

D.R. NO. 2016-9

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

In the Matter of

NEWARK STATE-OPERATED SCHOOL DISTRICT,
Public Employer,

-and-

Docket No. CU-2015-012

SEIU LOCAL 617,
Petitioner,

-and-

NEWARK TEACHERS UNION,
Intervenor.

SYNOPSIS

The Director of Representation dismisses a clarification of unit petition (petition) filed by the Service Employees International Union, Local 617 (SEIU) and denies the Newark Teachers Union's (NTU) request to add one of the petitioned-for titles into NTU's unit. SEIU's petition sought clarification of its unit of employees of the Newark State-Operated School District (District) to include seven job titles created by the District. SEIU and NTU's units of District employees were narrowly defined by recognition clauses in collective negotiations agreements that listed specific titles included in the unit and did not contain generic language encompassing the petitioned-for titles. SEIU contended the petitioned-for titles should be included in its unit because they share a community of interest with existing unit titles. The Director disagreed and found that a unit clarification petition was not the appropriate method for adding these titles to SEIU's unit because SEIU's recognition clause does not contain language identifying the petitioned-for titles as part of SEIU's unit. The Director also declined NTU's request to add a title to its unit since NTU's recognition clause did not include generic language encompassing that title.

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Appearances:

For the Public Employer
Adams Gutierrez & Lattiboudere, LLC
(Adam S. Herman, of counsel)

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

For the Intervenor
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
(Colin Lynch, of counsel)

DECISION

On December 9, 2014 and June 18, 2015, the Service Employees International Union, Local 617 (SEIU), filed a clarification of unit petition (petition) and amended petition^{1/} seeking to

^{1/} By email dated June 18, 2015, SEIU amended its petition by withdrawing its request to include the title Community Engagement Specialist (CES). Since the CES is no longer the subject of SEIU's petition, we decline to address whether
(continued...)

clarify its collective negotiations unit of employees of the Newark State-Operated School District (District) to include the following newly created job titles: family advocate, staffing coordinator, data analyst, health coordinator, coordinator contact center, coordinator of employee services and coordinator of federal programs. The unit is described in SEIU's 2010-2013 collective negotiations agreement (CNA) with the District as a unit of "all full and part-time employees of the Newark Public Schools under the following categories", and then lists 157 different job titles. The recognition clause has no language which excludes any titles from SEIU's unit.

The District opposes SEIU's petition, asserting the petitioned-for employees do not share a community of interest with unit employees. The Newark Teachers Union (NTU) intervened and asserted that the data analyst and community engagement specialist titles should be included in its unit.^{2/} N.J.A.C. 19:11-2.7.

1/ (...continued)
CES should be included in SEIU's unit or NTU's unit in this case.

2/ On September 11, 2014, prior to the filing of the instant petition, the NTU filed a clarification of unit petition, CU-2015-005, requesting the titles Data Analyst and Community Engagement Specialist together with two other titles be clarified into NTU's unit. NTU requested that CU-2015-005 be held in abeyance pending the outcome of motions related to good faith layoff appeals pending in the Office of Administrative Law.

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On June 22, September 4 and October 19, 2015, a Commission staff agent sent correspondence to NTU, SEIU and the District requesting information in support of their respective positions. SEIU Representative Larry Howell filed certifications accompanied by exhibits. The District's Executive Director of Staffing and Recruitment, Kimberly Kassnove, filed certifications accompanied by exhibits.

On February 19, 2016, I wrote to the parties and advised I was inclined to dismiss SEIU's petition and deny NTU's request to include the data analyst in NTU's unit. In the letter, I also invited the parties to respond if they disagreed with my factual and/or legal determinations. On February 23, 2016, NTU filed a certification with exhibits from NTU President, John Abeigon, in response. The District filed a letter indicating it would rely on Kassnove's certifications in response to my letter. SEIU did not file a response. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I make the following:

FINDINGS OF FACT

SEIU and the District are parties to a collective negotiations agreement (SEIU Agreement) extending from March 1,

2010 through February 28, 2013. The 2010-2013 SEIU Agreement is the most recent collective negotiations agreement between the District and SEIU. (Kassnove Certification, Paragraph 14). The parties executed the SEIU Agreement on September 28, 2010.

Article I of the SEIU Agreement includes a recognition clause that encompasses "all full and part-time employees of the Newark Public Schools under the following categories:", and then lists 157 job titles.^{3/} The petitioned-for titles are not among those enumerated in the Article I list, nor does the recognition clause include generic language encompassing the petitioned-for titles.

Kassnove certifies that the petitioned-for titles were created by the District between July 2013 and August 2014, approximately four years after the last SEIU Agreement was executed.

NTU and the District are parties to a collective negotiations agreement (NTU Agreement) effective from July 1, 2009 through June 30, 2010, and extended by memoranda of agreement from July 1, 2010 through June 30, 2015. Article I of the NTU Agreement contains a recognition clause that defines NTU's unit as including employees in the "following categories of employment":

^{3/} A copy of the recognition clause with the listed job titles is attached to this decision.

Teachers, itinerant teachers, homebound teachers, recreation teachers, speech language specialist, athletic trainer, middle school drug and safety coordinator, job developer, middle school drug prevention and safety coordinator, prevention specialist, licensed practical nurse, literacy coach, remedial reading teachers, staff developers, librarians, drop out counselors, guidance counselors, regular teachers teaching four nights per week in Newark Evening High School, and coordinators having permanent status as teachers, resource teachers, learning disability teachers consultants, social workers, psychologists, attendance counselors, court representatives, special investigators, consulting psychiatrists, occupational therapist, physical therapist, program assistant, research assistant, audiologist, pianist, substance abuse coordinator, clerk stenographer(school), physical therapist assistant, text book clerk, assistant text book clerk in the Newark Evening High School, parent liaisons, parent involvement community specialists and interpreters.

The recognition clause in the NTU Agreement does not identify the data analyst as part of NTU's unit, nor does it contain generic language which encompasses data analysts.

NTU President Abeigon certifies that the job duties performed by the data analyst are substantially similar to those of three other job titles he represents are in the NTU unit: mathematics coach, literacy coach, and data coach (collectively referred to as "coaching positions"). The literacy coach title is the only one of the three job titles which is identified in the recognition clause of the agreement. Abeigon asserts that the data coach title was created by the District in 2009 to

consolidate the job functions of the mathematics coach and literacy coach. Abeigon certifies that in 2011, the data coach position was abolished. Abeigon contends that the NTU unit should be clarified to include the data analyst title because the coaching positions' job duties are "effectively identical and/or substantially similar to the current title of data analyst." (Abeigon Certification, Paragraph 29). Alternatively, Abeigon posits that "even if there are distinctions between the job duties, the NTU believes that the position of data analyst flows out of the natural progression of job duties and training of data coaches, who were previously math and literacy coaches, all of whom had been represented by NTU." (Abeigon Certification, Paragraph 30).

ANALYSIS

SEIU contends that the petitioned-for employees share a community of interest with SEIU unit employees and should be included in its unit. The District disagrees. For the reasons explained below, I dismiss SEIU's petition and deny NTU's request to include data analysts in its unit. A unit clarification petition is not the appropriate vehicle for including the petitioned-for employees in either SEIU or NTU's units.

The purpose of a clarification of unit petition is to resolve questions concerning the scope and composition of a collective negotiations unit as defined by a Commission

certification or by a recognition clause in a collective negotiations agreement. New Jersey Transit, P.E.R.C. No. 2000-6, 25 NJPER 370, 371 (¶30160 1999); Clearview Reg.Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977). Unit clarification petitions cannot be used to enlarge the scope of an existing unit to include previously unrepresented employees. New Jersey Transit; Clearview Reg. Bd. of Ed. In Rutgers University, D.R. No. 84-19, 10 NJPER 284 (¶15140 1984), the Director explained the purpose behind unit clarification petitions:

The Commission's clarification of unit procedure is for the purpose of identifying unit employees whom the parties have intended to be encompassed by the unit definition. Community of interest considerations, alone, are not a sufficient basis to enlarge the scope of a negotiations unit through unit clarification. [10 NJPER at 285]

We have repeatedly held that titles must be identified as part of an existing unit in order to be clarified into a unit. Barneqat Tp. Bd. of Ed., D.R. No. 84-15, 10 NJPER 54 (¶15029 1983); Newark Housing Authority, D.R. No. 95-22, 21 NJPER 132, 133 (¶26082 1995) (Director emphasizes that "titles to be clarified into a unit must be identified as being within the scope of the existing unit; it is insufficient that a title may share a community of interest" with unit employees); Irvington Housing Authority, D.R. No. 98-15, 24 NJPER 244, 245 (¶29116 1998) (Director noted that "newly created titles will be clarified into a unit only if they fall within the definition of

the scope of the existing recognition clause of the parties' collective negotiations agreement"); Mercer Cty. Special Services Bd. of Ed., D.R. No. 2000-3, 29 NJPER 331, 333 (¶102 1999) (Director rejects union's claim that three titles should be clarified into a unit based on a shared community of interest with existing unit employees, noting that "whether they share a community of interest is immaterial"); City of Englewood, D.R. No. 2004-11, 30 NJPER 89 (¶34 2004). Adding employees who are not represented and are not part of an existing unit by means of a clarification of unit petition would deprive those employees of their statutory right to choose whether to be represented by a employee organization. Mercer Cty. Special Services Bd. of Ed., 29 NJPER at 333, Newark Housing Authority, 21 NJPER at 133.

Where parties expressly agree to include only specific titles in a unit, we have denied requests seeking to add unidentified titles to the unit by means of a unit clarification petition. Passaic Cty. Bd. of Social Services, D.R. No. 98-1, 23 NJPER 438 (¶28201 1997)(Director declines to include professional employees in a unit defined by a recognition clause that did not set forth generic language encompassing professional employees, but instead listed represented titles that did not include petitioned-for titles); State of New Jersey, P.E.R.C. No. 85-77, 11 NJPER 74, 79-80 (¶16036 1985), aff'd NJPER Supp.2d 162 (¶143 App. Div. 1986). (Commission rejected claim that temporary

employees were covered by a recognition clause that specifically listed included job classifications because the plain language of that clause did not include "temporary employees.") We have reached this conclusion even in cases where the petitioned-for employees perform the same work as unit employees. Id.; Newark Housing Authority. In Mercer Cty. Special Services Bd. of Ed., the Director explained:

[I]f the parties have negotiated a contract that includes without reservation certain persons or titles, the Commission must assume that the written agreement is the result of good faith negotiations in which the parties have imparted finality to their give and take. A party to the agreement should not be permitted to gain additional profit from resort to the Commission's processes after the contract is executed.
[29 NJPER at 333, quoting Clearview, 3 NJPER at 251-252]

I dismiss SEIU's petition because the recognition clause does not identify the petitioned-for titles as part of SEIU's unit. SEIU's recognition clause narrowly defines its unit of District employees as including those full and part-time employees who hold one of the 157 job titles listed under Article I. The petitioned-for titles are not listed as included in SEIU's unit. Article I also does not set forth generic language that covers the petitioned-for titles. Moreover, no facts have been presented indicating the parties intended to include more than the 157 job titles listed in the recognition clause. While SEIU urges us to clarify the petitioned-for employees into its

unit based on a shared community of interest with unit employees, that factor is irrelevant in deciding the appropriateness of utilizing a unit clarification petition to add titles not identified as part of SEIU's unit. Newark Housing Authority; Mercer Cty. Special Services Bd. of Ed.^{4/}

I also decline to clarify NTU's unit to include the data analyst. NTU maintains the data analyst performs substantially similar work to that of the coaching positions, one of which (the literacy coach) is identified in Article I as part of NTU's unit. I reject NTU's position because the narrowly defined unit in Article I of the NTU Agreement does not encompass data analysts. Since the unit definition in the NTU Agreement does not contain generic language that would encompass data analysts, we cannot clarify the data analyst into NTU's unit, even if the data analyst performs substantially similar duties as the coaching positions. State of New Jersey, 11 NJPER at 80-81; Passaic Cty. Bd. of Social Services, 23 NJPER at 439.^{5/}

^{4/} We do not decide the question of whether the petitioned-for employees share a community of interest with unit employees. We find only that a unit clarification petition is not the appropriate means to include the petitioned-for employees within SEIU's unit. SEIU may file a timely representation petition to accrete the petitioned-for employees, or any appropriate titles, into its unit. Mercer Cty. Special Services Bd. of Ed., 29 NJPER at 333 (fn. 3)(Director dismisses unit clarification petition but allows for the filing of a timely representation petition).

^{5/} NTU may file a timely representation petition to accrete the
(continued...)

Accordingly, I dismiss SEIU's petition, and deny NTU's request to add the data analyst to its unit.

/s/Gayl R. Mazuco
Gayl R. Mazuco, Esq.
Director of Representation

DATED: June 1, 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 June 13, 2016.

5/ (...continued)
data analyst, or any other appropriate title, into its unit. Mercer Cty. Special Services Bd. of Ed., 29 NJPER at 333 (fn. 3)(Director dismisses unit clarification petition but allows for the filing of a timely representation petition).