

D.R. NO. 2023-3

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

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS)

Public Employer,

-and-

Docket No. CU-2022-014

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

The Director of Representation dismissed a clarification of unit petition filed by the Communications Workers of America (CWA) seeking to add 49 employees of the State of New Jersey to the CWA's unit. The petition was filed pursuant to N.J.S.A. 34:13A-5.15. The State contended the petition was deficient under N.J.A.C. 19:11-1.5 and should be dismissed. The Director agreed with the State and found the petition did not satisfy the pleading requirements under N.J.A.C. 19:11-1.5 and did not satisfy the burden to produce competent evidence in support of the petition under Commission precedent.

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Appearances:

For the Public Employer,
Matthew J. Plotkin, Acting Attorney General
(Eric A. Zimmerman, Deputy Attorney General)

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

DECISION

On May 9, 2022, the Communications Workers of America, AFL-CIO (CWA or Petitioner) filed a clarification of unit petition (petition) seeking to clarify one or more of several collective negotiations units it represents to include 49 employees of the State of New Jersey (State).^{1/} The petitioned-for employees hold

^{1/} The 49 employees/job titles that are the subject of the instant petition were also the subject of clarification of unit petitions filed by the CWA in 2012 (bearing docket numbers CU-2012-030; CU-2012-031; CU-2012-032 and CU-2012-033). On February 25, 2022, the CWA withdrew petitions CU-2012-030; CU-2012-031; CU-2012-032 and CU-2012-033 and the
(continued...)

a range of job titles, including: Government Representative 1; Communications Manager; Government Representative 2; Legislative Liason; Members of The Board of Review; Executive Assistant 3; Executive Assistant 4; Legal Specialist; Coordinator NJ EAP Coordinator; Personnel Assistant and Coordinator NJSP Northern Regional Manager. The petitioned-for employees work in the following Executive Branch departments: the Department of Labor and Workforce Development; the Department of the Treasury; the Department of Law and Public Safety; the Department of Human Services; the Department of Environmental Protection; the Department of Health and Senior Services; the Department of Community Affairs and the Department of Banking and Insurance.^{2/}

1/ (...continued)
cases were closed. On April 26, 2022, CWA counsel sent a letter to the Director of Representation asserting the withdrawal of these petitions was mistaken, as the subject employees/titles' unit placement remained in dispute, and requested the Director re-open the matters. The Director did not re-open the 2012 petitions, but permitted the CWA to file petition CU-2022-014 over the same employees/titles that were the subject of the withdrawn 2012 petitions; essentially preserving the 2012 matter for adjudication. According to the CWA, petition CU-2022-014 was filed ". . . with the consent of the State of New Jersey Governor's Office of Employee Relations as the parties have been working for several years regarding this matter." See June 3, 2022 email from CWA counsel Patricia Villanueva to Commission Staff Attorney Ryan Ottavio.

2/ During our investigation, the CWA and State resolved their dispute over several job titles and employees. Specifically, the CWA withdrew its request to include the following employees in CWA's units: Christine M. Zapicchi (Government Representative 2) and Laurie Facciarossa-Brewer (continued...)

The CWA specifically describes its collective negotiations unit in its petition as "all employees in the V, W, X and Y employee relations groups that are neither managerial executives nor confidential."^{3/}

CWA filed this petition pursuant to N.J.S.A. 34:13A-5.15 and N.J.A.C. 19:11-1.5. N.J.A.C. 19:11-1.5(b) (3) (vi) permits an exclusive majority representative to petition to add employees who perform "negotiations unit work" to a certified or recognized unit. "Negotiations unit work" is defined under the Workplace Democracy Enhancement Act (WDEA), N.J.S.A. 34:13A-5.11 through 5.15, as:

[W]ork that is performed by any employees who are included in a negotiations unit represented by an exclusive representative employee organization without regard to job

^{2/} (...continued)
 (Government Representative 1). The State also does not object to the inclusion of the following petitioned-for employees of the Department of Banking and Insurance in CWA's unit: Peter Espeut (Government Representative 1); Eva L. McBride (Communications Manager); Teresa Sicard-Archambeault (Communications Manager); John A. Tirado (Government Representative 1); William Horner (Government Representative 1); Rashonda Kinnard (Government Representative 1) and Connie A. Ellis (Government Representative 1).

^{3/} The Employee Relations Groups (ERGs) represent different groupings or classifications of employees and information about the ERGs are available on the New Jersey Civil Service Commission's website at <https://www.state.nj.us/csc/>. ERG "V" consists of "Higher Level Supervisors Unit, Exempt"; "W" is "Administrative and Clerical Services Unit, Exempt"; "X" is "Exempt" employees; and "Y" is "Professional Unit, Exempt" State employees.

title, job classifications or number of hours worked, except that employees who are confidential employees or managerial executives, as those terms are defined by [N.J.S.A. 34:13A-3], or elected officials, members of boards and commissions, or casual employees, may be excluded from the negotiations unit. Casual employees are employees who work an average of fewer than four hours per week over a period of 90 calendar days.

[N.J.S.A. 34:13A-5.15(b)]

N.J.A.C. 19:11-1.5 also sets forth specific pleading requirements for this type of petition. It requires the petitioner to "identify the positions/titles the petitioner seeks to include in any existing negotiations unit, along with a statement explaining fully the reasons for the proposed inclusion." N.J.A.C. 19:11-1.5(c)(2). The petitioner must also include in the petition "a description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform, and an explanation of why the work is negotiations unit work." N.J.A.C. 19:11-1.5(c)(2)(I). Finally, the petition cannot seek the inclusion of employees that are part of another unit of the same employer. N.J.A.C. 19:11-1.5(c)(1).

On June 1, 2022, the State filed a letter contending the petition was deficient under N.J.A.C. 19:11-1.5.^{4/} In the

^{4/} The State sought a stay of our investigation of the petition, contending the petition should not have been docketed and processed under N.J.A.C. 19:11-1.5. Although we did not stay the investigation of the petition, we do
(continued...)

letter, the State contends the petition should not be docketed or processed because it does not conform with the pleading requirements under N.J.A.C. 19:11-1.5. Specifically, the State identified these deficiencies with the petition in its June 1 letter:

CWA's filing only contains a statement identifying which individuals it wants included in its unit. CWA fails to describe the job duties of the petitioned for titles, identify any job titles already in its bargaining unit with the same or substantially similar duties, or attest that the State has not asserted the disputed titles are confidential or a managerial executive. As such, the State contends CWA has not filed this petition in accordance with the Commission's rules.

The CWA did not amend its petition to cure the asserted deficiencies.

On June 16, 2022, a Commission staff agent sent a letter to the State and CWA requesting information relevant to the disposition of the petition and briefs addressing whether it is appropriate under the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., to include the petitioned-for employees in the CWA's units. The letter directed the CWA and State to respond to 11 questions/requests for information,

4/ (...continued)
address, in this decision, the State's argument that the CWA's petition is deficient under N.J.A.C. 19:11-1.5.

including, in pertinent part, the following requests:

(1) A detailed explanation of the job duties performed by the petitioned-for employees;

(2) A detailed explanation of the similarities, if any, of the work performed by the petitioned-for employees and the work performed by CWA unit employees; and

(3) A detailed explanation of whether the petitioned-for employees' work is negotiations unit work.

The June 16 letter also notified the CWA and State that all facts in response to these questions/requests for information "must be supported by competent evidence, such as certifications or sworn affidavits from individuals with personal knowledge of the facts attested to . . ." and 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 of the petition."^{5/}

On June 28, 2022, the CWA and State filed and served on their adversary responses to the June 16 investigative letter.^{6/} The CWA filed a certification with exhibits from William Bradley ("Bradley Cert."), a "Senior Campaign Lead for [the CWA] in District 1." The State filed certifications with exhibits from

^{5/} See City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

^{6/} Neither party requested extensions of time to file their responses.

Ila Bhatnagar, Assistant Commissioner of Administration at the Department of Banking and Insurance; Christopher S. Possessky, Administrator of Employee Relations in the Department of Community Affairs Office of Human Resources; Ranji Persaud, Executive Director of the New Jersey Highlands Council; Loreta Sepulveda, Director of Human Resources for the New Jersey Department of Health and Senior Services; Andrea Katz, Deputy Commissioner of Operations for the New Jersey Department of Human Services; Lawrence Fox, Employee Relations Administrator for the New Jersey Department of Labor and Workforce Development; Melica Blige, Employee Relations Administrator for the New Jersey Department of Law and Public Safety; and Nicole P. Colon, Administrator of Employee Relations and Development with the Treasury Department. The State's certifications provide a detailed explanation of the job duties performed by the petitioned-for employees. In its brief, the State asserts the petition should be dismissed because it does not explain what negotiations unit work the petitioned-for employees perform.

On July 1, 2022, I sent a letter to the State and CWA. In the letter, I informed the parties that the CWA's petition and responses to the June 16 letter are "deficient" and that "absent correction to these defects, the petition will be dismissed." After identifying the statutory, regulatory and decisional law governing unit clarification petitions and the burden of

producing competent evidence, the letter described the deficiencies in CWA's petition and responses:

[T]he CWA's petition and certification in response to our June 16 letter does not address the central question in this case: whether the petitioned-for employees perform negotiations unit work. The petition does not provide a statement of reasons or explanation as to why the petitioned-for employees perform negotiations unit work, and the petition does not identify which of the four units (Professionals Unit, Administrative and Clerical Unit, Primary Level Supervisors Unit, or Higher Level Supervisors Unit) the petitioned-for employees should be included in. Moreover, the CWA's certification does not set forth facts explaining whether negotiations unit work is performed by the petitioned-for employees and describe specifically *what* negotiations unit work the petitioned-for employees perform (information specifically requested in our June 16 letter).

A deadline of July 8, 2022, was provided to CWA to file and serve "supplemental submissions on the State of New Jersey addressing whether the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15." The State was permitted to file a response to CWA's supplemental submission by July 15, 2022.^{7/}

In response to my July 1 letter, CWA counsel Patricia

^{7/} Neither party requested an extension of time to file these responses.

Villanueva submitted a letter with exhibits on July 8, 2022. The CWA did not provide certification(s) or affidavit(s) in response to the July 1 letter. On or about July 15, 2022, the State's counsel filed a letter brief with exhibits in response to CWA's July 8 submission.

In its July 8 response, CWA contends "the Civil Service Commission (CSC) has already determined that employees in employee relations groups V, W, and Y are performing negotiations unit work." CWA asserts the CSC classifies employees' positions based on a "job analysis" and places those employees with "similar qualifications, authority and responsibility" in ERGs V, W and Y. According to the CWA, ERGs V, W and Y are the "exempt counterpart" to ERGs "A, P, R and S", the latter of which the CWA represents. Given these ERG classifications, CWA concludes that "the petitioned-for employees in employee relations groups V, W, and Y are performing negotiations unit work."

The CWA also asserts in its July 8 response that it is "not able to fully explain what negotiations unit work the petitioned-for employees perform because the State has refused to provide substantive job descriptions for many of these employees." CWA further contends that the "State's insistence that CWA's Petition is somehow deficient because it does not explain how certain employees perform negotiations unit work neglects the fact that the information required to conduct such an analysis rests with

the State and has been requested by the CWA on numerous occasions to no avail." The CWA nonetheless asserts that "the reason for the proposed inclusion of the petitioned-for employees is that, upon information and belief, the petitioned-for employees are performing CWA negotiations unit work, they do not belong in any other negotiations unit, and they are neither confidential employees nor managerial executives.^{8/} (Page 3 of July 8

^{8/} CWA counsel makes factual assertions "upon information and belief" about whether the petitioned-for employees perform negotiations unit work and/or confidential duties. The assertions are not supported by a certification or affidavit from an individual with personal knowledge of the duties performed by the petitioned-for employees and CWA unit employees. The Commission has repeatedly noted that attorney certifications are inadequate and inadmissible evidence. Somerset County Library Commission, P.E.R.C. No. 2017-55, 43 NJPER 375, 376 (¶106 2017) (fn.1) (Commission notes that ". . . certifications and affidavits must be based on personal knowledge" and that "certifications from attorneys will rarely be appropriate or constitute admissible evidence"); Ocean County Vocational Technical School, P.E.R.C. No. 2022-32, 48 NJPER 359, 364 (¶80 2022) (Commission finds Charging Party's certification inadequate because it "does not certify to the facts asserted in the Association's [Charging Party's] brief"); N.J.A.C. 19:13-3.6(f) and (g) (Briefs filed in scope of negotiations matters "shall recite all pertinent facts supported by certification(s) based on personal knowledge" and the failure to provide the certification(s) may result in "rejection" of the brief). A letter from an attorney is even less probative than an attorney certification, and we have held as much in applying N.J.S.A. 34:13A-5.15 to a unit clarification dispute arising under the WDEA. Lawrence Tp., D.R. No. 2019-13, 45 NJPER 295, 297 (¶76 2019) (Director holds that petitioner union failed to prove petitioned-for employee performed negotiations unit work within meaning of N.J.S.A. 34:13A-5.15 because it did not submit a certification ". . . from a person with knowledge identifying any specific duties performed that are similar

(continued...)

letter).

In response to the July 8 letter, the State disputes the CWA's assertion that the State did not provide the CWA with requested documents and contends the CWA's petition should be dismissed. The State argues the CWA "still does not identify how any of the petitioned-for individuals perform negotiations unit work, as required by N.J.A.C. 19:11-1.5(c)(2)(I)." (Page 2 of State's July 18 letter). The State also contends that the "CWA does not meet its burden to produce adequate and competent evidence to demonstrate what negotiations unit work each petitioned-for individual performs" and that "these deficiencies affect PERC's ability to fairly adjudicate this petition" because "PERC cannot determine whether the petitioned-for employees belong in CWA negotiations units" without an explanation of the negotiations unit work performed in each of CWA's units (i.e., Professionals Unit, Administrative-Clerical Unit; Primary Level Supervisors Unit; and Higher Level Supervisors Unit). Finally, the State maintains that several of the petitioned-for employees are confidential or managerial executives under the Act and should not be included in any negotiations unit.

Based on our review of the parties' submissions, no substantial or material factual issues require us to convene an

8/ (...continued)
to those" of unit employees).

evidentiary hearing.^{9/} N.J.A.C. 19:11-2.6. I make the following:

FINDINGS OF FACT

The CWA and State are parties to a collective negotiations agreement extending from July 1, 2019 through June 30, 2023 (Agreement).^{10/} Article 1 of the Agreement defines CWA's units as including all State ". . . employees in the statewide Professional, Administrative and Clerical Services, Primary Level Supervisors and Higher Level Supervisors Units", as well as ". . . all employees who perform Administrative-Clerical, Professional, Primary Level Supervisors and Higher Level Supervisors unit work."^{11/} The CWA's unit also includes, under

^{9/} The only certified facts about the petitioned-for employees' duties are presented in the State's submissions. CWA's Bradley Certification does not explain what duties the petitioned-for employees perform.

^{10/} The Agreement is available on the New Jersey Public Employment Relations Commission's website, at <https://www.perc.state.nj.us/publicsectorcontracts.nsf/ER?OpenView&CollapseView>.

^{11/} These four units are a product of statute under N.J.S.A. 34:13A-5.10. That statute provides, in pertinent part, that "there shall be only twelve collective negotiations units for civilian employees of the Executive Branch of State government", and "those units shall be as follows: administrative and clerical; professional; primary level supervisors; higher level supervisory; operations; maintenance and services; crafts; inspection and security; health care and rehabilitation services; State colleges and university; State colleges and universities adjuncts; deputy attorneys general, and State government managers." N.J.S.A. 34:13A-5.10(b)(1).

Article 1, those employees who fit within the units described above and who are "full-time permanent, career service, unclassified and provisional employees, permanent part-time employees (career service, unclassified and provisionals) who are employed an average of four (4) hours per week over a period of 90 days"

The State has submitted seven certifications from administrators and/or supervisors employed in the following Executive Branch Departments: the Department of Banking and Insurance; the New Jersey Highlands Council; the Department of Health and Senior Services; the Department of Human Services; the Department of Labor and Workforce Development; the Department of Law and Public Safety; and the Department of the Treasury. The certifications explain in detail the duties performed by the petitioned-for employees. The State served the certifications on the CWA on June 28, 2022. The CWA did not submit certifications or affidavits explaining the job duties that are performed by either CWA unit employees or the petitioned-for employees.^{12/}

ANALYSIS

I dismiss CWA's petition for two principal reasons: (1) the

^{12/} Since the CWA has not met its burden of pleading and proving that the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15, we need not summarize the State's submissions explaining the duties performed by the petitioned-for employees. We find here the CWA's petition is deficient under N.J.A.C. 19:11-1.5 and should be dismissed.

petition does not satisfy the pleading requirements under N.J.A.C. 19:11-1.5; and (2) CWA has not produced competent evidence in support of its claim that the petitioned-for employees perform negotiations unit work and establishing which of CWA's four units the petitioned-for employees should be placed. Given this determination, I need not address the separate questions of whether or not the petitioned-for employees are confidential or managerial executives within the meaning of the Act.

Pleading Requirements

CWA's petition does not conform with the pleading requirements for unit clarification petitions under N.J.A.C. 19:11-1.5. These requirements apply both generally to all unit clarification petitions and specifically to petitions seeking to add employees to a negotiations unit pursuant to N.J.S.A. 34:13A-5.15. As such, CWA's petition is dismissed.

All unit clarification petitions must contain "a description of the present negotiations unit", a "description of the proposed clarification of the unit", and a "statement by petitioner listing and explaining fully the reasons for the proposed clarification." N.J.A.C. 19:11-1.5(b)(1), (2) and (3). Petitions seeking to add employees to a unit under N.J.S.A. 34:13A-5.15 must also "explain fully the reasons for the proposed inclusion." N.J.A.C. 19:11-1.5(c)(2). Those "reasons" must include "a

description of the negotiations unit work the petitioner alleges the employees in the disputed positions/titles perform and an **explanation why that work is negotiations work.”** N.J.A.C. 19:11-1.5(c) (2) (i) (emphasis added). And no petition can seek the addition of an employee who is included in another unit for the same employer. N.J.A.C. 19:11-1.5(c) (1).

Here, CWA's petition should be dismissed because it does not comply with the pleading requirements under N.J.A.C. 19:11-1.5. The petition does not provide "a description of the present negotiations unit" represented by the CWA, but instead lists the ERGs the CWA is seeking to *add* to its unit (*i.e.*, ERGs V, W, X and Y who are neither confidential employees or managerial executives). Article 1 of the collective negotiations agreement between the State and CWA recognizes the CWA as the majority representative of four separate units, including a Professionals Unit; Administrative and Clerical Services Unit, a Primary Level Supervisors Unit, and a Higher Level Supervisors. Nowhere in the petition are those four units described or identified.

More importantly, the petition does not explain or describe which of the four units the CWA seeks to clarify. For the 49 employees listed in the petition, the CWA neither explains nor identifies which of the four units each employee should be placed. Instead, the CWA simply claims that these employees belonging to ERGs, V, W, X and Y and notes that it is filing its

petition under N.J.S.A. 34:13A-5.15. This declaration fails to meet the requirements of N.J.A.C. 19:11-1.5.

On the issue of negotiations unit work, the petition is silent. It does not provide "a description of the negotiations unit work" the petitioned-for employees perform, nor does it offer any explanation for "why that work is negotiations work." N.J.A.C. 19:11-1.5 (c) (2) (I). We cannot ascertain from the petition which of the 49 petitioned-for employees perform negotiations unit work and *what* that negotiations unit work consists of for each of CWA's four units (Professionals; Administrative and Clerical Services, Primary Level Supervisors, and Higher Level Supervisors).

For these reasons, CWA's petition is deficient and is dismissed.

The Civil Service Commission and Defining Unit Work

CWA contends it does not need to plead or provide certified facts about negotiations unit work because the CSC has already made that determination. It requests that we defer to the CSC's classification of the petitioned-for employees as being part of ERGs V, W, X, and Y and conclude from that determination that the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15, since these ERGs are the "exempt counterpart" to ERGs A, P, R and S (employees represented by CWA). I disagree. Under the Act, the Public Employment

Relations Commission (Commission) is not bound by CSC job classifications in the processing of unit clarification petitions. Moreover, the Commission has an obligation to investigate unit clarification petitions irrespective of CSC determinations or job classifications.

In the event of a dispute, the Commission has an obligation to determine the appropriate unit for a petitioned-for employee(s). N.J.S.A. 34:13A-5.3. In making that determination, the Director of Representation must investigate a unit clarification or representation petition and determine the facts. N.J.A.C. 19:11-1.5(d); N.J.A.C. 19:11-2.2(a). Historically, in making unit clarification determinations involving State employees, we have not deferred to State or CSC job classifications, ERGs, or other CSC determinations in lieu of conducting a case-by-case investigation of the facts about what duties are actually performed by the petitioned-for employees. 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).^{13/}

^{13/} See also State of New Jersey (DEP), P.E.R.C. No. 87-116, 13 NJPER 281 (¶18117 1987) (Commission, following an investigation, finds a "site manager" for the DEP was not a managerial executive despite the State's Office of Employee Relation's classification of site managers generally as managerial executives); State of New Jersey (Treasury Dept.), P.E.R.C. No. 88-117, 14 NJPER 355 (¶19137 1988) (Commission following an investigation finds some but
(continued...)

And this investigative approach to unit placement disputes is consonant with our long-standing principle that when investigating the job duties of petitioned-for employees, we look beyond an employee's official job description, job title or job classification to understand the nature of the duties performed. Clark Tp., H.O. No. 85-10, 11 NJPER 283, 290 (¶16104 1985), aff'd P.E.R.C. No. 85-105, 11 NJPER 283 (¶16104 1985) ("The Commission looks beyond titles, to the actual duties of the individuals occupying them when passing on the question of what constitutes an appropriate collective negotiations unit."); Montclair State University, D.R. No. 2018-15, 44 NJPER 244, 250 (¶70 2018), req. for review denied P.E.R.C. No. 2018-42, 44 NJPER 398 (¶111 2018) ("The Commission will look beyond an employee's job description or title to ascertain the nature of the [supervisory] authority actually exercised."). This longstanding principle is reinforced by the WDEA. Under the WDEA, "negotiations unit work" is defined ". . . without regard to job title" or "job classification." N.J.S.A. 34:13A-5.15(b). Thus, ERG determinations by the CSC are not a substitute for investigation and analysis of unit clarification petitions. And that principle applies with equal

13/ (...continued)

not all of certain employees in particular ERGs are confidential under the Act); State of New Jersey, D.R. No. 2022-3, 49 NJPER 1 (¶1 2022) (Director finds State employee previously deemed as "confidential" by the State was not a confidential employee within the meaning of the Act).

force to defining negotiations unit work under N.J.S.A. 34:13A-5.15.

The Burden of Production in Unit Clarification Proceedings

In its July 8 response, the CWA argues that even if the CSC's ERG determinations do not support its unit work claim, the CWA believes, "upon information and belief", that the petitioned-for employees perform negotiations unit work. This assertion is not supported by a certification, affidavit, or other competent evidence. As such, the CWA has not produced sufficient, competent evidence in support of its claim that the petitioned-for employees perform negotiations unit work under N.J.S.A. 34:13A-5.15. For this additional reason, the CWA's petition is dismissed.

In unit clarification cases, the party asserting a claim for inclusion (or defense against inclusion) of an employee in a unit bears the burden of producing competent evidence in support of that claim or defense. State of New Jersey, 11 NJPER at 510 (Burden of producing competent evidence of confidential status of an employee is on the party "seeking to place an employee outside the Act's protection"); Lawrence Tp., D.R. No. 2019-13, 45 NJPER 295 (¶76 2019). Competent evidence includes certifications or affidavits from individuals with personal knowledge of the duties performed by the petitioned-for employees and relevant unit employees. Lawrence Tp.; City of Camden Housing Authority, D.R.

No. 2014-7, 40 NJPER 219 (¶84 2013).^{14/} And it may also include specific work samples or examples of work supported by certifications demonstrating the duties actually performed by unit or petitioned-for employees. 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); Tp. of Eastampton, D.R. No. 2000-5, 26 NJPER 43 (¶31014 1999); Evesham Tp. Fire Dist. #1, D.R. No. 99-4, 24 NJPER 503 (¶29233 1998).^{15/}

^{14/} The New Jersey Supreme Court has also emphasized the importance of providing an adequate certification to establish a record upon which a claim can be adjudicated in the labor relations context. In re State & School Employees Health Benefits Commissions' Implementation of Yucht, 233 N.J. 267 (2018) (Supreme Court holds that the record is insufficient to establish union's claim that the State provided inadequate notice of erroneous reimbursement rates for counseling services since the union did not produce certifications from unit members explaining whether they in fact received notice of the erroneous rates)

^{15/} It is true that, at the *hearing* stage of a unit clarification case, the process is ". . . considered investigatory and not adversarial" and "neither party has the burden of proof." N.J.A.C. 19:11-6.2(c); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339, 340 (¶19128 1988). However, "neither public employers nor public employee representatives have an absolute right to a hearing" in representation cases. County of Somerset, P.E.R.C. No. 2014-88, 41 NJPER 55, 56 (¶15 2014). The Commission has ". . . a consistent policy of resolving representation questions after administrative investigations unless substantial and material facts are in dispute." Somerset Cty., 41 NJPER at 56; County of Burlington, P.E.R.C. No. 2019-25, 45 NJPER 237 (¶62 2019); N.J.A.C. 19:11-2.6(f) (A hearing may be conducted "if it appears to the Director of Representation that substantial and material

(continued...)

The burden of production in unit clarification cases has been applied to both petitioning unions and petitioning employers. Lawrence Tp.; Camden Housing Authority. In Lawrence Tp., the American Federation of State, County and Municipal Employees, Council 63, Local 2257 (AFSCME) filed a clarification of unit petition seeking to clarify its collective negotiations unit of white collar employees of Lawrence Township (Township) to include the job title, fire prevention specialist. 45 NJPER 295. In response to an investigative letter requesting certifications or other competent evidence in support of the petition, AFSCME filed a letter asserting “. . . that the duties of the fire prevention specialist were similar to those of the fire protection inspector, a unit title.” 45 NJPER at 296. Based on this assertion, AFSCME contended the fire prevention specialist should be included in the white collar unit under N.J.S.A. 34:13A-5.15. I disagreed, concluding that the evidence submitted was insufficient to support that claim:

Although AFSCME has generally asserted that the fire prevention specialist performs duties similar to the fire protection inspector, it has not set forth any specific similar duties nor submitted a certification

15/ (...continued)
factual issues exist which, in the exercise of reasonable discretion, may more appropriately be resolved after a hearing”). Here, CWA has not produced competent evidence establishing any facts that raise a substantial material factual issue. N.J.A.C. 19:11-2.6(f)(1).

from a person with knowledge identifying any specific duties performed that are similar to those of the fire protection inspector.

[45 NJPER at 297].

Also, a Hearing Officer decision and a National Labor Relations Board decision were cited to support the application of the burden of production in the case. 45 NJPER at 298 (fn. 3).^{16/}

In Camden Housing Authority, the Director dismissed a clarification of unit petition filed by the City of Camden Housing Authority (Authority) which sought to exclude property managers from a unit represented by AFSCME Council 71, Local 3974 (AFSCME). 40 NJPER 219. The Authority contended the property managers were managerial executives and confidential employees within the meaning of the Act. Id. The Director rejected these arguments and dismissed the petition, finding the Authority's certifications were inadequate to support its claims. 40 NJPER at 222. The Director further concluded that "absent a proffer of specific duties property managers actually perform and competent evidence, such as work samples, sworn affidavit(s) or certification(s) attesting to the confidential job duties property managers perform, I find that property managers are not confidential employees." Id.

^{16/} See City of Burlington, H.O. No. 2002-1, 28 NJPER 1 (¶33000 2001), citing NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 711-12 (2001).

Here, the CWA has not satisfied its burden to produce competent evidence in support of its claim that the petitioned-for employees perform "negotiations unit work" and in establishing *which* of CWA's four units the petitioned-for employees belong in. The Bradley Certification submitted by the CWA sets forth conclusory assertions about the confidential status of the petitioned-for employees and does not provide any certified facts about their duties and how those duties constitute "unit work." CWA's July 8 response also does not provide certified facts about the duties performed by the petitioned-for employees, what duties constitute "negotiations unit work" in CWA's four units, and which of the four units the petitioned-for employees appropriately belong in. Moreover, a letter from an attorney, as explained above, has little, if any, probative value of the facts needed to establish a negotiations unit work claim under N.J.S.A. 34:13A-5.15.

The CWA also contends that it ". . . is not able to fully explain what negotiations unit work the petitioned-for employees perform because the State has refused to provide substantive job descriptions for many of these employees." (Page 2 of CWA's July 8 Letter). Even if I assume the truth of this (disputed) assertion,^{17/} I note that the State has provided the CWA the

^{17/} The State avers that it provided to CWA the functional job descriptions of the petitioned-for employees, organizational (continued...)

certifications of seven managers (i.e., four Administrators, an Assistant Commissioner, a Deputy Commissioner, a Director and a Executive Director; see p. 6-7) detailing the duties of the petitioned-for employees. CWA did not respond to the State's proffer. I assume that the CWA has access to its unit members, who can provide information about the duties they perform in each of CWA's units. In the event that the State might impede such inquiries, CWA has the ability under the Act to obtain this information by filing an unfair practice charge accompanied by an application for interim relief. See Bergen Community College, I.R. No. 2014-2, 40 NJPER 574 (¶185 2013).

In Bergen Community College, a Commission Designee ordered Bergen Community College (BCC) to provide information needed by the Bergen Community College Administrators Association (Association) to process the Association's clarification of unit petition. 40 NJPER at 576. The Association, an exclusive majority representative of mid-level managerial employees of BCC, filed the petition to add 22 other administrators to its unit. To support its petition, the Association prepared questionnaires and certifications for the petitioned-for employees to respond to and the questionnaires, among other topics, covered the issue of what job duties the petitioned-for employees perform. 40 NJPER

17/ (...continued)
charts and bases for excluding employees from CWA's unit.
These materials were copied to us.

at 575. When the BCC interfered with this process and directed the petitioned-for employees not to respond to the Association's information requests, the Association filed an unfair practice charge with an application for interim relief. The Commission Designee granted the Association's application and ordered BCC not to interfere with the petitioned-for employees responding to the questionnaires and certifications presented by the Association. 40 NJPER at 576.

The same tools available to the Association in Bergen Community College for acquiring information about employees' job duties are available to the CWA. It could have prepared certifications to review or questionnaires seeking responses for both its unit employees and the petitioned-for employees. Armed with that information, it could have then provided us a factual basis for defining negotiations unit work and determining which of CWA's four units the petitioned-for employees belong. It did not. The CWA's submission does not satisfy the burden of production under our Act. Lawrence Tp.; Camden Housing Authority.

The WDEA and the Act

The CWA argues that under the WDEA, as long as an employee performs negotiations unit work and is not confidential, a managerial executive, or casual under N.J.S.A. 34:13A-5.15, the employee *must* be included in the unit. (See Generally July 8 CWA

Response). But in several instances the CWA argues a petitioned-for employee *could* be included in either one or multiple units, without explanation as to which unit would be the most appropriate. (See, e.g., pages 9-10 of the July 8 Response)^{18/}. The determination, however, of which unit is most appropriate is not an arbitrary choice.

When considering appropriate unit placement of an employee, the Commission must make that determination "with due regard for the community of interest" between the petitioned-for employee and proposed unit. N.J.S.A. 34:13A-5.3; State v. Professional Ass'n of New Jersey Dept. of Education, 64 N.J. 231, 243 (1974). Where more than one unit may be appropriate, the Commission must determine the most appropriate unit, for an employee cannot be placed in more than one unit. 64 N.J. at 257; N.J.A.C. 19:11-1.5(c)(1) (Prohibiting the inclusion of one employee in more than one unit). Historically, the Commission has applied a number of factors in defining community of interest and deciding which unit is most appropriate. Somerset Cty., D.R. No. 2014-14, 40 NJPER 527 (¶172 2014), request for rev. denied at P.E.R.C. No.

^{18/} For instance, on page 9 of its July 8 submissions, the CWA contends that petitioned-for employee Shannon Natale performs unit work "that can be categorized as either administrative and clerical or professional work." In other instances, the CWA contends an employee "can" be placed in one unit or "can be placed in the R or S units" without explanation as to which of the units are most appropriate. (Page 10 of July 8 Letter).

2014-88, 41 NJPER 55 (§15 2014).

The Director of Representation in Somerset Cty. summarized the factors the Commission has considered in defining community of interest and deciding which of multiple units is most appropriate:

To determine whether the requisite community of interest exists in a proposed unit, the Commission examines a number of factors, such as common employer, shared goals, common supervision, location of employment, job duties, and similarity in wages, hours and terms and conditions of employment. See State of New Jersey (State College Locals), D.R. No. 97-5, 24 NJPER 295, 297 (§29141 1996); West Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218, 219 (§56 1971). "[T]he importance of any one factor in a particular case depends upon how it interrelates with other factors." Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272, 273 (§15134 1984).

Several other considerations are also relevant with respect to unit determinations. The New Jersey Supreme Court has affirmed the Commission's policy favoring broad-based negotiations units over units structured along departmental or occupational lines. State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974). The Commission has explained that broad-based units streamline negotiations by reducing the potential for such problems as "competing demands, whipsawing and continuous negotiations . . ." that could result from negotiations with numerous smaller units. Id. at 241 (quoting State of New Jersey (Prof'l

Ass'n), P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972)). The Commission also examines whether a proposed unit would lead to undue unit fragmentation or proliferation. Id. See also New Jersey State Coll. of Medicine & Dentistry, D.R. No. 77-17, 3 NJPER 178 (1977); Teaneck Tp., P.E.R.C. No. 88-20, 13 NJPER 721 (¶18270 1987). Additionally, the Commission considers the history of the negotiations units, the extent of organization of the petitioned-for titles, the desires of the parties and the Act's purpose. See Passaic Cty., P.E.R.C. No. 87-123, 13 NJPER 298 (¶18125 1987) recon. denied P.E.R.C. No. 87-141, 13 NJPER 483 (¶18179 1987); State of New Jersey (Human Services), D.R. No. 95-1, 20 NJPER 308 (¶25154 1994); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12228 1981). Lastly, the Commission must balance the need to find the most appropriate unit with the public employees' right to obtain representation. Univ. of Medicine and Dentistry of N.J., P.E.R.C. No. 84-28, 9 NJPER 598, 600 (¶14253 1983); Bergen Cty. (Physicians and Dentists), D.R. No. 87-3, 12 NJPER 619, 620 (¶17234 1986).

[40 NJPER at 528-529]

Here, the CWA has not presented facts addressing *which* of CWA's units are most appropriate for the 49 petitioned-for employees. And without a clear factual explanation of what constitutes "negotiations unit work" and whether the petitioned-for employees perform that work, we cannot ascertain whether one, two, three or all four of CWA's units could be appropriate for inclusion of a petitioned-for employee under N.J.S.A. 34:13A-

5.15.

Read in isolation from the rest of the Act, the language of N.J.S.A. 34:13A-5.15 (a) and (b) does lend support to the CWA's position. The WDEA provides that "all regular full-time and part-time employees of the public employer who perform negotiations unit work **shall** be included in the negotiations unit represented by the exclusive representative employee organization." N.J.S.A. 34:13A-5.15(a) (emphasis added). It follows that if an employee performs negotiations unit work, which is defined as "work that is performed by any employees who are included in a negotiations unit . . ." and is not a managerial executive, casual or confidential employee, then that employee must be included in that. N.J.S.A. 34:13A-5.15 (b).

But where a petitioned-for employee performs "negotiations unit work" in common with more than one unit, we must analyze and apply the standards the Commission has utilized for decades in defining which unit shares the strongest community of interest with that employee and is most appropriate.^{19/} In such a case,

^{19/} See Rancocas Valley Bd. of Ed., E.D. No. 76-39, 41 NJPER 150, 152 (¶51 1976) (Executive Director explains several criteria the Commission addresses when deciding the appropriate unit for an employees, including "commonality of work site, lines of supervision, similarity of aims, goals and purposes, level of interaction and interdependence, salary and fringe benefits, similarity in training, skills, and levels of education, presence or absence of potential conflict"); New Jersey Institute of Technology, D.R. No. 79-22, 5 NJPER 102 (¶10056 1979); Hamilton Tp., D.R. No. 80-23, (continued...)

the WDEA is the beginning, not the end, of our inquiry. The "unit work provisions of the WDEA were proposed by the Legislature as supplementing the Act", not to repeal or replace provisions of the Act. Jefferson Tp. Bd. of Education, P.E.R.C. No. 2019-11, 45 NJPER 149, 152 (¶38 2018). As such, the decades of precedent applying and interpreting the Act's requirements for defining community of interest and determining the most appropriate unit must be heeded. Somerset Cty. And without a clear explanation or competent evidence defining negotiations unit work, those issues cannot be adjudicated.

ORDER

The clarification of unit petition is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Representation

DATED: August 25, 2022
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 September 6, 2022.

19/ (...continued)
6 NJPER 99 (¶11051 1980); Florence Tp., D.R. No. 2000-9, 26 NJPER 155 (¶31060 2000); Holmdel Tp. Bd of Ed., D.R. No. 2020-12, 46 NJPER 285 (¶70 2019).