

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

In the Matter of

BERGEN PINES HOSPITAL,

Public Employer,

-and-

COMMUNICATIONS WORKERS OF AMERICA,

DOCKET NO. CU-79-19

Petitioner,

-and-

LOCAL 549, COUNCIL 52, AMERICAN
FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFE-CIO,

Intervenor.

SYNOPSIS

The Director of Representation dismisses a Petition filed by CWA seeking clarification of a negotiations unit consisting of non-medical professional employees to include an employee in the title "Medical Librarian." The Medical Librarian, although a non-medical professional employee, had not been identified by the Hospital and CWA as included within the medical professional employee unit. Rather, two years later, the Medical Librarian was identified by all parties as a clerical employee and placed in the clerical employee unit represented by AFSCME. The Director observes that a majority representative must exercise diligence in searching for employees who may be identified as within its unit and concludes that clarification of a unit to include overlooked employees will be denied where the employees have not been identified before the execution of a second collective negotiations agreement with the employer.

The Director determines that the appropriate procedure available to CWA to seek the representation of the Medical Librarian is through the filing of a certification petition since the

Medical Librarian was included in the clerical employee unit without being provided with a professional option ballot. A certification petition may be filed 90 to 120 days before the expiration of AFSCME's first collective negotiations agreement seeking to sever the Medical Librarian from the clerical employees unit and to include the Medical Librarian in the non-medical professional employee unit.

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Appearances:

For the Public Employer
R. W. Kornfeld, Personnel Director

For the Petitioner
Edward A. Schultz, Representative

For the Intervenor
Rothbard, Harris & Oxfeld
(Nancy Iris Oxfeld, of Counsel)

DECISION

On November 15, 1978, a Clarification of Unit Petition was filed with the Public Employment Relations Commission (the "Commission") by Communications Workers of America, AFL-CIO ("CWA") raising a question concerning the composition of a

collective negotiations unit. Specifically, CWA seeks a determination that the collective negotiations unit comprised of all non-medical professional employees employed by Bergen Pines Hospital (the "Hospital") of which CWA is the majority representative, includes the title of Medical Librarian. This title, however, is currently included in the unit of all regularly employed clerical employees at the Hospital, represented by Local 549, Council 52, American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME").

Pursuant to a Notice of Hearing, a hearing was held before Commission Hearing Officer Dennis J. Alessi on May 18, 1979, at Newark, New Jersey at which all parties were given the opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. By letter dated March 16, 1979, the Hospital, through its Personnel Officer, R. W. Kornfeld, reaffirmed an earlier stated position that "the unit clarification request, as cited, will not affect Hospital operations in any manner and, as such, the decision rendered by the Commission would be acceptable." Accordingly, the Hospital took no part in the hearing.

At the initiation of the hearing, AFSCME moved to dismiss the Petition on the basis that the Petitioner failed to show a good faith dispute concerning the composition of a unit of public employees. ^{1/} A brief in support of the Motion was simultaneously

^{1/} This Motion was first filed on March 26, 1979 with the undersigned and was referred to the Hearing Officer by letter dated April 6, 1979.

filed. AFSCME contends that since the title Medical Librarian existed at the time the white collar unit was certified and was specifically included in the clerical unit pursuant to a consent election agreement in which the CWA participated, the Clarification of Unit Petition should be dismissed as being disruptive and interfering with a voluntary agreement. AFSCME argues that under these circumstances a Clarification of Unit Petition would not be in order unless CWA could demonstrate that since the placement of the Medical Librarian in the clerical unit there has been some change of circumstances in the duties of the Medical Librarian which would justify the Commission's consideration of the unit placement of this title at this time. The Hearing Officer's decision denying the motion is attached hereto and made a part hereof.

Subsequent to the Hearing Officer's denial of the Motion to Dismiss, AFSCME and CWA orally entered into the record the following stipulations:

1. The Bergen Pines Hospital is a public employer within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., is the employer of the employees who are the subject of this Petition, and is subject to the provisions of the Act.

2. Communications Workers of America, AFL-CIO and Local 549, Council 52 American Federation of State, County and Municipal Employees, AFL-CIO, are employee representatives within the meaning of the Act and are subject to its provisions.

3. On November 6, 1975, CWA was certified as the exclusive majority representative of all non-medical professional employees employed by the Hospital. 2/

4. On October 18, 1977, AFSCME was certified as the exclusive majority representative of all regularly employed clerical employees employed by the Hospital including the title of medical librarian. 3/

5. On September 1, 1977, the Director of Representation approved an Agreement for Consent Election. This agreement was signed by the Hospital, CWA and AFSCME. The unit was defined as all regularly employed clerical employees including the title of medical librarian. As a result of the secret ballot election, AFSCME was certified as the exclusive majority representative of this unit. AFSCME and the Hospital are parties to a collective negotiations agreement covering this unit for the period 1978 through 1980.

6. There is only one employee in the title of Medical Librarian.

7. The employee in question has a college degree and also holds a Master's Degree in Library Science.

8. All employees in the unit represented by CWA have a college degree.

2/ Exhibit C III in evidence. Also submitted into evidence as P2 are the job descriptions for the non-medical professional titles currently represented by CWA.

3/ Exhibit C IV in evidence. Also submitted into evidence as P3 are the job descriptions for the clerical titles currently represented by AFSCME.

9. CWA and the Hospital have been parties to two collectively negotiated agreements: One for the period January 1, 1976 to December 31, 1977; the other from January 1, 1978 to December 31, 1979. ^{4/}

10. The parties have agreed to the submission of the job description for Medical Librarian as a joint exhibit.

11. The parties also stipulate to the fact that this job description is accurate in the sense that the person in question, on a day-to-day basis, does perform the functions which are listed in the job description.

12. The parties further agree to waive the Hearing Officer's Report and to proceed directly to the Director of Representation for a decision on this matter.

13. The parties also agree that the current Medical Librarian holds a professional librarian's certification issued by the State of New Jersey Department of Education. ^{5/}

A review of the record leads the undersigned to conclude that the issues in dispute are: (1) is the instant Clarification of Unit Petition appropriate for consideration; (2) is the Medical Librarian a non-medical professional employee; and (3) if the Medical Librarian is a non-medical professional employee,

4/ Exhibit P1 in evidence

5/ This stipulation of fact was entered into the record separately from the initial twelve stipulations. It has been numbered as stipulation 13 for administrative convenience.

should the non-medical professional employees unit be clarified as including the Medical Librarian or should the Medical Librarian remain in the clerical unit?

AFSCME filed a post-hearing brief on July 13, 1979. CWA, although provided two extensions of time, has not filed a brief. The Hospital has not provided a brief.

The undersigned has considered the entire record, including the Hearing Officer's interim decision on the Motion to Dismiss, the stipulations, exhibits and briefs.

Regarding the first issue, the undersigned affirms the Hearing Officer's denial of AFSCME's Motion to Dismiss. CWA has questioned whether a particular title is encompassed within the inclusionary or exclusionary language of the description of the unit which it represents. A Clarification of Unit Petition is the appropriate procedure for resolving such issues. ^{6/} The Commission has permitted the processing of clarification of unit petitions notwithstanding the previous inclusion of disputed employees in another negotiations unit. ^{7/}

Regarding the second issue, i.e., is the Medical Librarian a non-medical professional employee, N.J.A.C. 19:10-1.1 defines a "professional" employee as:

6/ In re Clearview Regional High School Board of Education,
D.R. No. 78-2, 3 NJPER 248 (1977)

7/ In re State of New Jersey, P.E.R.C. No. 80-65, 5 NJPER
(¶ 1979), aff'g D.R. No. 80-8, 5 NJPER 454 (¶ 10229 1979)

any employee whose work is predominantly intellectual and varied in character, involves the consistent exercise of discretion and judgment, and requires knowledge of an advanced nature in the field of physical, biological, or social sciences, or in the field of learning. The commission will also consider whether the work is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time. The term shall also include any employee who has acquired knowledge of an advanced nature in one of the fields described above, and who is performing related work under the supervision of a professional person to qualify to become a professional employee as defined herein. The term shall include, but not be limited to, attorneys, physicians, nurses, engineers, architects, teachers and the various types of physical, chemical and biological scientists.

The Hospital's job description for Medical Librarian states as follows:

Definition: Under direction, supervises the activities of a medical library; performs the highly responsible and varied professional tasks requiring thorough knowledge of medical language and understanding of the divisions of medicine and their individual applications; does related work as required.

Examples of Work: Plans and organizes the work of the medical library; gives suitable assignments and instructions to assigned employees; maintains the medical library collection of books journals, pamphlets, recordings and reference materials; keeps books in order on the shelves; sends out overdue notices; explains the uses of the reference materials and assists individuals in obtaining such material; performs search and research for medical personnel; issues and receives library materials; aids in the

selection and ordering of materials, books, and journals; processes and catalogues materials, compiles lists of duplicate and missing journals; requests and completes orders to handle correspondence through the Medical Library Association Exchange; initiates good library procedures and practices, decides and prepares written material to be accepted as library policy; reclassifies books according to the National Medical Library System; prepares, records, and transcribes notes taken at various medical conferences; establishes and maintains necessary records and files.

Requirements:

1. Applicants must possess a professional librarian's certificate issued by the New Jersey Department of Education.
2. Two years of experience in the field of library science with a specialization in medical or reference work.
3. Thorough knowledge of the principles and practices of library science and their usage in a medical library; of the uses and limitations of primary and secondary records, indexes, and classification systems.
4. Ability to apply principles and practices of medical library science to situations; to supervise employees; to evaluate medical information, and to make frequent independent decisions.
5. Good health and freedom from disabling physical and mental defects which would impair the proper performance of the required duties or which might endanger the health and safety of oneself or others.

It is clear from stipulations number seven and thirteen and the jointly submitted job description that the Medical Librarian is required to and does possess knowledge of an advanced nature

in the fields of medical and library science. Since AFSCME and CWA have stipulated that the job description is an accurate statement of the functions actually performed by the Medical Librarian on a day-to-day basis, the undersigned concludes that the Librarian is a professional employee. The Librarian's authorities and responsibilities, to plan and organize the work of the library, assist and instruct individuals on research methods, perform searches and researches for medical personnel, and aid in the selection of materials for the library, are clearly and predominantly intellectual and varied in character, involving the consistent exercise of discretion and judgment.

AFSCME's position is that the Medical Librarian, having initially been included by these parties in the clerical unit, should not be removed from that unit and placed in the non-medical professional employee unit. AFSCME acknowledges that the duties of the Medical Librarian are currently the same as those performed when the Medical Librarian was included in the unit. In response to CWA's assertion that the non-inclusion of this title in its non-medical professional unit was accidental, AFSCME states that during the two years between CWA's certification as representative of the non-medical professional unit and the consent election agreement regarding the clerical employees unit, "CWA had sufficient time to ascertain the job duties of employees at the hospital, to search for employees who were appropriately included within its unit and to file clarification of unit petitions

concerning those employees." AFSCME suggests the possibility that CWA purposely included the Medical Librarian in the clerical employees' election agreement to gain an additional vote. The stipulated record does not reveal any evidence to establish this claimed motivation.

The parties agree that the CWA represents a unit consisting of non-medical professional personnel. AFSCME's certification is for a unit of "All regularly employed clerical employees." Significantly, the Medical Librarian title is included in a specific list of included titles which follows the term "clerical employees." The Medical Librarian title is not included in the certified unit on the basis of its "professional" status. Professional employees are specifically excluded from the certified unit. The undersigned, further, taking administrative notice of the Commission's records, finds that both AFSCME and CWA filed certification petitions seeking the representation of the clerical employees unit. ^{8/} Each party provided a separate list of those titles which were sought to be included in the proposed unit. CWA's identification of the title "librarian" as a clerical employee was the single deviation from the parties' otherwise identical lists. At the informal conference in which the parties executed a consent agreement, all parties agreed to the inclusion of the "medical librarian" in the unit. The undersigned concludes that all parties shared responsibility for the misidentification of the Medical

8/ Docket Nos. RO-78-4 and RO-78-9

Librarian as a clerical employee. It is clear that had the Medical Librarian been identified by all parties as a professional employee, the exclusionary language of the unit definition would have excluded her from the unit. Had any party questioned her employment status, a challenge could have been asserted.

It is clear that an appropriate unit placement of the Medical Librarian is in a unit consisting of non-medical professional employees. The issue before the undersigned is whether the instant Clarification of Unit Petition may appropriately be used to place the Medical Librarian in that unit. In order to reach a determination other factors must be considered as well. See In re Clearview Regional High School Board of Education, supra, n.6; In re State of New Jersey, D.R. No. 80-8, 5 NJPER 454 (¶ 10229 1979), aff'd P.E.R.C. No. 80-65, 5 NJPER ____ (¶ ____ 1979); In re Wayne Board of Education, D.R. No. 80-6, 5 NJPER 422 (¶ 10221 1979); and In re Fair Lawn Board of Education, D.R. No. 78-22, 3 NJPER 389 (1977).

In the above decisions, the Commission has examined the significance of factors related to the timing of a petitioner's request for unit clarification and the inclusion of the personnel in question in other collective negotiations units. In the State of New Jersey matter, both of the above factors were present. The Commission approved the clarification of the State Inspection and Security Unit as including certain titles previously placed in the Administrative and Clerical Unit represented by a different

employee organization. In that matter, the clarification of unit petition was filed shortly after the conclusion of the first contractual agreement for the Inspection and Security Unit and promptly after the placement of those titles in the Administrative and Clerical Unit.

In the instant matter, CWA's Petition was filed in the middle of its second negotiations agreement with the Hospital, three years after its certification, fourteen months after AFSCME's certification, and five months after the effective ratification of AFSCME's first contract. An additional factor must be considered herein, i.e., the specific exclusion of professional employees from the clerical employee unit. This factor must be considered in the context of the mandate of N.J.S.A. 34:13A-6(d) that a professional employee may not be included in a unit with nonprofessional employees through a Commission certification unless the professional employee has been afforded an opportunity by means of a professional option vote, and has indicated a desire to be included in a unit with nonprofessional employees.

The undersigned's conclusion is that the scope of the clerical employee unit is intended to exclude professional employees. The accidental or wrongful inclusion of the Medical Librarian in the clerical unit cannot be utilized to impede CWA's Clarification of Unit Petition, if otherwise valid. Had the unit definition in the AFSCME-Hospital-CWA consent agreement contained the inclusion of the Medical Librarian as a professional

employee, this factor would have militated strongly in favor of the conclusion that the non-medical professional unit be clarified as not including the Medical Librarian.

The undersigned agrees with AFSCME that a representative must exercise due diligence in searching out employees who are within the definitional scope of its collective negotiations unit. The "waiver" analysis presented in the Wayne and Fair Lawn matters, supra, is premised upon this responsibility. In the State of New Jersey matter, the undersigned concluded that the clarification of unit which resulted in the inclusion of the employees in question in the Petitioner's unit was appropriate where the petition was filed shortly after the expiration of the Petitioner's first contractual agreement. Ordinarily, due diligence on the part of a representative during the term of its first collective negotiations agreement with the employer requires searching out and identifying all unit employees who may have been inadvertently overlooked during the initial formation of the unit. The degree of diligence must include vigilance on the part of the representative concerning the proposed representation of employees in other collective negotiations units - either through recognition or Commission certification proceedings. The Commission provides for posting procedures to accommodate the vigilance of interested parties. The representative's execution of a second collective negotiations agreement precludes the representative from later seeking to add employees

into its unit through a clarification of unit petition. ^{9/}

Therefore, since CWA's Petition was filed after the execution of its second agreement with the Hospital, clarification of its unit as including the Medical Librarian in its unit is denied.

Accordingly, the appropriate procedure available to CWA to accomplish the representation of the Medical Librarian within the non-medical professional employee unit is through the filing of a certification petition which raises a question concerning the Medical Librarian's representation and which provides the opportunity for the Medical Librarian to choose or reject representation by CWA. A Petition seeking to sever the Medical Librarian from the clerical employee unit and to include the Medical Librarian in the non-medical professional employee unit is appropriate since the Medical Librarian was denied her statutory right to exercise a professional option as to her inclusion in the clerical employee unit and since the petition to include her in the non-medical professional employee unit can be raised during the first collective negotiations agreement governing the clerical employee unit.

^{9/} Similarly, in an accretion proceeding, where employees in newly created programs or acquired enterprises or facilities are sought to be clarified as included in a previously existing unit, the representative must search out these employees and file a petition prior to its execution of a successor collective negotiations agreement.

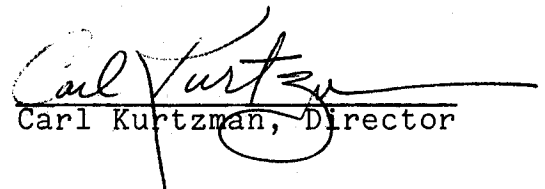
The filing of a Petition for Certification of Public Employee Representative during the period of an existing written agreement normally must be in accordance with the Commission's rules concerning the time period within which certification petitions may be filed. See N.J.A.C. 19:11-2.8(c). The extraordinary circumstances involved herein, however, makes the mechanical application of the Commission "contract bar" rule inappropriate. Therefore, CWA's Petition may not be barred by the contract bar rule. Nevertheless, the undersigned has observed in In re Clearview Regional High School Board of Education, supra, that the removal of employees from an inappropriately established collective negotiations unit must be consistent with the parameters of a governing contractual agreement, i.e., the Act's policy of encouraging stability and the finality of collective negotiations agreements requires that the removal of such employees from a unit be effectuated at the expiration of the agreement which covers the employees. ^{10/} In the undersigned's judgment the circumstances presented herein require application of the above consideration. Therefore, CWA's Petition must be filed within 90 to 120 days prior to the expiration of the current AFSCME agreement. CWA's Petition shall be accompanied by an adequate showing of interest. AFSCME will be permitted to intervene in the Petition on the basis

10/ In accordance with the Clearview determination, had CWA's Clarification of Unit Petition herein been appropriate, "special circumstances" would nevertheless have mandated the continued inclusion of the Medical Librarian in the clerical employees unit until the AFSCME contract expired.

of its written agreement covering the Medical Librarian. In the election to be conducted by the Commission, the Medical Librarian will vote as to whether she desires to be included in the non-medical professional employee unit represented by CWA or whether she desires to exercise a professional option in favor of her continued inclusion in the clerical unit represented by AFSCME. 11/ After such an election, CWA's or AFSCME's certification, as appropriate, will be modified to reflect the appropriate unit description language.

Therefore, based on the above, the Clarification of Unit Petition is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION


Carl Kurtzman, Director

DATED: January 18, 1980
Trenton, New Jersey

11/ Since all parties to the September 1977 consent agreement agreed that the appropriate unit may include the Medical Librarian, there is no dispute as to the appropriateness of this unit. Under the unique circumstances of this case, the employee's vote will result in her placement in either one of two appropriate units.

Hearing Officer's Ruling on Motion to Dismiss

CWA has filed a Clarification of Unit Petition requesting that the Commission clarify the unit of non-medical professional employees which it represents at Bergen Pines Hospital, to include the title of medical librarian. This title is currently included in a unit of regular full-time and part-time clerical employees represented by AFSCME, Council 52 and covered by a collective negotiations agreement with Bergen Pines Hospital which expires on December 31, 1980. CWA contends that the title in question is, in fact, a non-medical professional title which should appropriately be included in its unit. Therefore, CWA argues that there is a question concerning the identification of a title which can properly be presented in a Clarification of Unit Petition.

Council for AFSCME has filed a motion to dismiss the Clarification of Unit Petition on the basis that the petition has failed to show a good faith dispute concerning the composition of a unit of public employees.

On a motion to dismiss in a Clarification of Unit Petition the standard to be employed is whether, assuming as true all of the facts as alleged by the Petitioner, and evaluating those facts in a light most favorable to the Petitioner, has the Petition made a prima facie showing that a question concerning the composition of unit has been raised. Such a question involves interpreting the language which defines the existing units in order to determine whether a particular title is includable or should be excluded from units whose representational status is already established. Typically, a clarification is sought as to whether a particular title is contemplated within the scope of the unit definition and the matter relates primarily to identification of the title -- that is whether the title in dispute comes within the ambit of the generic description of the unit. Further, a unit clarification petition is appropriate where there is an ambiguous unit description, or where an employee or title has been inadvertently

overlooked. But it may not be utilized to expand the scope of the unit to include titles which are not within the generic description of the unit.

Applying this standard to the facts of this case, in the light most favorable to the Petitioner, it appears that AFSCME represents a unit which is generically described as all permanent full-time and part-time clerical employees. The unit definition lists all the specific titles which are said to fall within the unit's description. The title, medical librarian is included in this list. The definition then goes on to specifically exclude all professional employees employed by Bergen Pines Hospital.

The unit represented by CWA may be generically described as including all non-medical professional employees of Bergen Pines Hospital. The definition lists specific titles which fall within the ambit of this generic description. The title medical librarian is not included in this list. The definition then goes on to specifically exclude all other professional employees of Bergen Pines Hospital. By inference, this exclusion must refer to medical and administrative professionals.

CWA asserts that the title of medical librarian is, in fact, a professional non-medical title, on the basis that the educational requirement for the position is a master's degree in library science and the job description states that the medical librarian is required to perform professional library functions. Further, CWA asserts that the title, itself, is ambiguous as to whether it refers to a position which is professional or clerical in nature. Therefore, CWA alleges that in 1975, when it was certified as the representative of the non-medical professional unit, and again in 1977, when it consented to an election with AFSCME for a unit of clerical employees, it inadvertently overlooked this professional title due to the ambiguity caused by the nomenclature used.

Assuming all of the facts as alleged by CWA are true, and evaluating them in a light

most favorable to the Petitioner, it appears that there is an internal inconsistency in the definitions of both units.

CWA represents a unit of non-medical professional employees, which excludes other types of medical and administrative professionals; yet the title, medical librarian, an allegedly non-medical professional title, has been excluded. AFSCME represents a unit of all permanent clerical employees, excluding all types of professional employees, yet the allegedly professional, medical librarian title has been included in the unit. Accordingly, it does appear at this time that a question concerning the identification of a title does exist. The question is whether the title of medical librarian is, in fact, a professional title or a clerical title, appropriately includable in CWA's professional unit or AFSCME's clerical unit. As discussed above, this is the type of question which may appropriately be brought in a unit clarification petition. Further, assuming as true the Petitioner's contentions concerning the ambiguity caused by the nomenclature of this title, and the consequential inadvertent omission of this title, two additional questions are raised which may appropriately be presented for determination in a clarification of unit petition.

Moreover, the above questions of whether there are, in fact, ambiguities in the two current unit definitions, whether the title medical librarian is, itself, ambiguous, whether the title was inadvertently overlooked, and the further question of whether CWA is actually attempting to expand the scope of its unit to include titles other than non-medical professionals, cannot be finally determined until after the presentation of the evidence relating to the true nature of this title.

Accordingly, for these reasons the motion to dismiss CWA's Petition is hereby denied at this time.