

D.R. NO. 2019-1

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

In the Matter of

JEFFERSON TOWNSHIP BOARD OF
EDUCATION,

Public Employer,

-and-

Docket No. CU-2017-028

JEFFERSON TOWNSHIP EDUCATION
ASSOCIATION,

Petitioner.

SYNOPSIS

The Acting Director of Representation dismisses a clarification of unit petition filed by the Jefferson Township Education Association (Association). The petition sought clarification of a unit of non-craft, certificated and non-certificated employees of the Jefferson Township Board of Education (Board) to include a newly created job title of Building Services Coordinator (BSC). The Board and Association agreed the BSC was an electrician and craft employee within the meaning of the New Jersey Employer-Employee Relations Act. The Director held that a craft employee, pursuant to N.J.S.A. 34:13A-6(d), cannot be included in a unit of non-craft employees without an option to vote for inclusion. The Director also rejected arguments by the Association that the Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.11 through 5.15, superseded or nullified the statutory requirement of a craft option vote pursuant to N.J.S.A. 34:13A-6(d).

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Appearances:

For the Public Employer,
Cleary, Jacobbe, Alfieri, Jacobs LLC, attorneys
(Matthew J. Jacobbe, of counsel)

For the Petitioner,
Oxford Cohen, P.C., attorneys
(William P. Hannan, of counsel)

DECISION

On May 9, 2017, the Jefferson Township Education Association (Association) filed a clarification of unit petition (petition) seeking to clarify its collective negotiations unit of certificated and non-certificated personnel employed by the Jefferson Township Board of Education (Board) to include the newly created job title of Building Services Coordinator (BSC). The Association contends that the BSC is a maintenance employee covered by the recognition provision of the parties' collective

negotiations agreement. The Board opposes the petition for four principal reasons: (1) the BSC is a supervisor within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act); (2) inclusion of the BSC in the Association's unit would engender an impermissible conflict of interest under the Act; (3) the BSC does not fit within the definition of the Association's unit since it performs more specialized and complex tasks than other custodial and maintenance personnel; and (4) the BSC is a craft employee within the meaning of N.J.A.C. 19:10-1.1 and the statutory conditions for the BSC's inclusion in the Association's unit have not be satisfied, pursuant to N.J.S.A. 34:13A-6(d).^{1/}

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2. On December 27, 2017, the staff agent investigating the petition sent a letter to the parties requesting certification(s) from "...individuals with personal knowledge of the facts." The staff agent warned that a failure to provide competent evidence in support of a claim could

^{1/} The Board argues that it can unilaterally set the BSC's salary under Article 16(A),(C) and (E) of the collective negotiations agreement. We decline to address that contention in deciding the merits of a unit clarification petition. The parties must resolve contractual disputes in accordance with their agreement's grievance procedures. N.J.S.A. 34:13A-5.3; State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

result in dismissal of the petition or rejection of a position opposing the petition.

On February 16 and 20, 2018, the Association filed and served on the Board a certification with exhibits from Louis Migliacci, Association President (certification hereinafter referred to as "Migliacci Cert."). The Board filed and served on the Association a brief, exhibits and a certification from Dora Zeno, School Business Administrator (certification hereinafter referred to as "Zeno Cert.") and a certification from Bradley D. Tishman, Esq. ("Tishman Cert."), an attorney with the law firm representing the Board. By email sent on February 16, 2018, the parties were afforded an opportunity to reply to these submissions. They did not.

On March 27, 2018, the assigned staff agent solicited the parties' positions and facts on whether the BSC was a "craft employee" within the meaning of the Act and whether any other unit employees were craft employees. In response, on May 11, 2018, the Association filed and served on the Board a letter brief and second certification from Migliacci (hereinafter referred to as "Second Migliacci Cert.") and the Board filed and served on the Association a supplemental certification from Zeno (hereinafter referred to as "Supplemental Zeno Cert."). The Board and Association also filed replies to these submissions on May 18, 2018.

On May 18, 2018, our Governor signed into law the "Workplace Democracy Enhancement Act" (WDEA), N.J.S.A. 34:13A-5.11 through 5.15. On May 23, 2018, the assigned staff agent requested the parties to file position statements addressing the impact of the WDEA on this matter. On June 8, 2018, the parties filed and served letter briefs and were afforded an opportunity to file replies. They did not.

Based upon our review of the parties' submissions, no substantial and material factual issues require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.6. I make the following:

FINDINGS OF FACT

The Association and Board are parties to a collective negotiations agreement extending from July 1, 2012 through June 30, 2015. (Zeno Cert., Exhibit A). Article 1 of the Agreement sets forth a recognition provision defining the Association's unit as including certificated and non-certificated employees, including teachers, specialists, nurses, guidance counselors, secretaries, custodians, maintenance employees, bus drivers/mechanics, hall/cafeteria security monitors, instructional aides, transportation aides, technical support assistants and a district mail carrier. (Zeno Cert., Exhibit A).^{2/}

^{2/} On July 10, 2017, the Board ratified a successor agreement extending from July 1, 2015 through June 30, 2018. The successor agreement does not modify the recognition clause in the 2012-2015 agreement. (Zeno Cert., Paragraph 2 and
(continued...)

The recognition clause does not exclude titles from the unit. (Zeno Cert., Exhibit A).

In November, 2016, a unit maintenance employee performing electrical work resigned his employment. (Migliacci Cert., Response to Question 10).^{3/} The Board sought to replace him with another maintenance employee with similar electrical work experience. (Zeno Cert., Paragraph 6). On November 28, 2016, the Board published a job posting for the position of "Maintenance-Electrician." (Zeno Cert., Paragraph 7).

The job posting for the Maintenance-Electrician requires applicants to possess "electrical and mechanical skills;" to hold a New Jersey Electrical Contractor's License (NJECL), and to have five years' experience in the electrical mechanical trades. (Zeno Cert., Exhibit B). On December 19, 2016, the Board published a job posting for a new title, "Building Services Coordinator", in lieu of "Maintenance-Electrician." (Zeno Cert., Paragraph 13; Tishman Cert., Response to Question 1; Migliacci Cert., Response to Question 10). The job posting for the BSC was identical to the posting for the Maintenance-Electrician position, but added two additional responsibilities: (1) the BSC

^{2/} (...continued)
Exhibit A).

^{3/} References to numbered questions are references to the questions set forth in the staff agent's December 27, 2017 investigatory letter.

would "provide building repairs and enhancements which support an efficient and safe educational environment" and "must be a multi-skilled building equipment worker." (Zeno Cert., Exhibits B and F). Zeno certifies that the BSC was created to be a "...supervisory position that would alleviate some of the Supervisor of Grounds and Maintenance Staff's responsibilities" and would "...serve as the Departmental Supervisor during the actual Supervisor's absence." (Zeno Cert., Paragraphs 13-15).

The Board also approved a job description for the BSC on December 19, 2016. (Zeno Cert., Exhibit C; Migliacci Cert., Response to Question 10). According to the job description, the BSC must possess "electrical and mechanical skills" and be "familiar with all maintenance functions as performed in public school or institutional facilities" and hold and maintain a NJECL. (Zeno Cert., Exhibit C). The BSC reports to the Supervisor of Buildings and Grounds and must perform "electrical maintenance of assigned buildings and grounds facilities," provide "maintenance of heating, air-conditioning and refrigeration systems" and "perform all other duties as assigned by the Supervisor of Buildings and Grounds." (Zeno Cert., Exhibit C). According to the job description, the BSC's job performance is evaluated by the District's Business Administrator. (Zeno Cert., Exhibit C).

On January 5, 2017, the Board hired Louis Chuddley as the BSC. (Tishman Cert., Response to Question 2; Migliacci Cert., Response to Question 2). Chuddley started work on January 23, 2017. (Tishman Cert., Response to Question 2; Migliacci Cert., Response to Question 2).

Both parties certify that the BSC is a craft employee within the meaning of the Act^{4/} because he is a licensed electrician who utilizes skills acquired through a substantial period of training and demonstrates a high degree of judgment and manual dexterity in his work. (Second Migliacci Cert., Responses to Questions 1, 2 and 4^{5/}; Supplemental Zeno Cert., Paragraph 2). Migliacci certifies that Chuddley performs a "wide array of electrical work." (Second Migliacci Cert., Paragraph 1). Migliacci also

4/ N.J.A.C. 19:10-1.1 defines a craft employee as:

[A]ny employee who is engaged with helpers or apprentices in a manual pursuit requiring the exercise of craft skills which are normally acquired through a long and substantial period of training or a formal apprenticeship and which in their exercise call for a high degree of judgment and manual dexterity, one or both, and for ability to work with a minimum of supervision. The term shall also include an apprentice or helper who works under the direction of a journeyman craftsman and is in a direct line of succession in the craft.

5/ Migliacci also asserted that three heating, ventilation and air conditioning (HVAC) mechanics employed by the Board in 2000 and 2007 were craft employees. (Second Migliacci Cert., Response to Question 2(a)). The Association, however, recanted that position in a letter dated May 18, 2018, writing that "...the Association is in agreement with the Board that three maintenance employees with HVAC certifications are not craft employees."

asserts that another maintenance unit employee, a journeyman electrician, Jason Gardner, was a craft employee under the Act (Second Migliacci Cert., Response to Question 2).

Jason Gardner performed electrical work for the Board between December 2013 and December 2016, after which he resigned and was replaced by Chuddley. (Supplemental Zeno Cert., Paragraph 7; Second Migliacci Cert., Responses to Questions 2 and 5). The Board acknowledges that Gardner was a member of the Association's unit, as he was considered a "maintenance worker," but denies that he was a craft employee (Supplemental Zeno Cert., Paragraph 7).

On April 14, 1969, the Board and Association entered into a contract extending from July 1, 1969 through June 30, 1970 that recognized the Association as the majority representative of a wall-to-wall unit that included, among others, teachers, nurses, custodians and maintenance employees. The unit was created through recognition by the Board. Jefferson Tp. Bd of Ed., P.E.R.C. No. 61, NJPER Supp 248, 249 (¶61 1971). No findings of fact in that decision indicate that craft employees "voted" to be included in the Association's unit. Id.

ANALYSIS

The question arising in this case is whether a long recognized broad-based collective negotiations unit of professional (certificated) employees and non-certificated, non-

craft employees may be clarified to include a craft employee if craft employees were never afforded the opportunity to vote on whether they wished to be included in a unit with non-craft employees. The facts show and the parties agree that the BSC is a craft employee within the meaning of the Act, but disagree about whether the BSC should be included in the unit. The Association contends that its unit should be clarified to include the BSC under the WDEA and Commission precedent. The Board disagrees. I disagree with the Association's position and hold that craft employee Chuddley cannot be included in a unit with non-craft employees absent an opportunity to vote for inclusion. In so holding, I find that a unit clarification petition is not the appropriate means for adding the BSC to the Association's unit. Instead, the Association may file a timely representation petition for certification to add the BSC to its unit and afford the BSC the opportunity to vote for or against inclusion in the Association's unit.

Craft employees have a statutory right to choose representation in a unit with non-craft employees. N.J.S.A. 34:13A-6(d). Our Act provides, in a pertinent part:

The commission, through the Division of Public Employment Relations, is hereby empowered to resolve questions concerning representation of public employees by conducting a secret ballot election or utilizing any other appropriate and suitable method

designed to ascertain the free choice of employees. The division shall decide in each instance which unit of employees is appropriate for collective negotiation, provided that, except where dictated by established practice, prior agreement, or special circumstances, **no unit shall be appropriate which includes** (1) both supervisors and non-supervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit, or (3) **both craft and non-craft employees unless a majority of such craft employees vote for inclusion in such unit.** [N.J.S.A. 34:13A-6(d), emphasis added]

Since 1969, we have consistently interpreted N.J.S.A. 34:13A-6(d) to require the Commission to afford craft employees the option of voting to be included in a unit with non-craft employees (otherwise referred to as the "craft option"). City of Jersey City, P.E.R.C. No. 5, NJPER Supp. 16 (¶5 1969); New Jersey Highway Authority, E.D. No. 37, NJPER Supp. 509 (¶128 1971); Essex County, D.R. No. 80-16, 5 NJPER 534 (¶10274 1979); Bergen County Housing Authority, D.R. No. 88-37, 14 NJPER 449 (¶19185 1988); Camden County Health Services, D.R. No. 89-36, 15 NJPER 379,382 (¶20161 1989). The Commission has also interpreted very similar language in N.J.S.A. 34:13A-6(d) as affording professionals the option of voting to be included in a unit with

nonprofessionals (otherwise known as the "professional option").^{6/}
Bergen Pines Hospital, D.R. No. 80-20, 6 NJPER 61 (¶11034 1980);
Mercer Cty., P.E.R.C. No. 89-112, 15 NJPER 277 (¶20121 1989);
Village Charter School, D.R. No. 2001-12, 27 NJPER 203 (¶32069
2001).

In initial representation petition instances regarding professional and/or craft employees, the Commission has found that the statutory right to choose representation in a non-craft or non-professional unit cannot be waived by a union or employer. Bergen Pines Hospital, 6 NJPER 61; Camden County Health Services, 15 NJPER 379. Nor can the existence of a mixed unit of professional/nonprofessional employees or craft/non-craft employees respectively strip a craft employee or professional employee of the right to choose whether to be part of a unit, unless that unit composition was formed by an agreement pre-dating the enactment of the Act. Id.; New Jersey Turnpike Authority, P.E.R.C. No. 24, NJPER Supp. 86 (¶24 1969); Rutgers

^{6/} Since N.J.S.A. 34:13A-6(d) sets forth virtually identical language recognizing a craft and professional employee's option to vote for inclusion in a unit, cases applying the professional option are instructive in analyzing how this statute should be applied and understood with respect to craft options. State of New Jersey, P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), aff'd 42 NJPER 165 (¶41 App. Div. 2015)(Appellate Division agreed with Commission's analysis of similarly worded statutes governing the "at-will" status of different state law enforcement personnel).

University, D.R. No. 90-27, 16 NJPER 294 (¶21119 1990). N.J.S.A. 34:13A-6(d) is a statutory mandate "...that a professional [or craft] employee may not be included in a unit with nonprofessional [or noncraft] employees through a Commission certification unless the professional [or craft] employee has been afforded an opportunity by means of a professional option [or craft option] vote, and has indicated a desire to be included in a unit with nonprofessional employees." 6 NJPER at 63.

The statutory right to choose representation runs counter to the purpose and function of a clarification of unit petition. In a unit clarification proceeding to add or "accrete" titles to an existing unit, the petitioned-for employee's desire for representation is irrelevant. Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389 (1977); Essex Cty, H.O. No. 2003-1, 28 NJPER 438 (¶33162 2002). As explained in Essex County:

If an accretion to an existing unit is appropriate [by way of unit clarification], then '...no self-determination election is afforded to those employees so accreted...as this would be disruptive of a stable bargaining relationship.' Permitting voter choice provides an opportunity for a minority group of employees to opt out of a unit in which they naturally belong--a privilege (set against the compelling policy reasons that a majority determine the representational status of a unit) that is not available to other minority groups of employees without extenuating reasons.

Similarly, employees in newly created titles are entitled to no greater free choice rights than new employees in titles originally placed in the unit. The public interest in preserving stable employment relationships would, in view of the potential disruption to the existing negotiations relationship, mandate that these employees be included in the unit. [28 NJPER at 447-448; quoting Fair Lawn Bd. of Ed., D.R. No. 78-22, 3 NJPER 389, 390 (1977)][internal quotations omitted]

See also, Fair Lawn Bd. of Ed., 3 NJPER 390 (Director holds that where unit clarification by accretion is "appropriate the disputed employees will be accreted to Petitioner's unit without recourse to the desires of the disputed employees", but if "a question concerning representation exists, the Clarification Petition is to be dismissed as improper").

Recognizing the mandate of N.J.S.A. 34:13A-6(d) and decades of Commission precedent, I find that the Association's unit clarification petition is not the appropriate procedure for adding the BSC to the Association's unit because it would deprive the BSC of a statutory right to choose representation in a unit with non-craft employees. It is undisputed that the BSC is a craft employee and that the Association is seeking to add the BSC to a unit consisting of non-craft employees, including teachers, aides, secretaries and other non-craft employees. No facts indicate that a mixed unit of craft/non-craft employees existed

before 1968 (year of the Act's enactment) that would qualify as an exception to the rule governing craft options.^{7/} The BSC must be afforded the opportunity to vote on whether to be included in the Association's unit.

Conceding that the BSC is a craft employee, the Association contends this fact is irrelevant, given the recent passage of the WDEA. It quotes with emphasis these provisions of the WDEA in support of its position that the craft employee should be included in its unit without a craft option:

(a) 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.

(b) Negotiations unit work means work that is performed by any employees who are included in a negotiations unit represented by an exclusive representative employee organization without regard to job title, job classification or number of hours worked, except that

^{7/} The Association argues that we should presume that if a craft employee (informally) voted for inclusion in the Association's unit, he or she would have been part of the sub-group of custodians and maintenance personnel that voted for inclusion in its unit in 1969. (Page 2 of Association's May 11, 2018 letter brief). We decline to adopt such a presumption in the absence of a finding that a craft employee in the petitioned-for unit voted for inclusion in the unit. Moreover, even if we adopted that presumption, the BSC still enjoys the right to formally choose representation in this unit. Camden County Health Services.

employees who are confidential employees or managerial executives as those terms are defined by Section 1 of P.L. 1941, c. 100 (C.34:13A-3), or elected officials, members of boards or 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-5.11(a) and (b)]

The Association contends these WDEA provisions "supersede" N.J.S.A. 34:13A-6(d) and require the inclusion of the BSC in its unit, regardless of his status as a craft employee.^{8/} According to the Association, since the WDEA was passed later in time than N.J.S.A. 34:13A-6(d) and since the WDEA does not identify the categories of craft or professional employees in its list of exclusions, the Legislature, through this omission, implicitly repealed N.J.S.A. 34:13A-6(d). I disagree.

In construing companion statutes, "...implied repealers are disfavored" by the courts and this Commission. Jackson Tp. Bd. of Ed., P.E.R.C. No. 99-62, 25 NJPER 87 (¶30037 1999), aff'd 334 N.J. Super. 162 (App. Div. 2000), 26 NJPER 373 (¶31150 App. Div.

^{8/} The Association also argues the WDEA nullifies the longstanding prohibition against including supervisors in a non-supervisory unit. Since I do not need to address this issue to decide this case, I decline to do so and leave for another day in a contested case the resolution of that question. N.J.S.A. 34:13A-5.3 (Commission will not address questions concerning unit definition in the absence of a dispute).

2000), certif. denied 165 N.J. 676 (2000), 27 NJPER 18 (¶32010 Sup. Ct. 2000); Essex County Sheriff, P.E.R.C. No. 2006-86, 32 NJPER 164 (¶73 2006). "A conclusion that a repeal has occurred requires clear and compelling evidence, free from reasonable doubt that the Legislature intended a repeal." Jackson Tp. Bd. of Ed., 334 N.J.Super. at 171; Yacenda Food Management Corp. v. New Jersey Highway Authority, 203 N.J.Super. 264, 274 (App. Div. 1985)("The doctrine of implied repeal is disfavored in our law unless the later expression of the legislative will is so clearly in conflict with the earlier statute that the two cannot reasonably stand together."). If companion statutes can be read harmoniously, each given effect in their own respective spheres of operation, then "...there is no inconsistency from which an intent to repeal may be inferred." 334 N.J.Super. at 171; 203 N.J.Super. at 274.

Representation petitions for certification raise two fundamental questions: (1) does a majority of the petitioned-for employees *choose* exclusive representation by the petitioner for purposes of collective negotiations; and (2) is it *appropriate* to certify the petitioned-for employees in a collective negotiations unit under the Act? The craft option statute safeguards the right to *choose* representation in a unit. That right was created in 1968 with the enactment of N.J.S.A. 34:13A-5.3, which provides that public employees shall have "...the right, freely and without

fear of penalty or reprisal, to form, join and assist any employee organization" and the concomitant passage of craft option statute. N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-6(d). The Commission and our Supreme Court have "...liberally construed the Act to protect these rights." State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507, 508 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985); Galloway Tp. Bd. of Ed. V. Galloway Tp. Educ. Ass'n, 78 N.J. 25 (1978).

The WDEA, on the other hand, describes the conditions under which it is *appropriate* to include an employee in a unit. It provides that if an employee is "full-time or part-time," performs "negotiations unit work," and is not "confidential," a "managerial executive," "casual" or an elected official or member of a board or commission, then that employee shall be included in a unit. N.J.S.A. 34:13A-5.15(a) and (b). But the WDEA says nothing of the right to choose representation.

Given this omission, the WDEA and craft option statute can be read harmoniously, *i.e.*, by giving effect to each statute without creating a conflict. The BSC can choose whether to be represented by the Association under N.J.S.A. 34:13A-6(d). If he chooses representation, the WDEA is applied to determine whether it is appropriate to include the BSC in the Association's unit. Critically, these statutes can both be given effect in the context of a representation petition for certification, but not

in a unit clarification petition because the latter procedure does not afford the BSC the option to choose representation.

The Association argues that the WDEA's silence about the craft option is clear evidence of the Legislature's intent to repeal the craft option. Precisely the opposite is true. In construing the WDEA and N.J.S.A. 34:13A-6(d), we "...must assume that the Legislature is thoroughly conversant with its own enactments and with the judicial construction placed on them." Yacenda Food Management, 203 N.J.Super. at 273; citing Quaremba v. Allan, 67 N.J. 1 (1975). In enacting the WDEA, therefore, we must assume the Legislature was aware of the craft option statute and the decades of precedent recognizing craft and professional options to choose representation. With that knowledge, the Legislature chose not to address or modify craft and professional employees' longstanding right to choose representation in a non-craft or non-professional unit. The omission of any reference to N.J.S.A. 34:13A-6(d) in the WDEA is a strong indication, in my view, that the Legislature did not intend to extinguish a craft employee's right to choose representation in a non-craft unit. 203 N.J.Super. at 273.

For these reasons, I dismiss the Association's unit clarification petition as an improper method for adding the BSC to its unit. The Association may file a timely representation petition to add the BSC to its unit and the Board may raise

objection(s) to the validity of that petition and/or the appropriateness of including the BSC in the Association's unit. Given this disposition, I do not now need to address the remaining arguments of the parties concerning whether the BSC is a supervisor; whether his inclusion in the Association's unit would create an impermissible conflict of interest, and/or whether the BSC is covered by the recognition clause in the parties' collective negotiations agreement.

ORDER

The Association's clarification of unit petition is dismissed.

By Order of the Acting
Director of Representation

/s/Jonathan Roth
Acting Director of Representation

DATED: July 20, 2018
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 August 3, 2018.