

D.R. NO. 2016-10

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

In the Matter of

TOWNSHIP OF GALLOWAY,
Public Employer,

-and-

Docket No. RO-2016-031

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 68,
Petitioner,

-and-

GOVERNMENT WORKERS UNION
SUPERVISORS' COUNCIL 10,
Intervenor.

SYNOPSIS

The Director finds that the showing of interest is adequate to support the petitioner's representation petition. Despite the intervenor's filing of a Clarification of Unit petition, balancing all of the factors, pursuant to N.J.A.C. 19:11-2.6 (c) 3, the Director directs a secret ballot election among the employees in the petitioned-for unit.

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Appearances:

For the Respondent
Blaney & Karavan, P.C., attorneys
(Kyle D. Weinberg, of counsel)

For the Petitioner
O'Brien Belland and Bushinsky, attorneys
(Mark Belland, of counsel)

For the Intervenor
Government Workers Union Supervisors' Council 10
David L. Tucker, President

DECISION AND DIRECTION OF AN ELECTION

On January 20 and February 5, 2016, the International Union of Operating Engineers Local 68 ("Local 68") timely filed a petition for certification and an amended petition seeking to represent a collective negotiations unit of approximately twelve full-time and regular part-time construction officials, project

coordinators, tax assessors, deputy directors, community service directors, court administrators, senior/social services directors, community education directors, assistant directors of community development, administrative office managers, deputy tax collectors, deputy court administrators (certified and non-certified), deputy tax assessors, supervisor of records, registrar, deputy registrar, public works director and deputy public works director employed by the Township of Galloway ("Township"), but excluding confidential employees and managerial executives.^{1/} The petition seeks certification by an election. N.J.S.A. 34:13A-5.3. The petition was accompanied by an adequate showing of interest. N.J.A.C. 19:11-1.2(a)9.

The petitioned-for employees are currently represented by Government Workers Union Supervisors Council 10 ("Council 10"), which was certified as the majority representative on December 18, 2012. The certified unit includes "[a]ll regularly employed supervisory employees employed by the Township of Galloway," and excludes "[m]anagerial executives, confidential employees, non-supervisors, police, casual employees, professional employees and all other employees employed by the Township of Galloway." (RO-2013-012). Council 10 opposes the petition, and declines to sign a consent agreement for election.

^{1/} The amended petition changed the name of the current majority organization from "Government Workers Union" to "Government Workers Union Supervisors Council 10."

On January 27, 2016, we requested that the Township provide a list of employees identified in the petition and post a notice to public employees describing the petitioned-for unit. N.J.A.C. 19:11-2.4. On February 5, 2016, the Township provided the list of employees. On February 25, 2016, the Township advised that it posted the notice on the same date. Based on the Township's list, the petition is accompanied by an adequate showing of interest. N.J.A.C. 19:11-2.1.

The current majority organization, Council 10, sought to intervene in the matter on February 3, 2016. N.J.A.C. 19:11-2.7. Intervention was granted on February 4, 2016. Id.

On February 4 and 9, 2016, the parties participated in investigatory conferences. By letter dated February 10, 2016, we requested that the parties execute an Agreement for Consent Election. Local 68 and the Township consented to an election. On February 17, 2016, Council 10 submitted a written objection to a consent election asserting that "the appropriate unit composition has not been determined at this time by the Commission;" that the petitioner's requested unit "is inconsistent with the historical makeup;" and a "valid question concerning appropriate inclusions and exclusions exists." Council 10 also asserted that it had filed a clarification of unit petition "to resolve the questions."

On February 18, 2016, Council 10 filed a clarification of unit petition with the Commission (Docket No. CU-2016-020). The petition seeks to exclude nine of the eleven titles included in the unit. These titles are administrative office manager, assistant director of community development, construction official, court administrator, deputy court administrator, deputy director of public works, director of community service, public works director, and tax assessor. Council 10 alleges that the unit should consist solely of supervisory employees, and "not non-supervisory white collar clericals and not department heads, professionals or managerial executives" as "[m]ixing these titles in a bargaining unit is against the language and intent of the Act and is unfair to the affected employees."

On February 25, 2016, we wrote to the parties in response to Council 10's February 17, 2016 letter, inviting them to provide written submissions by March 1, 2016, regarding the appropriate unit composition and whether Local 68's requested unit is inconsistent with the historical unit makeup. No replies were received.

On May 3, 2016, I wrote a letter to the parties, advising of my tentative findings and conclusions and inviting responses. Specifically, I wrote that I was inclined to issue a decision finding that the petitioned-for unit is appropriate and directing a secret ballot election among the employees in the unit in order

to determine whether they wish to be represented by Local 68, Council 10, or no representative. Finally, I invited any party to respond if it believed that my determinations were incorrect or if additional material facts should be brought to my attention.

Council 10 filed a response on May 12, 2016. In its response, Council 10 essentially reiterated its argument relating to this representation petition, (RO-2016-031) as well as argument relating to its own clarification of unit petition. We will not address arguments concerning the clarification of unit petition here, except as necessary to explain the procedural history of the representation petition and provide factual support for the analysis of this matter. With regard to the representation petition, Council 10 argued that the clarification of unit petition should be processed before the representation petition, as the appropriate unit composition has not been determined by the Commission and the petitioned-for unit is inconsistent with the historical unit. These arguments were made by Council 10 in earlier submissions, and are addressed in this decision.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. No disputed substantial and material facts warrant a formal hearing.

N.J.A.C. 19:11-2.6(f). Based upon our investigation, the following facts appear.

The Township is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act"). N.J.S.A. 34:13A-1 et seq.

Council 10 objects to the petition for certification "because the appropriate unit composition has not been determined at this time by the Commission," and because Local 68's "requested unit is inconsistent with the historical unit makeup." Council 10 argues that "[a] valid question concerning appropriate inclusions and exclusions exists."

Council 10 was certified as the majority representative on December 18, 2012. The employees represented by Council 10 are presumptively in the unit and are eligible to vote.

Council 10 filed a clarification of unit petition seeking to exclude nine out of eleven of its own unit members, for whom Council 10 was certified as the majority representative in 2012. Local 68's representation petition seeks an election to determine the majority representative. The existing unit was certified in 2012, and neither Council 10 nor the Township filed a petition to change the unit composition until after Local 68 filed its petition for certification.

The Director wrote about the purpose of a clarification of unit petition in Clearview:

The purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the provisions of the Act, the unit definition contained in a Commission certification, or as set forth in the parties recognition agreement. Normally, it is inappropriate to utilize a clarification of unit petition to enlarge or to diminish the status of the negotiations unit for reasons other than the above.

Clearview Reg. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977)

(emphasis added).

On or about February 13, 2015, Council 10 and a representative of the Township signed a memorandum of agreement with wage increases retroactive to 2012, when the incumbent was first certified. Included among the terms of the agreement is a recognition provision (Article Two) setting forth all of the titles that are now the subject of the clarification of unit petition. We are unaware of any circumstances that could have occurred in the past year, let alone since the expiration of the memorandum - December 31, 2015 - that could warrant the filing of a clarification of unit petition intended to eviscerate the unit from twelve employees to two. I infer from these facts that the purpose of the clarification of unit petition is to either delay the processing of the representation petition or diminish the size of the unit for the purpose of rendering certain employees ineligible to vote.

In City of Hoboken, D.R. No. 85-4, 10 NJPER 597 (¶15276 1984), a similar situation arose where Teamsters Local 97 ("Teamsters") filed a representation petition seeking to represent a unit of employees employed by the City of Hoboken, who were represented by the Hoboken Municipal Employees Association (the "Association"). Id. The Association intervened in the matter, as Council 10 has done here. The Teamsters and the Association entered into an Agreement for a Consent Election, but the Association claimed that one title - foreman - should be included in the unit and was therefore eligible to vote in the election. Id. The Association made this claim despite the fact that foremen had been excluded from the recognition clause of the Association's most recent collective negotiations agreement with the City of Hoboken. Id.

There, the Director found:

Essentially, the Association's position is that its present unit should be clarified to include the foreman classification as a non-supervisory category of employees. This request is premature. The Commission's policy is not to process requests for clarification of an existing collective negotiations unit during the pendency of a representation proceeding challenging the incumbent's majority status.

Id. (emphasis added). The Director ordered that an election be conducted among the employees in the existing collective negotiations unit. Id.

Furthermore, with regard to Council 10's clarification of unit petition, the expeditious processing of representation petitions cannot be thwarted based on objections regarding the inclusion of various titles in a unit, as explained in Monmouth County Prosecutor's Office, D.R. No. 2010-13, 41 NJPER 117 (¶42 2010). In that matter, two units were certified, one of professional employees, and one of non-professional clerical employees; the Prosecutor did not object to the unit structures, but asserted that two titles in the professional unit should be placed in the non-professional unit. Id.

The Director of Representation found that the Prosecutor's assertions at a late stage of processing the representation petitions would inappropriately interfere with the employees' legitimate representation rights:

The Commission's policy is to expedite the processing of representation petitions so that employees' statutory rights to select a representative may be addressed promptly. For months, the Prosecutor did not object to separate negotiations units for professional and non-professional employees. In fact, it maintained that the two disputed titles were professional. Suddenly, it now asserts that all of the titles which CWA seeks to represent are non-professional, questioning for the first time the appropriateness of a separate professional unit. I find that consideration of the Prosecutor's objection at this late date will thwart the legitimate representation rights of employees who have petitioned the Commission for card check certification . . . It is no longer appropriate to delay resolution of these representation cases. [Id., 41 NJPER 117]

As in Monmouth County Prosecutor, the clarification of unit petition filed by Council 10 cannot be permitted to frustrate the legitimate representational rights of these employees. It is well-established that a clarification of unit petition filed after a representation petition is processed can be used to address any issues regarding titles that an employer or certified representative believes may be improperly included within a negotiations unit. See Monmouth County Prosecutor's Office, D.R. No. 2010-13, 41 NJPER 117 (¶42 2010); Township of Manalapan, D.R. No. 80-5, 5 NJPER 367 (¶10187 1979) (the Director of Representation directed an election, determining that a dispute regarding the inclusion of two individuals in the proposed unit is properly resolved through post-election procedures, and not prior to the election); IMO City of Camden Housing Authority, D.R. No. 2013-2, 39 NJPER 230 (¶79 2012) (a clarification of unit petition is appropriate where circumstances have occurred which change a title's job functions, or a new title has been created, but absent changed circumstances, it is inappropriate to use a clarification of unit petition to enlarge or diminish the scope of a negotiations unit).

Finally, Council 10's filing of the clarification of unit petition will not obstruct the expeditious processing of this representation petition. It is well-established that an election should be among the employees in the existing, certified unit.

See, e.g., Township of Fairfield, D.R. No. 93-10, 19 NJPER 76 (¶24035 1992). In Township of Fairfield, which involved a decertification petition and an election to determine whether a majority wished for continued representation by the incumbent union, the Director of Representation rejected the Township's argument that recently created titles should be added to a unit and made eligible to vote in the election. D.R. No. 93-10, 19 NJPER 76 (¶24035 1992). The Director reasoned that a decertification petition is not an appropriate opportunity to expand the unit to include additional titles which the parties did not mutually intend to include in the unit. Id.

Thus, contrary to Council 10's assertion that the appropriate unit composition has not been determined by the Commission and that the petitioned-for unit is inconsistent with the historical unit, the appropriate unit for the election is the unit as described in the existing certification.

The showing of interest is adequate to support Local 68's representation petition. Despite Council 10's filing of a clarification of unit petition, balancing all of the factors in this case, I will not delay this matter further. Therefore, pursuant to N.J.A.C. 19:11-2.6(c)3, I direct a secret ballot election among the employees in the petitioned-for unit.

The election shall be among the employees in the following appropriate unit:

Included: All regularly employed supervisory employees employed by the Township of Galloway.

Excluded: Managerial executives, confidential employees, non-supervisors, police, casual employees, and all other employees employed by the Township of Galloway.

Eligible employees will vote on whether they wish to be represented by I.U.O.E. Local 68, GWU Supervisors Council 10, or no representative. The election shall be conducted in accordance with the Commission's rules. The election shall be conducted no later than forty-five (45) days from the date of this decision. Those eligible to vote must have been employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off, including those in the military service. Ineligible to vote are employees who resigned or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date.

Pursuant to N.J.A.C. 19:11-10.1, the public employer is directed to promptly file with us an eligibility list consisting of an alphabetical listing of names of all eligible voters in the unit, together with their last known mailing addresses and job titles. In order to be timely filed, the eligibility list must be received by the Director no later than 10 days before the date of the election. In a mail ballot election, the date of the

election shall be the date on which the ballots are scheduled to be mailed. A copy of the eligibility list shall be simultaneously provided to Local 68 and Council 10 with a statement of service filed with us. We shall not grant an extension of time within which to file the eligibility list except in extraordinary circumstances.

The parties may be provided an opportunity to agree upon dates of the mail ballot election and designations on the ballot, within the time period set by this decision, subject to my approval. The assigned staff agent will convene a conference call among the parties for this purpose. In the absence of an agreement among the parties, I shall determine the dates of the mail ballot election, the time and place of the counting of the ballots, and the designations on the ballot. N.J.A.C. 19:11-5.1.

BY ORDER OF THE
DIRECTOR OF REPRESENTATION

/s/Gayl R. Mazuco
Gayl R. Mazuco

DATED: June 21, 2016
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 July 1, 2016.