

P.E.R.C. NO. 2019-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY COLLEGE,

Public Employer,

-and-

Docket No. CU-2018-011

UNION COUNTY COLLEGE CHAPTER
OF THE AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the College's request for review of a Director of Representation decision clarifying a unit of instructional and professional library staff represented by the AAUP to include the job title of academic specialist. The Commission finds no compelling reason warranting review of the Director's determination that the requisite community of interest exists among unit members and academic specialists, and that academic specialists are not supervisors and have no actual or potential substantial conflict of interest with unit members.

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, L.L.C., attorneys
(Matthew J. Giacobbe, of counsel)

For the Petitioner, Levy Ratner, P.C., attorneys
(Carl J. Levine, of counsel)

DECISION

On December 28, 2018, Union County College (College) filed a request for review of D.R. No. 2019-9. In that decision, the Director of Representation clarified a unit of instructional and professional library staff represented by the Union County College Chapter of the American Association of University Professors (AAUP) and employed by the College to include the job title of academic specialist. Finding that the requisite community of interest exists among unit members and academic specialists, and that academic specialists are not supervisors within the meaning of the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A-1 et seq. (Act) and have no actual or potential substantial conflict of interest with unit members, the Director held that the job title of academic specialist be included in the AAUP's unit. The Director found additional support for including academic specialists in the unit from N.J.S.A. 34:13A-5.15(a), part of the recently enacted "Workplace Democracy Enhancement Act" (WDEA),^{1/} which provides that: "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."

The College asserts that the Director erred in concluding that academic specialists are not supervisors and that their inclusion in the AAUP unit would not present conflicts of interest. It argues that the Director erred in concluding that academic specialists share a community of interest with AAUP unit members. The College contends that the Director erroneously relied on the expired (2012-2015) collective negotiations agreement (CNA) instead of the parties' current (2015-2018) CNA. It asserts that the Director's decision violates the contracts clauses of the New Jersey and United States constitutions because

^{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.

the terms of both the current and expired CNAs allegedly require all teaching staff members to teach a minimum of 15 credit hours per semester to be in the unit, while academic specialists are required to teach only nine credit hours a semester. The College also argues that the Director's decision erroneously relied on the WDEA and that the WDEA is unconstitutional.

The AAUP responds that the Director correctly concluded that the academic specialists should not be excluded from the unit because they do not qualify as supervisors under the Act. It asserts that the Director correctly determined that there is a requisite community of interest between the academic specialists and full-time faculty members because both titles teach classes while also performing administrative and outside of the classroom duties. The AAUP argues that while academic specialists are required to spend 9-12 hours a week in the classroom and faculty members are generally required to spend 15 hours a week or their equivalent in the classroom, faculty members can receive release time from their annual teaching credit hours in order to perform extra administrative duties. The AAUP asserts that the contractual terms cited by the College do not govern this dispute because they relate to the terms and conditions of employment of the full-time instructional and professional library staff titles who already comprised the unit, while the specific terms applicable to the newly created academic specialists may still

need to be negotiated if they are found to be included in the unit. It contends that the language of the CNA's recognition clause is determinative regarding whether the new title is included in the unit, and further notes that the parties explicitly reserved their rights concerning the inclusion of the academic specialist position in the unit during negotiations for the 2015-2018 CNA. The AAUP also argues that the Director's determination regarding the WDEA was appropriate but was not necessary to support his holding.

N.J.A.C. 19:11-8.2(a) states that 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.

We deny the College's request for review as it has not advanced any compelling reasons to review the Director's findings or conclusions.

We first address the College's argument that the Director's decision incorrectly relied on language from the expired 2012-

2015 CNA, instead of the 2015-2018 CNA, and that inclusion of the academic specialist in the unit violated the terms of those agreements. Initially, we note that the Director's decision did not refer to the parties' 2015-2018 CNA because it was not part of the record before him. The College did not submit a copy of the 2015-2018 CNA until it filed this request for review. The 2015-2018 CNA, that is now part of the record before the Commission, was not executed until May 2, 2018. The parties had already filed their position statements on the AAUP's clarification of unit petition on February 26, 2018. In response to a Commission staff agent's April 18 request, the AAUP and College subsequently filed additional certifications and exhibits in May and June respectively, but neither party's exhibits included a copy of the recently executed 2015-2018 CNA.

More significantly, however, is that the determinative language relied upon by the Director, i.e., the recognition clause, remained exactly the same from the 2012-2015 CNA to the 2015-2018 CNA (and indeed has remained unchanged since the AAUP became the majority representative in 1983, D.R. at 6). Thus, regardless of the parties not having submitted to the Director their most recent and current CNA, the outcome is the same. That recognition clause provides that the CNA "shall apply in full force and effect to any and all accretions of the unit and specifically to all full-time instructional and professional

library staff who perform duties which are the same as or are similar to the duties performed by full-time instructional and professional library staff." The Director used the recognition clause to support his finding that clarifying the existing unit to include academic specialists conforms with the Commission's "preference for broad-based units" and is not prohibited by the parties' agreed upon contract terms. D.R. at 39-40; See Gloucester Cty., P.E.R.C. No. 2011-69, 37 NJPER 141 (¶42 2011). Moreover, during negotiations for a successor agreement, the parties specifically reserved consideration of whether the new academic specialist title should be included in the unit, so its absence from the 2015-2018 CNA cannot be used to infer an intent by the parties to exclude it from the AAUP. D.R. at 4, 28.^{2/}

2/ On November 14, 2016, the parties agreed to the following:

During the late stages of negotiations for a successor Collective Negotiations Agreement the College began hiring individuals into a newly created classification designated as "Academic Specialists" which it maintains are not properly included in the Union's negotiations unit. The College hereby agrees that if the parties reach final agreement on a Successor Agreement, which does not address the bargaining status of individuals hired into this new classification, it will agree that entering into such an Agreement will not act as a waiver of the Union's right to assert, through an appropriate action before the Public Employment Relations Commission, that this classification should properly be included in the Union's negotiations unit.

We next address the College's contention that the differences in the specific number of typical classroom teaching hours required of the faculty and of the academic specialists outweigh the broader similarities in community of interest or the broader, more inclusive language of the aforementioned recognition clause. We note that, while Article XXIX of the 2015-2018 CNA requires instructional staff to teach a minimum of 15 credit or equivalent hours per semester (and Article I I. defines full-time instructional staff as normally teaching 30 credit hours per academic year), it also permits teaching load requirements for full-time members of the instructional staff to be reduced to 11 per semester for the Chairperson, and 12 per semester for the Chairperson of the Peer Evaluation Committee, the Chairperson of the Curriculum Committee, the Chairperson of the Professional Development Committee, and the President of the Union County College AAUP. An even more significant reduction in teaching credits is allowed per Article XXIX A.1.c.(2), which provides:

Full-time members of the instructional staff having agreed to assume administrative duties shall have their teaching load reduced proportionately with these duties up to a maximum reduction of twelve (12) credit hours or equivalent contact hours for the academic year.

Thus, full-time faculty in the unit may teach as little as 18 credit hours per academic year (30 per year with a 12 credit

reduction), or 9 per semester, in order to assume administrative duties. By comparison, academic specialists are typically required to teach 9 credit hours per semester, though some academic specialist positions may teach up to a maximum of 12 credit hours per semester.^{3/} Accordingly, the contract language itself already encompasses unit faculty members who may teach as little as 9-12 credit hours in addition to administrative duties.

We also dispute the College's contention that the Director disregarded or misunderstood the fact that the Department Chair and Coordinator appointments had been removed from the AAUP contract by the January 2016 "Impact MOA" the parties agreed to following expiration of the 2012-2015 CNA. The Director acknowledged that the faculty members were no longer assigned to those particular administrative titles when he stated: "Before 2015, full-time faculty were assigned some administrative duties and served as Department Chairs and Coordinators." D.R. at 18. The Director reviewed the history of those positions in the unit, and noted:

In late 2014, the College announced a number of organizational changes including the elimination of all Departments and Department Chairs as well as most Coordinator positions. In order to address these changes, AAUP demanded impact negotiations. On January 29, 2016, the parties reached an agreement

^{3/} The Association's exhibits before the Director included job descriptions for multiple academic specialist positions that specified "Classroom instruction up to 12 hours per week."

regarding impact that modified their expired CNA in a number of ways, including the removal of references to Departments and Chairs.

[D.R. at 23-24.]

The Director's discussion demonstrates that the unit has historically included faculty positions that had greater administrative duties and reduced courseloads, performing "many/all of the same duties currently assigned to academic specialists." D.R. at 38-39. One of the factors the Commission considers in determining the most appropriate unit is the history of the unit. 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). Thus, the Director's consideration of the historically included Department Chairs and Coordinators who performed similar duties with a similar balance of teaching and administrative tasks as the academic specialists was relevant to the clarification of unit analysis.

Next, we find no substantial questions of law or fact implicated by the Director's rejection of the College's supervisory/conflict of interest claims or his determination of a shared community of interest between academic specialists and the existing unit. The Director applied the requisite legal analysis to determine that the academic specialists do not perform duties that create an actual or potential substantial conflict of interest with other unit members. West Orange Bd. of Educ. v.

Wilton, 57 N.J. 404, 425-427 (1971); New Jersey Turnpike Auth.,

P.E.R.C. No. 98-28, 23 NJPER 511 (¶28249 1997). D.R. at 29-34.

The Director analyzed the various factors comprising community of interest, noting the common employer, shared goals, common supervision, shared employment location, similar/related job duties, similar wages, and similar hours and terms and conditions of employment. D.R. at 37-38. In finding the requisite community of interest, the Director cited pertinent precedent applicable to educational settings. That precedent provides that a community of interest exists among virtually all non-supervisory educational employees and that a community of interest can be found among professional educational personnel who instruct students regardless of whether they are considered regular teachers or are employed in special programs. It further provides that divisions based on whether employees could or could not obtain tenure have been discounted, and that even non-instructional professional employees who perform services related to the educational mission may share a community of interest for purposes of unit inclusion under our Act. See, e.g., Trenton Bd. of Ed., D.R. No. 2012-4, 38 NJPER 372 (¶126 2012); Union Cty. Reg. H.S. Dist. #1, D.R. No. 83-22, 9 NJPER 228 (¶14106 1983); and Newark Bd. of Ed., D.R. No. 80-1, 5 NJPER 314 (¶10170 1979). D.R. at 36-37.

We next turn to the College's allegation that the Director failed to consider additional evidence that he had requested. On December 6, 2018, a Commission staff agent requested the following of both parties:

At your earliest opportunity, please provide the names of all other collective negotiations units at the College. Additionally, if the College negotiates with an administrators' unit, please provide all titles in that unit, the number of members in the unit, job description and the collective negotiations agreement for that unit - to include the current and immediately preceding contract for that unit. Please provide the foregoing information by Monday, December 10, 2018.

Counsel for the AAUP responded via email on December 10 that the information sought by the Commission is available from, and should be provided by the College. Counsel for the College responded via email on December 10 with attachments and a letter stating that he had attached the following: "1. Names of all other Collective Bargaining negotiations units at the College; 2. Titles, the number of members in the unit, job descriptions; and 3. Current and immediately preceding contracts for that unit." The attachments included names of other negotiations units of the College, as well as contracts, job titles, and job descriptions for the Union County College Employees Association (UCCEA) (referred to by the parties as the "administrators' unit").

Clarification of unit petitions always involve information requested by the Commission during the investigation phase that

may or may not be specifically referenced or discussed in the Director's decision, depending on their relevance. In this case, the parties had already submitted voluminous exhibits and certifications in response to the Commission staff agent's April 18, 2018 letter requesting detailed explanations and specific examples of a variety of duties and responsibilities of the academic specialist position. The Director appropriately cited to the parts of the record most pertinent for deciding the clarification of unit petition. Our review of the submissions confirms that they contain no new material information that would warrant a substantive discussion about the possibility that any of the College's other bargaining units would be more appropriate for academic specialists than the AAUP. The UCCEA unit that is the focus of the College's argument is explicitly a unit of "non-teaching professional employees" as set forth in the recognition clause. The academic specialists, however, are not non-teaching positions, but are positions that involve both teaching and administrative duties, and therefore more closely align with the AAUP unit as discussed earlier and by the Director. Accordingly, we find no basis for the College's assertion that the Director ignored its final evidentiary submission, as it is apparent from the UCCEA recognition clause and job titles that the unit does not share a community of interest with the academic specialists like the AAUP does.

Finally, we decline to address the College's constitutional claims regarding the WDEA because we do not have jurisdiction to rule on the constitutionality of a statute that we are charged with implementing. Essex Cty. and Essex Cty. Sheriff, P.E.R.C. No. 2005-52, 31 NJPER 86 (¶41 2005); Hunterdon Cty., P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), aff'd, 369 N.J. Super. 572 (App. Div.), certif. denied, 183 N.J. 139 (2004); Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), aff'd as mod. sub. nom., Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S.Ct. 1388 (1986). However, we do note that the Director's decision did not rely on the WDEA to find that the academic specialists are appropriately included in the AAUP unit. As discussed above, the Director's determination was based on a finding of the requisite community of interest among the unit members and the academic specialists. The discussion of the WDEA was limited to one paragraph at the end of decision, providing an alternate legal basis in support of his conclusion. Although we agree with the Director's application of the WDEA to the facts before him, his decision stands alone in finding that the unit should be clarified to include the academic specialist title regardless of whether the WDEA applies.

For all of the foregoing reasons, the College has not established any of the reasons for granting a request for review and we accordingly deny its request.

ORDER

Union County College's request for review is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 20, 2019

Trenton, New Jersey