State of Delaware, Department of Health and Social Services, Plaintiff in Error

v.

Public Employment Relations Board, Defendant in Error,

v.

Delaware Public Employees AFSCME Council 81, AFL-CIO, Defendant in Error

Date of Decision: February 25, 2000

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PERB

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE, Department of Health and Social Services,	)	
Plaintiff in Error,	)	
v.	)	C.A. No.: 99A-10-014-FSS
PUBLIC EMPLOYMENT RELATIONS BOARD,	)	
Defendant in Error,	)	
v.	)	
DELAWARE PUBLIC EMPLOYEES AFSCME COUNCIL 81, AFL-CIO,	)	
Defendant in Error.	)	

Submitted: November 8, 1999
Decided: February 25, 2000

OPINION and ORDER

Upon Petition for Writ of Certiorari–*AFFIRMED*

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SILVERMAN, J.

The State of Delaware, Department of Health and Social Services brought this Petition for Writ of Certiorari asking the Court to vacate an order of the Public Employment Relations Board. The order certified a stand-alone collective bargaining unit for Senior Social Workers/Case Managers in the Division of Mental Retardation of the Department of Health and Social Services.

I.

On December 8, 1998, the American Federation of State, County and Municipal Employees, Council 81 filed a petition with PERB to establish a new bargaining unit for Senior Social Workers in DMR. A PERB hearing officer held a hearing on April 28, 1999. Both parties filed post-hearing briefs. The hearing officer issued a written decision on July 26, 1999, certifying the new bargaining unit.

The State challenged the hearing officer's decision. PERB held a hearing on August 28, 1999, at which the Chairman recused himself. The resulting vote was a tie on whether the hearing officer's decision was correct and the hearing officer's decision was left standing. The State then filed this Petition for a Writ of Certiorari to vacate PERB's action. Meanwhile, the Court declined to stop the November 10, 1999 election and the Senior Social Workers voted to form a bargaining unit.

II.

There is a statutory right to appeal certain PERB actions to the Court of Chancery.[1] There is no statutory right, however, to appeal decisions concerning the certification of new bargaining units. Certiorari is the appropriate remedy here because there is no right to appeal this PERB decision.

III.

A vote by PERB must be by a majority to be decisive.[2] The order upholding the hearing officer's decision is not valid because the vote was a tie.[3] Since PERB's invalid order is not reviewable, the Court must review the hearing officer's decision. Although *Hopson v. McGinnes* holds that on appeal, where there is no decision to review "the Court may remand for further consideration by the Commission or it may make its own findings based upon the record made before the

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[1] 19 *Del. C.* § 1309.

[2] 14 *Del. C.* § 4006 (made applicable to all State employees by 19 *Del. C.* § 1306).

[3] *Hopson v. McGinnes*, Del. Supr., 391 A.2d 187, 189 (1978) ("If the [State Personnel] Commission was evenly divided and thus did not make a decision, there is not a ruling which the Court may judicially review").

Commission,"[4] *Hopson* does not apply here. *Hopson* differs from this case because *Hopson* was an appeal and this is certiorari. As previously mentioned, parties have the statutory right to appeal certain PERB decisions,[5] but decisions concerning the certification of bargaining units are not included in the statute. Nothing indicates the Court should review the hearing officer's decision under a different standard than the Court would use to review PERB's.

Under certiorari, where mixed questions of fact and law are involved, the Court accepts the hearing officer's fact finding, but the Court reviews the law the hearing officer applied and how the hearing officer applied it. As long as the fact-finding process was regular, under certiorari the hearing officer's facts are beyond review. The hearing officer's interpretation and application of law, however, is subject to plenary review.[6]

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[4] *Id.*

[5] 19 *Del. C.* § 1309.

[6] *See City of Wilmington v. State Fire Prevention Comm'n*, Del. Super., C.A. No. 98A-09-017, Silverman, J. (Nov. 24, 1999) (OPINION AND ORDER); *Rende v. Delaware State Fair, Inc.*, Del. Super., C.A. No. 98A-05-006, Silverman, J. (July 17, 1998) (OPINION AND ORDER).

IV.

A.

The State contends that DMR Senior Social Workers should not be in a stand-alone bargaining unit, but rather they belong in a preexisting unit. According to the State, the most appropriate place for DMR Senior Social Workers is the DSS bargaining unit because it already includes other Senior Social Workers. As an alternative, the State suggests that DMR Senior Social Workers belong in a preexisting DMR bargaining unit.

Both DSS and DMR are divisions within DHSS, which has a human resource office functioning as a centralized personnel office for the whole department. Grievance handling, discipline and discharge are centralized for both divisions. The wages and benefits for Senior Social Workers in both divisions are the same and they can make interdivisional transfers.

The nature and scope of duties for both groups of Senior Social Workers are claimed to be the same, as are the principal accountabilities, knowledge, skills, abilities and qualifications. The State presented testimony that both groups of Senior Social Workers have identical working conditions. Further evidence established that Senior Social Workers from both divisions work with vulnerable client populations and have a common requirement of "[a]ssessing the

needs, providing services, or directing individual clients to those services." Senior Social Workers in DMR may be presented with clients who have economic needs and Senior Social Workers in DSS may have clients with mental disabilities. There also is an expectation that Senior Social Workers in both divisions exchange information when appropriate. It is the State's position that no special expertise is needed to help clients who lack self-sufficiency due to mental disabilities.

In summary, the State contends:

> [W]e have an existing bargaining unit, represented by AFSCME, in which the position of the Senior Social Worker/Case Manager exists. The exact same title as in DMR, performing the same duties, the same responsibilities, the same principal accountabilities, the same knowledge, skills and abilities, the same educational requirements.

In the alternative, as mentioned, the State suggests placing DMR Senior Social Workers into preexisting DMR bargaining units. The suggested units are the Habilitation Supervisors unit or the Community and Residential Nurses unit. The State asserts that the HS unit is appropriate because it is a stand-alone bargaining unit in DMR, composed of employees who serve mentally disabled clients. The justification for the appropriateness of the CRN unit is that the nurses also are in DMR and work with mentally disabled clients.

It is the State's further contention that certifying the Senior Social

Workers as a stand-alone bargaining unit in DMR will lead to overfragmentation. As a matter of policy, the State argues that carving out Senior Social Workers impermissibly fragments the bargaining unit. To rule otherwise, the State argues, would set a precedent encouraging single-classification units, undermining the efficient administration of government by requiring the devotion of additional resources to negotiate and administer contracts.

AFSCME's petition indicates that the approximate size of the proposed Senior Social Workers bargaining unit is 30 employees. Martha Austin, Deputy Human Resources Director of DHSS testified that the DSS unit includes approximately 400 employees, the CRN unit between 60 and 85, and the HS unit between 20 and 30. The State presented no data about the typical bargaining unit size.

B.

AFSCME contends that DMR Senior Social Workers form a homogenous unit, both in terms of its clients and its members' education, and therefore should be certified as its own unit. According to AFSCME, the Senior Social Workers unit is identifiable and distinct because of the special education necessary to work with clients who have psychological and medical problems.

AFSCME further contends that the DSS bargaining unit is not

appropriate because of the differing clientele of DMR and DSS. AFSCME cites the Governor's budget to demonstrate the differing missions of DSS and DMR:

> The mission of the Division of Social Services is to protect vulnerable populations and provide an integrated system of opportunities, service and income supports that enable low income individuals to develop self-sufficiency . . . .

Meanwhile, the mission of DMR is "to provide services and supports to individuals with mental retardation, developmental disabilities and their families . . . ." While DSS clients primarily suffer from economic problems, DMR exclusively handles clients with psychological and medical problems.

Witnesses for the State conceded that DSS and DMR have separate management and that hiring decisions are made separately by the divisions. AFSCME argues that placing DMR Senior Social Workers in the DSS bargaining unit is inappropriate because of the workers' separate management.

AFSCME also contends that the DSS bargaining unit is not appropriate because it is a "wall-to-wall" unit of nearly all DSS employees. Included in the unit are twenty-nine job titles such as telephone operator, vehicle operator, data entry technician and secretary. All DSS employees below mid-management are in the same bargaining unit. As a matter of policy, AFSCME argues that:

> [W]eight must be given professional employees' [DMR Senior Social Workers] issues whose interest and focus on

> their professional duties may be diluted by the interests of other employees with totally different working requirements and skills.

AFSCME further contends that including DMR Senior Social Workers in a bargaining unit with nonprofessional employees would:

> [F]orce them into a homogenized grouping of varied employees with disparate interests, den[ying] [them] their legal right to represent their individual and unique professional interests in the collective bargaining process.

Finally, AFSCME contends that certifying a new bargaining unit consisting only of Senior Social Workers in DMR is consistent with prior PERB decisions. AFSCME cites *Lake Forest Education Ass'n v. Lake Forest Board of Education*[7] for two propositions. The first is that:

> Many factors impact the determination of an appropriate bargaining unit and one alone is determinative. Of particular importance, when grouping employees together into an appropriate bargaining unit, is that they share similar responsibilities, duties, and skills.[8]

The second proposition is that *Lake Forest*, echoing the federal approach, also holds that for a bargaining unit to be certified, it need only be appropriate and not

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[7] Del. PERB Rep. Pet. No. 91-03-060, 1 PERB 651 (1991).

[8] *Id.* at 665.

necessarily the most appropriate unit.[9]

Finally, AFSCME argues that case law supports its position. AFSCME asserts that Delaware courts traditionally apply federal case law where the statutory schemes are similar[10] and federal case law supports its position.[11]

V.

The hearing officer correctly found that "[w]hile a number of factors impact the determination of an appropriate [bargaining] unit, none alone is determinative." In grouping employees into an appropriate bargaining unit, the hearing officer found it is particularly important whether they share similar duties, skills and working conditions. The hearing officer further found that:

> A single classification of employees within one department, reporting to the same management structure and performing work within that classification, necessarily share a community of interest.

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[9] *Id.* at 655.

[10] *Cofrancesco v. City of Wilmington*, D. Del., 419 F. Supp. 109, 111 (1976).

[11] *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enf'd*, 7th Cir., 190 F.2d 576 (1951) (NLRB need not select "the only appropriate unit . . . or the most appropriate unit"); *P.J. Dick Contracting*, 290 NLRB 150 (1988) (if NLRB finds petitioning unit appropriate, employer's alternative proposals not considered).

Accordingly, the decisive issue was whether the application of other statutory factors requires a finding that certifying DMR Senior Social Workers as a stand-alone bargaining unit is inappropriate.

In addressing the State's position that DMR Senior Social Workers should be in the same bargaining unit as those in DSS, the hearing officer found that:

> Critically missing from a job description is context, e.g., employees' working conditions, to whom they report, how their responsibilities fit into the mission and goals of the employing agency.

The hearing officer found no evidence establishing what Senior Social Workers in either division do during a normal work day. Further, the hearing officer found that the record established no basis upon which to conclude that a single-classification unit of DMR Senior Social Workers is inappropriate.

As to the history and extent of employee organization, the hearing officer found that "the State of Delaware has a long-standing history under the Governor's Council on Labor of certifying multiple units within departments and even within divisions . . . ." Therefore, the hearing officer concluded that the history and extent of employee organization favored a new bargaining unit for DMR Senior Social Workers.

As to overfragmentation, the hearing officer found that:

> Except for the State's preference for negotiating with fewer rather than more bargaining units, no evidence was presented supporting the claim that creation of a new unit would adversely affect the efficiency of the division, department, or the State.

In conclusion, the hearing officer dismissed the State's overfragmentation claim by finding that the simple assertion that a modified existing unit would be preferable to the creation of a new unit does not establish an adverse effect on the efficient administration of government.

VI.

A.

Although the State does not contest the proceedings' regularity, the Court will address the subject briefly. There are no set criteria for determining whether the record is regular, but the Court must examine the record and be satisfied there was a fair hearing. Both parties had the opportunity to present their cases before the hearing officer, both filed post-hearing briefs, and the hearing officer took both parties' evidence and arguments into consideration. In that sense, the proceedings before the hearing officer were regular. As presented above, the Court will not review the PERB hearing because the tie vote rendered it moot.

B.

The governing statute provides:

> 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 similarity of duties, skills and working conditions of the employees involved; the history and extent of the 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.[12]

In other words, the statute requires the hearing officer, acting as PERB's designee, to take into account the community of interests, but is silent on the weight to be given to any of the nonexclusive factors comprising the community of interests. In addition to the statutory factors, the hearing officer also may consider anything else that the hearing officer deems appropriate.

The hearing officer's finding that the history and extent of employee organization supports certification of a new bargaining unit is justified, though weakly, by the evidence. The hearing officer noted that "[c]urrently, there are three certified and represented bargaining units within DHSS, Division of Mental

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[12] 19 *Del. C.* § 1310(d). Compare 5 U.S.C. § 7112; *Cleveland Construction, Inc. v. NLRB*, D.C. Cir., 44 F.3d 1010, 1013 (1995) (establishing federal guidelines upon which Delaware statute based).

Retardation . . . ." The existence of other DMR bargaining units lends support to the hearing officer's finding.

As to the parties' recommendations, their divergence is the basis of this dispute. The hearing officer took the recommendations into consideration.

As to overfragmentation, the hearing officer noted that the State produced neither a witness nor any evidence to show that certifying DMR Senior Social Workers as a stand-alone bargaining unit would create overfragmentation, adversely impacting the efficient administration of government. The hearing officer correctly found that the mere assertion that a preexisting unit would be preferable to a new unit is inadequate to establish overfragmentation and an adverse effect on the State.

As presented by the parties, the core dispute is the similarity of duties, skills and working conditions of the employees involved, which the parties overlabel as "community of interests." The hearing officer's finding that a single classification of employees reporting to the same management and performing the same work necessarily share a community of interest makes sense, and the State has not argued to the contrary. Rather, the State argues that placing the Senior Social Workers in a preexisting bargaining unit, preferably the DSS unit, is more appropriate. Reliable indicators of common interests are common supervision as

well as centralized, local and daily control of those labor policies that most immediately affect the employees involved.[13] Although the Senior Social Workers in DMR and DSS have many things in common, the separate management of DMR and DSS provides sufficient justification for not placing both in the same bargaining unit.

The State has failed as a matter of law to demonstrate a community of interests between DSS and DMR Senior Social Workers that would necessitate the placement of both in the same bargaining unit. As to the State's contention that the Senior Social Workers may be appropriately included in another DMR unit, the State's only evidence of a community of interests is that all employees work within DMR and assist mentally disabled persons.

C.

Under federal labor law, there is the concept of accretion. "An accretion occurs when new employees are added to an already existing [bargaining] unit."[14] The Court makes note of the more than passing relevance of federal labor law. Where issues under Delaware labor law are similar to issues under federal law,

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[13] *NLRB v. DMR Corp.*, 5th Cir., 795 F.2d 472, 475 (1986).

[14] *Universal Security Instruments, Inc. v. NLRB*, 4th Cir., 649 F.2d 247, 253 (1981), *cert. denied*, 454 U.S. 965 (1981).

"Delaware is expected to consider, and in all likelihood, follow federal law."[15] Under federal law, if the bargaining unit suggested by the employees merely is appropriate, the inquiry ends.[16]

The community of interests analysis necessary to support an accretion differs from the analysis to certify a bargaining unit initially[17] because there is a heightened concern for the employees' interests due to accretion's interference with the employees' freedom to choose their own bargaining agents.[18] Accretion interferes with the employees' freedom of choice because it "forecloses a vote and restricts the employees in the exercise of their basic right to select their bargaining representative."[19] "A group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing

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[15] *City of Wilmington v. Wilmington Firefighters Local 1590*, Del. Supr., 385 A.2d 720 (1978) (quoting *Cofrancesco v. City of Wilmington*, D. Del., 419 F. Supp. 109, 111 (1976)).

[16] *P.J. Dick Contracting*, 290 NLRB 150 (1988).

[17] *NLRB v. Security Columbian Banknote Co.*, 3d Cir., 541 F.2d 135, 140 (1976).

[18] *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 9th Cir., 759 F.2d 1477, 1480 (1985).

[19] *Boire v. International Brotherhood of Teamsters*, 5th Cir., 479 F.2d 778, 796-97 (1973) (quoting *Pix Mfg. Co.*, 181 NLRB 88, 90 (1970)).

unit that they have no true identity distinct from it."[20]

Though couched in terms of certification, the State basically asks that the Senior Social Workers be accreted into a preexisting bargaining unit. Since DMR Senior Social Workers have a community of interests with each other and the State has not demonstrated that certifying the new bargaining unit would create overfragmentation, the certification decision is justified under federal law. As there is an inadequate community of interests between the different Senior Social Workers under the standard for certification, it is impossible to find that Senior Social Workers should be accreted into a preexisting bargaining unit. Even if there were a sufficient "community of interests" between DMR and DSS Senior Social Workers to certify both groups of employees into the same bargaining unit, there still would be no justification for accretion. Not only does the separate management of both groups of Senior Social Workers reflect distinct identities, but there is nothing that justifies a finding that DMR Senior Social workers have no distinct identity from the DSS bargaining unit as a whole. In summary on this point, while the Court is not

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[20] *NLRB v. Saint Regis Paper Co.*, 1st Cir., 674 F.2d 104, 107-08 (1982); *accord Security Columbian Banknote Co.*, 3d Cir., 541 F.2d 135, 140 (1976) (accretion proper "when such a community of interest exists among the entire group that the additional employees have no separate unit identity").

deciding this matter on the basis of federal law, it appears that the PERB hearing officer's decision is consistent with federal law and that consistency is desirable.

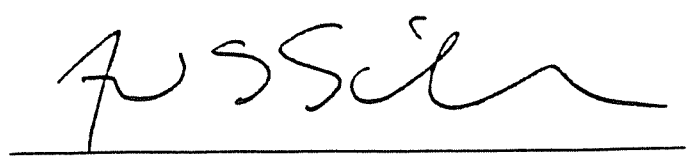
VII.

In conclusion, under all the relevant standards, the hearing officer's decision must be upheld. Although the Court is concerned that this decision will lead to a proliferation of single-classification bargaining units, the State has failed to present evidence to support the assertion that a new unit would create overfragmentation affecting the efficient administration of government.

In the final analysis, this case concerns administrative pigeon holing. While reasonable minds can disagree about where the DMR Senior Social Workers fit best, the PERB hearing officer's decision reflects a reasoned, lawful approach. The Court finds ample reason to uphold the administrator.

For the foregoing reasons, the decision of PERB is **AFFIRMED**.

IT IS SO ORDERED.



Judge

oc: Prothonotary - Appeals Division