasons for inclusion:

Vice-Chairs

Over the last few years, a number of departments, particularly in RWJMS and SPH, have given faculty members the title of "Vice-Chair." This title is not among the titles in our Recognition Article that should be excluded from the bargaining unit. Equally, many of [the] vice-chairs do not perform managerial executive duties warranting exclusion. Finally, while some vice-chairs have been excluded, some vice-

chairs have remained in the unit. This, of course, adds to confusion surrounding their classification.

FTRP

O[n] July 13, 2015, the University and the AAUP-BHSNJ entered into the "Memorandum of Agreement concerning Rutgers Faculty Represented by AAUP-BHSNJ, Application for Faculty Transition to Retirement Program." This specified that eligible tenured faculty could apply for terminal appointments at .5 FTE before retiring fully. Paragraph IX states "[p]articipating faculty shall not be members of the AAUP-BHSNJ bargaining unit." However, this provision conflicts with the 2018 Workplace Democracy Enhancement Act, which makes clear that "[e]mployees who are performing negotiations unit work and who are not included in a negotiations unit because they did not meet the threshold of hours or percent of time worked as set forth in a certification of representative, recognition clause or other provision in a collective negotiations agreement, shall be included in the negotiations unit by operation of this act, within 90 calendar days from the effective date of this law." Hence, because these faculty are performing bargaining unit work at .5 FTE, they are part of the class of employees contemplated by the Act, and thus must be included in the negotiations unit.

Those With "Director" Titles Who Do Not Perform Managerial or Supervisory Work

A great many members of the faculty listed occupy a title that implies that they carry managerial or supervisory responsibility. However, this is not the case. Our preliminary assessment indicates that those listed faculty do not make or direct the effectuation of policy nor do they have the power to hire, fire, discipline or effectively recommend the same. Even if they may occasionally have input into these types of actions, it is a minor portion of their overall job duties. We also think that this is one area where the University is abusing

this particular exclusion. In one egregious example, the Gastrointestinal Division of the RWJMS Department of Medicine has excluded 7 of the 14 members of the faculty from the bargaining unit. Quite coincidentally, this is a division where a former division director made negative comments about the union. Finally, it is quite common for medical school faculty to hold a title of one kind or another. However, the holding [of] a ceremonial title is not in itself a basis for exclusion from the negotiations unit.

Those With "Director" Titles And [Who] Perform Managerial Or Supervisory Work But Do Not Supervise Any Faculty

For the most part, we have assumed that those with decanal, division director or division chief titles are properly excluded from the unit. We have, though, on occasion included those individuals when it appears that no faculty report to the individual with the excludable title. We think it common sense that in order to execute a supervisory or managerial function, there must be at least one faculty member subject to the individual's supervision. While the union has asked for organization charts on multiple occasions, it has not received them. Hence, we have relied upon publicly available information when making this determination.

On December 13, 2019, the Director notified Rutgers of the AAUP's CU petition, enclosed a copy of the petition, and requested "a written statement of your position concerning the proposed clarification of unit by December 27, 2019." On June 4, 2020, following several requests for extension by Rutgers, to which the AAUP consented and the Director granted, the AAUP notified the Director that Rutgers had not yet responded with a position statement since the parties last agreed to an extension

on April 2, 2020. The AAUP requested that the petition be processed.

On August 3, 2020, a Commission Staff Agent sent the parties a clarification of unit investigation letter (informally referred to as a "Teaneck letter") attaching the list of petitioned-for employees supplied by the AAUP with its CU petition and noting that Rutgers "has not yet taken a position with respect to these titles." The letter stated:

As part of my investigation, I am requesting the Council and Rutgers respond to the questions set forth below. 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. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013). (emphasis in original.)

After two extension requests by Rutgers, the parties' responses to the Staff Agent's investigatory letter were due on December 10, 2020. The Staff Agent did not specify whether they should serve each other with their responses. The AAUP served Rutgers with its response and Rutgers did not serve the AAUP.

By letter of December 10, 2020, the AAUP responded to the Staff Agent's investigatory letter with the following, in pertinent part:

Because the petitioned-for employees are not currently in the negotiations unit, the Union does not know exactly what duties those employees are performing. Nor does the Union have access to such information. Absent such information, it is the Union's position on information and belief that the individuals in these 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. Accordingly, once the University has provided its response to the petition and support for its position that some or all of the petitioned-for titles should not be included in the negotiations unit, the Union will be in a better position to respond to any questions the Commission may have.

Also on December 10, 2020, Rutgers responded to the Staff Agent's investigative letter stating that, of the 173 individuals identified in the AAUP's petition, 58 petitioned-for employees should be not be in dispute because they were: already in the AAUP unit; were no longer employed by Rutgers; were in a different unit; or, in the case of one employee, because he is not a faculty member. Those asserted exclusions were supported by the certification of Meredith Mullane, Vice Chancellor for Academic Affairs for Rutgers. Rutgers identified 18 petitioned-for employees that it "agrees to discuss the inclusion" of. Rutgers' also asserted that 97 petitioned-for employees should be excluded from the unit based on supervisory and/or confidential status. Those assertions were not supported by a certification or other evidence. Rutgers concluded its response with the

following statement about gathering more information:

As we previously discussed, I am continuing to gather information regarding each of the individuals who the University continues to maintain should remain excluded and intent to provide you with additional information, as necessary. As these are positions for individuals within RBHS, involving Rutgers' health professionals across many schools and centers, that has continued to be more challenging at this time. I am hopeful that our continued discussions may obviate the need to provide information for at least some of these individuals.

On December 11, 2020, the Staff Agent informed the parties 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 to narrow down the list of titles in dispute. D.R. at 4. Over the following year, the parties continued discussions and further narrowed down the list of petitioned-for employees. On December 15, 2021, the AAUP e-mailed the Staff Agent to request that the agency resolve the dispute over supervisory exclusions and that Rutgers provide evidence of supervisory status. On January 18, 2022, the Staff Agent scheduled a February 10 telephone conference with the parties.

On February 14, 2022, the Staff Agent sent the parties an updated clarification of unit investigation letter. The letter included four preliminary questions concerning the petitioned-for titles/employees job duties and positions within Rutgers, five

supervisor/conflict of interest questions, a community of interest question, and a request for any additional information in support of a position for why the petitioned-for employees should or should not be included in the AAUP unit. The letter again requested that facts be presented in certification or sworn affidavit and that they "include attached exhibits and sample work performed, where applicable." Following several extension requests by Rutgers, the parties' responses to the Staff Agent's February 14 investigatory letter were due by June 6, 2022.

On June 6, 2022, Rutgers responded to the Staff Agent's February 14 investigative letter stating, in pertinent part:

[A]s a result of ongoing discussions in this matter, Rutgers and the Union successfully have resolved the status of 88 individuals previously petitioned-for by the Union. Thus, the University addresses herein the remaining 85 individuals as set forth in the Union's correspondence dated February 10, 2021 and the accompanying spreadsheet provided by the Union.

Rutgers provided a list of 14 petitioned-for employees it asserts are no longer employed by Rutgers, one employee who has already been returned to the negotiations unit, and one employee who it asserts is not a faculty member. Rutgers provided a list of 16 petitioned-for employees for whom it would agree to discuss including in the unit. Rutgers provided a list of 54 petitioned-for employees it maintained should be excluded because they are supervisory, confidential, and/or managerial/executive. In

support of these statutory exclusion claims, Rutgers submitted a supplemental certification with exhibits from Meredith Mullane, as well as certifications with exhibits from administrators of the RBHS schools that employ the petitioned-for employees.

The Staff Agent's February 14, 2022 letter did not require the parties to serve each other with their responses. Rutgers did not serve a copy of its June 6, 2022 responses and supporting certifications and exhibits on the AAUP. The AAUP did not file a response to the Staff Agent's February 14 letter. On September 30, 2022, the Staff Agent e-mailed the parties regarding possible settlement of the CU petition. Per N.J.A.C. 19:11-2.6(c), we cannot divulge the details of the settlement discussions.^{2/} On December 8, 2022, the AAUP e-mailed the Staff Agent and Rutgers informing them that it did not accept the settlement proposal and requesting that a clarification of unit decision be issued.

On March 15, 2023, the Director issued his decision in D.R. No. 2023-13 dismissing the AAUP's clarification of unit petition. On March 22, the AAUP filed a request for reconsideration with the Director. The AAUP asserted that dismissal on the basis that

^{2/} N.J.A.C. 19:11-2.6(c) provides: "Information disclosed to a staff member in confidence regarding any representation matter shall not be divulged. All files, records, reports, documents or other papers received or prepared by a staff member for purposes of settlement shall be classified as confidential. The staff member shall not produce any confidential records of, or testify in regard to, any settlement discussions conducted by him or her, on behalf of any party in any type of proceeding."

its CU petition did not meet the pleading requirements seems manifestly unjust at this stage of the CU petition. It asserted:

The alleged deficiency is that the Union did not inform the Commission that the faculty in legacy UMDNJ positions it seeks to have returned to a negotiations unit of faculty in legacy UMDNJ positions are, in fact, faculty in legacy UMDNJ positions doing faculty work. Any alleged pleading deficiency could have been addressed earlier had the staff agent alerted the Union to any such deficiency. In fact, the only real dispute in the case is that Rutgers claims that these faculty are also supervisors and the Union disagrees. The second issue involves the burden of production. The Union, which does not have access to the evaluations allegedly performed by the petitioned-for employees, fully expected to agree to the continued exclusion of those who truly supervise and to continue to challenge those for whom no evidence of performing evaluations was submitted to the Commission. . . . This D.R. denies the Union the opportunity to have the Commission decide the legal issues based on the undisputed evidence submitted by the employer, evidence provided ex parte that the Union has not even seen. Cf. Brick Tp., P.E.R.C. No. 92-59, 18 NJPER 42 (¶23015 1991) (remanding case to Director who improperly relied on ex parte submission).

On March 24, 2023, the Director declined to reconsider his decision in D.R. No. 2023-13. The Director found that the rules do not provide for a motion for reconsideration process, but that N.J.A.C. 19:11-8.2 provides for Commission review of a Director of Representation decision.

On March 28, 2023, the AAUP filed a request for review with the Commission. On May 9, Rutgers filed a brief opposing the

request for review. On May 10, the AAUP filed a request for leave to file a reply brief and a request to file an extension of time to file its request for review nunc pro tunc, which the Commission granted on May 15.^{3/} On May 19, the AAUP submitted a reply brief and on May 23 Rutgers submitted its sur-reply brief.

Arguments

The AAUP asserts that review must be granted because the conduct of the Director's ruling resulted in prejudicial error and because there is a substantial question of law concerning administration of the Act. The AAUP asserts that dismissal on the grounds of a pleading deficiency more than three years after filing is "manifestly unjust." It argues that because the pleading requirements of N.J.A.C. 19:11-1.5(c)(2)(I) were not effective until February 18, 2020, the Director should not have imposed them on the AAUP's December 4, 2019 petition, which provided all the required information. The AAUP asserts that, as Rutgers has not disputed that the petitioned-for employees are performing negotiations unit work, the only dispute in the case

^{3/} Based on the March 15, 2023 date of issuance of D.R. No. 2023-13, the AAUP's request for review before the Commission was due by March 27, 2023. N.J.A.C. 19:11-8.1. The AAUP requested a tolling of the deadline due to its filing of the request for reconsideration with the Director on March 22 and the Director's response on March 24. The Secretary to the General Counsel stated: "Your request for an extension of time nunc pro tunc is granted, after factoring in the two days for the Director of Unfair Practices to issue his decision on your initial request for reconsideration."

is over Rutgers' claimed statutory exclusions. The AAUP contends that as clarification of unit proceedings are investigatory, the Director departed from Commission policy by treating this case as adversarial and dismissing the petition rather than making a determination based on evidence from both parties. It asserts that the Director's approach would require the AAUP to file an unfair practice charge and obtain interim relief to obtain the same information that Rutgers has already supplied.

The AAUP next contends that it does not have access to information about the petitioned-for employees that Rutgers has, and that the Director should have given it an opportunity to review and respond to Rutgers' submissions that contained detailed explanations of the job duties of the petitioned-for employees. Finally, the AAUP asserts that the Director should have, as in previous cases, advised the parties of his tentative findings and invited responses, and that the Director had the authority to reconsider his decision.

Rutgers asserts that the AAUP's request for review is untimely. It argues that the Director did not err in dismissing the CU petition because, under either version of the rules, the AAUP did not explain fully the reasons for the proposed clarification under N.J.A.C. 19:11-1.5(b) (3) or identify a reason for the proposed inclusion. Rutgers asserts that the Director appropriately dismissed the AAUP's petition because it did not

satisfy its initial burden of producing competent evidence that the petitioned-for employees perform negotiations unit work. Rutgers contends that the AAUP could have accessed information directly from the petitioned-for employees rather than relying on Rutgers. Rutgers argues that the Director did not err by not requiring it to supply the AAUP with its June 6, 2022 submissions because it is under no statutory or regulatory obligation to provide the AAUP with a copy. Finally, Rutgers contends that the Director was not required to advise the parties of his tentative findings and that the Director's decision not to reconsider his own decision was correct and not a basis for review.

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.

As further discussed below, we grant the AAUP's request for

review because the dismissal was based on regulations which were not in effect when the petition was filed and because the clarification of unit process, even for WDEA-based petitions, remains an investigatory process through which a determination should be made if the record developed from both parties provides sufficient competent evidence from which to render a decision or require a hearing if substantial, material facts are in dispute. We find that the AAUP's CU petition provided a sufficient explanation of why the petitioned-for employees perform AAUP negotiations unit work, subject to consideration of Rutgers' evidence in support of its asserted statutory exclusions.

Analysis

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). Historically, "clarification of unit proceedings were generally limited to resolving questions regarding the inclusion or exclusion of employees from a unit based on the existing unit definition in a Certification of Representative or the fairly attributable mutual intent of the parties reflected in their conduct and understanding as set forth in a recognition provision of a CNA, and based on the applicability of statutory provisions of the Act that might warrant exclusion." Union Cty. Vo. Tech. Sch. Bd. of Ed., D.R. No. 2023-5, 49 NJPER 505, 506

(¶122 2022); see also Newark State-Operated Sch. Dist., P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016). Clarification of unit procedures were not generally utilized to enlarge the scope of an existing unit to include previously unrepresented employees except in cases of changed circumstances such as changes in an employee's job functions, creation of a new title, or creation of a new operation or opening of a new facility. City of Jersey City, 2021 N.J. Super. Unpub. LEXIS 205 (App. Div. 2021), aff'g P.E.R.C. No. 2020-24, 46 NJPER 232 (¶54 2019); and Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

The "Workplace Democracy Enhancement Act," P.L. 2018, c. 15, (WDEA), enacted May 18, 2018, supplemented the Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), with new sections at N.J.S.A. 34:13A-5.11 through 5.15. The WDEA created a new basis (performance of unit work) for enlargement of the negotiations unit through a clarification of unit petition, separate from the language of a recognition provision. Under the WDEA, all regular full-time and part-time employees who perform "negotiations unit work" performed by any negotiations unit employee "shall be included in the negotiations unit" regardless of job title, job classification, or the number of work hours previously required under the CNA. N.J.S.A. 34:13A-5.15(a), (b), and (d). The WDEA maintained the Act's statutory exclusions from representation for managerial executives, confidential employees,

elected officials, members of boards/commissions, and excluded casual employees. N.J.S.A. 34:13A-5.15(b); N.J.S.A. 34:13A-3(d).

Unit clarification proceedings are “investigatory and neither party has the burden of proof.” Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339, 340 (¶19128 1988); see also State of N.J. (Montclair State University), P.E.R.C. No. 2018-42, 44 NJPER 398 (¶111 2018), quoting River Dell Bd. of Ed., P.E.R.C. No. 78-85, 4 NJPER 252, 253 (¶4128 1978) (“a representation proceeding is quasi-legislative, as opposed to quasi-judicial in nature, and no burden of proof is attached thereto”). While there is no traditional burden of proof in clarification of unit cases, the Director’s ultimate findings concerning unit inclusion or exclusion should be based on sufficient competent evidence in the record.

N.J.A.C. 19:11-2.2 provides that, upon the filing of any representation petition, “the Director of Representation shall investigate the petition to determine the facts” and “shall determine whether or not a valid question concerning the representation of employees exists in a prima facie appropriate unit.” The Director may then request the petitioner withdraw the petition, issue a decision dismissing the petition, issue a decision clarifying a unit, or take other appropriate measures. N.J.A.C. 19:11-2.6(d). Any such dispositions “shall be based on an administrative investigation or a hearing conducted pursuant

to N.J.A.C. 19:11-6.1 (Hearings)." N.J.A.C. 19:11-2.6(e).

Applying these rules, the Commission has "a consistent policy of resolving representation questions after administrative investigations unless substantial and material facts are in dispute." County of Somerset, P.E.R.C. No. 2014-88, 41 NJPER 55, 56 (¶15 2014); N.J.A.C. 19:11-2.6(f). Even when material facts are in dispute and a hearing is warranted, the representation hearing is "considered investigatory and not adversarial" because its "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). The Commission has thus described representation proceedings in general, and clarification of unit proceedings in particular, as "non-adversarial." See, e.g., State of N.J. (OER) and CNJSCL NJSFT-AFT, AFL-CIO, P.E.R.C. No. 90-22, 15 NJPER 596 (¶20244 1989), aff'd, 1991 N.J. Super. Unpub. LEXIS 10 (App. Div. 1991); and Passaic Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976).

Initially, we decline to find that the AAUP's request for review was untimely. As discussed in the procedural history above, the Commission granted the AAUP's request to file an extension of time to file its request for review nunc pro tunc, based on a tolling of the deadline while its motion for reconsideration was under consideration by the Director. We find

no reason to change that determination. See N.J.A.C. 19:10-3.1^{4/}

Next, we find that the Director appropriately declined to entertain the AAUP's motion for reconsideration. N.J.A.C. 19:11-8.2 provides for a request for review process before the Commission and N.J.A.C. 19:11-9.3 provides for a motion for reconsideration of that Commission decision. The Commission's representation rules do not provide for a motion for reconsideration before the Director of Representation.^{5/} We note that the Commission has recognized that the lack of a rule explicitly authorizing reconsideration of an agency decision does not preclude reconsideration. Rockaway Tp., P.E.R.C. No. 2018-30, 44 NJPER 308, 310 (¶86 2018) ("Administrative agencies have inherent power of reconsideration absent statutory qualification," citing Handlon v. Belleville, 4 N.J. 99 (1950)).

Next, we find that the Director's dismissal of the AAUP's

^{4/} N.J.A.C. 19:10-3.1(b) provides: "When an act is required or allowed to be done at or within a specified time, the commission may at any time, in its discretion, order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with the proper effectuation of the act (N.J.S.A. 34:13A-1 et seq.)."

^{5/} Under N.J.A.C. 19:11-2.3(c) there is a "motion to reopen" process before the Director within 15 days after a petition has been dismissed; however, that process only applies where the Director has dismissed the case after determining "there is no dispute concerning the composition of the unit" and after requesting withdrawal of the petition. N.J.A.C. 19:11-2.3(a). Note the distinction between dismissals following such withdrawal requests and other dismissal decisions. (N.J.A.C. 19:11-2.6(d)(1) and (2)).

December 4, 2019 CU petition improperly relied on amended clarification of unit rules which had not become effective until February 18, 2020. See 52 N.J.R. 201(a). Pursuant to N.J.S.A. 34:13A-5.15(e) the Commission promulgated rules to effectuate the provisions of the WDEA by amending its preexisting clarification of unit rules, N.J.A.C. 19:11-1.5. The Director's dismissal for not satisfying the pleading requirements specifically quoted from N.J.A.C. 19:11-1.5(c) (2) in finding that the AAUP did not adequately explain the reasons for unit inclusion or describe the negotiations unit work performed by the petitioned-for employees. D.R. at 9. As the amended clarification of unit rules were not effective until February 18, 2020, the Director could not rely on them to dismiss the AAUP's CU petition.

The clarification of unit rules in effect at the time of the AAUP's CU petition required the following:

19:11-1.5 Petition for clarification of unit

(a) The exclusive representative or the public employer may file a petition for clarification of unit.

(b) A petition for clarification of unit shall contain:

1. A description of the present negotiations unit and the date of the certification or recognition, if known;
2. A description of the proposed clarification of the unit;
3. A statement by petitioner listing and explaining fully the reasons for the proposed

clarification. The reasons may include:

- I. Changed circumstances;
- ii. Creation of a new position or title;
- iii. Dispute over a title in a newly certified/recognized negotiations unit;
- iv. New operation or facility;
- v. Statutory exclusions;
- vi. Any other reasons why the petition is appropriate; and

4. The information required by paragraphs (a)1, and (a)4 through (a)8 of N.J.A.C. 19:11-1.2.

The AAUP's CU petition satisfied these filing requirements. The petition described the present AAUP negotiations unit by specifying all of the included and excluded titles according to the CNA's recognition clause. Although determinations about whether a recognition clause was meant to encompass certain titles "are obviated [based on claims that] they perform unit work under the WDEA, . . . [t]he CNA's recognition provision is . . . [still] relevant under the WDEA to the extent that it describes unit work." Union Cty. Vo. Tech. Sch. Bd. of Ed., D.R. No. 2023-5, 49 NJPER at 507. The CU petition provided the following explanation for the reasons for the proposed clarification:

Rutgers has improperly excluded faculty who are performing bargaining unit work as per the WDEA. These faculty do not perform supervisory duties to warrant exclusion.

As the WDEA was effective prior to the CU petition, the AAUP's assertion that the petitioned-for faculty are "performing bargaining unit work as per the WDEA" was an appropriate basis for unit clarification.^{6/} The petition provided a list of the 173 petitioned-for employees, along with their school within the RBHS, their department, and their job title. Additionally, the AAUP attached a letter it had sent to Rutgers with a more detailed explanation of why certain faculty groups or titles should not be excluded from the AAUP unit.

The WDEA and its implementing regulations did not amend the Commission's rules or case law providing that clarification of unit determinations are based on an administrative investigation. While the amended clarification of unit rules are meant to spur the production of as much relevant information as is necessary for the Director to make a determination based on performance of negotiations unit work within the 60-day statutory time frame (see N.J.S.A. 34:13A-5.15(e)), they are not meant to serve as a

^{6/} We note that the CU petition form does not require parties to select a specific reason from the list in N.J.A.C. 19:11-1.5(b)(3). Under the rules in effect at the time, the reasons for the AAUP's CU petition would be both N.J.A.C. 19:11-1.5(b)(3)(v) "statutory exclusions" based on the assertion that these petitioned-for faculty had been improperly excluded from the unit, as well as the catch-all N.J.A.C. 19:11-1.5(b)(3)(vi) "any other reason why the petition is appropriate". Under the new rules, subsections 1.5(b)(3)(v) (statutory exclusions), 1.5(b)(3)(vi) (performance of negotiations unit work), and 1.5(b)(3)(vii) (any other reason) would have been applicable.

new procedural hurdle to the clarification of unit process. When amending the clarification of unit rules, the Commission determined not to create a new certification requirement for the petitioner, stating that "the relevant information or evidence can be developed during the course of the proceeding." See 52 N.J.R. 201(a). Thus, even in WDEA-based clarification of unit cases, an investigation is to be conducted to develop the record through disclosures of relevant information from both parties.

Accordingly, we find that, under both the rules in effect at the time of the AAUP's CU petition, as well as under the amended rules promulgated pursuant to the WDEA, the AAUP's CU petition should not have been dismissed based on a pleading deficiency or for not satisfying a burden of production. Under the particular facts of this case, the AAUP's CU petition provided a sufficient explanation of why the petitioned-for employees perform AAUP negotiations unit work. See N.J.A.C. 19:11-1.5(c)(2)(I). The AAUP unit is composed of "teaching and/or research legacy UMDNJ faculty and librarians" within the RBHS and the CU petition seeks to include faculty who are employed in schools within the RBHS. In the AAUP's attached list of 173 petitioned-for employees, all but four have job titles with faculty designations (in full or abbreviated form) such as: Professor, Associate Professor,

Assistant Professor, Adjunct Professor, and Instructor.^{7/} This information was sufficient for a determination that the AAUP faculty unit is the "prima facie appropriate unit" for the petitioned-for employees, subject to consideration of any objections, statutory or otherwise, that Rutgers may have to their inclusion in the unit. See N.J.A.C. 19:11-2.2(b).^{8/}

Furthermore, throughout the clarification of unit investigation, Rutgers never challenged AAUP's basic assertion set forth in its CU petition that the petitioned-for employees are RBHS faculty members performing negotiations unit work that is currently being performed by other faculty members represented by the AAUP. Rutgers only asserted and certified as to one employee being inappropriate for the unit based on not being a faculty member; all other objections were based on assertions that the petitioned-for employees were no longer employed or that they are subject to exclusion based on supervisory, confidential, or managerial executive status.

We also find the conduct of the parties to be relevant. The record indicates that both Rutgers and the AAUP treated this CU proceeding as an investigatory process involving an ongoing

^{7/} The only four job titles which did not include a faculty title were: Chief Quality Officer; Clinical Medical-PD; Physician On Call; and Asst-Clin-Dir.

^{8/} "The Director of Representation shall determine whether or not a valid question concerning the representation of employees exists in a prima facie appropriate unit."

exchange of information and continuing discussions among the parties and between the parties and the Staff Agent. Both parties acknowledged that they provided incomplete responses to the Director's August 3, 2020 investigatory letter. The AAUP's response explained that because the petitioned-for employees are not currently in the negotiations unit, it would wait until Rutgers' response to better respond to questions about the petitioned-for employees. Rutgers' initial response provided no evidentiary support for its assertion that 97 petitioned-for employees should be excluded based on supervisory or confidential status, explaining that it was "continuing to gather information" and that it was "hopeful that our continued discussions may obviate the need to provide information for at least some of these individuals." The parties then continued discussions, as advised by the Staff Agent, to further narrow down the list of petitioned-for employees in dispute. The AAUP consented to many extensions of time for Rutgers throughout this process. On February 14, 2022, the Staff Agent sent an updated investigatory letter and Rutgers' June 6, 2022 response indicated that the parties had successfully resolved the status of 88 additional previously petitioned-for employees and that only 85 remained in dispute. Rutgers' response provided certifications and exhibits, including job descriptions and job duties, in support of its assertion that 54 petitioned-for employees were subject to

statutory exclusions. The AAUP did not respond and was not provided with a copy of Rutgers' June 6 submissions or asked to respond to them. Following unsuccessful settlement discussions between the parties and the Staff Agent, the petition was ultimately dismissed on March 15, 2023. D.R. No. 2023-13.

In Union Cty. Vo. Tech. Sch. Bd. of Ed., D.R. No. 2023-5, supra, although neither party complied with requests for information supported by certification or affidavit, the Staff Agent's investigation of the union's WDEA-based clarification of unit petition developed a sufficient record from which the Director of Representation was able to issue a decision clarifying the unit to include the petitioned-for employees. Based only on "[t]he Board's job description for the title of teacher" and the CNA's recognition clause, the Director found there was sufficient evidence that the petitioned-for part-time teachers performed unit work. Id.; 49 NJPER at 507. Moreover, the Director noted, "I find teaching in general to be unit work" in rejecting distinctions between different teaching situations, schedules, and locations as justifying the continued exclusion of the petitioned-for teachers from the existing unit of full-time teachers and other personnel. Id. at 508, n.4; see also State of N.J. (MSU), P.E.R.C. No. 2018-42, supra (approving of Director's reliance on the employer's submissions to support inclusion of petitioned-for employees).

Here, we find that, although the AAUP did not submit a response to the Staff Agent's February 14 investigatory letter, dismissal of the clarification of unit petition was inappropriate under these circumstances. The record includes the information provided in the CU petition concerning the AAUP faculty unit and reasons for inclusion, as well as exhibits from Rutgers containing detailed job descriptions for the petitioned-for employees. As in the above-discussed cases, even where the petitioning party does not produce certifications or other evidence to comprehensively support its clarification of unit petition, a determination may still be made based on the record developed from both parties. The WDEA did not disturb this investigatory, non-adversarial process. As there is no traditional burden of proof in a clarification of unit proceeding, the failure by one party to produce a particular type of evidence does not require dismissal where the investigatory record as a whole provides sufficient competent evidence to make a clarification of unit determination. See State of N.J. (MSU), P.E.R.C. No. 2018-42, supra; Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, supra; and River Dell Bd. of Ed., P.E.R.C. No. 78-85, supra. As Rutgers has submitted certifications in support of excluding 54 petitioned-for employees based on certain statutory exclusions, excluding 14 petitioned-for employees based on assertions that they are no longer employed by Rutgers, and

excluding 1 employee for not being a faculty member, the clarification of unit investigation should proceed to evaluate the evidence pertaining to those disputed employees.^{9/}

This matter is distinguishable in several significant ways from State of N.J. (OER), P.E.R.C. No. 2023-25, supra, a case relied on by Rutgers in which the Commission declined to grant the union's request for review of the Director's dismissal. First, that case involved four different negotiations units and the petitioned-for employees had various job titles and duties from which the appropriate unit could not be easily ascertained. The Commission noted the union's failure to "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." 49 NJPER at 355. By contrast, in this case there is only one unit and it is apparent from the description of unit work contained in the recognition clause, along with the AAUP's statement of reasons for proposed inclusion and the job titles of the petitioned-for employees, that they were legacy UMDNJ faculty performing unit (faculty) work. Second, the dismissal in State of N.J. (OER) was specifically based on failure to comply with N.J.A.C. 19:11-1.5(c)(2)(I), a rule which was not effective when this CU petition was filed.

^{9/} Rutgers' June 6, 2022 submission did not assert reasons to exclude the final group of 16 petitioned-for employees, noting that it "agrees to discuss [their] inclusion."

Ibid. Third, the employer in State of N.J. (OER) repeatedly, from its initial response, challenged the petition and sought its dismissal on the basis that it was procedurally deficient under N.J.A.C. 19:11-1.5(c)(2)(I) for not explaining how the petitioned-for employees perform negotiations unit work. See D.R. No. 2023-3, 49 NJPER 135 (¶30 2022). By contrast, Rutgers never asserted during this investigation that the AAUP's petition should be dismissed as procedurally deficient and, except for one employee it asserted is not a faculty member, never challenged the AAUP's petitioned-for employees on the basis that they do not perform negotiations unit work. Furthermore, the Director in State of N.J. (OER) issued a letter advising the parties that their responses were deficient and he would be dismissing the petition if the defects were not cured. The parties were then invited to make supplemental submissions with very specific instructions on what information should be addressed. Id.; 49 NJPER at 355. In declining the union's request for review, the Commission emphasized the fact that the Director's "letters carefully identified the regulatory deficiencies in the CWA's petition and supplementary submissions and gave the CWA multiple opportunities to cure them." 49 NJPER at 356. Here, the Director did not issue a letter advising the AAUP of the specific reasons why the petition would be dismissed, and the AAUP was not provided an opportunity to cure any alleged deficiencies.

Next, we turn to the AAUP's argument that the Director should have required Rutgers to serve its June 6, 2022 response on the AAUP and allowed the AAUP to respond to the information contained therein. The amended clarification of unit rules provide that, upon the filing of a WDEA-based petition, the employer's response to the Director's request for relevant information "shall be supplied to the Director and petitioner within 10 calendar days of receipt of the request." N.J.A.C. 19:11-1.5(d). As discussed above with regard to the inapplicability of N.J.A.C. 19:11-1.5(c) to this case, N.J.A.C. 19:11-1.5(d) was not in effect when the AAUP filed its CU petition. However, N.J.A.C. 19:11-2.6(a), which was effective during this investigation and is applicable to all representation investigations provides, in pertinent part:

The petitioner, the public employer, and any intervenor(s) shall present documentary and other evidence, as well as statements of position, relating to the matters and allegations set forth in the petition. Such submissions shall be simultaneously served upon the parties.

The Appellate Division has found that these disclosure provisions of N.J.A.C. 19:11-2.6(a) apply to clarification of unit investigations. See State v. Council of N.J. State College Locals, AFT, 2015 N.J. Super. Unpub. LEXIS 322 at *17 (App. Div. 2015). Despite this rule, application of N.J.A.C. 19:11-2.6(a) to the parties' responses to a Staff Agent's clarification of

unit investigative letter has varied in practice. While many clarification of unit decisions, both pre- and post-WDEA, have required that the parties serve each other,^{10/} in other cases such service was not required.^{11/} Nonetheless, we see service among the parties as a preferred practice, generally.

While we agree with the Director that the AAUP would be entitled to receive information from Rutgers under threat of unfair practice liability (D.R. at 14-15), we find it preferable and more efficient for the Director to require such information-sharing in the context of an investigatory clarification of unit proceeding instead of requiring the parties to resort to additional, adversarial proceedings. We therefore grant the AAUP's request to have the Director supply it with a copy of Rutgers' June 6, 2022 responses and allow it to respond.

Finally, we decline to find that the Director was required to first supply the parties with a "7-day letter" or "tentative findings" that the parties are permitted to respond to before a final decision is rendered. Although that practice has been common (see, e.g., State of N.J., D.R. No. 2022-3, 49 NJPER 1 (¶1

^{10/} See, e.g., State of N.J., D.R. No. 2022-3, 49 NJPER 1 (¶1 2022); Franklin Tp., D.R. No. 2019-14, 45 NJPER 333 (¶89 2019); and Park Ridge Bd. of Ed., D.R. No. 2020-4, 46 NJPER 82 (¶15 2019).

^{11/} See, e.g., State of N.J. (MSU), P.E.R.C. No. 2018-42; and Jefferson Tp. Bd. of Ed., D.R. No. 2019-1, 45 NJPER 39 (¶11 2018).

2022); Franklin Tp., D.R. No. 2019-14, 45 NJPER 333 (¶89 2019); and State of N.J. (MSU), D.R. No. 2018-15), it is discretionary and is not required by the rules.

Based on the above, the AAUP's request for review is granted. The Director's decision dismissing the clarification of unit petition is reversed and the case is remanded to the Director to resume his investigation of the remaining disputed petitioned-for employees. We leave it to the Director's discretion to determine, following the AAUP's response to Rutgers' June 6, 2022 submission, whether to issue a clarification of unit determination based on that record, whether the parties' responses warrant further investigation, or whether a material dispute of fact arises to warrant a hearing.

ORDER

The request for review is granted and this matter is remanded to the Director of Representation for further processing consistent with this decision.

BY ORDER OF THE COMMISSION

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

ISSUED: August 24, 2023

Trenton, New Jersey