P.E.R.C. NO. 2019-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JEFFERSON TOWNSHIP BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CU-2017-028

JEFFERSON TOWNSHIP EDUCATION ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission grants the Association's request for review of the Director of Representation's decision in a clarification of unit petition seeking to include a newly created "craft" employee job title into a unit of non-craft employees. The Commission grants review because a substantial question of law was raised concerning the interpretation of recent amendments to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., enacted by the Workplace Democracy Enhancement Act. The Commission affirms the Director decision dismissing the petition, and holds that the Act's new unit work provisions, N.J.S.A. 34:13A-5.11(a) and (b), did not eliminate the professional or craft options contained in N.J.S.A. 34:13A-6(d).

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, Cleary, Giacobbe, Alfieri, Jacobs LLC, attorneys (Matthew J. Giacobbe, of counsel; Bradley D. Tishman, on the brief)

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

DECISION

On August 3, 2018, the Jefferson Township Education Association (Association) filed a request for review of D.R. No. 2019-1, 45 NJPER 39 (¶11 2018). In that decision, the Director of Representation dismissed a clarification of unit petition filed by the Association seeking to clarify a unit of non-craft, certificated and non-certificated personnel employed by the Jefferson Township Board of Education (Board) to include a newly created job title. Finding that the parties agreed that the new title was a "craft employee" within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

(Act), the Director held that, pursuant to N.J.S.A. 34:13A-6(d), the craft employee cannot be included in the Association's non-craft unit without an option to vote for inclusion. A clarification of unit petition provides no opportunity for such a vote. The Director also rejected arguments by the Association that N.J.S.A. 34:13A-5.15, part of the recently enacted "Workplace Democracy Enhancement Act" (WDEA), nullified the statutory requirement of a "craft option" vote pursuant to N.J.S.A. 34:13A-6(d).[1/] Finally, the Director noted that the proper method for attempting to add the new title to its unit would be through a timely filed representation petition for certification, which would allow the craft employee the opportunity to vote for or against inclusion in the Association's non-craft unit.[2/]

We incorporate the procedural and factual history cited by the Director. D.R. No. 2019-1, 1-8. The essential facts relied upon by the Director are not in dispute and we briefly summarize them here. Since 1969, the Association has been recognized by

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1/ The "Workplace Democracy Enhancement Act," P.L.2018, c.15, enacted May 18, 2018, supplemented our Act with new sections at N.J.S.A. 34:13A-5.11 through 5.15, and amended N.J.S.A. 52:14-15.9e.

2/ The Director also noted that the Board's other objections to including the BSC position in the unit such as whether it is supervisory or whether there is an impermissible conflict of interest may be raised in response to a representation petition.

the Board as the majority representative of a broad-based unit including teachers, nurses, custodians, and maintenance workers. Jefferson Tp. Bd of Ed., P.E.R.C. No. 61, NJPER Supp. 248, 249 (¶61 1971). On December 19, 2016, the Board approved a job description for a new Building Services Coordinator (BSC) position and published a job posting for it. On January 5, 2017, the Board hired a BSC. Both the Board and Association certified that the BSC position is a craft employee within the meaning of the Act 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.[3/] The record establishes that there are no craft employees in the negotiations unit. Further, there are no facts on record to indicate that any craft employee ever voted for inclusion with non-craft employees in the Association's unit.[4/]

3/ N.J.A.C. 19:10-1.1 provides the following definition:

> "Craft employee" means any 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 that craft.

4/ In contrast, the Association's professionals voted, per N.J.S.A. 34:13A-6(d), to be included in a unit with non-professionals. Jefferson, supra, NJPER Supp. 248, 249.

A party may request review of a decision by the Director of Representation. Under 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 Association is seeking review under the first factor described above - i.e. a substantial question of law is raised concerning the interpretation or administration of the Act - based on the Director's interpretation and application of the newly enacted WDEA. It asserts that the WDEA, enacted while this clarification of unit petition was pending before the Director, contains provisions concerning the appropriateness of certain negotiations units that allow for mixed craft/non-craft units without a "craft option" vote. Specifically, it argues that N.J.S.A. 34:13A-5.11(a) and (b) supersede N.J.S.A. 34:13A-6(d). It contends that the new statutory language requiring all employees who perform unit work to be included in the unit cannot be harmonized with the supervisory, professional, and craft

categories contained in N.J.S.A. 34:13A-6(d). The Association asserts that because the WDEA was passed later in time, its provisions must take precedence over any earlier statutory language in the Act with which it conflicts. It argues that because N.J.S.A. 34:13A-5.11(b) specifically reiterates the Act's pre-existing employee exclusions from N.J.S.A. 34:13A-3(d) (i.e., managerial executives, confidential employees, elected officials, members of boards/commissions, and casual employees) as exclusions from the WDEA's unit work rule (N.J.S.A. 34:13A-5.11(a)), but does not mention the classifications from N.J.S.A. 34:13A-6(d) (i.e., supervisor/non-supervisor, professional/non-professional, and craft/non-craft), then it must be presumed that the Legislature did not mean to preserve the latter classifications to permit exclusion from a negotiating unit.

The Board opposes review. It asserts that pursuant to N.J.S.A. 34:13A-6(d), craft employees cannot be included in a negotiations unit with non-craft employees unless a majority of craft employees vote for inclusion. The Board argues that the WDEA lacks any language affecting the rights of craft employees, and therefore the Director properly determined that the WDEA's silence does not change the requisite legal procedure for representing craft employees such as the BSC. It contends that the WDEA can be read in pari materia with the Act's craft employee provision, and is devoid of any superseding language.

It asserts that the omission of any reference to N.J.S.A. 34:13A-6(d) in the WDEA indicates that the Legislature did not intend to extinguish a craft employee's right to choose representation in a non-craft unit. The Board also argues that the BSC's highly specialized duties and responsibilities, including supervisory obligations, mean that the position does not perform "negotiations unit work" per N.J.S.A. 34:13A-5.11(a) of the WDEA.

This case presents an issue of first impression concerning the unit work provisions of the WDEA legislation enacted this year. We have never considered whether the new unit work provisions of N.J.S.A. 34:13A-5.11(a) and (b) affect the employee categories contained in N.J.S.A. 34:13A-6(d) for determining appropriate units. We therefore grant review under N.J.A.C. 19:11-8.2(a)(1) ("a substantial question of law is raised concerning the interpretation or administration of the Act") and affirm the Director's decision.[5/]

Per the WDEA, the Act's new language at N.J.S.A. 34:13A-5.11(a) and (b) provides:

5/ When there is a substantial question of law raised, the Commission has granted requests for review even if affirming the Director's decision. See, e.g., North Bergen Tp., P.E.R.C. No. 2010-37, 35 NJPER 435 (¶143 2009) ("We grant review because this case presents an issue of first impression under the card-check legislation enacted in 2005."); and State of New Jersey and NJ Corrections Assn., Inc. and SLEC, P.E.R.C. No. 2004-49, 30 NJPER 4 (¶13 2004).

> 34:13A-5.15 Inclusion in negotiations unit
>
> (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 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 and 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.

Besides the "casual employee" exception defined in the new language, all of the other exceptions to the WDEA's unit work provisions reiterate and reference the Act's definition of "employee." N.J.S.A. 34:13A-3(d). The types of employees specifically excluded from the Act per N.J.S.A. 34:13A-3(d) are: "elected officials, members of boards and commissions, managerial executives and confidential employees."[6/] These pre-existing exceptions, which have been reiterated in the WDEA, exclude these types of employees from representation in any negotiations unit.

6/ N.J.S.A. 34:13A-3(f) and (g) define "managerial executive" and "confidential employee" for purposes of the Act.

In contrast, N.J.S.A. 34:13A-6(d) concerns the appropriate types of units for different statutory categories of employees (i.e., supervisors, professionals, and craft employees), but does not bar any of those categories of employees from representation in an appropriate unit. N.J.S.A. 34:13A-6(d) provides:

> (d) 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 the 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 nonsupervisors, (2) both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit or, (3) both craft and noncraft employees unless a majority of such craft employees vote for inclusion in such unit. All of the powers and duties conferred or imposed upon the division that are necessary for the administration of this subdivision, and not inconsistent with it, are to that extent hereby made applicable. Should formal hearings be required, in the opinion of said division to determine the appropriate unit, it shall have the power to issue subpoenas as described below, and shall determine the rules and regulations for the conduct of such hearing or hearings.

Essentially, N.J.S.A. 34:13A-6(d) sets forth three dichotomies - supervisors/non-supervisors, professional/non-professional employees, and craft/non-craft employees - and generally

prohibits supervisors, professionals, and craft employees from inclusion in a unit with their respective non-supervisor, non-professional, and non-craft counterparts. In addition to each of these categories retaining the right to form a unit among themselves (e.g., a supervisory unit or a professional unit), N.J.S.A. 34:13A-6(d) allows professional and craft employees to choose to be included in a unit with non-professionals or non-craft employees, respectively, if a majority of the professional or craft employees vote for inclusion in the combined unit.

First, we find that the WDEA did not explicitly omit, amend, or address subsection 6(d) of the Act. Nothing in the WDEA mentions the supervisor, professional, or craft categories of employees, or states that those statutory categories for determining the appropriateness of a proposed unit are no longer valid. Nothing in the WDEA explicitly repeals a craft or professional employee's right under N.J.S.A. 34:13A-6(d) for a "craft option" or "professional option" vote regarding whether to be included a unit with non-craft or non-professional employees.[7/]

Next, we address the Association's position that the WDEA impliedly repealed subsection 6(d) of the Act. "Whenever

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7/ 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. See D.R. No. 2019-1, 11-12, and Commission cases cited therein.

statutory analysis involves the interplay of two or more statutes, we seek to harmonize them, under the assumption that the Legislature was aware of its actions and intended for related laws to work together." New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 555 (2012). "It is to be presumed that the lawmaking body did not intend to disregard or modify a long-settled statutory policy, unless the purpose so to do is declared in certain and unequivocal terms." Modern Indus. Bank v. Taub, 134 N.J.L. 260, 264 (E. & A. 1946). Therefore, "there is a strong presumption in the law against implied repealers and every reasonable construction should be applied to avoid such a finding." New Jersey Ass'n of School Adm'rs, supra, at 555. No implied repealer is found "where the statutory provisions may reasonably stand together, each in its own particular sphere of action." Swede v. City of Clifton, 22 N.J. 303, 317 (1956). To find an implied repealer, the later-enacted statute would have to be found "utterly inconsistent or repugnant to the earlier" statute. Board of Educ. of City of Sea Isle City v. Kennedy, 196 N.J. 1, 16 (2008). "A repeal by implication requires clear and compelling evidence of the legislative intent, and such intent must be free from reasonable doubt." Mahwah v. Bergen County Bd. of Taxation, 98 N.J. 268, 280 (1985).

Applying these Supreme Court standards for analyzing whether a later-enacted statute acts as an implied repealer of an

existing statute that was not explicitly replaced or amended, we find that the WDEA language of N.J.S.A. 34:13A-5.11(a) and (b) did not impliedly repeal N.J.S.A. 34:13A-6(d). These separate provisions are not utterly inconsistent with each other, but are capable of being reconciled each in their own particular sphere of application. As outlined earlier, the crucial distinctive element of the WDEA's exceptions to inclusion in a unit are that they are exceptions to the ability to be represented in any unit. These exceptions (elected official, board/commission member, managerial executive, and confidential employee) are reiterations of the exceptions that had already been contained in the Act's definition of employee. N.J.S.A. 34:13A-3(d). In contrast, N.J.S.A. 34:13A-6(d) does not preclude coverage under the Act, but provides the option of professional employees being included in a unit of non-professional employees, supervisors being included in a unit with non-supervisors, and craft employees being included in a unit with non-craft employees. The exceptions contained in N.J.S.A. 34:13A-3(d) have always been read harmoniously with the categories for appropriate units contained in N.J.S.A. 34:13A-6(d).

Furthermore, the Association has not identified, nor can we find, any indicia of legislative intent supporting the position that the WDEA impliedly repealed the supervisor, professional, and craft unit distinctions set forth in N.J.S.A. 34:13A-6(d).

Moreover, the unit work provisions of the WDEA were proposed by the Legislature as "supplementing" the Act, and included as "new sections" with no replacements or revisions of preexisting sections or language in the Act. P.L. 2018, c. 15 (Advance Law). In contrast, other parts of the WDEA specifically amended N.J.S.A. 52:14-15.9e by deleting previous statutory language and inserting new "amended" language into that statute. Id. The Legislature's express amendments to preexisting law suggest that it would not, within the same enactment, intend to include an implied repealer. Swede v. Clifton, supra, at 317 ("Although not in itself conclusive, a specific repealer is evidence of an intent that further repeals (by implication) are not intended. Sutherland's Statutory Construction (3rd ed.), section 2015.").

For the foregoing reasons, we hold that the WDEA's unit work provisions (N.J.S.A. 34:13A-5.11(a) and (b)) neither explicitly nor implicitly repealed N.J.S.A. 34:13A-6(d) of our Act.

ORDER

The Association's request for review is granted. The Director's decision to dismiss the Association's clarification of unit petition is affirmed.

BY ORDER OF THE COMMISSION

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

ISSUED: October 25, 2018

Trenton, New Jersey