

D.R. NO. 2018-8

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

In the Matter of

WOODLAND PARK BOARD OF EDUCATION,

Public Employer,

-and-

Docket No. CU-2016-012

WOODLAND PARK EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Director of Representation dismisses a clarification of unit petition filed by the Woodland Park Education Association (Association). The Association's petition sought clarification of a collective negotiations unit of employees of the Woodland Park Board of Education (Board). Specifically, the petition sought the inclusion of the newly created job title Districtwide Behaviorist (behaviorist) in the Association's unit. The Director denied the Association's request, finding the recognition provision of the parties' collective negotiations agreement did not generically or specifically identify the behaviorist as part of the Association's unit. The Director also found there was no probative evidence indicating the parties intended to include the behaviorist in the Association's unit.

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Appearances:

For the Public Employer,
Sciarillo, Cornell, Merlino, attorneys
(Jeffrey R. Merlino, of counsel)

For the Petitioner,
Oxfeld Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

DECISION

On November 24, 2015, the Woodland Park Education Association (Association) filed a clarification of unit petition (petition) seeking to clarify its collective negotiations unit of employees of the Woodland Park Board of Education (Board) to include a newly created job title, Districtwide Behaviorist (behaviorist) in the Association's unit. The Board opposes the petition because the behaviorist title is not set forth in the recognition provision of the parties' collective negotiations agreement. The Board also argues that the behaviorist does not

share a community of interest with the employees in the Association's unit. The Association disagrees.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On June 2, 2016 and February 28, 2017, a Commission staff agent sent correspondence to the Association and Board requesting information in support of their respective positions. Former Association President Lisa Barreto and current Association President Stephen Scholtz filed certifications in support of the Association's position ("Barreto Cert." and "Scholz Cert.", respectively). Board Superintendent Michele Pillari filed two certifications ("Pillari Cert.") with exhibits in support of the Board's position.

On August 3, 2017, I wrote to the parties and advised I was inclined to dismiss the Association's petition. In the August 3 letter, I also invited the parties to respond if they disagreed with my factual and/or legal determinations. No responses were filed. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon our administrative investigation, I make the following:

FINDINGS OF FACT

The Association and Board signed a collective negotiations agreement (CNA) extending from July 1, 2012 through June 30, 2016. Article I of the CNA sets forth a recognition provision

that defines the Association's collective negotiations unit. The unit is defined as follows:

The Board hereby recognizes the Association as the exclusive representative for collective negotiations concerning terms and conditions of the employment for the following full-time and part-time personnel represented by the Association and who are employees of the Board:

- Teachers (All Teaching Personnel)
- Nurses
- Attendance/Security Officer
- Teaching Vice Principals
- Custodians
- Learning Disabilities Teacher
- Speech Therapist
- Secretaries
- Psychologist
- Librarian
- Home Instruction Teacher
- Social Worker
- Aides
- Dean of Students
- Secretary to the Board Secretary/Business Administrator
- Secretary to the Child Study Team

- Computer Operator/Purchasing Secretary
- District Coordinator/Guidance Secretary

The following persons by the Board are excluded:

- Superintendent of Schools
- Business Administrator/Board Secretary
- Principals
- Full-time Vice Principals
- Supervisor of Buildings and Grounds
- Supervisor of Special Education
- Supervisor of Instruction and Curriculum and Testing
- Confidential Secretary to the Superintendent of Schools
- Confidential Secretary to the Business Administrator

The first identified group of included employees, "Teachers (All Teaching Personnel)" was also included in the recognition provision of the parties' predecessor collective negotiations agreement, extending from July 1, 2008 through June 30, 2012.

In July, 2015, the Board created and approved a job description for the behaviorist title. (Pillari Cert., Para. 7, Exhibit 2). The behaviorist title was created after the parties signed the 2012-2016 collective negotiations agreement. (Barreto

Cert., Para. 2). In the summer of 2015, the Board appointed James Grochowski to the position. (Barreto Cert., Para. 3).

Superintendent Pillari certifies that the Board's job description accurately describes a "majority of the duties" performed by the behaviorist. (Pillari Cert., Para. 8). Pillari certifies that the behaviorist must hold a certificate as a Board Certified Behavior Analyst (BCBA). (Pillari Cert., Para. 4). To obtain a BCBA certificate, an employee must pass a BCBA examination and obtain a graduate degree in education, behavior analysis or psychology. (Pillari Cert., Para. 6, Exhibit 3). A BCBA certificate does not require prior teaching experience or a teaching certificate. (Pillari Cert., Paragraph 5 and Exhibit 3).

Pillari certifies that the behaviorist is not identified as part of the Association's unit under Article I of the agreement, nor does it fit within the category of "teaching personnel" under Article I. (Pillari Cert., Para. 5). The job description of the behaviorist "requires the holder to possess a valid BCBA certificate and "have at least five years of successful employment in education." (Pillari Cert., Para. 4, Exhibit 2). The behaviorist job description does not require prior teaching experience. (Pillari Cert., Para. 4, Exhibit 2).

The behaviorist writes and prepares individual behavior plans for students with special needs covered by Individualized Education Programs (IEP). (Barreto Cert., Paragraph 5; Pillari Cert., Exhibit 2). The behaviorist also guides teachers and teachers' aides on how to implement behavioral plans and trains teachers and other staff on appropriate methods of intervention for students with behavioral problems. (Barreto Cert., Para. 5; Pillari Cert., Exhibit 2). As part of his duties, the behaviorist also attends meetings with child study teams to discuss IEPs for students and works with parents on dealing with student behaviors at home. (Barreto Cert., Para. 5; Pillari Cert., Exhibit 2).

Barreto certifies that behaviorist Gronchowski has not counseled students individually or in groups about behavioral issues, but has "interacted with students for whom he creates behavior plans." (Barreto Cert., Para. 6). According to Barreto, Grochowski shares a community of interest with other unit employees, including the learning disabilities teacher, speech therapist, psychologist and social worker because all are included in the District's child study team, participate in IEP meetings and are certificated employees. (Barreto Cert., Para. 8). Barreto also certifies that Grochwoski holds a "Teacher of Students with Disabilities" certificate, which permits him to teach special education students. (Barreto Cert., Para. 4).

Given this fact, Barreto contends Grochowski fits within the unit definition of "all teaching personnel" and should therefore be added to the Association's unit. (Barreto Cert., Para. 8).

On February 28, 2017, a Commission staff agent issued a letter to the parties requesting supplemental certifications addressing several questions concerning the meaning of the term, "Teachers (All Teaching Personnel)" set forth in the recognition provision of the parties' agreement. Specifically, the staff agent requested information concerning what employees the parties intended to include when that language was added to the recognition provision; whether a title such as a behaviorist was intended to be covered by that term; and a comparative explanation of the job duties of "teaching personnel" versus the behaviorist. The parties were also asked to explain what, if any, limiting principle should govern our interpretation of that provision and its inclusive reach in relation to other employees. In response, the Board and Association filed certifications from Superintendent Pillari and from Stephen Scholtz, the current Association President.

Scholtz certifies "all teaching personnel" includes "any individuals holding teaching certifications who write lesson plans, teach students, conduct assessments, plan curriculum, etc. and any other staff who interact on an educational basis with students." (Scholtz Cert., Para. 3). Scholtz asserts that since

Grochowski holds a teacher's certificate, he may be assigned to supervise students. (Scholtz Cert., Para. 4). According to Scholtz, the term, "all teaching personnel" is ". . . broad terminology which the Association intended to be a clause including any employees who interact with students on an educational basis." (Scholtz Cert., Para. 6). Scholtz also asserts that the recognition provision list of employees was intended to include "all employees who were eligible to participate in the Association." (Scholtz Cert., Para. 7). There are no facts in Scholtz's certification establishing when the term, "all teaching personnel" was added to the recognition provision and what, if any, involvement Scholtz had in the negotiations that led to the inclusion of that term in the parties' collective negotiations agreement.

Pillari certifies that the phrase, "teachers" was expanded to "all teaching personnel" as part of negotiations of the parties 2012-2015 Memorandum of Agreement. (March 23, 2017 Cert., Para. 3). According to Pillari, the phrase "all teaching personnel" was intended to include all full and part-time teachers and was not intended to include the behaviorist. (Second Cert., Para. 3). Pillari also certifies that a behaviorist "does not instruct students" but rather "supports the District's instructional program by facilitating student attainment of social and emotional growth consistent with student

needs.” (Second Cert., Para. 6). Pillari certifies that the District did not employ a behaviorist before July, 2015 and that “in the past, the services of a behaviorist were contracted through a private therapy service provider.” (Second Cert., Para. 7).

ANALYSIS

The Association argues that its unit should be clarified to include the behaviorist title because it shares a community of interest with unit employees and fits within the definition of “all teaching personnel” under Article I of the CNA. The Board disagrees. For the reasons explained below, I dismiss the Association’s petition. A unit clarification petition is not the appropriate procedure for adding the behaviorist to the Association’s unit. The Association may file a timely petition for certification to add the behaviorist to its unit. See Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977); Washington Tp. Bd. of Ed., D.R. No. 2016-8, 43 NJPER 13 (¶4 2016).

The purpose of a clarification of unit petition is to resolve questions concerning the scope and composition of a collective negotiations unit as defined by a Commission certification or by a recognition clause in a collective negotiations agreement. New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370, 371 (¶30160 1999); Clearview Reg. Bd. of Ed. Unit

clarification petitions cannot be used to enlarge the scope of an existing unit to include previously unrepresented employees. New Jersey Transit; Clearview Reg. Bd. of Ed. In Rutgers University, D.R. No. 84-19, 10 NJPER 284, 285 (¶15140 1984), the Director explained the purpose behind unit clarification petitions:

The Commission's clarification of unit procedure is for the purpose of identifying unit employees whom the parties have intended to be encompassed by the unit definition. Community of interest considerations, alone, are not a sufficient basis to enlarge the scope of a negotiations unit through unit clarification.

We have repeatedly held that titles must be identified as part of an existing unit in order to be clarified into a unit. Barnegat Tp. Bd. of Ed., D.R. No. 84-15, 10 NJPER 54 (¶15029 1983); Newark Housing Authority, D.R. No. 95-22, 21 NJPER 132, 133 (¶26082 1995) (Director emphasizes that "titles to be clarified into a unit must be identified as being within the scope of the existing unit; it is insufficient that a title may share a community of interest" with unit employees); Irvington Housing Authority, D.R. No. 98-15, 24 NJPER 244, 245 (¶29116 1998) (Director noted that "newly created titles will be clarified into a unit only if they fall within the definition of the scope of the existing recognition clause of the parties' collective negotiations agreement"); Mercer Cty. Special Services Bd. of Ed., D.R. No. 2000-3, 29 NJPER 331, 333 (¶102 1999) (Director rejects union's claim that unit should be clarified to

include three petitioned-for titles based on a community of interest shared with existing unit employees, noting that “. . . whether they share a community of interest is immaterial”); Newark State-Operated School District, D.R. No. 2016-9, 43 NJPER 19 (¶6 2016), req. for rev. denied P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016). (Commission affirms Director’s decision dismissing a unit clarification petition seeking to add titles neither specifically nor generically identified in the recognition clause of the parties’ agreement). Adding employees who are not represented and are not part of an existing unit by means of a clarification of unit petition would deprive those employees of their statutory right to choose whether to be represented by an employee organization. Mercer Cty. Special Services Bd. of Ed., 29 NJPER at 333, Newark Housing Authority, 21 NJPER at 133.

When parties expressly agree to include only specific titles in a unit, we have denied requests seeking to add titles to the unit by means of a unit clarification petition. East Orange Bd. of Ed., D.R. No. 80-25, 6 NJPER 114 (¶11061 1980) (Director declines to add summer school teachers to a unit defined by a recognition clause that specifically identified included job titles and rejected union’s argument that the identified job category of “classroom teachers” included summer school teachers); Passaic Cty. Bd. of Social Services, D.R. No. 98-1, 23

NJPER 438 (¶28201 1997) (Director declines to include professional employees in a unit defined by a recognition provision that did not set forth generic language encompassing professional employees, but instead listed represented titles that did not include petitioned-for titles); State of New Jersey, P.E.R.C. No. 85-77, 11 NJPER 74, 79-80 (¶16036 1985), aff'd NJPER Supp. 2d 162 (¶143 App. Div. 1986). (Commission rejected claim that temporary employees were covered by a recognition clause that specifically listed included job classifications because the plain language of that clause did not include "temporary employees"). We have reached this conclusion even in cases where the petitioned-for employees perform the same work as unit employees. Id.; Newark Housing Authority. In Mercer Cty. Special Services Bd. of Ed., the Director explained:

[I]f the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed.
[29 NJPER at 333, quoting Clearview, 3 NJPER at 251-252]

Since Article I of the parties' CNA does not specifically or generically identify the behaviorist as part of the Association's unit, I dismiss the Association's petition. Although Barreto certifies that the behaviorist shares a community of interest

with other unit employees, such as the Board's speech therapist and psychologist, community of interest considerations are irrelevant in the context of a unit clarification petition when the parties, by way of agreement, have not identified the behaviorist as part of its unit. Newark State-Operated School District; Mercer Cty. Special Services Bd. of Ed. The parties could have agreed to more encompassing or generic terms in Article I that could have contemplated the inclusion of all "certificated" or "professional" employees in the unit. They did not do so. We are constrained by the parties' agreed-upon unit description.^{1/}

The Association maintains that the term, "all teaching personnel" encompasses the behaviorist because the parties intended that language to include "any employees who interact with students on an educational basis." (Scholtz Cert., Para. 6). Since the behaviorist has interacted with students "on an educational basis", the Association argues, the title is an example of "teaching personnel" under Article I of the CNA. I

^{1/} We do not decide the question of whether the behaviorist shares a community of interest with unit employees. We find only that a unit clarification petition is not the appropriate means to include the behaviorist in the Association's unit. The Association may file a timely representation petition to add the behaviorist to its unit. Mercer Cty. Special Services Bd. of Ed., 29 NJPER at 333 (fn.3) (Director dismisses unit clarification petition but allows for the filing of a timely representation petition).

disagree for two primary reasons: (1) the certifications supporting that contention are not based upon personal knowledge of what the parties intended at the time the term, "all teaching personnel" was added to the recognition provision; and (2) the Association's interpretation of Article I would render redundant and/or superfluous the listing of other employees included under Article I who "interact with students on an educational basis."

In the context of a unit clarification petition, the parties' mutual intent at the time an agreed-upon unit is formed is a relevant factor in deciding whether a petitioned-for title is encompassed by the parties' unit definition. City of Plainfield, D.R. No. 82-39, 8 NJPER 156, 157 (¶13068 1982); UMDNJ, D.R. No. 96-6, 22 NJPER 49, 50 (¶27025 1995); Newark State-Operated School District, P.E.R.C. No. 2017-16, 43 NJPER 115, 116 (¶34 2016). Where there is no competent evidence establishing the parties' mutual intent to include a title in a unit, we have declined to add the subject title to the petitioner's unit by way of clarification petition. Plainfield; UMDNJ; Newark State-Operated School District.

The Association's certifications do not show that Scholtz and/or Barreto participated in or personally knew of the collective negotiations leading to the parties' agreement to include "all teaching personnel" in the recognition provision. The term, "all teaching personnel" was part of the parties' 2008-

2012 CNA and may have been included in prior CNAs.^{2/} Absent facts providing any foundation for Scholtz's and Barreto's shared opinion that the Association intended "all teaching personnel" to include the behaviorist title and anyone who "interacted with students on an educational basis," their representations of the meaning of "all teaching personnel" carries little probative value.^{3/}

The Association's interpretation of "all teaching personnel" would also render other language in Article I superfluous. A contract "should not be interpreted to render one of its terms meaningless." Cumberland Cty. Improvement Authority v. GSP Recycling, Inc., 358 N.J.Super. 484, 497 (App. Div. 2003). If the parties intended the phrase "all teaching personnel" to include any employee who "interacted with students on an educational basis", there would be no reason to list other included titles in Article I that clearly "interact with students on an educational basis" (such as aides, librarians, teaching vice principals, and learning disabilities teachers, all of which

2/ The record is unclear as to when the language "Teachers (All Teaching Personnel)" was added to the parties' CNA.

3/ I also reject the Board's interpretation of "all teaching personnel." Pillari certifies that phrase was added to the parties' 2012-2015 Memorandum of Agreement to include all full and part-time teachers. However, that assertion is factually inaccurate since the language "all teaching personnel" was part of the recognition clause in the parties' 2008-2012 CNA.

are expressly included in the unit). The Association's interpretation of teaching personnel would thus render the language specifically referencing employees who "interact with students on an educational basis" meaningless. Id.

The Association also contends that the behaviorist should be included under the Article I job category, "teachers (all teaching personnel)", because Gronchowski holds a certificate that allows him to teach special education students and because the behaviorist performs curriculum-related work. The Association relies on Sayreville Bd. of Ed., P.E.R.C. No. 83-89, 9 NJPER 73 (¶14039 1982); and Piscataway Tp. Bd. of Ed., D.R. No. 81-11, 6 NJPER 527 (¶11268 1980) in support of this position. I disagree.

The Association's reliance on Sayreville Bd. of Ed. and Piscataway Tp. Bd. of Ed. is misplaced. Sayreville did not raise a question concerning representation. 9 NJPER at 74-75. The Commission found in Sayreville that the board of education violated the Act by refusing to negotiate with the teachers' association regarding summer assignments given to compensatory education teachers to prepare summer lesson plans for students needing remedial instruction. Id. at 74. The Commission noted that there was "no dispute that compensatory education teachers are unit employees" and wrote that the "issue before us related

solely to the Board's refusal to negotiate with respect to the summer assignments of these teachers." Id.

Unlike compensatory education teachers in Sayreville, the behaviorist is not identified as part of the Association's unit. Sayreville does not stand for the proposition, as suggested by the Association, that any employee of the Board performing "curriculum related" work must be deemed a "teacher" as defined by Article I of the parties' CNA. Instead, Sayreville addresses an employer's obligation to negotiate with a majority representative over the terms and conditions of employment of unit employees who perform "other services" related to their regular, unit position's duties (such as the preparation of summer lesson plans in relationship to compensatory education throughout the school year). 9 NJPER at 74.

Piscataway Tp. Bd. Of Ed. is also inapposite. In Piscataway, the Director clarified a unit that included, among other employees, "classroom teachers," to also include teachers of English as a Second Language (ESL teachers). 6 NJPER at 527. ESL teachers, like other teachers in the unit, were required to have a teaching certificate and to teach students in the classroom in need of remedial instruction. The issue in Piscataway was not whether an ESL teacher was a "teacher" within the meaning of the parties' unit definition, but was rather whether ESL teachers were "part-time" as defined by the unit or

casual employees who should not be included in the unit. 6 NJPER at 419. The Board argued ESL teachers should not be included in the unit because they were hourly employees and the parties' recognition clause did not contemplate the inclusion of hourly employees. Id. The Director disagreed and adopted the Hearing Officer's finding that ESL teachers "displayed a regularity and continuity of employment" such that their inclusion in the unit was appropriate. Id.

In contrast to the ESL Teachers in Piscataway, the behaviorist is not a "teacher" and not required to hold a teaching certificate. Although Gronchowski holds a teaching certificate, the omission of that requirement from the behaviorist title differentiates it from "teachers (all teaching personnel)" in the disputed unit. A behaviorist's functional responsibilities are not those of a unit "teacher" and, contrary to the Association's contention, neither Piscataway nor Sayreville support the position that any employee who incidentally holds a teachers' certificate is a "teacher" within the meaning of Article I of the parties' agreement.

The Association's broad interpretation of "teaching personnel" would also lead to absurd results. If a title was to be considered a teacher under Article I because the employee holding that title has a teacher's certificate (even if that certificate is not required for the position the employee holds),

then titles expressly excluded from the Association's unit -- principals, vice-principals, supervisors of special education, etc., -- could be included merely because those employees possessed a teaching certificate. This would lead to confusion and inconsistency in the unit placement of titles. It would also be antithetical to our basic analytical approach in defining appropriate, broad-based units, which is to focus on the duties attendant to the title in question and not on the individual employee who holds the title. State v. Prof. Ass'n of N.J. Dept. of Ed., 64 N.J. 231 (1974).

Accordingly, I dismiss the Association's petition.

/s/Daisy B. Barreto
Acting Director of Representation

DATE: August 15, 2017
Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due by August 25, 2017.