

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

DELAWARE CORRECTIONAL OFFICERS	)	
ASSOCIATION,	)	DECISION ON REMAND
	)	
v.	)	<b>ULP No. 00-07-286</b>
	)	
STATE OF DELAWARE, DEPARTMENT	)	Chancery Court Case
OF CORRECTION.	)	C.A. 19115 NC

**BACKGROUND**

This matter involves the State of Delaware, Department of Correction (“State”) and the Delaware Correctional Officers Association (“DCOA”). During collective bargaining negotiations over a successor collective bargaining agreement, the State and DCOA entered into a Memorandum of Understanding (“Agreement”) dated February 1, 1996. The Agreement provided that the State would provide DCOA with the name, home address, position classification and seniority date of each bargaining unit member on a semi-monthly basis. DCOA agreed to use the information solely for reasons related to its role of exclusive bargaining representative and to hold the State harmless against liability or other legal claims.

The State continued to abide by the Agreement until receiving an informal opinion from the State Attorney General’s office in February, 2000, that the release of home addresses may violate employees’ privacy rights. Thereafter, the State informed DCOA it would no longer provide home addresses.

On July 25, 2000, DCOA filed an unfair labor practice charge alleging violations of specific sections the Public Employment Relations Act (“PERA” or “Act”), namely 19 Del.C. §§ 1307(a)(1), (2), (3), and (5). The hearing officer concluded that home addresses are reasonably necessary and relevant to DCOA in the performance of its representation duties under the PERA. Consequently, unless otherwise contrary to law, the State is obligated to provide the agreed upon home addresses.

The State appealed the Hearing Officer's decision to the PERB for review. In its decision issued September 10, 2001, the PERB affirmed the decision of the hearing officer in its entirety.

The State appealed the PERB's decision to the Chancery Court where the matter was assigned to a Master in Chancery who issued his final report on April 12, 2002. Before the Master, the State argued for the first time that the PERB's Order violated the State's common law right of privacy. By Order of Remand dated April 1, 2002, the Master remanded the matter to the PERB for the express purpose of considering, "Whether compliance with the Memorandum of Understanding is unlawful under this state's common law of privacy?"

At a meeting on April 24, 2002, PERB remanded the matter to the Executive Director for disposition. A telephone conference was held on April 30, 2002, at which time the parties agreed to an expedited responsive briefing schedule, with final briefs being received on May 22, 2002.

This decision results from the record thus compiled.

### **ISSUE**

Whether compliance with the Memorandum of Understanding  
is unlawful under this State's common law of privacy?

### **SUMMARY POSITIONS OF THE PARTIES**

**STATE:** The State argues on remand that because the Agreement contains no date of termination, it is for an indefinite period and can, therefore, be unilaterally modified or discontinued at any time by either party.

The collective bargaining agreement finalized after the effective date of the Agreement contains an "entireties clause" which provides:

This Agreement represents and incorporates the complete and final understanding and settlement by the parties on all bargainable issues which were or could have been the subject of negotiations. [DCOA and DOC Collective Bargaining Agreement, 10/96-10/99, Article 60]

The Memorandum of Understanding is not incorporated therein, either explicitly or by reference.

The State further contends that the individual right of privacy is an evolving area of the law. The State argues that, “The origins of an individual right of privacy emanate from a variety of case decisions in many different areas of the law.” The State contends that state law privacy decisions combined with federal precedent support the proposition that public employees have a right to privacy in their home addresses. Therefore, in this instance, compliance with the Agreement is unlawful under Delaware’s common law.

DCOA: DCOA accuses the State of arguing different and, at times, inconsistent positions before the PERB, in the first instance, the Court of Chancery on appeal and before the PERB on remand. In its appeal to the Court of Chancery, the State essentially argued that, in the absence of a clear expression of intent by the legislature to the contrary, the preexisting common law privacy rights survive the enactment of the PERA. Consequently, the State should have never signed the Agreement because revealing home addresses were always a violation of employee privacy.

The State's position that the Agreement is terminable at will by either party is inconsistent with its prior position that the Agreement is a legally binding document. Further, since the Agreement was signed, two (2) administrations of DCOA officers have come and gone and neither past-President is still affiliated with DCOA or employed by the State. For this reason, the State’s argument concerning the validity of the Agreement is barred by the equitable doctrine of laches.

DCOA further argues that, never having been presented by the State as a basis for the appeal to Chancery Court and having nothing to do with the right of privacy, the State’s terminable at will argument exceeds the scope of the Master’s remand order.

Concerning the common law right of privacy, DCOA asserts the State argues on remand that the evolving common law decisions involving privacy (some of which were issued after the enactment of the Public Employment Relations Act and the Agreement), have abrogated any duty by the State to provide DCOA with the addresses of its bargaining unit members. DCOA also argues this argument was not

presented to the Master in Chancery and therefore exceeds the scope of the remand order and should be rejected for that reason alone.

In the event the PERB determines, notwithstanding these objections, to consider the State's revised privacy arguments on remand, DCOA argues there is no cognizable common-law right to privacy which supercedes the State's statutory obligation to provide DCOA with the addresses of those individuals DCOA is statutorily required to represent. Notwithstanding the existence of the Agreement, the PERB held that the State was statutorily obligated to provide DCOA with the home addresses of all bargaining unit members. Consequently, the status of the Agreement is irrelevant.

DCOA argues the State has taken the opportunity on remand to expand its initial argument to include what the State refers to as the "evolving law concerning individual privacy rights." What the State ignores is that its duty to provide home addresses is a function of the statutory duty to bargain established by the PERA. The PERB has concluded, as have other jurisdictions, that the "duty to bargain" includes the duty to provide information to the Union which is necessary and relevant to the proper performance of the Union's duties. This includes the names and addresses of employees in the bargaining unit. Consequently, no "evolution" of Delaware's common law is sufficient to abrogate this statutory requirement. The Agreement entered into by the State requiring that it provide home addresses only compounds the seriousness of its unilateral refusal to do so.

DCOA maintains the State's argument is unsupported by the cases cited by the State in its opening brief, which DCOA distinguishes from the current matter.

DCOA points out that, inconsistent with its position in this matter, the State has recently supplied the names and addresses of bargaining unit employees for use in a representation election to a non-bargaining representative which is attempting to decertify DCOA. <sup>1</sup>

STATE: In its reply brief the State argues its position both on appeal and before the PERB has consistently been that employees have a common law privacy right of their home addresses. The PERA

does not expressly authorize the release of employees' home addresses to the collective bargaining representative and thus does not repeal the common law right of privacy in employee home addresses.

The State argues that the legal effect of the Agreement is relevant to the issue on remand because whether compliance with the Agreement is unlawful or constitutes an unfair labor practice depends on the enforceability of the Agreement.

The State distinguishes providing home addresses under the Agreement from providing home addresses for a representation election. The State contends that providing home addresses for a representation election is governed by 19 Del.C. §1311(c) and PERB Rule 4.3(a).

The State denies that pursuing this matter constitutes bad-faith. To the contrary, the privacy right of public employees in their home addresses raises an important issue of first impression which the Court recognized by remanding the matter to the PERB.

### **DISCUSSION**

The unfair labor practice charge filed by DCOA contesting the State's refusal to continue to provide home addresses of bargaining unit members raised two legal issues under the Public Employment Relations Act:

First, whether the State violated the statute by unilaterally refusing to continue to comply with the terms of the parties' 1996 Memorandum of [Understanding] and ceasing to provide home addresses of bargaining unit members to DCOA. The second issue is whether DCOA is entitled, as a matter of law, to home addresses and telephone numbers under the Public Employment Relations Act, independent of any negotiated agreement. Delaware Correctional Officers Assn. v. Delaware Dept. of Correction, ULP No. 00-07-286, III PERB 2209, 2214 (May, 2001).

The PERB affirmed the Hearing Officer's decision that DCOA had a right to the home addresses as a matter of law, under the circumstances presented, namely the rapid increase in the size of the bargaining unit, the

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<sup>1</sup> It is noted for the record that the State did provide an Excelsior list, pursuant to PERB Reg. 4.3(a), which included names, home addresses, and work locations of all bargaining unit employees to both DCOA and the challenging labor organization as part of the decertification election process. The election is scheduled for June 12, 2002.

high employee turn-over rate, and the fact that DCOA and the State were engaged in negotiations for a successor collective bargaining agreement. That issue is not on remand in this matter.

The Order of Remand issued on April 1, 2002, concerns the first issue raised by the charge:

. . . the Court remands the State's new arguments, for the Board to consider whether compliance with the Memorandum of Understanding is unlawful under this state's common law of privacy. [Order of Remand, (April 1, 2002) Glasscock, Master in Chancery, at 2].

The State argues that the Agreement is inherently defective because it contains no expiration date and is, therefore, subject to unilateral termination by either party at any time. It contends that the Agreement was entered into in good faith and its terms adhered to until the State Attorney General's office determined that, with regard to the home addresses, the Agreement was illegal because it violated the state's common law right of privacy.

The State's argument that the Agreement is inherently defective is beyond the scope of the Master's Remand Order. The limited issue remanded to the PERB for resolution is whether compliance with the Agreement is unlawful under this State's common law right of privacy, not whether the Agreement is inherently defective and could be unilaterally terminated by either party at any time.

So, too, whether the Agreement was superseded by the entireties clause in the collective bargaining agreement is separate and apart from the common law right of privacy and, therefore, also beyond the scope of the remand order.

The Court's remand order extends exclusively to "this state's common law right of privacy." In this area, PERB will consider all common law arguments, regardless of whether they were specifically raised previously. In his final order, the Master repeatedly refers to the fact that the common-law right of privacy argument is one which was not previously raised. In fact, this is the basis for his remand:

This matter has been remanded to the PERB because the State sought to raise an issue on appeal that was not fairly presented below . . . . I do note, however, that the merits of the common law of privacy argument sought to be raised for the first time on appeal are now before the PERB. That body, not this Court, is in the best position to determine whether those issues have merit such that the PERB is persuaded that it should stay or modify its order of September 10, 2001, pending its resolution of the issues on remand. [Master's Report, dated April 12, 2002 at 11].

The State cites six (6) cases which, it claims, establish a common law right of privacy in Delaware. News-Journal Co. v. Billingsley, Del.Ch., Hartnett, V.C. (Nov. 1980), 1980 WL 3043, 6 Del.J.Corp.L. 343, involved a private request by the newspaper and two of its reporters to obtain information from an investigatory file of a member of the Association of Professional Engineers (“Association”) under the Delaware Freedom of Information Act (“DFOIA”). After determining that the requested information was not subject to the DFOIA, the Court held that the information need not be divulged. In reaching its decision the Court observed that the issue presented involved two laudable governmental policies including, first, that the DFOIA is intended to assure that government functions are performed in public so that the public is better prepared to evaluate the performance of elected officials. Counter-balancing this goal is the purpose of the Professional Engineers Act (24 Del.C. §2802) to promote public welfare by regulating the qualifications of professional engineers employed in Delaware.

The Court concluded that revealing investigatory files would have a chilling effect upon those who might otherwise bring pertinent information to the Association. Additionally, the Association’s ability to investigate would be hampered and, so too, its ability to maintain the qualifications of registered engineers. The Court concluded that, “Preventing this result must take precedence over a disclosure right.” News Journal, 1980 WL 3043 at 3, 6 Del.J.Corp.L. at 346.

The News Journal case clearly involves a legitimate public interest, i.e., maintaining the integrity of both the investigatory process and the role of the Association, in which the State had a legitimate interest. Concerning the individual right of privacy, the Court observed: “Furthermore, the registered engineer under investigation has a right of privacy that would be jeopardized by making investigatory files available to private persons.” Id.

In Bd. of Ed. of the Colonial School District v. Colonial Education Association, Del. Ch., C.A. No. 14383, Allen, C., (Feb. 28, 1996), 1996 WL 104231, aff’d., Del. Supr., 685 A.2d 361 (1996), a music teacher received a three-day suspension for insubordinate and unprofessional conduct resulting in the appearance of sexual harassment directed towards female students. When the Colonial Education

Association's ("CEA") request for the names of the individual students involved was denied, the Association filed an unfair labor practice charge before the Public Employment Relations Board (PERB). The matter eventually found its way to the Court of Chancery on appeal.

In Colonial, the Court very clearly set forth the PERB's role in reviewing and balancing the competing legitimate interests of fair representation and privacy. The Court first identified that the employer in that case had a special responsibility to protect the children it is responsible to educate:

Certainly the District bears a special responsibility to protect and educate children while in the District's schools. This responsibility includes the responsibility to take reasonable steps to protect children from foreseeable harm and to take such steps as are feasible and prudent to advance the education of children in its schools. It can hardly be doubted that, at least in many contexts, for a child to be involved to any extent in a controverted teacher disciplinary proceeding would not be beneficial to the child. It would at the very least be powerfully distracting and at the worst a cause for serious distress. Should the student's identity be known to the Association, there are possible risks to the child that responsible teachers and administrators could not simply ignore.... Colonial School District v. Colonial Education Assn., 1996 WL 104231 at 8.

The Court also held that such determination must be made on a case-by-case basis, and set forth specific factors for consideration:

Thus, when student-sensitive information is relevant to the assessment by the Association of a filed grievance, the determination of what such relevant information is appropriately disclosed and under what circumstances will of necessity require a case-by-case determination. Inevitably the first such determination will be that of the District and of parents. If the district, after consultation with parents, cannot come to agreement about that subject, the PERB will be required to decide that question in an action of this sort under the Delaware Act, but in such determination PERB will be required to consider and balance the competing legitimate interests of fair representation and student privacy, and should be careful in that context to afford some weight and respect to any professional judgments made by the District or decision made by parents concerning the welfare of children. If the matter cannot thus be resolved, this court will be required on a case-by-case basis to resolve the balance between legitimate privacy claims and the need for access to information relevant to the processing of a grievance. In that connection among the facts to be considered will be specific interests of the child at stake, and the nature and extent of threats to those interests; the severity of the discipline that is being grieved; and the availability of alternative means to provide some assurance or opportunity for greater information without risking inappropriate intrusion into important interests of the child. [Citations and footnotes omitted, emphasis added]. Id.

The Court resolved the Colonial case by balancing the interests in its remedy:

An appropriate remedial order would require that the District do now what it might have done originally to see if the childrens' guardians would consent to a disclosure that might permit the Association to more easily and more reliably determine its course of action with respect to the Briggs' grievance. The District shall within thirty days deliver to the Association a signed statement either identifying the parties of the children involved, with their permission, or stating what efforts were made without success to gain permission to disclose the parents' identity. Any such disclosure made shall be for the use of the Association in the grievance that gave rise to this matter and shall not be disclosed in any other person for any other purpose. Id. at 9.

The case of Delaware State University v. Delaware State University Chapter of the American Association of University Professors, Del. Ch., C.A. 1389-K, Strine, V.C. (May 16, 2000), 2000 WL 33521111, involved a deferral issue. The Court, citing the Colonial case (Supra.), again suggested that legitimate competing interests must be balanced on a case-by-case basis:

. . . the statutory informational right necessarily raises the same sort of balance concerns that arise in discovery disputes in litigation.

Indeed, the nature of the information sought in this case suggests that a reasoned resolution of the discovery dispute between the union and DSU required a careful distinction between aspects of the files that lacked any credible claim to confidentiality (e.g., published articles) and aspects that are more sensitive (evaluations and merit recommendations). Although Article 14.4.6 would seem to subordinate the confidentiality concerns of DSU to the union's need for relevant information, in legal proceedings, under statutes like the PERA a union's "right to access to relevant information is not, of course, absolute" and is instead "subject to privileges that may arise from threats to other legally protectible interests. Colonial School District, 1996 Del. Ch., LEXIS 27 at \*24 - \*25. In this case, such concerns suggest that the union's access to certain information perhaps should have been subject to a confidentiality order limiting the purposes for which the information could be used and restricting who could see it. DSU, 2000 WL 33521111 at 16.

The case of United States Department of Defense, et. al. v. Federal Labor Relations Authority, et. al., 510 U.S. 487 (1984) involved a request for information, including home addresses, of a federal employees. Although this case involved a request under the Federal Freedom of Information Act, the Court concluded that divulging certain information, including home addresses, would constitute an invasion of personal privacy.

Relying on the Court's decision in Department of Defense, the Court of

Appeals for the Third Circuit raised a concern about the privacy interests of employees of their home addresses. Sheetmetal Workers International Association, Local Union No. 19 v. United States Department of Veterans Affairs, 135 F.3d 891 (3d Cir. 1998). There, the Court held that the certain information concerning a government contractor's employees, including home addresses, need not be divulged to a Union engaged in monitoring compliance with the Davis-Bacon Act. It is important to note that the Union requesting the home addresses of employees in this case was not the exclusive bargaining representative of those employees.

In Grinnell Fire Protection Systems Inc. v. National Labor Relations Board, 272 F. 3d 1028 (8th Cir. 2001), the union requested that the employer disclose certain information including the names of all bargaining unit employees, including replacement workers hired during a strike resulting from a collective bargaining impasse. The Court of Appeals held that, under the circumstances presented, the employees had a right to privacy in their home addresses. In ruling for the employer, the Court acknowledged that the NLRB has consistently considered employee names and addresses as information which is "presumptively relevant" to collective bargaining to which the union is entitled. The Court opined, however, that, "relevant information may be withheld from the Union when the interest in confidentiality outweighs the union's need for the information." Grinnell, 272 F. 3d at 1029.

The State cites Nationwide General Ins. v. Seeman, Del.Supr., 702 A.2d 915, 919 (1997) for the proposition that it would be illegal to continue to comply with the terms of an agreement that violate the developing common law. Contracts that conflict with Delaware common law may be reformed as a matter of public policy.

Although distinguishable on the facts, the cited cases establish a recognition by state and federal courts of the existence of a common law right of privacy; and that disputes involving an alleged violation of this common law right are properly resolved on a case-by-case basis by balancing the interest favoring confidentiality against the purpose for which the information is requested. It is within this context that the current matter is to be resolved.

The PERA provides, in relevant part:

§1301. Statement of policy.

It is the declared policy of the State and the purpose of this Chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (1) Granting to public employees the right of organization and representation;
- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and
- (3) Empowering the Public Employment Relations Board to assist in resolving disputes between public employees and public employers and to administer this chapter.

§ 1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.
- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection insofar as any such activity is not prohibited by this chapter or any other law of the state.
- (4) Be represented by their exclusive representative, if any, without discrimination.

§ 1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. . . .

The common law right of privacy is commonly applied to protect individual members of the public from government interference. Here, the individuals whose privacy the State seeks to protect are not members of the public, at large. Rather, they are employees of the State who have voluntarily chosen DCOA to act as their "exclusive bargaining representative" in negotiating their terms and conditions of employment with the State. 19 Del.C. §1302(e), (j), (q).

In the current case, there has been no factual establishment of the specific interests at stake and the nature and extent of threats to those interests, nor to the employer's responsibility to protect those interests. While the State asserts it is protecting Correctional Officers from the potential harm that might result if DCOA were to release the addresses to released prisoners or their accomplices at large, the Agreement specifically states that DCOA agrees to use the information "solely for official Association purposes in its role as exclusive bargaining representative."

Additionally, the State admits that there was not a single objection from a bargaining unit member to the employer's release of his or her home address to their union during the four years in which the State provided this information. There is no question in this case but that the addresses in question are not subject to DFOIA disclosure. The origin from which the State derives its asserted responsibility to protect its employees from their chosen bargaining representative is unclear.

Unlike the cases it cites, the specific public interest which the State seeks to protect is unclear. There is one statewide unit of Correctional Officers working at approximately eight central facilities. The bargaining unit employees work continuous shifts. The ability of DCOA to contact the bargaining unit employees is hampered by an acknowledged high rate of turnover and large increases in the ranks of Correctional Officers over the past couple of years. As the hearing officer noted, at the time the State discontinued supplying DCOA with home addresses the parties were engaged in collective bargaining negotiations. The obvious impact of the State's action was to compromise the ability of DCOA to carry on meaningful communication during this period.

It is undisputed that providing DCOA with employees' home addresses places no unusual burden on the State. By the terms of the Agreement, DCOA has committed to using the addresses solely for reasons

related to its collective bargaining responsibilities and to hold the State harmless from any liability suits. Further, as noted by the Master in his Final report, "... even absent the hold-harmless provision of the agreement, it is not clear that a successful suit could be maintained, in the face of sovereign immunity, based upon the State's compliance with an order of the PERB or of this Court." [Master's Report, Supra, at 9].

Under the circumstances here present, the State has failed to establish that the common law right of privacy, constitutes a valid State interest which would render the Memorandum of Understanding contrary to law, or that it supersedes the State's obligation to provide relevant information to the exclusive bargaining representative of its employees under the Public Employment Relations Act. The Agreement not only represents an effective accommodation of the interest of DCOA in obtaining information necessary for its duty to represent bargaining unit employees but also limits the use of that information specifically for representational purposes, consistent with prior decisions issued by this Court.

### **DECISION**

Consistent with the foregoing discussion, it is determined that:

Compliance with the Memorandum of Understanding  
is not unlawful under this State's common law of privacy.

DATED: 10 June 2002

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