

D.R. NO. 2018-12

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

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.

Appearances:

For the Public Employer  
Scarinci Hollenbeck, attorneys  
(Shana T. Don, of counsel)

For the Petitioner  
Weismann and Mintz, attorneys  
(Ira W. Mintz, of counsel)

**DECISION**

On August 15, 2017, the Newark Teachers Union Local 481, AFT, AFL-CIO (NTU or Petitioner) filed a representation petition for certification based on authorization cards, seeking to add school operations managers, school operations assistants, community engagement specialists, family advocates, partnership and transition senior coordinators and data analysts (hereinafter collectively referred to as "petitioned-for employees") to its collective negotiations unit of non-supervisory, certificated and non-certificated employees. The petition was accompanied by

authorization cards signed by a majority of the petitioned-for employees. The State-Operated School District of the City of Newark (District) declines to sign a Stipulation of Appropriate Unit form.

On October 16, 2017, at 11:38 a.m., NTU withdrew petition RO-2018-002 and filed another representation petition seeking certification of the same unit described in petition RO-2018-002. The petition is timely filed in accordance with N.J.A.C. 19:11-2.8 and is supported by the same authorization cards constituting a majority of petitioned-for employees, initially submitted on August 15, 2017.<sup>1/</sup>

We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:11-2.2(a). The disposition of the petition is properly based upon our administrative investigation. No disputed, substantial material factual issues warrant our convening an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. Based upon the administrative investigation, I make the following:

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<sup>1/</sup> On October 16, 2017, at 11:35 a.m., the District emailed us a letter objecting to this petition (bearing docket number RO-2018-002) as untimely under N.J.A.C. 19:11-2.8. In May of 2017, the parties ratified a Memorandum of Agreement (MOA) containing substantive terms and conditions of employment and extending from July 1, 2015 through June 30, 2019. Under N.J.A.C. 19:11-2.8, the open period for filing a representation petition under this MOA runs from September 1, 2017 through October 16, 2017. See the Director's "Open Period" Memorandum, at [http://www.state.nj.us/perc/open\\_per.pdf](http://www.state.nj.us/perc/open_per.pdf).

**FINDINGS OF FACT**

NTU's representation petition (petition) seeks to add approximately 189 employees to its existing unit of non-supervisory, certificated and non-certificated employees. The petitioned-for employees hold the following job titles: School Operations Manager, School Operations Assistant, Community Engagement Specialist, Family Advocate, Partnership and Transition Senior Coordinator, and Data Analyst.

NTU and the District are parties to a collective negotiations agreement effective from July 1, 2009 through June 30, 2010, and extended by a series of memoranda of agreement extending from July 1, 2010 through June 30, 2019.(NTU Agreement). Article I of the NTU Agreement contains a recognition clause that defines the unit as follows:

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, 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

coordinator, clerk stenographer(school), physical therapist assistant, text book clerk, 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 days 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.

NTU seeks to add the petitioned-for employees to this unit.

On August 17, 2017, the Acting Director of Representation, in response to the initial petition, issued a letter to the District requesting information needed to process the petition, including a list of employees in the petitioned-for unit and a signed Certification of Posting attesting that notice of NTU's petition was posted in an area where unit employees would normally congregate. On September 15, 2017, the District provided a list of employees in the unit. The District has not provided a Certification of Posting. The failure to post a notice of NTU's petition will not delay processing of NTU's petition. N.J.A.C. 19:11-2.4(e).

We have carefully reviewed NTU's authorization cards and compared them to the list of employees provided by the District.

NTU has submitted cards, all dated within six months of the petition's initial and subsequent filing, from a majority of petitioned-for unit employees. The cards set forth clear language designating NTU as the exclusive majority representative of unit employees for purposes of collective negotiations over terms and conditions of employment.

On September 12, 2017, the assigned Commission staff agent issued a letter to the parties notifying them that the petition enjoys majority support and presented a proposed Stipulation of Appropriate Unit (Stipulation) form for the parties' signature. NTU expressed in writing approval of the Stipulation; the District declined to sign the Stipulation. On September 22, 2017, the District submitted a letter to the staff agent and NTU objecting to the Stipulation. The District contends that school operations managers and transition senior coordinators are supervisors and managerial executives within the meaning of the Act; that the data analyst is a confidential employee; and that the petitioned-for employees do not share a community of interest with NTU unit employees. The District also contends that our decision in Newark State-Operated School District, D.R. No. 2016-9, 43 NJPER 19 (¶6 2016); req. for review denied P.E.R.C. No. 2017-16, 43 NJPER 115 (¶34 2016) (hereinafter referred to as the "Newark CU Decision"), precludes us from certifying NTU's unit.

On September 25, 2017, the Commission staff agent sent a letter to the District requesting a brief, certifications(s) and any other pertinent documents in support of the District's contentions. NTU was afforded an opportunity to respond to the District's submission. On October 3, 2017, the District submitted a letter and certification from Larisa S. Shambaugh ("Shambaugh Cert."), the District's Chief Talent Officer, in response. NTU filed a brief and six certifications from school operations managers in response to the District's submissions.

The petitioned-for employees are salaried employees who report to their school principal and/or a District administrator. (Shambaugh Cert., Paragraph 5). NTU unit employees, such as teachers, are also salaried and report to their school principal.<sup>2/</sup> (Shambaugh Cert., Paragraph 29) Unit employees and the petitioned-for employees receive similar benefits "such as paid leave and medical insurance." (Shambaugh Cert., Paragraph 26). The petitioned-for employees "do not have any authority to hire, fire, or discipline any NTU unit employees, or recommend same." (Shambaugh Cert., Paragraph 27). The petitioned-for employees are also "not involved in collective negotiations, grievance processing or any other matters involving the NTU's administration of the collective negotiations agreement."

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<sup>2/</sup> Their salaries are contained in the parties' collective negotiations agreement.

(Shambaugh Cert., Paragraphs 28 and 31). Shambaugh also asserts that the petitioned-for employees "do not have any authority to make employment decisions for any NTU unit employees or recommend the same" and that they do not share a community of interest with NTU unit employees. (Shambaugh Cert., Paragraph 23).

All of the petitioned-for employees provide support in the management and operation of the District. (Shambaugh Cert., Exhibit B). The School Operations Manager works closely with coordinators, non-instructional staff and other school personnel to "ensure the successful operations of" many District programs, including the Free and Reduced lunch program, maintenance of student records, procuring school materials, and other day-to-day activities by staff in support of the school principal's instructional and classroom priorities. (Shambaugh Cert., Exhibit B). The School Operations Assistant works "directly with the School Operations Manager and Principal to maintain effective operations within the school." (Shambaugh Cert., Exhibit B). A community engagement specialist is responsible for communication and outreach efforts with students' families and community stakeholders and "reports to the Principal" while working "closely with various internal stakeholders throughout the District." (Shambaugh Cert., Exhibit B).

The Family Advocate works with students' families by providing them with "the needed support so that they can

facilitate children's school readiness." (Shambaugh Cert., Exhibit B). The Partnership and Transition Senior Coordinator advises teachers and District staff about "best practices around job, career, and college plans" and "partners with teachers to support college and career readiness activities in the classroom." (Shambaugh Cert., Exhibit B). The Data Analyst, working under the direction of a school principal provides "ongoing professional development to teachers, administrators and other instructional coaches in the interpretation and use of student data" and "works with school staff to develop best methods for tracking student performance at the school level." (Shambaugh Cert., Exhibit B).

On October 10, 2017, NTU submitted six certifications from school operations managers and a letter brief. All six operations managers certify that they do not have the authority to hire, fire or discipline any District employees, and do not make effective recommendations to hire, fire or discipline employees. They also certify they do not evaluate and/or make hiring, firing or disciplinary decisions with respect to school operations assistants. NTU disputes the District's assertions that the petitioned-for titles lack a community of interest with unit employee and contends none of the titles are confidential, managerial executives, or supervisors within the meaning of the



Act. NTU also argues that the Newark CU Decision does not preclude the filing of a representation petition.

### **ANALYSIS**

The District objects to our certifying NTU's petitioned-for unit on the grounds that several of the petitioned-for titles are either managerial executives, supervisors, confidential, or otherwise lack a community of interest with NTU unit employees. The District also contends that, based on the Newark CU Decision, we cannot add titles to NTU's unit that were not added by way of unit clarification petition. NTU disagrees and argues the petitioned-for unit is appropriate. I reject the District's contentions and certify NTU's petitioned-for unit.

On July 19, 2005, the Legislature amended the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3 to authorize the Commission to certify a majority representative where: (a) a majority of employees in an appropriate unit have signed authorization cards designating that organization as their negotiations representative; and (b) no other employee representative seeks to represent those employees. See N.J.A.C. 19:11-2.6(b). The Director of Representation "shall determine whether a majority of employees in the unit have signed valid authorization cards" in support of certification. N.J.A.C. 19:11-2.6(b). A union may petition to add employees to its

existing unit and we will grant such a request when a majority of the employees to be added choose the union as their majority representative. Jackson Tp. Fire Dist., D.R. No. 2012-11, 39 NJPER 44 (¶16 2012).

The Legislature has determined that a check of an organization's authorization cards signed by a majority of employees in an appropriate unit is a lawful method to determine a majority representative. Our review of NTU's authorization cards against the employer's list of employees shows that it has submitted cards from a majority of the petitioned-for employees. The cards set forth clear language designating NTU as their exclusive majority representative for purposes of collective negotiations. The employees' signatures on the cards meets the intent of the statute and our rules.

I will address the District's objections in *seriatim*.

### **Newark CU Decision Discussion**

In the Newark CU Decision, the Commission affirmed the Director of Representation's determination that the data analyst title could not be clarified into NTU's unit since the title was not identified by the parties' recognition clause as part of NTU's unit. 43 NJPER at 21. The Director also noted that the NTU could add the data analyst title by filing a timely representation petition. 43 NJPER at 21 (fn. 5). I reject the

District's argument that the Newark CU Decision precludes NTU from filing a representation petition. NTU's petition is appropriate.

### **Supervisor and Managerial Executive Discussion**

The District asserts that school operations managers and partnership and transition senior coordinators are supervisors and managerial executives within the meaning of the New Jersey Employer-Employee Relations Act (Act). NTU disagrees. I reject the District's arguments and find these employees are not supervisors or managerial executives within the meaning of the Act.

Our Act prohibits supervisors and non-supervisors from being represented in the same collective negotiations unit. N.J.S.A. 34:13A-5.3. The Commission has defined a statutory supervisor as an employee having the authority to hire, discharge, or discipline another employee; or effectively recommend those actions. Hackensack Bd. of Ed., P.E.R.C. No. 85-59, 11 NJPER 21 (¶16010 1984); City of Linden, D.R. No. 2011-12, 38 NJPER 159 (¶46 2011). We will not find that an employee is a statutory supervisor without evidence that the employee's alleged supervisory authority is exercised with some degree of regularity. Id.; see also Somerset Cty. Guidance Center; D.R. No. 77-4, 2 NJPER 358 (1976); North Bergen Parking Authority, D.R. No. 2013-9, 39 NJPER 294 (¶98 2012).

The District admits the petitioned-for employees "do not have any authority to hire, fire, or discipline any NTU unit employees, or recommend the same" and "do not have any authority to make employment decisions for any NTU unit employees or recommend the same." (Shambaugh Cert., Paragraphs 23 and 27). I find the petitioned-for employees are not supervisors within the meaning of the Act.

The school operations manager and partnership and transition senior coordinator are also not managerial executives under the Act. The Act defines "managerial executives" in school districts as "only the superintendent or other chief administrator, and the assistant superintendent of the district." N.J.S.A. 34:13A-3(f). Since a school operations manager and partnership and transition senior coordinator are neither a superintendent, chief administrator nor an assistant superintendent, I find they are not managerial executives under the Act.

### **Confidential Employee Discussion**

The District contends the data analyst is confidential under the Act since he "aggregates and disseminates data generated by students," including data on "state-wide testing, which is a component of teacher evaluations, and requires the employee to provide professional development and training to teaching staff." (Quoting the District's September 22, 2017 letter). I disagree

and find the data analyst does not meet the definition of a confidential employee under the Act.

Confidential employees are excluded from the Act's definition of "employee" and do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines "confidential employees" of public employers other than the State as:

[E]mployees 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 is to narrowly construe the term confidential employee. Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd NJPER Supp. 2d 186 (¶165 1988); 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 State of New Jersey, we explained our approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [Id. at 510]

See also, Ringwood Bd. of Ed., Supra. In New Jersey Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331 (1997), our Supreme

Court approved the standards articulated in State of New Jersey and explained:

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. N.J.S.A. 34:13A-3(g); see also State of New Jersey, supra, 11 NJPER 507 (¶16179 1985) (holding that final determination is 'whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit.') 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 and 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. [Id. at 358.]

In evaluating confidential status claims, we have consistently applied strict standards of proof. Absent a proffer of specific duties and a demonstration that the purported confidential duties are actually performed, we will not find

confidential status. City of Camden Housing Authority, D.R. No. 2014-7, 40 NJPER 219 (¶84 2013).

Here, the District has not provided adequate evidence of specific instances in which the data analyst performed confidential duties under the Act. Indeed, the District certifies that the petitioned-for employees are "not involved in collective negotiations, grievance processing or any other matters involving the NTU's administration of the collective negotiations agreement." (Shambaugh Cert., Paragraphs 28 and 31). I find the data analyst is not a confidential employee under the Act.

### **Community of Interest Discussion**

Finally, the District contends the petitioned-for titles lack a community of interest with NTU unit employees. Specifically, the District asserts that the Transition Coordinator and Family Advocate work outside the school with community members, while the majority of NTU members work inside the school. I reject this argument and find the petitioned-for employees share a community of interest with NTU unit employees.

The Commission is charged with determining the appropriate unit for negotiations. N.J.S.A. 34:13A-6(d). N.J.S.A. 34:13A-5.3 requires that negotiations units be defined "with due regard for the community of interest among the employees

concerned." The New Jersey Supreme Court has affirmed the Commission's policy favoring broad-based, employer-wide negotiations units rather than small units of separate occupational groups. Broad-based units streamline negotiations by reducing the potential for such problems as "competing demands, whipsawing and continuous negotiations . . ." that result from negotiating with numerous smaller units. State of New Jersey and Prof. Assn. of N.J. Bd. of Ed., 64 N.J. 231 (1974), aff'g P.E.R.C. No. 68, NJPER Supp. 273, 275 (¶68 1972).

The Commission has long held that broad-based units of education employees -- both units of all school support staff employees and units combining support staff and professional staff -- are appropriate. West Milford Bd. of Ed., P.E.R.C. No. 56 (1971); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 84-124, 10 NJPER 272 (¶15134 1984). In Piscataway, the Commission wrote:

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. See West Milford Bd. of Ed., P.E.R.C. No. 56 (1971). 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. State of New Jersey and Professional Assn of N.J. Dept. of Ed., 64 N.J. 231 (1974).  
[Id., 10 NJPER at 274].

It is based on this longstanding Commission precedent that we recently noted that a "community of interest exists among virtually all-non-supervisory employees in an educational setting." Washington Tp. Board of Ed., D.R. No. 2016-8, 43 NJPER 13, 14 (¶4 2016).

Based on this precedent, I find the petitioned-for employees do share a community of interest with NTU unit employees. The petitioned-for employees share with unit employees the common goal and mission of promoting and improving the education of students. They receive similar salary and fringe benefits, perform similar duties and report to the same administrators and principals unit employees report to. The fact that the Family Advocate and Transition Coordinator may have a more "outward looking" position outside the school than school employees such as teachers does not defeat the shared community of interest between the employees. Somerset County, D.R. No. 2014-14, 40 NJPER 527 (¶172 2014)(no single factor is dispositive in community of interest analysis).

For these reasons, I find the petitioned for employees share a community of interest with NTU unit employees.

Accordingly, I find that a sufficient number of valid authorization cards have been submitted to warrant certification of NTU as a majority representative.

I find that the following unit is appropriate for collective negotiations:

**Included:** All regularly employed, non-supervisory school operations managers, school operations assistants, partnership and transition senior coordinators, community engagement specialists, family advocates and data analysts, to be added to an existing unit of non-supervisory, certificated and non-certificated employees of the Newark State Operated School District.<sup>3/</sup>

**Excluded:** Managerial executives, confidential employees and supervisors within the meaning of the Act; craft employees, police, casual employees, and all other employees of the Newark State Operated School District.

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<sup>3/</sup> The existing unit is presently defined by a recognition clause in the parties' collective negotiations agreement, referred to at pages 3 and 4 of this slip opinion.

ORDER

I certify the Newark Teachers Union, Local 481, AFT, AFL-CIO as the exclusive representative of the unit described above, based upon its authorization cards.<sup>4/</sup>

BY ORDER OF THE ACTING  
DIRECTOR OF REPRESENTATION

/s/Daisy B. Barreto  
Daisy B. Barreto

DATED:      October 31, 2017  
                 Trenton, New Jersey

A request for review of this decision by the Commission may be filed pursuant to N.J.A.C. 19:11-8.1. Any request for review must comply with the requirements contained in N.J.A.C. 19:11-8.3.

Any request for review is due November 13, 2017.

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<sup>4/</sup> A certification of representative is attached.