

P.E.R.C. NO. 2018-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK STATE OPERATED SCHOOL DISTRICT,

Public Employer,

-and-

Docket No. RO-2018-005

NEWARK TEACHERS UNION, LOCAL 481,
AFT, AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the request for review of the Acting Director's decision in a representation petition filed by the NTU. The Commission finds no compelling reason warranting review of the acting Director's determination and that the Acting Director properly found that the original petition was withdrawn and the instant petition was timely filed. The Commission also finds that the District failed to demonstrate that it suffered any harm resulting from the NTU's failure to name the SEIU as an interested party or the NTU's differing unit descriptions and that even if the petitions had been processed as wholly independent filings, the ultimate outcome would remain the same.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Public Employer, Scarini &
Hollenbeck, LLC, attorneys (Shana T. Don, of
counsel)

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

DECISION

On November 27, 2017, the Newark State Operated School District (District) filed a request for review of D.R. No. 2018-12, 44 NJPER 195 (¶57 2017) [D.R.]. In that decision, the Acting Director of Representation (Acting Director) granted a representation petition filed by the Newark Teachers Union, Local 481, AFT, AFL-CIO (NTU). The petition, supported by the required number of authorization cards, sought to add the titles of school operations manager, school operations assistant, community engagement specialist, family advocate, partnership and transition senior coordinator, and data analyst to the NTU's existing unit of non-supervisory, certificated and non-

certificated employees of the District. The Acting Director found that school operations managers and partnership and transition senior coordinators were not supervisors or managerial executives within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. The Acting Director also found that data analysts did not meet the definition of confidential employees under the Act. Finally, the Acting Director found that transition coordinators and family advocates shared a community of interest with the NTU's existing unit members.

On December 4, 2017, the NTU filed a response opposing review. On December 8, the District filed a reply brief. On December 11, the NTU filed a response.^{1/}

PROCEDURAL HISTORY & FACTUAL BACKGROUND

The NTU currently represents a unit comprised of the following titles:

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,

^{1/} The parties were granted leave to file reply papers.

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 coordinators, clerk stenographer (school), physical therapist assistant, text book clerk and assistant text book clerk in the Newark Evening High School, parent liaisons, parent involvement community specialists and interpreters but excluding department chairpersons, acting department chairpersons, head guidance counselors, teachers to assist the principal, vice principals, principals, acting vice principals, acting principals, directors, assistant superintendents, superintendents, laboratory assistants, nurses, maintenance workers, cafeteria workers, security guards, per diem substitutes with thirty (30) days non-consecutive service in the same position who are not Newark Public Schools appointed, teacher and school aides, and all permanent, acting, temporary or provisional supervisory employees.

The District and the NTU are parties to a collective negotiations agreement (CNA) effective from July 1, 2009 through June 30, 2010, continued by a series of memoranda of agreement extending from July 1, 2010 through June 30, 2019.

On September 11, 2014, the NTU filed a clarification of unit petition (CU-2015-005) seeking to clarify that the titles part-time pre-screener, data analyst, school operations management assistant, and community engagement specialist were included in the NTU's existing unit. On July 26, 2016, the NTU withdrew its petition.

On December 9, 2014, the Service Employees International Union, Local 617 (SEIU), filed a clarification of unit petition (CU-2015-012) seeking to clarify that the titles family advocate, staffing coordinator, data analyst, health coordinator, coordinator contact center, community engagement specialist, coordinator of employee services, and coordinator of federal programs were included in the SEIU's existing unit. On December 15, the Director of Representation (Director) sent a letter to the NTU indicating that the SEIU had filed CU-2015-012 and providing guidance on how to intervene. On February 12, 2015, the NTU's request to intervene was granted. On June 1, 2016, the Director issued D.R. No. 2016-9, 43 NJPER 19 (¶6 2016) dismissing the SEIU's petition and denying the NTU's request to add the data analyst title to its unit. On September 22, 2016, the Commission issued P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016) affirming D.R. No. 2016-9 and denying requests for review filed by the SEIU and the NTU.

On August 15, 2017, the NTU filed a representation petition (RO-2018-002) supported by the required number of authorization cards seeking to "[a]dd to the [NTU's existing unit, or, only if the employer objects, certify a separate unit for" 189 employees in the following titles: school operations manager, school operations assistant, community engagement specialist, family advocate, partnership and transition senior coordinator, and data

analyst. The NTU's petition indicated that there were no other employee organizations that had an interest in the petition and did not specify any titles that would be excluded from the unit. An investigation was initiated and the petition was processed for approximately two months. On October 16, 2017, however, the NTU withdrew RO-2018-002 because it was filed outside the open period. See N.J.A.C. 19:11-28.

On October 16, 2017, the NTU filed the underlying, nearly-identical representation petition (RO-2018-005) seeking only to "[a]dd to the [NTU's existing unit]" 189 employees in the following titles: school operations manager, school operations assistant, community engagement specialist, family advocate, partnership and transition senior coordinator, and data analyst. Again, the NTU's petition indicated that there were no other employee organizations that had an interest in the petition but specified that "[t]itles excluded under the existing recognition clause" would be excluded from the unit. Compare RO-2018-002 with RO-2018-005. On October 31, the Acting Director issued D.R. No. 2018-12 granting the NTU's petition.

The instant request for review ensued.

LEGAL ARGUMENTS

The District advances four main arguments in support of its request:

- (1) a representation petition may not be amended to cure a time bar;
- (2) the [Acting Director's] decision makes assumption of facts in the absence of documentary or testimonial evidence;
- (3) the representation petitions are not the same and should be regarded as such; and
- (4) the NTU failed to identify an organization which may be interested in the petitioned-for employees.

In response, the NTU argues that the District "never asserted a contract bar defense . . . even though the initial petition was filed seventeen days before the beginning of the [o]pen [p]eriod." After the District "indicated . . . that it would not waive any contract bar/timeliness defense, the NTU simply refiled its petition during the [o]pen [p]eriod" in order to "cure[] any contract bar/timeliness concerns." The NTU maintains that the Acting Director "considered and rejected each of the District's [substantive] objections" that are reiterated in the instant request for review. The NTU also asserts that the fact that "SEIU . . . did not seek to file a representation petition or intervene in these proceedings does not provide a factual or legal basis to reject the NTU's petition or grant the District's request for review."

STANDARD OF REVIEW

Pursuant to N.J.A.C. 19:11-8.2, "[a] request for review will be granted only for one or more of these compelling reasons:"

1. A substantial question of law is raised concerning the interpretation or administration of the Act or these rules;
2. The Director of Representation's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of the party seeking review;
3. The conduct of the hearing or any ruling made in connection with the proceeding may have resulted in prejudicial error; and/or
4. An important Commission rule or policy should be reconsidered.

In Somerset Cty., D.R. No. 2014-14, 40 NJPER 527 (¶172 2014), the Director of Representation stated the following:

The Commission is responsible for determining the appropriate collective negotiations unit when questions concerning representation of public employees arise. N.J.S.A. 34:13A-6(d). When more than one unit is potentially appropriate, the Commission must decide which unit configuration is the most appropriate. State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974). The Act mandates that the Commission define the negotiations unit "with due regard for the community of interest among the employees concerned." N.J.S.A. 34:13A-5.3. To determine whether the requisite community of interest exists in a proposed unit, the Commission examines a number of factors, such as common employer, shared goals, common supervision, location of employment, job duties, and similarity in wages, hours and terms and conditions of employment. See State of New Jersey (State College Locals),

D.R. No. 97-5, 24 NJPER 295, 297 (¶29141 1996); West Milford Bd. of Ed., P.E.R.C. No. 56, NJPER Supp. 218, 219 (¶56 1971). "[T]he importance of any one factor in a particular case depends upon how it interrelates with other factors." Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272, 273 (¶15134 1984).

Several other considerations are also relevant with respect to unit determinations. The New Jersey Supreme Court has affirmed the Commission's policy favoring broad-based negotiations units over units structured, along departmental or occupational lines. State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974). The Commission has explained that broad-based units streamline negotiations by reducing the potential for such problems as "competing demands, whipsawing and continuous negotiations . . ." that could result from negotiations with numerous smaller units. Id. at 241 (quoting State of New Jersey (Prof'l Ass'n)). P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972)). The Commission also examines whether a proposed unit would lead to undue unit fragmentation or proliferation. Id. See also New Jersey State Coll. of Medicine & Dentistry, D.R. No. 77-17, 3 NJPER 178 (1977); Teaneck Tp., P.E.R.C. No. 88-20, 13 NJPER 721 (P18270 1987). Additionally, the Commission considers the history of the negotiations units, the extent of organization of the petitioned-for titles, the desires of the parties and the Act's purpose. See Passaic Cty., P.E.R.C. No. 87-123, 13 NJPER 298 (¶18125 1987) recon. den. P.E.R.C. No. 87-141, 13 NJPER 483 (¶18179 1987); State of New Jersey (Human Services), D.R. No. 95-1, 20 NJPER 308 (¶25154 1994); Englewood Bd. of Ed., P.E.R.C. No. 82-25, 7 NJPER 516 (¶12228 1981). Lastly, the Commission must balance the need to find the most appropriate unit with the public employees' right to obtain representation. Univ. of Medicine and Dentistry of N.J., P.E.R.C. No. 84-28, 9 NJPER 598, 600 (¶14253 1983); Bergen Cty.

(Physicians and Dentists), D.R. No. 87-3, 12
NJPER 619, 620 (¶17234 1986).

The Commission has a "preference for broad-based units and reluctance to form units along occupational or departmental lines [that] is well established." Gloucester Cty., P.E.R.C. No. 2011-69, 37 NJPER 141 (¶42 2011) (citing State v. Prof'l Ass'n of N.J. Dep't of Educ., 64 N.J. 231 (1974)).

ANALYSIS

We find no compelling reason warranting review of the Acting Director's determination. However, we will briefly address the District's arguments.

With respect to the timeliness of the NTU's petition, we agree with the Acting Director's determination that RO-2018-002 was withdrawn and RO-2018-005 was timely filed during the applicable open period.^{2/} See D.R. at 2. After determining that

^{2/} N.J.A.C. 19:11-2.8, entitled "Timeliness of petitions," provides in pertinent part:

(c) During the period of an existing written agreement containing substantive terms and conditions of employment and having a term of three years or less, a petition for certification of public employee representative or a petition for decertification of public employee representative normally will not be considered timely filed unless:

. . .

3. In a case involving employees of a school district, the petition is filed during the period between September 1 and October 15,

(continued...)

RO-2018-002 was not timely filed, it was within the Acting Director's discretion to "request the party filing such a petition to withdraw the petition without prejudice"

N.J.A.C. 19:11-2.3(a) (emphasis added). Moreover, the District has not cited any authority precluding the NTU's actions nor has it demonstrated that it suffered any resulting harm.

With respect to the contents of the NTU's petition, we acknowledge the issues raised by the District regarding RO-2018-002 and RO-2018-005.^{3/}

2/ (...continued)

inclusive, within the last 12 months of such agreement.

(d) For the purpose of determining a timely filing, an agreement for a term in excess of three years will be treated as a three-year agreement and will not bar a petition filed at any time after the end of the third year of the agreement

3/ N.J.A.C. 19:11-1.2, entitled "Contents of petition for certification," provides in pertinent part:

(a) A petition for certification of public employee representative filed by a public employee, a group of public employees, any individual, or an employee organization shall contain:

-
- 2. A description of the collective negotiations unit claimed to be appropriate for the purpose of exclusive representation by the petitioner. Such description shall indicate the general classifications of employees sought to be included and those sought to

(continued...)

Specifically, despite the history outlined above regarding CU-2015-005 and CU-2015-012, the NTU neglected to identify the SEIU as an "interested employee organization" in both petitions pursuant to N.J.A.C. 19:11-1.2(a)4. See, e.g., D.R. No. 2016-9, 43 NJPER 19 (¶6 2016), adopted P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016). However, the District raised the SEIU's potential interest during the processing of RO-2018-002 (see District's Br. at Exh. N); has acknowledged sending "appropriate notice to the SEIU" regarding RO-2018-002 (District's Reply Br. at 3); and does not dispute that it failed to provide the Acting Director with a Certification of Posting related to RO-2018-002^{4/} in accordance

3/ (...continued)

be excluded and the approximate number of employees in the unit claimed to be appropriate;

. . .

4. The names, addresses and telephone numbers of any other interested employee organizations, if known to the petitioner;

. . .

8. This dated and signed certification by the petitioner or its representative: "I declare that I have read the above petition and that the information is true to the best of my knowledge and belief."

4/ The District asserts that the agency did not provide a second Notice to All Employees pertaining to RO-2018-005. We find that this is of no moment pursuant to N.J.A.C. 19:11-2.4(e) ("[t]he failure of the Director of Representation to direct the posting of such notices or the failure of the public employer to post notices normally shall not serve to delay or invalidate any subsequent
(continued...)

with N.J.A.C. 19:11-2.4(c) (see D.R. at 4). To date, the SEIU has it contacted the agency regarding RO-2018-002 or RO-2018-005 nor has not sought to intervene in either matter pursuant to N.J.A.C. 19:11-2.7(c). Moreover, the District has not demonstrated that it suffered any harm resulting from the NTU's failure to name the SEIU as an interested party.^{5/}

Turning to the differing unit descriptions in RO-2018-002 and RO-2018-005, we find same to be a distinction without a meaningful difference. In both petitions, the NTU sought certification by card check for the same titles and number of employees. Compare RO-2018-002 with RO-2018-005. Although the NTU was required to provide "[a] description of the collective negotiations unit claimed to be appropriate" (N.J.A.C. 19:11-1.2(a)2 (emphasis added)), the proposed Stipulation of Appropriate Unit (see District's Br. at Exh. K) and the Acting Director's determination regarding the appropriate unit (see D.R. at 18) included a unit description that was based upon the agency's investigation (see N.J.A.C. 19:11-2.2) - not the unit that the NTU "claimed" to be appropriate in either of its

4/ (...continued)
Commission action which occurs pursuant to the filing of a petition").

5/ When the agency is made aware of the existence of an interested employee organization, it should - either directly through correspondence or indirectly through the parties - notify the other organization of the pending representation petition.

petitions. See also, N.J.S.A. 34:13A-6(d) (the agency "shall decide in each instance which unit of employees is appropriate for collective negotiation"). Again, the District has not demonstrated that it - or the employees affected by the representation petition - suffered any harm resulting from the NTU's differing unit descriptions in RO-2018-002 and RO-2018-005.

Notwithstanding these technical discrepancies, we agree with the Acting Director's determination that RO-2018-005 sought certification of the same unit described, and was supported by the same authorization cards submitted,^{6/} in RO-2018-002. See D.R. at 2. The District has not demonstrated that it suffered any harm based upon the manner in which the petitions were processed; the substantive issues advanced in this request for review were also raised before the Acting Director. See D.R. at 4-18. Moreover, even if the petitions had been processed as wholly independent filings, we find no reason to believe that the ultimate outcome would have been different. See N.J.A.C. 19:11-2.6.

With respect to the substance of the NTU's petition, the District reiterates arguments advanced before the Acting Director

6/ We have reviewed the executed authorization cards and find that they are dated within six months prior to the filing of both petitions. See N.J.A.C. 19:10-1.1 ("'[a]uthorization card' means a dated card or separate sheet of paper signed by an employee, normally within six months prior to the filing of a petition").

(i.e., that "the [petitioned-for] titles lack a community of interest with NTU members, that certain positions are managerial and others confidential pursuant to the Act") and asserts that the NTU's failure to submit contrary evidence weighs in its favor. See District's Br. at 7-9; see also D.R. at 5-19. Based upon our review of the record and the parties' arguments, we find adequate factual and legal support for the Acting Director's determination.

The Commission has "specifically held that many different types of school district unit structures are appropriate for certification: some containing teachers alone, some containing one or more groups of supportive staff alone, and some containing a mixture of teachers and one or more groups of supportive staff." Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984).

When a dispute concerning the propriety of including one or more groups of supportive staff with teachers and professional school district employees has arisen, the Commission since 1969 has consistently found . . . that teachers and supportive staff have a community of interest stemming from such factors as their shared goals, the central authority controlling their working conditions, and their common working facilities and environment; and that this community of interest generally warrants giving teachers and supportive staff the opportunity to choose a unified representative in a single unit if they so desire. In the Commission's judgment, affording teachers and supportive staff such an opportunity promotes labor stability since

unified employee representation may permit negotiations with an already centralized and unified employer to proceed more smoothly.

[Id. (emphasis added).]

Contrary to the District's assertions, the evidence submitted sufficiently demonstrates a community of interest that is consistent with relative legal precedent between the petitioned-for titles and existing NTU unit members. See, e.g., Somerset Cty.; Piscataway Tp. Bd. of Ed. Similar to existing NTU unit members, the petitioned-for titles are District employees tasked with promoting and improving the education of students; are responsible for reporting to school principals or administrators within the District and generally share common working facilities and environment; are salaried positions that "receive similar benefits such as paid leave and medical insurance"; are charged with performing duties related to the District's mission and provide support in the management and operation of the District. See District's Br., Exh. S at ¶¶ 5-14, 23, 26-27, 28-29, 31-32 and attached job descriptions; see also D.R. at 6-9, 15-18.

Contrary to the District's assertions, the evidence submitted demonstrates that the petitioned-for titles are not managerial executives^{7/} or supervisors. According to the

^{7/} Pursuant to N.J.S.A. 34:13A-3(f), "in any school district [managerial executives] shall include only the

(continued...)

District's Chief Talent Officer, the petitioned-for titles "do not have authority to make employment decisions" or "to hire, fire, or discipline any NTU unit employees, or recommend same." See District's Br., Exh. S at ¶¶ 4, 7-13, 23, 27; see also D.R. at 11-12. Similarly, the evidence submitted also demonstrates that the petitioned-for titles are not confidential employees.^{8/} According to the District's Chief Talent Officer, the petitioned-for employees "are not involved in collective negotiations, grievance processing or [any] other matters involving the NTU's administration of their collective negotiations agreements." See District's Br., Exh. S at ¶¶ 7-13, 28, 31; see also D.R. at 12-15.

ORDER

The request for review is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: April 26, 2018

Trenton, New Jersey

^{7/} (...continued)
superintendent or other chief administrator . . . and the assistant superintendent of the district."

^{8/} Pursuant to N.J.S.A. 34:13A-3(g), "'confidential employees' of a public employer means employees whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties."