

D.R. NO. 2018-15

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

In the Matter of

STATE OF NEW JERSEY
(MONTCLAIR STATE UNIVERSITY),

Public Employer,

-and-

Docket No. CU-2016-022

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, AFT/AFL-CIO,

Petitioner.

SYNOPSIS

The Acting Director of Representation clarifies a collective negotiations unit of employees of Montclair State University (MSU) to include the following titles: Director of Special Events, Assistant Director of Communications and Marketing, Assistant Director of Media Relations, Associate Director-Donor Relations-Events, and the Associate Director-Donor Relations-Scholarships. The Council of New Jersey State College Locals, AFT/AFL-CIO (Council) filed a unit clarification petition to include these titles in a unit of professionals, faculty, librarians and other administrative personnel. MSU objected to the petition, arguing the petitioned-for titles were managerial executives, supervisors, confidential and that the titles' inclusion in the unit would generate an impermissible conflict of interest. Based on the administrative record, the Acting Director rejected MSU's position and found the petitioned-for titles' inclusion in the Council's unit was appropriate.

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Appearances:

For the Public Employer,
(Marolhin D. Mendez, Esq.)

For the Petitioner,
(Debra Davis, Staff Representative)

DECISION

On February 29 and December 7, 2016, the Council of New Jersey State College Locals, AFT, AFL-CIO (Council) filed a clarification of unit petition (petition) and amended petition^{1/} seeking to clarify its collective negotiations unit of employees of the State of New Jersey, Montclair State University (MSU) to include the following job titles at MSU: Director of Special

^{1/} The February 29th petition sought the inclusion of nine titles in the Council's unit. On December 7, the Council amended its petition by withdrawing its request to include three of the nine titles, namely, the Director of Media Relations, the Director of Annual Giving, and the Director of Red Hawk Math Learning Center.

Events, Assistant Director of Communications & Marketing, Assistant Director of Annual Giving, Assistant Director of Media Relations, Associate Director-Donor Relations-Events, and Associate Director-Donor Relations-Scholarships (collectively referred to as "petitioned-for titles" or "petitioned-for employees"). The Council contends that the petitioned-for employees are non-managerial, administrative employees that are covered by the recognition clause in its collective negotiations agreement with the State of New Jersey (State).^{2/} MSU opposes the petition and argues the petitioned-for employees are managerial executives and supervisors within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). MSU also contends the petitioned-for employees' inclusion in the Council's unit would create a conflict of interest and that the Assistant Director of Media Relations is confidential within the meaning of the Act.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On August 22, 2016, a Commission staff agent sent a letter to the Council and MSU requesting certification(s) setting forth facts in support of the Council and MSU's legal positions. The letter also requested

^{2/} The collective negotiations agreement between the State and Council covers a state-wide unit of employees of the State's nine colleges and universities, including Montclair State University.

that the parties provide specific examples and detailed explanations demonstrating whether the petitioned-for employees formulated or directed the effectuation of MSU policies; performed supervisory duties within the meaning of the Act, and/or whether inclusion of the petitioned-for employees in the Council's unit would generate an impermissible conflict of interest. The letter advised the parties that 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 October 21, 2016, the Council filed a response consisting of certifications with exhibits from Debra L. Davis, Council staff representative representing AFT Local 1904^{3/} (Davis Cert.), and from Jennifer S. Higgins, a Council unit employee who serves as Vice President for External Affairs on behalf of AFT Local 1904 and is a representative on the Council's Executive Board for Professional Staff (Higgins Cert.). Higgins has been employed at

^{3/} AFT Local 1904 represents non-supervisory faculty, librarians and professional staff at MSU. The Council negotiates a master agreement between the nine State colleges/universities and State of New Jersey, but delegates authority to local organizations at each university or college to represent employees at the individual university or college; the locals negotiate agreements governing terms and conditions of employment on issues that, by the terms of the CNA between the State and Council, are reserved for resolution between the local and individual college/university. State of New Jersey (Kean University), D.U.P. No. 2011-7, 37 NJPER 156 (¶48 2011), aff'd at P.E.R.C. No. 2012-43, 38 NJPER 291 (¶103 2012).

MSU since 2000; her current job title is "Research Analyst" in MSU's Office of University Advancement.

On October 21, 2016 and May 24, 2017, MSU filed a response, which included certifications with exhibits from John Shannon, Jr., Vice President for University Advancement (October 21 certification, hereinafter referred to as the "Shannon Cert."; the May 24 certification from Shannon, hereinafter referred to as the "Supplemental Shannon Cert.") and Frederick Bonato, Associate Provost for Academic Affairs at MSU.^{4/} Attached to the October 21 certification were over one hundred pages of forms and documents, several dozen of which bear no relevance to our investigation. Several written representations in the certification were either non-responsive or did not set forth facts which support MSU's legal positions.

On August 8, 2017, the Acting Director of Representation issued a tentative decision clarifying the Council's unit to include the petitioned-for titles. The parties were afforded fifty-five (55) calendar days to respond to the August 8 decision. On September 22, 2017, MSU filed a letter brief and four certifications with exhibits from the following employees: John Shannon ("Third Shannon Cert."); Director of Donor Relations

^{4/} Bonato certifies only to facts and documents pertaining to the Director of Red Hawk Math Learning Center. Since the Council has withdrawn its request to include this title in its unit, we do not rely on Bonato's certification for purposes of reviewing the remaining and disputed titles.

Moira Sullivan Renke ("Renke Cert."); Assistant Vice President of Communications & Marketing Ellen Griffin ("Griffin Cert."); and Assistant Vice President for Annual Giving Jean Marano ("Marano Cert."). The arguments raised in the brief are summarized and addressed in the "Analysis" section of this decision. The Council did not file a response.

Based on our review of the parties' submissions, no substantial and material factual issues require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.6. I make the following:

FINDINGS OF FACT

On July 3, 2012, the Council and the State entered into a collective negotiations agreement extending from July 1, 2011 through June 30, 2015 (CNA). Article I of the CNA contains a recognition clause that provides, in pertinent part, that "administrative staff (non-managerial)" are included in the Council's unit and "Deans, Associate and Assistant Deans and other managerial executives" are excluded from the Council's unit. The Council asserts that the petitioned-for titles are non-managerial, administrative titles.

MSU's Administrative Organization and Structure

MSU's administration consists of eight separate offices or departments: Office of the President, Academic Affairs, University Facilities, Finance and Treasury, Human Resources, Information Technology, Student Development and Campus Life, and

University Advancement.^{5/} With the exception of the Office of the President, each of the other seven departments are led by a Vice President. The Vice President for University Advancement is John Shannon, Jr. (Shannon Cert., Exhibit A). The petitioned-for employees work in University Advancement. (Shannon Cert., Exhibit A; Higgins Cert.)

The MSU President is appointed by and reports to the Board of Trustees. The Board of Trustees "exercises the powers and duties necessary for the control and management of University Affairs."^{6/} As MSU's chief executive officer, the President is "responsible for the management of the University and for the execution and enforcement of the rules, regulations and orders governing its conduct and administration."^{7/}

University Advancement is responsible for marketing MSU's services and for building positive relationships between MSU,

^{5/} The facts regarding MSU's administrative organization and structure were gleaned from MSU's official website. See <https://www.montclair.edu/human-resources/policies-and-procedures/employee-handbook/organization-and-structure/> (last visited on December 28, 2016). <https://www.montclair.edu/provost/faculty-handbook/governance/administration/> (last visited December 28, 2016); and <https://www.montclair.edu/university-advancement/> (last visited December 28, 2016).

^{6/} <https://www.montclair.edu/human-resources/policies-and-procedures/employee-handbook/organization-and-structure/> (last visited on December 28, 2016)

^{7/} <https://www.montclair.edu/university-advancement/> (last visited December 29, 2016).

alumni, and donors. Its main goal is "raising funds to support and advance the University's mission."^{8/} As head of the department, Shannon has "overall management and fiscal responsibility for all of the institution's external relations, encompassing Alumni Relations, Development, Communications, and the MSU foundation."^{9/}

University Advancement has over fifty employees in more than fifty job titles and is comprised of three major divisions: External Relations, Development, and the Montclair State Foundation.^{10/} (Shannon Cert., Exhibit A; Third Shannon Cert., Exhibit C). Each division is led by an Associate Vice President, who reports to Shannon through an Executive Administrative Assistant. (Third Shannon Cert., Exhibit C). Immediately below the Associate Vice Presidents in the organizational hierarchy are two directors, three executive directors, two assistant vice presidents, and a Publications Editor; all of whom rank higher in authority than all of the petitioned-for employees, with the exception of the Director of Special Events. (Third Shannon Cert., Exhibit C).

^{8/} Id.

^{9/} Id.

^{10/} Id.

Assistant Director Titles

MSU created and first appointed someone to the Assistant Director of Annual Giving (ADAG) title in July 2013 (Supplemental Shannon Cert., Paragraph 3; Shannon Cert., Exhibits B and K).^{11/} Hillary Brintle was employed as ADAG and hired in April 2016. (Shannon Cert., Exhibit K). In June 2017, Brintle left the ADAG position and the vacant title will be abolished. (Third Shannon Cert., Paragraph 4).

MSU created the job title of Assistant Director of Communications and Marketing (ADCM) on September 6, 2013.^{12/} Ellie

^{11/} MSU contends the Council's request that its unit be clarified to include the ADAG is untimely. I disagree. Shannon certifies that the job title, "Telefund Manager" was reclassified as the ADAG and filled in July, 2013. (Supplemental Shannon Cert., Paragraph 3). Shannon also certifies that the ADAG was "originally titled, 'Managing Assistant Director 2'" in 2004. (Supplemental Shannon Cert., Paragraph 3). The reclassification of Telefund Manager to ADAG is a "change in circumstance" that justifies the filing of a unit clarification petition. N.J.A.C. 19:11-1.5(b)(3)(I); Essex Cty. Sheriff, D.R. No. 2009-4, 34 NJPER 274 (¶97 2008) (employer files CU petition to add county police officers to sheriff's officer unit after police officers were reclassified by Department of Personnel as sheriff's officers). Here, the change in circumstance occurred during the parties' 2011-2015 CNA and the Council filed its petition prior to executing a successor CNA. The petition is timely. Paramus Bd. of Ed., D.R. No. 2014-6, 40 NJPER 169 (¶64 2013).

^{12/} MSU contends the Council's request that its unit be clarified to include the ADCM is untimely. I disagree. Shannon certifies that the job title, "Director of Annual Fund" was reclassified as the ADCM and filled in October 2013. (Supplemental Shannon Cert., Paragraph 2). Shannon also certifies that the ADCM was "originally titled

(continued...)

Uberto currently works as ADCM. She was hired as ADCM on May 31, 2016. (Shannon Cert., Exhibit B).

At the direction of the Director of Marketing and Analysis, the ADCM "assists in the planning, implementation and analysis of [MSU's] overall marketing plan", including such marketing areas as "brand identity, internal client relations, managing external agency relationships, copywriting, performance metrics and analysis." (Shannon Cert., Exhibit F). She assists in developing the University's marketing budgets and with the execution of university marketing and advertising campaigns. She also implements policies regarding the production of marketing and advertising materials in support of MSU. (Shannon Cert., Exhibit F and Response to Question 6).

Uberto reports to Jubin Kwon, Director of Marketing and Analysis, who in turn reports to Ellen Griffin, Assistant Vice President of Communications and Marketing. Griffin reports to Carol Blazejowski, the Associate Vice President of External Relations, who in turn reports to Shannon. (Shannon Cert.,

12/ (...continued)

'Managing Assistant Director 2'" and was filled in 1998. The reclassification of the Director of Annual Fund title to ADCM is a change in circumstance that justifies the filing of a unit clarification petition. N.J.A.C. 19:11-1.5(b)(3)(I); Essex Cty. Sheriff., 34 NJPER 274. Here, the change in circumstance occurred during the parties' 2011-2015 CNA and the Council filed its petition prior to executing a successor CNA. The petition is timely. Paramus Bd. of Ed., 40 NJPER 169.

Exhibit A; Third Shannon Cert., Exhibit C). Uberto "directly supervises" unit employee Julisse Duran, Coordinator of Marketing and Communications. (Griffin Cert., Paragraph 9). Uberto provides "day to day project supervision and guidance" to Duran and "meets with Duran on a weekly basis to prioritize her workload." (Griffin Cert., Paragraph 9).

Uberto has not hired, fired or disciplined Duran or any other unit employee and has not effectively recommended the same, though "it is anticipated that Ms. Uberto will be the first-line evaluator in the future." (Shannon Cert., Responses to Questions 9 and 10; Griffin Cert., Paragraph 9).^{13/} She has not evaluated unit employees and has not processed or decided grievances (Shannon Cert., Griffin Cert., Paragraph 9); but directs "outside vendors and consultants." (Higgins Cert.; Shannon Cert., Responses to Questions 9, 10, 11 and 12). The ADCM does not perform tasks that raise an actual or substantial potential conflict of interest between MSU and the unit. (Shannon Cert., Response to Question 13; Higgins Cert.).

MSU provides a few examples of Uberto providing input and implementing University Advancement programs and policies. Uberto provided "Advancement leadership" and MSU's President and

^{13/} Shannon asserts that Uberto "has the authority to evaluate Duran's job performance and make recommendations to hire, fire, reappoint and discipline Duran." (Third Shannon Cert., Paragraph 9) MSU does not provide examples of that authority being exercised.

Provost with proposals and analysis on ways of improving online advertising of MSU. (Griffin Cert., Paragraph 7). Uberto also worked on a program designed to improve recruitment at MSU's School of Nursing. (Griffin Cert., Paragraph 8). In doing so, Uberto "worked directly with the Dean on implementation, assessment and mid-course corrections" and "interpreted nuanced feedback from the Dean and applied it to hands on implementation." (Griffin Cert., Paragraph 8).

MSU created the title Assistant Director of Media Relations (ADMR) on October 5, 2015. (Shannon Cert., Exhibit B; Davis Cert.). Andrew Mees was hired as ADMR on January 25, 2016. (Shannon Cert., Exhibit B; Davis Cert.).

The ADMR reports to the Director of Media Relations, Erika Bleiberg, and is responsible for supporting the Director "on the development, management and implementation of proactive media strategies and communication activities" with the "goal of expanding and elevating the University's reputation" in regional and national markets. (Shannon Cert., Exhibit I; Davis Cert.) The ADMR also assists the Director in "managing press inquiries, assisting media on campus and, with the guidance of the Director and department leadership, responding to the press during periods of high-media interest." (Shannon Cert., Exhibit I).

Mees can be responsible for media relations functions in the Director's absence and as a "member of the media team,

contributes to brainstorming, analysis, strategy recommendation and strategy implementation." (Griffin Cert., Paragraph 3). During the course of his work, Mees "interacts with senior leadership of the University," including the MSU President and deans of the various colleges. (Griffin Cert., Paragraph 3). Mees "works closely with the Director of Media Relations in handling all media inquiries" and has "direct responsibility to assist in the development of strategy over media relations matters." (Griffin Cert., Paragraph 4). According to MSU, Mees' role in "stepping in" for the Director of Media Relations can make him privy to confidential information concerning labor relations issues. (Griffin Cert., Paragraph 4). As an example, MSU cites the fact that Mees once met with MSU's Vice President of Human Resources to get briefed on key aspects of a collective negotiations agreement that was finalized during the summer of 2017 with the American Federation of Teachers. (Griffin Cert., Paragraph 3). He has worked in consultation with the MSU President and Executive Council on media relations issues. (Griffin Cert., Paragraph 3).

As part of his duties, Mees has developed policy statements and programs setting guidelines for MSU staff to coordinate their work with the media relations division and to "make University faculty more visible to the media..." (Griffin Cert, Paragraph 6). The ADMR occupies a relatively low position within

University Advancement's organizational hierarchy. (Davis Cert., Third Shannon Cert., Exhibit C). The ADMR reports to the Director of Media Relations, who in turn reports to the Assistant Vice President of Communications and Marketing, Ellen Griffin. Ms. Griffin reports to the Associate Vice President of External Relations, Carol Blazejowski, who in turn reports to Shannon. (Third Shannon Cert., Exhibit C; Davis Cert.).

The ADMR has not hired, fired or disciplined Council unit employees, nor has he effectively recommended the same. (Higgins Cert., Shannon Cert., Responses to Questions 9 and 10). The ADMR does not evaluate unit employees' performance, does not process grievance(s) and has not been involved in a situation that would raise a conflict of interest with the unit and MSU. (Higgins Cert., Shannon Cert., Responses to Questions 11, 12 and 13).

Associate Director Titles

MSU created the title Associate Director, Donor Relations-Events (ADRE) on August 14, 2015. (Shannon Cert., Exhibit B; Davis Cert.). MSU hired Julie Pozo-Cepeda as ADRE on January 25, 2016. (Shannon Cert., Exhibit B). Pozo-Cepeda currently holds the ADRE position. (Shannon Cert., Exhibit E). Pozo-Cepeda's immediate supervisor is Moira Sullivan Renke, the Director of Donor Relations. (Renke Cert., Paragraph 2).

According to the job description, the ADRE works under the direction of the Director of Donor Relations in creating an

"institution-wide comprehensive donor relations and stewardship program that appropriately and consistently promotes interaction with and recognition of donors at all levels." (Shannon Cert., Exhibit E). The ADRE works closely with the Directors of Development and other administrators in producing recognition events honoring donors. (Shannon Cert., Exhibit E.). Pozo-Cepeda "works in concert" with Director Renke in establishing "policies and procedures for the implementation of a donor centric events and a recognition program" for donors. (Renke Cert., Paragraph 3). Pozo-Cepeda "manages the overall donor relations program" at MSU and "manages the budgets" for donor events. She has prepared feedback and guidelines for vendors who work with MSU on donor recognition events, including the establishment of a procedure to ensure contract guidelines for vendors are adhered to and to "ensure that all donor events are done at the Presidential standards." (Renke Cert., Paragraphs 5 and 6). Her work is done in collaboration with the "Director of Development, Alumni Relations Team, Deans, Vice Presidents, and leaders from across the University" (Renke Cert., Paragraph 7).

Pozo-Cepeda reports to Renke, who in turn reports to Lisa Barsanti-Hoyt, the Associate Vice President of Development. (Third Shannon Cert., Exhibit C; Higgins Cert.). Hoyt reports to Shannon. (Third Shannon Cert., Exhibit C). Cepeda does not have

the authority to hire, fire or discipline unit employees, nor has she recommended the same. (Higgins Cert., Shannon Cert, Responses to Questions 9 and 10). She does not evaluate employees' work and does not process or decide grievances. (Higgins Cert., Shannon Cert., Responses to Questions 11 and 12).

MSU created the title, "Associate Director, Donor Relations-Scholarships" (ADRS) on October 5, 2015 and appointed Alice Iverson to the position effective January 4, 2016. (Shannon Cert., Exhibit B). The term of Iverson's appointment as ADRS ended on June 30, 2017. (Shannon Cert., Exhibit J).

According to MSU's job description, the ADRS works "under the direction and supervision of the Director of Donor Relations" in "creating, maintaining and tracking a robust donor relations program for scholarship donors to MSU." (Shannon Cert., Exhibit J). The ADRS is the "point person for all communications with scholarship donors" and "works closely with the [ADRE], the Directors of Development, the Alumni Relations team and the Annual Giving staff as well as Deans, Vice Presidents and leaders from across the University to facilitate and coordinate donor recognition activities." (Shannon Cert., Exhibit J). Iverson reports to Director of Donor Relations Renke who, in turn, reports to Hoyt, who reports to Shannon. (Higgins Cert., Third Shannon Cert., Exhibit C). Iverson also works "in concert with the Advancement Services team, Financial Aid, Deans and Directors

of Development" to establish a framework for implementation of a "donor-centric scholarship and reporting program." (Renke Cert., Paragraph 9). She also assists MSU administrators and Donor Relations staff with "defining and managing a work plan/time-lines" for work in her department. (Renke Cert., Paragraph 12).

The ADRS does not have the authority to hire, fire or discipline unit employees and does not evaluate employee work performance. (Higgins Cert., Shannon Cert., Responses to Questions 9, 10 and 11). The ADRS does not process or decide grievances. (Shannon Cert., Response to Question 12; Higgins Cert.).

Director of Special Events

MSU created the title "Director of Special Events" (DSE) on October 13, 2015. (Shannon Cert., Exhibit B). MSU hired Jennifer Tunncliffe as DSE on January 19, 2016. (Shannon Cert., Exhibit B). She is currently employed in the position. (Shannon Cert., Exhibit H).

Under the direction of Carol Blazejowski, the DSE "manages the day to day operations of the unit which produces large signature university special events", such as "Commencement, Convocations, Homecoming, Annual Scholarship Dinner and others as designated by the Associate Vice President of External Relations." (Shannon Cert., Exhibit H). Commencement plans are "reviewed and vetted" by MSU's President and Provost. (Shannon

Cert., Response to Question 8). The DSE also directs the Special Events Manager and outside vendors and consultants. She creates and maintains professional standards and procedures for all event productions. (Shannon Cert., Exhibit H).

Tunncliffe reports to Blazejowski, who in turn reports to Shannon. (Shannon Cert., Exhibit A). She "works directly with the University President" and other MSU administrators in planning and producing university events. (Third Shannon Cert., Paragraph 6). She has managed budget allocations for events, recommended staffing plans for events and has overseen the procurement process for events while also having the "power to resolve areas of disagreement within the event team." (Third Shannon Cert., Paragraph 6). Tunncliffe once prepared an "Event Briefing Form" as "part of her implementation of a new procedure for the booking of on-campus events." (Third Shannon Cert., Paragraph 6).

Tunncliffe has not hired, fired or disciplined a unit employee, has not recommended the same, and has not processed or decided a grievance involving a unit employees. (Shannon Cert., Responses to Questions 7-13). Tunncliffe has evaluated and recommended for reappointment a unit employee named Diana Marchitelli, whose job title is "Events Manager." (Third Shannon Cert., Paragraph 7).

On November 10, 2016, Tunncliffe signed the evaluation and recommendation for Marchitelli's reappointment for fiscal year 2018. (Third Shannon Cert., Exhibit B). On November 16, 2016, Blazejowski signed a separate evaluation of Marchitelli and wrote in that evaluation that she concurred with Tunncliffe and independently recommended Marchitelli's reappointment to Shannon. (Third Shannon Cert., Exhibit B). Blazejowki signed the evaluation as the department's "unit head." Shannon too signed a separate evaluation of Marchitelli and expressed agreement with Blazejowski's and Tunncliffe's recommendation of reappointment, writing that he expects Marchitelli "will continue on that same progressive track under the supervision and mentorship of Jennifer Tunncliffe and Carol Blazejowski." (Third Shannon Cert., Exhibit B). Shannon signed the evaluation as the "Vice President/Division Head" in University Advancement. (Third Shannon Cert., Exhibit B). It is unclear who reviewed Shannon's reappointment recommendation.

ANALYSIS

MSU argues that our processing of the Council's unit clarification petition violates MSU's due process rights and the Administrative Procedures Act (APA). MSU also contends the petitioned-for employees are managerial executives and supervisors under the Act; that their inclusion in the Council's unit would create an impermissible conflict of interest; and that

the ADMR is a confidential employee under the Act. The Council disagrees. I reject MSU's contentions and clarify the Council's unit to include all of the petitioned-for titles except the vacant ADAG title. I also dismiss MSU's due process objections.

Due Process Objections

MSU argues our processing of the Council's petition infringes upon its due process rights and violates the strictures of the APA. According to MSU, we should have compelled the Council to provide MSU with its certifications and exhibits in order to afford MSU an opportunity to respond to the same. Moreover, MSU argues that we mistakenly relied on the Council's submissions without affording MSU an opportunity to respond to them. I disagree. MSU's arguments fundamentally misunderstand our unit clarification process. Further, our determinations are based on MSU's submissions and union submissions that corroborate or are consistent with the material facts set forth in MSU's submissions.

Unit clarification procedures are investigatory in nature. Neither the union nor the employer has a burden of proof as they would in an adversarial proceeding under the APA. River Dell Bd. of Ed., P.E.R.C. No. 78-85, 4 NJPER 252, 253 (¶4128 1978) ("It should be noted that a representation proceeding is quasi-legislative, as opposed to quasi-judicial in nature, and no burden of proof is attached thereto."); Cliffside Park Bd. of

Ed., P.E.R.C. No. 88-108, 14 NJPER 339, 340 (¶19128 1988)

(Commission noted that a unit clarification proceeding "is investigatory and neither party has the burden of proof");

N.J.A.C. 19:11-6.2©. Under the Act, we conduct an administrative investigation to determine the appropriate unit and decide, based on the administrative record, whether there are substantial, material facts in dispute that would warrant an evidentiary hearing. N.J.A.C. 19:11-2.2; N.J.A.C. 19:11-2.6(f).

Here, based on our administrative investigation, we find there are sufficient facts in the administrative record to render a determination on the Council's petition. We rely on the employer's submissions in finding that clarification of the Council's unit to include the petitioned-for employees is appropriate. We need not conduct a hearing to resolve immaterial issues of fact raised by the parties' certifications. N.J.A.C. 19:11-2.6(f).

MSU asserts we have the authority to compel the Council to serve its certifications on MSU. I disagree. Our Act does not require one party in a unit clarification proceeding to serve another party with the certifications it submitted in an administrative investigation. We decline to create and implement a procedure without the statutory or regulatory authority to do so. Paterson Charter School for Science and Technology, D.R. No. 2015-9, 42 NJPER 74 (¶19 2015); req. for rev. denied at P.E.R.C.

No. 2016-4, 42 NJPER 99 (¶27 2015) (Commission affirms Director's decision to not adopt a procedure advocated by an employer to revise a list of employees after the Director determines majority support because the Director lacked the authority under the Act to do so).

Mootness Discussion

Shannon certifies the ADAG position is vacant and will be abolished. (Third Shannon Cert., Paragraph 4). The dispute as to the placement of that title in the Council's unit is moot. Consistent with longstanding Commission policy, we will refrain from making a unit placement determination concerning a vacant title and deny the Council's request to include the ADAG title in its unit. Bordentown Tp., D.R. No. 2006-3, 31 NJPER 263, 264 (¶104 2005).

Managerial Executive Discussion

Under N.J.S.A. 34:13A-3(f), a "managerial executive" of any public employer other than the State^{14/} is defined as follows:

[M]anagerial executives of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing

^{14/} In State of New Jersey, P.E.R.C. No. 2013-52, 39 NJPER 301 (¶102 2013), aff'd in part and rev'd in part at 41 NJPER 357 (¶113 App. Div. 2015), the Appellate Division affirmed the Commission's holding that a state college's board of trustees, and not the State, is the public employer of employees at the state's colleges.

the effectuation of such management policies and practices.

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331 (1997), the New Jersey Supreme Court adopted this test to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises. [Turnpike Authority at 356]

The term "managerial executive" is narrowly construed, since the consequence of finding that an employee is a managerial executive is to deny that employee the benefits and protections of the Act. N.J.S.A. 34:13A-5.3; State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246, 247 (¶22112 1991).

The burden of demonstrating that an employee is a managerial executive falls "on the party seeking to place an employee outside the Act's protection." State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507, 510 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985); Willingboro Bd. of Ed., D.R.

No. 97-15, 23 NJPER 358 (¶28169 1997). We have applied strict standards of proof to managerial executive status claims: absent a proffer of specific duties and a demonstration that the purported managerial duties are actually performed, we will not find managerial executive status. Teaneck Tp., D.R. No. 2009-3, 34 NJPER 268 (¶96 2008), req. for rev. den. P.E.R.C. No. 2009-25, 34 NJPER 379 (¶122 2008) (employer's certification lacked sufficient, specific examples of department heads actually formulating or directing the effectuation of policies); City of Newark, D.R. No. 2000-11, 26 NJPER 234 (¶31094 2000), req. for rev. den. P.E.R.C. No. 2000-100, 26 NJPER 289 (¶31116 2000), aff'd 346 N.J. Super. 460 (App. Div. 2002) (employer claiming managerial executive status must make a particularized showing that employees actually perform those duties which make the titles managerial); City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013) (Director rejects the employer's managerial executive and confidential status claims because the employer did not produce affidavits setting forth sufficient facts and examples of work performed by the petitioned-for employees that demonstrated managerial authority or confidential status).

The facts presented by MSU establish that the petitioned-for employees do not exercise the level of independent discretion and decision-making authority necessary to support a managerial

executive status claim. Applying the three-factor test adopted in Turnpike Authority, the petitioned-for employees function within a university bureaucracy where their discretion in implementing MSU policies is significantly circumscribed. All of the petitioned-for employees occupy relatively low positions within MSU's administrative hierarchy and implement policies and procedures under the direction of or in consultation with higher-level administrators; including directors, associate directors, assistant vice presidents, associate vice presidents, vice presidents, deans, executive council members and the MSU President and Provost. Their functions entail the implementation of policies at the direction of higher-level administrators and are akin to that of a line supervisor whose function is to implement policy at the behest of others. Teaneck Tp.; See also State of New Jersey (DEP), P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999) (Commission rejected claim that section chiefs in Department of Environmental Protection were managerial executives, noting that while section chiefs were responsible for effectuating management policies, they did not direct the effectuation of such policies, but instead acted at the behest of higher-level administrators). The petitioned-for employees primarily assist directors and other higher-level administrators in marketing, media and other outreach campaigns to raise funds

for MSU. The facts indicate the petitioned-for employees do not exercise the broad authority over University Advancement policy-making which would support a finding of managerial executive status.

For these reasons, I find the petitioned-for employees are not managerial executives.

Supervisory and Conflict of Interest Discussion

Our Act prohibits supervisors and non-supervisors from being represented in the same collective negotiations unit. N.J.S.A. 34:13A-5.3. The Commission has defined a statutory supervisor as an employee having the authority to hire, discharge, or discipline another employee; or effectively recommend those actions. Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1984); City of Linden, D.R. No. 2011-12, 38 NJPER 159 (¶46 2011).

We will not find that an employee is a statutory supervisor without evidence that the employee's alleged supervisory authority is exercised with some degree of regularity. Id.; See also Somerset Cty. Guidance Center; D.R. No. 77-4, 2 NJPER 358 (1976); North Bergen Parking Authority, D.R. No. 2013-9, 39 NJPER 294 (¶98 2012). The Commission will look beyond an employee's job description or title to ascertain the nature of the authority actually exercised. Linden. Mere "possession of the [supervisory] authority is a sterile attribute unable to sustain

a claim of supervisory status." Somerset Cty. Guidance Center, 2 NJPER at 360. Facts indicating that an employee acts "in a lead capacity" or oversees and directs "the work of other employees, without more, does not render an employee a statutory supervisor." Linden, 38 NJPER at 160; Hackensack Bd. of Ed.

I find the petitioned-for employees are not supervisors within the meaning of the Act. Although MSU acknowledges and the Council certifies that the petitioned-for employees have not hired, fired or disciplined MSU employees, MSU contends that the petitioned-for employees "may" supervise unit employees in the future. The mere possibility of supervision, without more, is insufficient to establish supervisory status. Linden, Somerset Cty. Guidance Center. Absent evidence that the petitioned-for employees regularly exercised the authority to hire, fire or discipline unit employees, or effectively recommended those actions, we cannot find that these employees are supervisors within the meaning of the Act. Hackensack Bd. of Ed., Linden.

MSU also contends that the possibility that the petitioned-for employees may supervise unit employees raises an impermissible conflict of interest. I disagree.

In West Orange Bd. of Ed. v. Wilton, 57 N.J. 417, 425-26 (1971), the New Jersey Supreme Court held that the Act prohibits the inclusion of employees in a unit who exercise significant power or control over other unit employees such that their

inclusion would generate an actual or potential substantial conflict of interest. The Court explained:

If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. [Wilton, 57 N.J. at 426]

Impermissible conflicts of interest under Wilton are decided on a case-by-case basis after a close examination of the facts. Peripheral or de minimis conflicts are permitted under the Act. Monmouth Cty. Sheriff, D.R. No. 2015-6, 41 NJPER 508 (¶159 2015). An employee's role in the evaluation or grievance process is a significant factor in ascertaining whether there is an actual or substantial potential conflict. Monmouth Cty. Sheriff; Jackson Tp., D.R. No. 2016-4, 42 NJPER 389 (¶110 2015). Where an employee plays no role in the evaluation or grievance process and otherwise does not exercise significant authority over other employees such that their loyalty to the employer would be compromised if included in the unit, we have declined to find a conflict of interest. Id.

With the exception of the DSE, MSU acknowledges that the petitioned-for employees have not performed any duties that have generated an actual or substantial potential conflict of interest between MSU and Council unit employees. (Shannon Cert, Response

to Question 13). The petitioned-for employees play no role in the evaluation or grievance process and do not exercise authority over other unit employees to justify a finding of an impermissible conflict of interest under the Act. Jackson Tp.; Monmouth Cty. Sheriff. As with supervisory claims, the mere possibility that an employee may supervise unit employees is insufficient to support a finding of an impermissible conflict of interest. Roselle Park Bd. of Ed., P.E.R.C. No. 87-80, 13 NJPER 73 (¶18033 1986).

MSU asserts that the DSE is a supervisor and should not be included in the Council's unit because doing so would create an impermissible conflict of interest. In support of this position, MSU cites a single instance in which Tunnickliffe evaluated unit employee Diane Marchitelli and recommended her for reappointment. I find the DSE's inclusion in the Council's unit does not generate an impermissible conflict of interest and that the DSE is not a supervisor under the Act.

The Commission has "consistently held that supervisor's evaluations must be closely tied to a personnel action or disciplinary decision in order to find a Wilton conflict." Jackson Tp., D.R. No. 2016-4, 42 NJPER 389, 396 (¶110 2015), citing Watchung Hills Bd. of Ed., P.E.R.C. No. 85-116, 11 NJPER 368 (¶16130 1985); Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987); Burlington Cty. Bd. of Social Services,

D.R. No. 96-15, 22 NJPER 180 (¶27095 1996). Evaluations alone “do not necessarily create a conflict of interest sufficient to exclude the evaluator from a unit.” Westfield Bd. of Ed., 13 NJPER at 637. Evaluations that serve as recommendations “for another’s evaluations which might then serve as recommendations for another’s personnel decision are too far removed from the personnel decision to create a conflict of interest substantial enough to remove [a] title from the unit.” 13 NJPER at 637; City of Linden, P.E.R.C. No. 2012-63, 39 NJPER 24 (¶6 2012) (citing Westfield Bd. of Ed. with approval).

Tunnicliffe’s single evaluation of Marchitelli does not raise an impermissible conflict of interest under the Act. The evaluation is subject to independent review and approval by Blazejowski and Shannon and is, at least, thrice removed from the ultimate personnel decision to reappoint Marchitelli (since Blazejowski recommended Marchitelli’s reappointment to Shannon, who in turn recommended Marchitelli’s reappointment to another unknown administrator). Since the connection between Tunnicliffe’s evaluation/recommendation and the ultimate personnel decision to reappoint Marchitelli is tenuous, I find any conflict of interest raised by this single evaluation is *de minimis*.

Monmouth Cty. Sheriff.

We also find the record amply supports a finding of a shared community of interest between unit employees and the petitioned-

for employees in terms of the factors we have identified as relevant to that inquiry, such as a shared location of employment, common supervision, shared work goals and similarity in job duties and skills. See Somerset Cty., D.R. No. 2014-14, 40 NJPER 527 (¶172 2014).

Based on the foregoing, I reject MSU's conflict of interest and supervisory claims.

Confidential Employee Discussion

Confidential employees are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of public employers other than the State as:

[E]mployees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

The Commission's policy is to narrowly construe the term confidential employee. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp. 2d 186 (¶165 1988); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). In State of New Jersey, we explained our approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective

negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [Id. at 510]

See also, Ringwood Bd. of Ed., Supra. In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), our Supreme Court approved the standards articulated in State of New Jersey and explained:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge would make their membership in any appropriate negotiating unit incompatible with their official duties. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.') Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information and knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a

negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis. [Id. at 358.]

In evaluating confidential status claims, we have consistently applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find confidential status.

City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

In this case, MSU does not provide specific examples of the ADMR performing duties that would compromise MSU's right to confidentiality in collective negotiations. MSU cites one instance in which Mees met with MSU's Vice President of Human Resources to discuss aspects of a collective negotiations agreement reached between the AFT and MSU. But a collective agreement, by statute, is a public document accessible on the Commission's website. N.J.S.A. 34:13A-8.2; see http://www.state.nj.us/perc/Notice_to_Public_Employers_-_Public_Sector_Contracts_Letter_2012.04.02.pdf (notice to public about contract filings on website). Access to a collective negotiations agreement does not, by itself, demonstrate confidential status.

ORDER

I clarify the Council's unit to include the following titles, effective immediately: Director of Special Events, Assistant Director of Communications & Marketing, Assistant Director of Media Relations, Associate Director-Donor Relations-Events, and Associate Director-Donor Relations-Scholarships. I decline to clarify the Council's unit to include the vacant title of Assistant Director of Annual Giving.

/s/Daisy B. Barreto, Esq.
Acting Director of
Representation

DATED: January 10, 2018
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 January 22, 2018.