

D.R. NO. 2018-18

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

In the Matter of

CITY OF NEWARK,

Public Employer,

-and-

Docket No. CU-2014-006

SERVICE EMPLOYEES INTERNATIONAL
UNION, Local 617,

Petitioner,

-and-

NEWARK COUNCIL 21 NJCSA,
IFPTE, AFL-CIO,

Intervenor.

SYNOPSIS

The Acting Director of Representation dismisses a clarification of unit petition (petition) filed by the Service Employees International Union, Local 617 (SEIU). SEIU's petition sought clarification of its unit of employees of the City of Newark (City) to include the title of Public Safety Telecommunicator Trainee (PST Trainee). SEIU's unit was narrowly defined by a recognition provision in the collective negotiations agreement that listed specific titles included in the unit and did not contain generic language encompassing the petitioned-for title. SEIU contended the petitioned-for title should be included in its unit because it shares a community of interest with existing unit titles. The Acting Director disagreed and found that a unit clarification petition was not the appropriate method for adding these titles to SEIU's unit because SEIU's recognition provision does not contain language identifying the petitioned-for title as part of SEIU's unit.

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Appearances:

For the Respondent,
Newark Corporation Counsel
(France Casseus, Assistant Corporation Counsel)

For the Petitioner,
(Oxford Cohen, LLC, attorneys)
(Arnold S. Cohen, of counsel)

For the Intervenor,
(Law Offices of Daniel J. Zirrith, attorneys)
(Lyndsey A. Sterling, of counsel)

DECISION

On September 30, 2013, SEIU Local 617 (Local 617) filed a clarification of unit petition (petition) seeking to clarify its collective negotiations unit of non-police employees of the police department of the City of Newark (City) to include the job

title, Public Safety Telecommunicator Trainee (PST Trainee), in Local 617's unit.^{1/} The petition identified Newark Council 21 (Council 21) as an employee organization that may have an interest in the petition. By letter dated November 27, 2013, and served on Local 617 and Council 21, the City indicated that it took no position on the proposed clarification. On or about December 10, 2013, Council 21 formally intervened in the matter pursuant, to N.J.A.C. 19:11-2.7(e), arguing that it has historically represented the title of PST Trainee within the City, acknowledging that in the past, PST Trainees were assigned to the City's fire department only. Council 21 argues that its collective negotiations unit description - all City white collar employees - encompasses titles outside of the fire department, as well.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. The parties were asked to provide information relevant to the proposed clarification. Local 617 provided a position statement served on the parties that argued that the Public Safety Telecommunicator (PST) title was within its unit and that the PST Trainee title was a new title for trainees that become PSTs after their working test

^{1/} Local 617 filed a similar petition in June 2013, which it withdrew on July 15, 2013 (Docket CU-2013-037) because the City had not yet filled any PST Trainee positions in the police department.

period. Local 617 also argued that the duties that PSTs and PST Trainees perform are "essentially the same" and that therefore there was no reason to exclude PST Trainees from a unit with permanent PSTs. With its position statement, Local 617 provided Civil Service Commission job descriptions for the PST and PST Trainee titles. Local 617 also provided a copy of its (then) most recent collective negotiations agreement (CNA) covering the period January 1, 2005, through December 31, 2008. A copy of the page in the CNA containing Local 617's recognition provision and a copy of the Civil Service Commission job description for the PST Trainee title were also attached to Local 617's certified petition. The recognition provision defines Local 617's unit as follows:

[A]ll full-time and part-time employees of the Newark Police Department holding titles of chief communication officer, communication officer, communication clerk, lineman and supervising police property clerk, but excluding managerial executives, confidential employees, superior officers and supervisors as defined in the Act, and all others. Upon retirement of those employees who have served in the title of Senior Line Worker in 1998, Local 617 will no longer represent the title of Senior Line Worker or Line Worker.

Council 21 submitted a certification from Council 21 Vice-President Sean Small (Small Cert.). Attached to the certification were the (then) most recent CNA between the City and Council 21 covering the period January 1, 2009, through

December 31, 2014, three prior CNAs dating back to January 1, 1999, a copy of City of Newark Executive Order No.: C/D-99-0001-R creating the titles of PST and PST Trainee in the fire department and signed by the Mayor on June 15, 1999, and a partial Council 21 roster identifying PSTs assigned to the police division. The recognition provision in the 2009-2014 CNA, which is essentially identical to the recognition provision in the older CNAs attached to the certification, defines Council 21's unit as follows:

In accordance with "Certification of Representative" of the Public Employment Relations Commission dated June 10, 1985 (Docket No. RO-85-48) the City recognizes the Association as the exclusive collective negotiations agent for all white collar workers and professional employees, employed by the City of Newark, New Jersey, but excluding inspectors as identified in RO-102, craft employees, managerial executives, supervisors within the meaning of the Act, confidential employees, department heads and deputy department heads and policemen covered in the aforementioned Certification.

The City also recognizes the Association as the exclusive collective negotiations agent for white collar and professional part-time employees. A part-time employee is defined as any employee who is regularly scheduled to work less than thirty-five (35) hours per week.

Those employees serving in the Water/Sewer Utility will continue to be represented by Newark Council 21 until such time as they become employees of NIMaC in accordance with all relevant laws and agreements affecting the relationship between the City and NIMaC.

No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. I find these facts:

The City has referred to the Local 617 recognition provision titles of communication officer and communication clerk as "police communication officer" (PCO) and "police communication clerk" (PCC), respectively, and I will use these labels in this decision. Neither PST nor PST Trainee are listed among titles in the Local 617 recognition provision. Nor does it set forth generic or broad categories of included titles that reasonably contemplate the petitioned-for PST Trainee title.

By contrast, the recognition provision in the most recent CNA between Council 21 and the City prior to the filing of the petition, covering the period January 1, 2009, through December 31, 2014, defines Council 21's unit broadly, as "all white collar workers and professional employees, employed by City," but excluding specific other titles. The PST Trainee title is not specifically excluded. (Small Cert. Exhibit 1).

PST Trainee and PST positions were first created by the City in 1998 and assigned to the fire department, where they were represented by Council 21. (Small Cert. ¶13). Article IX of Council 21's 2009-2014 CNA specifically identifies the PST and PST Trainee titles regarding their receipt of holiday pay. (Small Cert. Exhibit 1). Council 21 also represents titles in the

police department, including police aides, traffic control officers, chief clerks, assistant chief clerk, administrative analysts, and community relations. (Small Cert. ¶8). PST Trainees and PSTs in both the fire and police departments handle 911 and dispatch-related calls. (Small Cert. ¶8). The majority of police PST Trainees, like fire PST Trainees, perform work duties in the same building at 311 Washington Street in Newark, where the Communications Division is located. (Small Cert. ¶8).

* * *

Local 617 argues that its unit should be clarified to include the PST Trainee title because it shares a community of interest with unit employees and has the same job duties as PSTs, which it asserts are already in its unit. Local 617's recognition provision includes PCOs and PCCs, but does not refer to PSTs. Uncertified statements from the City suggest that PSTs differ from PCOs and PCCs in that only PSTs can dispatch and PSTs must be trained in using the police database. The City also indicated that Local 617 had previously filed grievances alleging that its PCCs were working out of title when they were tasked with doing things that only PCOs and PSTs could do.

For the reasons explained below, I find it unnecessary to solicit other certifications or to hold a hearing regarding the job duties actually performed by the various titles and whether Local 617 has ever in fact represented permanent PSTs. A unit

clarification petition is not the appropriate procedure for adding PST Trainees to Local 617's unit. Therefore, I dismiss Local 617's petition. Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

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 provision 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) (“[T]itles 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) (emphasis supplied); 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 unrepresented employees who are not part (i.e., not identifiable as being within the negotiated scope) 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, Woodland Park Bd. of Ed., D.R. No. 2018-8, 44 NJPER 100 (¶33 2017).

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 Local 617's recognition provision does not specifically or generically identify the PST Trainee or PST title as part of Local 617's unit, I dismiss Local 617's petition seeking to add the PST Trainee title. 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 PST Trainee as part of the unit. Newark State-Operated School District; Mercer Cty. Special Services Bd. of Ed. Local 617 and the City could have agreed to more encompassing or generic terms in the recognition provision that could have contemplated the inclusion of all employees performing communication work or all white collar employees within the police department not represented by other employee

organizations. They did not do so and instead defined the unit by that provision's specifically-identified titles, omitting any broad or "catch-all" phrasing. I am constrained by the parties' agreed-upon unit description.

This result would be the same regardless of whether PST Trainees within the police department are considered to hold previously-existing titles because Council 21 has historically represented employees holding the title (although no employee previously held the title outside of the fire department), or whether they are considered to hold "new" titles, as asserted in Local 617's position statement, because there was previously never a "Police" PST Trainee title.

In Newark State-Operated School District, the Director of Representation dismissed a clarification of unit petition filed by Local 617 and declined to clarify the units of Local 617 or intervenor Newark Teachers Union (NTU) to include certain titles after holding that, even if the petitioned-for titles performed substantially similar duties as existing unit titles, the unit definitions in the CNAs did not provide generic or broad phrasing that would encompass the petitioned-for titles. The unions requested review of the Director's decision by the Commission, and NTU argued that the Director erroneously applied the standard for evaluating existing job titles rather than the appropriate standard for evaluating new job titles. The Commission denied

the request, finding that "the parties [in this case] negotiated a contract that includes without reservation certain persons or titles[.]" Id., 43 NJPER at 116. The Commission further noted that to the extent the unions contended that the District had renamed existing positions in an effort to unilaterally diminish unit representation, the issue would be more appropriately raised in an unfair practice charge alleging, for example, the shifting of unit work to employees outside of the unit without negotiations.^{2/}

For all of these reasons, I dismiss Local 617's petition.^{3/}

/s/Jonathan Roth
Acting Director of
Representation

DATED: April 26, 2018
Trenton, New Jersey

^{2/} NTU subsequently filed a timely representation petition for the contested title, and the expansion of the unit was certified based upon a card check. Newark State-Operated School District, D.R. No. 2018-12, 44 NJPER 195 (¶57 2017), req. for rev. pending.

^{3/} During the pendency of this case, which involved several changes to Commission staff and representatives of the respective parties, the City had apparently voluntarily recognized (and continues to recognize) Council 21 as the majority representative of PST Trainees in the police department. (Small Cert. ¶3 and 6). Therefore, in the absence of a dispute between the City and Council 21, it is unnecessary for me to address whether PST Trainees are appropriately in Council 21's unit. See N.J.A.C. 19:11-2.2(b), 2.3(a), N.J.S.A. 34:13A-5.3 ("[T]he Commission shall not intervene in matters of . . . unit definition except in the event of a dispute.").

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 May 7, 2018.