

P.E.R.C. NO. 2018-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(MONTCLAIR STATE UNIVERSITY),

Public Employer,

-and-

Docket No. CU-2016-022

COUNCIL OF NEW JERSEY
STATE COLLEGE LOCALS, AFT, AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the request for review of the Acting Director of Representation's decision in a clarification of unit petition filed by the Council. The Commission finds no compelling reason warranting review of the Acting Director's determination and that the Acting Director properly found that the petition was timely filed and appropriately issued her decision clarifying the unit without a hearing.

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, McElroy, Deutsch,
Mulvaney & Carpenter, LLP, attorneys (John J.
Peirano, of counsel and on the brief; Michael
J. Dee, of counsel and on the brief)

For the Petitioner, Debra Davis, Staff
Representative

DECISION

On January 24, 2018, the State of New Jersey (State),
Montclair State University (MSU) filed a request for review of
D.R. No. 2018-15, 44 NJPER 244 (¶70 2018) [D.R.]. In that
decision, the Acting Director of Representation (Acting Director)
determined that the following job titles should be included in an
existing unit represented by the Council of New Jersey State
College Locals, AFT, AFL-CIO (Council) effective immediately:
director of special events, assistant director of communications
and marketing, assistant director of media relations, associate
director of donor relations-events, and associate director of

donor relations-scholarships. The Acting Director declined to clarify the Council's unit to include the vacant title of assistant director of annual giving. The Council did not file any response to MSU's request for review.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

The Council represents nine State colleges including MSU and negotiates a global collective agreement, or master agreement, with the State on behalf of its members. The American Federation of Teachers Local 1904 (Local 1904) is a local within the Council that negotiates local agreements with MSU. The State and the Council are parties to successive collective negotiations agreements (CNA) having respective terms of July 1, 2007 through June 30, 2011; July 1, 2011 through June 30, 2015; and July 1, 2015 through June 30, 2019.^{1/}

Article I of the parties' 2011-2015 CNA, entitled "Recognition and Definition of Terms," Section A, provides:

The STATE, by the Office of Employee Relations, and the State Colleges/Universities hereby recognize the UNION as the exclusive representative for the purpose of collective negotiations for all terms and conditions of employment in a unit embracing all nine State Colleges/Universities, the composition of which is described as follows:

Included:

1. Teaching and/or research faculty
2. Department chairpersons

^{1/} MSU concedes that the parties' entered into the current CNA on June 30, 2017.

3. Administrative staff (non-managerial)
4. Librarians
5. Student personnel staff
6. Demonstration teachers
7. Demonstration Specialist - A. Harry Moore School
8. Professional academic support personnel (holding faculty rank)
9. Part-time personnel employed in categories 1-8 above who (a) are employed in regular, recurrent positions, (b) work at least half of a full load, and © are employed on either a one-year contract or on at least a second half-year contract occurring during any two consecutive academic years.
10. Members of the State Colleges/Universities Unit who teach summer session. (Inclusion of such employees in the negotiations unit shall not in any way alter the current rights, benefits or duties of such employees except as specifically indicated in this Agreement.)

Excluded:

1. College/University and Vice President
2. Deans, Associate and Assistant Deans and other managerial executives
3. Secretarial staff
4. Maintenance staff
5. Bookstore, food service, etc. staff
6. Adjunct Faculty and academic specialists
7. Graduate assistants
8. All others

Article XLIII of the parties' 2011-2015 CNA, entitled "Duration and Termination," provides in pertinent part:

This Agreement shall remain in full force and effect from July 1, 2011 until June 30, 2015. The Agreement shall automatically be renewed from year to year thereafter, unless either party shall give to the other party written notice of its desire to terminate, modify or amend this Agreement.

On February 29, 2016, the Council filed the underlying clarification of unit petition seeking to include the following job titles in the existing unit:

- assistant director of communications and marketing
- assistant director of annual giving
- assistant director of media relations
- director of red hawk math learning center
- associate director of donor relations-events
- associate director of donor relations-scholarships
- director of special events
- director of media relations
- director of annual giving

On December 7, the Council filed an amended petition withdrawing its petition with respect to the following titles: director of red hawk math learning center, director of media relations, and director of annual giving.

On August 8, 2017, the Acting Director issued a tentative decision that was consistent with her ultimate determination except with respect to the assistant director of annual giving, which was eventually excluded from the existing unit.

On January 10, 2018, the Acting Director issued D.R. No. 2018-15. The instant request for review ensued.

LEGAL ARGUMENTS

MSU advances three main arguments in support of its request:

- the Acting Director's decision misapplied governing Commission precedent regarding the timeliness of a [clarification of unit] petition;
- absent a hearing, the Acting Director was required to accept as true the facts set

forth by [MSU] and not accept disputed facts asserted by the Council; and

-the facts presented by [MSU] establish that the five positions at issue should remain outside the negotiations unit.

The Council has not submitted any response.

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.

The Commission has held that "[t]he purpose of a clarification of unit petition is to resolve questions concerning the scope of a collective negotiations unit within the framework of the Act or as set forth in the unit definition in a Commission certification or the parties' recognition agreement." Newark State-Operated Sch. Dist., P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016).

N.J.S.A. 34:13A-5.3 provides in pertinent part:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees, except in a school district the term managerial executive shall mean the superintendent of schools or his equivalent, nor, except where established practice, prior agreement or special circumstances dictate the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits non-supervisory personnel to membership, and the fact that any organization has such supervisory employees as members shall not deny the right of that organization to represent the appropriate unit in collective negotiations The negotiating unit shall be defined with due regard for the community of interest among the employees concerned, but the commission shall not intervene in matters of recognition and unit definition except in the event of a dispute.

With respect to managerial executives, N.J.S.A. 34:13A-3(f) provides in pertinent part:

In the case of any public employer other than the State of New Jersey, "managerial executives" of a public employer means persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator,

and the assistant superintendent of the district.

See State of New Jersey and Council of New Jersey State College Locals, AFT and Communications Workers of America, AFL-CIO, P.E.R.C. No. 2013-52, 39 NJPER 301 (¶101 2013), aff'd in part and rev'd in part, 41 NJPER 357 (¶113 App. Div. 2015) (holding that "PERC correctly determined that college employees are not state employees when applying N.J.S.A. 34:13A-3(f) for the determination of whether any such employee is a managerial executive"). "In light of the Act's policy favoring the organization of all employees desiring it, [the Commission] has construed this definition narrowly." State of New Jersey (Trenton State College), P.E.R.C. No. 91-93, 17 NJPER 246 (¶22112 1991).

In New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331, 356 (1997), the Supreme Court of New Jersey adopted the following test to determine managerial authority:

A person formulates policies when he develops a particular set of objectives designed to further the mission of [a segment of] the governmental unit and when he selects a course of action from among available alternatives. A person directs the effectuation of policy when he is charged with developing the methods, means, and extent of reaching a policy objective and thus oversees or coordinates policy implementation by line supervisors. Whether or not an employee possesses this level of authority may generally be determined by focusing on the interplay of three factors: (1) the relative position of that employee in

his employer's hierarchy; (2) his functions and responsibilities; and (3) the extent of discretion he exercises.

[citations omitted.]

With respect to confidential employees, N.J.S.A. 34:13A-3(g) provides in pertinent part:

"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.

The Commission's policy to "strictly constru[e] the term confidential employee" is "consistent with the Supreme Court's declaration that the Act's public policy favors the organization of all employees desiring collective negotiations: the burden must therefore be on the party seeking to place an employee outside the Act's protection." State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985).

In New Jersey Turnpike Authority, 150 N.J. at 358, the Supreme Court of New Jersey adopted the following test to determine whether an employee is confidential:

The baseline inquiry remains whether an employee's functional responsibilities or knowledge "would make their membership in any appropriate negotiating unit incompatible with their official duties." Obviously, an employee's access to confidential information may be significant in determining whether that employee's functional responsibilities

or knowledge make membership in a negotiating unit inappropriate. However, mere physical access to information without any accompanying insight about its significance or functional responsibility for its development or implementation may be insufficient in specific cases to warrant exclusion. The test should be employee-specific, and its focus on ascertaining whether, in the totality of the circumstances, an employee's access to information, knowledge concerning its significance, or functional responsibilities in relation to the collective negotiations process make incompatible that employee's inclusion in a negotiating unit. We entrust to PERC in the first instance the responsibility for making such determinations on a case-by-case basis.

[citations omitted.]

With respect to supervisors and conflicts of interest, N.J.S.A. 34:13A-6(d) provides in pertinent part:

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

In West Orange Bd. of Educ. v. Wilton, 57 N.J. 404, 425-427 (1971), the Supreme Court of New Jersey explained that "representatives of the employer and the employees cannot sit on both sides of the negotiating table" because "both employer and employee organization need the undivided loyalty of their representatives and their members . . . if fair and equitable settlement of problems is to be accomplished":

If performance of the obligations or power delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other included employees, the community of interest required for inclusion of such supervisor is not present. While a conflict of interest which is de minimis or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest. . . . [I]n the absence of a more definitive legislative treatment of the problem of appropriate unit for supervisors, each case must be determined on its own particular facts.

The Commission has held "that the Act does, in effect, define a supervisor to be one having authority to hire, discharge, discipline or to effectively recommend the same." Cherry Hill Tp., Dep't of Public Works, P.E.R.C. No. 30, NJPER Supp. 114 (§30 1970). However, "[a] determination of supervisory status . . . requires more than a job description or assertion that an employee has the power to hire, discharge, discipline or effectively recommend." Hackensack Bd. of Ed., H.O. No. 85-3, 10 NJPER 527 (§15241 1984), adopted P.E.R.C. No. 85-50, 11 NJPER 21 (§16010 1984). "An indication that the power claimed to be possessed is exercised with some regularity is needed" because "[t]he mere possession of the authority is a sterile attribute unable to sustain a claim of supervisory status.'" Id. (quoting Somerset Cty. Guidance Ctr., D.R. No. 77-4, 2 NJPER 358 (1976)). "Acting in a lead capacity, or overseeing and directing the work

of other employees, without more, does not render an employee a statutory supervisor." City of Linden, D.R. No. 2011-12, 38 NJPER 159 (¶46 2011). Rather, "[a]n employee's role in evaluations or grievance procedures" - including whether the "evaluations . . . [are] closely connected to personnel actions" - "is a significant factor in determining whether an actual or potential substantial conflict exists." Monmouth Cty. Sheriff's Office, D.R. No. 2015-16, 41 NJPER 508 (¶159 2015). "Another consideration in determining if an actual or potential substantial conflict exists is whether the historical relationship between the supervisor and other included employees reveals compromised interests or rights." Id.

ANALYSIS

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

With respect to the timeliness of the Council's petition, we agree with the Acting Director's determination that clarification of the assistant director of communications and marketing job title was timely sought.^{2/} See D.R. at 8-9, n.12. It is

^{2/} N.J.A.C. 19:11-1.5, entitled "Petition for clarification of unit," Section (b), provides in pertinent part:

A petition for clarification of unit shall contain: . . .

3. A statement by petitioner listing and

(continued...)

undisputed that in October 2013, a change in circumstances occurred when MSU reclassified the title "director of annual fund" to "assistant director of communications and marketing" and filled the position thereafter. Id.; see also MSU's Br. at 5-6. Although the 2011-2015 CNA expired on June 30, 2015, it was automatically renewed on a year-to-year basis until the parties entered into a successor agreement on June 30, 2017. See 2011-2015 CNA, Art. XLIII; 2015-2019 CNA, Agreement; see also MSU's Br. at 2. Accordingly, we agree with the Acting Director that the Council's February 29, 2016 clarification of unit petition was filed "during the contractual period in effect at the time the [change] arose and prior to the execution of a successor agreement."^{3/} Rutgers, The State University, D.R. No. 84-19, 10

2/ (...continued)

explaining fully the reasons for the proposed clarification. The reasons may include:

I. Changed circumstances

3/ Even if the 2011-2015 CNA had expired without automatic renewal, it remained the pertinent contractual period in effect until the parties entered into the 2015-2019 CNA on June 30, 2017. See N.J.S.A. 34:13A-33 ("[n]otwithstanding the expiration of a collective negotiations agreement, . . . no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative"); see also Union Cty. Reg. High School District #1, D.R. No. 83-22, 9 NJPER 228 (¶14106 1983) (noting that "Clearview [Reg. High School Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977)]")

(continued...)

NJPER 284 (¶15140 1984); accord Paramus Bd. of Ed., D.R. No. 2014-6, 40 NJPER 169 (¶64 2013) (“a clarification of unit petition is appropriately filed where the majority representative has identified and petitioned for newly-created titles or positions during the contract period in which the new title was established and prior to the execution of the next succeeding contract”); Willingboro Tp. Bd. of Ed., D.R. No. 97-15, 23 NJPER 358 (¶28169 1997) (finding that a December 1996 clarification of unit petition was timely filed where the disputed title was created in April 1996, the contract period expired in June 1996, and the parties had not executed a successor contract at the time the petition was filed).

With respect to the claim that the Acting Director was required to accept as true the facts presented by MSU absent a hearing, initially we note that after an administrative investigation and depending on the circumstances, the Acting Director retains the discretion to issue a decision clarifying a unit or to require a hearing. See N.J.A.C. 19:11-2.6(d)-(f); see also River Dell Bd. of Ed., P.E.R.C. No. 78-85, 4 NJPER 252

3/ (...continued)
sets forth certain guidelines regarding the effective implementation of clarification of unit determinations . . . [that] reflect policy considerations which place the rights of parties to obtain clarification of the composition of collective negotiations units in balance with the overall goal of achieving stability and predictability of contractual relationships and negotiations relationships”).

(¶4128 1978) (noting that “a representation proceeding is quasi-legislative, as opposed to quasi-judicial in nature, and no burden of proof is attached thereto” such that “developing a full and complete evidentiary record upon which the Commission or its designee may base its decision” is the central objective). In this case, the Acting Director specifically indicated that she “rel[ie]d [up]on [MSU’s] submissions in finding that clarification of the Council’s unit to include the petitioned-for employees [was] appropriate.” See D.R. at 20. Moreover, MSU has not demonstrated that any factual dispute was resolved in favor of the Council. See, e.g., D.R. at 5-18. Accordingly, we find that the Acting Director appropriately issued her decision clarifying the unit without a hearing.^{4/}

Turning to the substance of the Council’s petition, MSU reiterates the same arguments advanced before the Acting Director

^{4/} While we acknowledge MSU’s position that the Acting Director should have compelled the Council to provide MSU with its certifications and exhibits (see D.R. at 19), MSU had an opportunity to review the Acting Director’s tentative decision and provide additional evidence in support of its position (see D.R. at 4-5) before the underlying unit clarification determination was issued. See N.J.A.C. 19:11-2.6© (“[i]nformation disclosed to a staff member in confidence regarding any representation matter shall not be divulged”). Further, after the Acting Director’s decision was issued and before the instant request for review was filed, the agency provided MSU with the Council’s submissions in response to a request under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. However, MSU’s request for review does not include any additional evidence and does not demonstrate that any factual dispute was resolved in favor of the Council. See also infra.

(i.e., that “the petitioned-for employees are managerial executives and supervisors under the Act; that their inclusion in the Council’s unit would create an impermissible conflict of interest; and that the [associate director of media relations] is a confidential employee under the Act”) and asserts that the five job titles at issue should remain outside the negotiations unit. See MSU’s Br. at 9-19; see also D.R. at 18-32. We find that MSU has failed to demonstrate that the facts it presented, or the Acting Director’s application of the law to those facts, constitute a compelling reason warranting review. See N.J.A.C. 19:11-8.2.

Initially, we note that MSU has not challenged the Acting Director’s findings of fact regarding the organization and structure of University Advancement, the department within which all of the titles at issue fall. See D.R. at 5-7. All of the titles fall within the fourth tier of the department’s hierarchy with the exception of director of events, which falls within the third tier. See [Montclair State University - University Advancement Organizational Structure \(September 2017\)](https://www.montclair.edu/organizational-charts/wp-content/uploads/sites/10/2017/04/UA-oct.pdf), <https://www.montclair.edu/organizational-charts/wp-content/uploads/sites/10/2017/04/UA-oct.pdf> (last visited April 4, 2018). We agree with the Acting Director’s determination that the titles at issue “occupy relatively low positions within MSU’s

administrative hierarchy" See D.R. at 24; see also, New Jersey Turnpike Authority, 150 N.J. at 356.

With respect to the director of special events, MSU maintains that the September 21, 2017 Certification of John Shannon (Shannon) "confirms that the director of special events has significant discretion and is responsible for planning, managing and producing the most critical events for the University every year," "leads a team of senior administrators and exercises discretion in that role," and "has implemented new procedures and policies for the University involving the booking of special events" MSU argues that these factual assertions demonstrate that the position should be excluded from the unit under the managerial executive exception. See MSU's Br. at 9-10. MSU also argues that the director of special events "is the direct manager of a negotiations unit employee and represents the first and critical step in the evaluation, reappointment and promotional process" and that "includ[ing] both employees in the same negotiations unit would result in a conflict of interest under Wilton." See MSU's Br. at 10-12.

Initially, we note that the factual assertions regarding the director of special events set forth in the September 21, 2017 Certification of Shannon were acknowledged by the Acting Director. See D.R. at 16-18. Having reviewed the evidence cited in the request for review, we find that MSU has failed to

sufficiently demonstrate that the director of special events possesses the requisite level of authority to qualify as a managerial executive based upon the interplay between the title's relative position within the hierarchy, functions and responsibilities, and extent of discretion. See New Jersey Turnpike Authority, 150 N.J. at 356; see also State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999) (holding that DEP section chiefs do not qualify as managerial executives based upon their "low-level placement in the managerial hierarchy and supervisory chain," their "lack [of] power to determine organizationally the means and resources that will be committed to addressing the policy objectives set by their [supervisors]," and the fact that "the scope of their discretion and the influence of their opinions . . . stem mostly from their professional and technical expertise in highly complicated areas rather than from an organizational decision or desire to have policy matters decided at the section chief level"). Similarly, we find that MSU has failed to sufficiently demonstrate the existence of a Wilton conflict given that the "Reappointment Recommendation" relied upon by MSU, although initially issued by the director of special events on November 10, 2016, attaches separate "Reappointment Recommendation" forms from the associate vice president on November 16, 2016 and the vice president on

November 15, 2016. Moreover, the vice president's recommendation form also includes a signature line for the president's approval or denial. See September 21, 2017 Certification of Shannon at Exh. B; see also Westfield Bd. of Ed., P.E.R.C. No. 88-3, 13 NJPER 635 (¶18237 1987) (holding that "[r]ecommendations for another's evaluation[] which might then serve as recommendations for another's personnel decisions are too far removed from the personnel decision[] to create a conflict of interest substantial enough to [exclude] the title[] from the unit"). Accordingly, we agree with the Acting Director's determination that the director of special events is not a managerial executive and that inclusion of the title in the existing unit does not create a Wilton conflict. See D.R. at 21-30.

With respect to the assistant director of media relations, MSU maintains that the September 21, 2017 Certification of Ellen Griffin (Griffin) "confirms that the assistant director of media relations is instrumental in conceiving, creating and formulating management policies and practices in the media relations area" and "exhibits considerable discretion in devising and implementing critical University policies" MSU argues that these factual assertions demonstrate that the position should be excluded from the unit under the managerial executive exception. See MSU's Br. at 12-13. MSU also argues that the September 21, 2017 Certifications of Shannon and Griffin

demonstrate that "the assistant director of media relations' involvement in the University's communication strategies requires him to have access to and utilize internal, confidential University information and strategies to respond to issues involving employees and the unions that represent them" and therefore "is a confidential employee . . . [that] must be excluded from the unit." See MSU's Br. at 13-15.

Initially, we note that the factual assertions regarding the assistant director of media relations set forth in the September 21, 2017 Certifications of Shannon and Griffin were acknowledged by the Acting Director. See D.R. at 11-13. Having reviewed the evidence cited in the request for review, we find that MSU has failed to sufficiently demonstrate that the assistant director of media relations possesses the requisite level of authority to qualify as a managerial executive based upon the interplay between the title's relative position within the hierarchy, functions and responsibilities, and extent of discretion. See New Jersey Turnpike Authority, 150 N.J. at 356; see also State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999). Similarly, we find that MSU has failed to sufficiently demonstrate that the assistant director of media relations' "responsibilities or knowledge . . . would compromise the employer's right to confidentiality concerning the collective

negotiations process if the employee was included in [the] negotiating unit." State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985). Accordingly, we agree with the Acting Director's determination that the assistant director of media relations is not a managerial executive or a confidential employee. See D.R. at 21-25, 30-32.

With respect to the assistant director of communications and marketing, MSU maintains that the September 21, 2017 Certification of Griffin confirms that the "assistant director of media relations is responsible for proactively planning, implementing, accessing and redirecting advertising and marketing programs on an independent, continuous basis." MSU argues that these factual assertions demonstrate that the position should be excluded from the unit under the managerial executive exception. See MSU's Br. at 15-16. MSU also argues that the September 21, 2017 Certifications of Shannon and Griffin demonstrate that the assistant director of communications and marketing "directly supervises a negotiations unit employee," "has the authority to evaluate the performance of [that] employee," "can effectively make recommendations to hire, fire, reappoint and discipline that employee," and "has provided input into the evaluation of an employee represented by the Council . . . [and] will be the first-line evaluator of this employee in the future." MSU argues

that including a "direct supervisor and her subordinate in the same negotiations unit will result in . . . [a] conflict of interest" particularly because "Wilton applies to both actual and potential conflicts." See MSU's Br. at 16-17.

Initially, we note that the factual assertions regarding the assistant director of communications and marketing set forth in the September 21, 2017 Certifications of Shannon and Griffin were acknowledged by the Acting Director. See D.R. at 8-11. Having reviewed the evidence cited in the request for review, we find that MSU has failed to sufficiently demonstrate that the assistant director of communications and marketing possesses the requisite level of authority to qualify as a managerial executive based upon the interplay between the title's relative position within the hierarchy, functions and responsibilities, and extent of discretion. See New Jersey Turnpike Authority, 150 N.J. at 356; see also State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999). Similarly, we find that MSU has failed to sufficiently demonstrate the existence of a Wilton conflict given that "there is no evidence that an evaluation [by the assistant director of communications and marketing] has led to a personnel action or disciplinary determination" (Jackson Tp., D.R. No. 2016-4, 42 NJPER 389 (¶110 2015)) and "[t]he mere possession of the authority [to hire, discharge, discipline or effectively

recommend] is a sterile attribute unable to sustain a claim of supervisory status'" (Hackensack Bd. of Ed., H.O. No. 85-3, 10 NJPER 527 (¶15241 1984), adopted P.E.R.C. No. 85-50, 11 NJPER 21 (¶16010 1984) (quoting Somerset Cty. Guidance Ctr., D.R. No. 77-4, 2 NJPER 358 (1976)). Accordingly, we agree with the Acting Director's determination that the assistant director of communications and marketing is not a managerial executive and that inclusion of the title in the existing unit does not create a Wilton conflict. See D.R. at 21-30.

With respect to the associate director of donor relations-events and the associate director of donor relations-scholarships, MSU maintains that the September 21, 2017 Certifications of Shannon and Moira Sullivan Renke (Renke) demonstrate that "both positions exercise independent discretion when they develop strategies, events and communications" and are "not merely the result . . . of an employee carrying out the directives of others." In particular, the associate director of donor relations-events "has been responsible for the implementation of a donor centric events and recognition program" and "[has] devised a specific donor experience as a result of her own creativity and foresight"; the associate director of donor relations-scholarship "requires a similar level of independent judgment and creativity in devising donor programs specifically intended to benefit scholarship recipients." MSU argues that

both positions should be excluded from the unit under the managerial executive exception. See MSU's Br. at 17-19.

Initially, we note that the factual assertions regarding the associate director of donor relations-events and the associate director of donor relations-scholarships set forth in the September 21, 2017 Certifications of Shannon and Renke were acknowledged by the Acting Director. See D.R. at 13-16. Having reviewed the evidence cited in the request for review, we find that MSU has failed to sufficiently demonstrate that the associate director of donor relations-events or the associate director of donor relations-scholarships possess the requisite level of authority to qualify as a managerial executive based upon the interplay between the titles' relative positions within the hierarchy, their functions and responsibilities, and the extent of their discretion. See New Jersey Turnpike Authority, 150 N.J. at 356; see also State of New Jersey, P.E.R.C. No. 99-59, 25 NJPER 48 (¶30021 1998), recon. den. P.E.R.C. No. 2000-34, 25 NJPER 461 (¶30200 1999). Accordingly, we agree with the Acting Director's determination that the associate director of donor relations-events and the associate director of donor relations-scholarships are not managerial executives. See D.R. at 21-25.

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