

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

DELAWARE PUBLIC EMPLOYEES COUNCIL 81,	:	
AFSCME, AFL-CIO, Local 439	:	
	:	
Petitioner,	:	
	:	Representation Petition
and	:	<u>No. 95-04-126</u>
	:	
UNIVERSITY OF DELAWARE,	:	
	:	
Respondent.	:	

In the Matter of University of Delaware Bus Drivers

*Appearances:*      *Perry F. Goldlust, Esq. Heiman, Aber & Goldlust, For AFSCME*  
                              *Thomas LaPenta, Director, U.D. Labor Relations, For Employer*

BACKGROUND

The University of Delaware (hereinafter "University" or "Employer") is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), (hereinafter "PERA"). Delaware Public Employees Council 81, AFSCME, AFL-CIO, Local 439 (hereinafter "AFSCME" or "Union") is an employee organization within the meaning of §1302(h) of the Act.

AFSCME filed a modification petition on or about April 19, 1995, seeking to amend the bargaining unit represented by AFSCME Local 3472 (the bargaining unit of "skilled" employees) to include Bus Drivers employed by the University. The petition was accompanied by the uncoerced signatures of at least thirty percent (30%) of the employees in these unrepresented positions.

The employer opposed the inclusion of bus drivers in the skilled bargaining unit, asserting they were more appropriate for inclusion in the “unskilled” bargaining unit represented by AFSCME Local 439.

By letter dated May 25, 1995, the Union amended its petition by requesting that the unskilled unit represented by AFSCME Local 439 be amended to include the full-time, part-time and miscellaneous wage bus drivers.

A hearing was convened on August 7, 1995, for the purpose of receiving evidence concerning the appropriateness of the proposed modification to the bargaining unit. At the hearing, the University stipulated that it did not object to the inclusion of full-time bus drivers in the bargaining unit. The sole remaining issue is whether or not “miscellaneous wage”<sup>1</sup> bus drivers are appropriate for inclusion in the bargaining unit. The record was closed at the conclusion of the hearing.

### **ISSUE**

Are miscellaneous wage bus drivers eligible and appropriate for inclusion in the bargaining unit, represented by AFSCME Local 439, which includes full time unskilled employees of the University of Delaware?

### **POSITIONS OF THE PARTIES**

#### **AFSCME:**

AFSCME asserts that because part-time and/or temporary employees are not explicitly excluded from eligibility for representation under the PERA, these employees can and should be included in the Local 439 bargaining unit with their full-time and permanent counterparts

AFSCME asserts that miscellaneous wage bus drivers share a community of interest with permanent full time drivers. It argues that all bus drivers attend the same orientation, are paid at

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<sup>1</sup> During the hearing, it was established that the University does not employ permanent part-time bus drivers, but rather employs only full-time drivers and “miscellaneous wage” bus drivers. The positions in question will be referred to as miscellaneous wage drivers for the purposes of this decision.

an hourly rate which is not significantly different, do essentially the same work under the same conditions under the same supervision, have the same route assignments (although at different times), are accountable for the same standards of courtesy, dependability and safety, and are required to hold a Commercial Drivers' License. Based upon the strength of this established community of interest, AFSCME argues that all bus drivers should be included in the bargaining unit represented by Local 439.

#### EMPLOYER:

The University argues that miscellaneous wage bus drivers are temporary employees and, therefore, are not appropriate for inclusion in the existing bargaining unit. It argues that under the existing unit definition which explicitly excludes temporary employees, it is illogical to include one group of temporary employees in the unit.

The University further argues that miscellaneous wage bus drivers do not share the same long term community of interest with permanent bus drivers. It argues that AFSCME has not sustained its burden to establish the community of interest necessary to include these employees in the unit.

#### OPINION

The Public Employment Relations Act grants to public employees the rights of organization and representation. Section 1302(a) defines an appropriate bargaining unit as "... a group of public employees designated by the Public Employment Relations Board as appropriate for representation by an employee organization for purposes of collective bargaining." A "public employee" is defined at §1302(m):

... means any employee of a public employer except: (1) any person elected by popular vote or appointed to office by the Governor; (2) any person who is a prisoner or inmate or who is otherwise held in lawful custody by an agency of the State; (3) any person appointed to serve on a board or commission; (4) any employee, as defined in Chapter 40 of Title 14 of a public school employer, as defined in Chapter 40 of Title 14; (5) any police officers and firefighters employed

by the State or political subdivisions of the State or any agency thereof, or any municipal corporation, municipality, city or town located within the State or any agency thereof which, upon the affirmative legislative act of its common council or other governing body, has elected to come within Chapter 16 of this title. Any police officers and firefighters included in this subsection shall be subject to Chapter 16 of this title; (6) Confidential employees of the public employer; (7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed appropriate prior to September 23, 1994, shall so continue, unless said unit is decertified in accordance with §1311(b) of this title, or is modified in accordance with procedures authorized by §1310(e) of this title.

The PERB has broadly construed employee representation as a fundamental right under the Act. The statute neither defines nor excludes from its coverage part-time, temporary or other category of less than full time employees. Consequently, these employees are eligible for representation under the law. Del. Public Employees Council 81 and Del. Turnpike Administration, Del.PERB, Rep. Pet. 95-06-140 (9/95).

Concerning the issue of appropriateness, the statute does not require that the unit designated by the PERB be the only appropriate bargaining unit. Lake Forest Education Assn. and Board of Education, Del. PERB, Rep. Pet. No. 91-03-060 (1991); affirmed by PERB, Rep. Pet. 91-03-060A (1991).<sup>3</sup> Section 1310(d) of the PERA requires:

In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as the similarities of duties, skills and working conditions of the employees involved; the history and extent of employee organization; the recommendations of the parties involved; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate. The Board or its designee shall exclude supervisory employees from all appropriate units created subsequent to September 23, 1994.

Numerous factors impact the determination of an appropriate bargaining unit and none alone is determinative. Of particular importance, however, are the similarities in duties, skills and working conditions. The “community of interest” shared by various positions in a given

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<sup>3</sup> Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). Council 81, AFSCME, AFL-CIO, v. State of Delaware Div. of Highways, Del. PERB, ULP No. 95-01-111 (1995).

work environment does not easily lend itself to precise definition permitting a mechanical application of the law. The ultimate determination of the appropriateness of a proposed bargaining unit generally requires a detailed factual analysis rather than the simple application of the rule of law.

The full-time and miscellaneous wage bus drivers employed by the University of Delaware are not now nor have they previously been represented for the purposes of collective bargaining. The parties to this matter do not have a common recommendation as to the appropriateness of the bargaining unit concerning miscellaneous wage bus drivers, nor has overfragmentation been raised as an issue in this matter. Consequently, the determination of appropriateness in this case is controlled by the extent to which the duties, skills and working conditions of these employees are similar.

The University concedes that permanent bus drivers are appropriate for inclusion in the existing bargaining unit and did not dispute that they share a community of interest with the other positions in the existing unit. The evidence received in this matter establishes that both permanent and miscellaneous wage bus drivers work under the same job description, must meet the same responsibilities and standards for safety, courtesy and vehicle operation, must pass the same background and drug tests to be eligible for employment, must maintain a Commercial Drivers License, and attend the same orientation. The similarity of required skills, duties and working conditions is not overcome by the limited number of differences cited by the employer, namely, that permanent employees usually have more driving experience, permanent and miscellaneous wage drivers are paid on different pay days, and the insignificant difference in wage rates.

The University's opposition to the inclusion of miscellaneous wage drivers has two bases: (1) Permanent and miscellaneous wage drivers do not share the same long-term interests in their positions; and, (2) miscellaneous wage drivers are temporary employees of the University and therefore cannot be appropriate for inclusion in the existing unit, because temporary employees are explicitly excluded under the unit definition.

The University's argument that miscellaneous wage drivers do not share the same long term interest in their employment is not convincing. The testimony of the witnesses contained numerous examples of miscellaneous wage drivers with more than two years of seniority. Driver Nancy Deputy, the University's witness, testified that she had been employed as a miscellaneous wage driver for six (6) years prior to her appointment to a permanent position. No evidence was presented that the tenure of miscellaneous wage drivers was limited by the employer. Neither was there evidence offered regarding the relative turn-over rates of permanent and miscellaneous wage drivers. To the contrary, Transportation Services Manager Fentress Truxon testified that "seniority" is one of the factors considered in assigning routes to miscellaneous wage drivers. The mere assertion that "most" miscellaneous wage drivers have other employment or "come and go" is insufficient to override the established fact that permanent and miscellaneous wage drivers perform the same work under the same supervision and working conditions.

The University relies upon the existing bargaining unit definition to support its position that miscellaneous wage bus drivers are inappropriate for inclusion in this bargaining unit. The existing unit definition adopted by the Governor's Council on Labor, was based upon the stipulation of the parties, and approved by the Secretary Labor in DOL Case #16(d), in November, 1988. The bargaining unit includes a variety of specified "unskilled positions" in the Plant Operations, Food Service, Housing and Residence Life and Supporting Services Departments, and includes "All employees hired in trainee positions to support any of the aforementioned classifications." Specifically excluded from the bargaining unit are:

- (1) Temporary employees, being persons hired without expectation of any arrangement for permanent employment (i) to perform a specific job or (ii) to be employed for a limited period of time;
- (2) Student employees enrolled in a full time course of studies;
- (3) Campus Security Guards
- (4) All supervisors, being all individuals having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them to adjust their grievances, or effectively to recommend such actions.

The record does not support the University's conclusion that miscellaneous wage drivers are temporary employees within the cited definition. Consequently, the inclusion of miscellaneous wage drivers does not alter the integrity of the bargaining unit definition.

The statute does not preclude miscellaneous employees from inclusion in bargaining unit with other employees with whom they share a community of interest. The record establishes that the miscellaneous wage bus drivers share a significant community of interest with full-time bus drivers and are, therefore, appropriate for inclusion in the bargaining unit.

### **DECISION**

The bargaining unit defined by DOL Case #16(d), which is represented by AFSCME Local 439, is hereby modified to include all full-time and miscellaneous wage bus drivers employed by the University of Delaware.

An election will be scheduled within thirty days of this decision.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard  
**DEBORAH L. MURRAY-SHEPPARD**  
Principal Assistant/Hearing Officer  
Public Employment Relations Board

/s/Charles D. Long, Jr.  
**CHARLES D. LONG, JR.**  
Executive Director  
Public Employment Relations Board

Dated: September 29, 1995