

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

AMERICAN FEDERATION OF STATE, COUNTY)	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,)	
)	<u>ULP No. 03-07-395</u>
Petitioner,)	Probable Cause
)	Determination
STATE OF DELAWARE,)	
Respondent.)	

BACKGROUND

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

American Federation of State, County and Municipal Employees, Council 81 (“AFSCME” or “Council 81”) is an employee organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, pursuant to 19 Del.C. §1302(i). AFSCME, with and through its designated locals, represents numerous discrete bargaining units of State employees for the purpose of collective bargaining and is certified as the exclusive bargaining representative of those units. 19 Del.C. §1302(j).

On or about December 12, 1995, the State and AFSCME entered into the following Memorandum of Understanding:

Memorandum of Understanding

In recognition of the exclusive bargaining agent's obligation to represent all employees within the bargaining unit for collective bargaining purposes pursuant to 19 Del.C., ch.13, the American Federation of State, County and Municipal Employees, Council 81 ("AFSCME") and the State of Delaware ("State") hereby agree to the following Memorandum of Understanding ("Memorandum"):

1. The State agrees to provide AFSCME with a quarterly list of all employees in State bargaining units where AFSCME has exclusive recognition status which contains the name, home addresses, position classification and employment date of each bargaining unit employee;
2. AFSCME agrees that any and all information provided by the State pursuant to this Memorandum shall be used solely for collective bargaining representational purposes;
3. AFSCME agrees to indemnify and hold the State harmless against any and all claims, demands, legal actions and other forms of liability that arise out of or by reason of any action taken or not taken by the State to comply with any term of this Memorandum; and
4. This Memorandum shall take effect and be implemented within two payroll periods of its signing date.

/s/ Michael A. Begatto
For AFSCME
Date: 12-12-95

/s/ Thomas LoFaro
For the State
Date: 12-12-95

On or about June 10, 2003, AFSCME made a request of Thomas LoFaro, Deputy Director of State Personnel for the State of Delaware, for a list of the names, home addresses, position classification, and employment date of each bargaining unit employee, pursuant to the terms of the Memorandum. The State responded by e-mail to AFSCME's counsel on or about June 18, 2003, in relevant part:

Our understanding has been that AFSCME has been receiving this information, with the exception of home addresses for all bargaining unit members. In fact, where AFSCME has experienced problems with certain agencies complying with the MOU, it has sought our intervention and we have assisted in ensuring that information was forwarded to AFSCME.

AFSCME's counsel responded by e-mail, "The issue is the home addresses. The Council believe[s] that it is entitled to the information. We are asking that the information be produced in a timely fashion. Is the State willing to produce this information?"

The State's Manager of Labor Relations responded to AFSCME Council by e-mail sent June 19, 2003:

You may recall that, several years ago, the Department of Justice advised State Personnel that releasing home addresses of bargaining unit members to a labor organization would violate their privacy rights. State Personnel therefore discontinued its practice of providing this information to labor organizations. As a consequence, the Delaware Correctional Officers Association (DCOA) filed an unfair labor practice against the State. The PERB heard the case and ruled that the home addresses should be provided. The Department of Justice appealed the PERB's ruling into Chancery Court. The Court remanded the case back to the PERB for further consideration, after which time it went back to the Court where a ruling was issued that the matter had become moot due to the intervening decertification of DCOA. However, we are presently awaiting a decision from the Court on DCOA's request for attorney's fees and whether the Court will vacate the PERB ruling.

Presently, the Department of Justice continues to maintain that releasing this information would violate employee's privacy rights. Accordingly, we are unable to provide this information to AFSCME.

On July 9, 2003, AFSCME filed this charge alleging the State's refusal to provide names and home addresses of bargaining unit members is a failure to bargain in good faith and a violation of 19 Del.C. §1307(a)(1), (a)(2), and (a)(5).¹

On July 17, 2003, the State filed its Answer to the Charge, denying the allegations contained therein. The State further asserted under new matter that the Memorandum had no termination date, was terminable at-will, and was lawfully terminated by the State.

¹ 19 Del.C. §1307 (a): It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- (1) Interefere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (2) Dominate, interefere with or assist in the formation, existence or administration of any labor organization.

On July 21, 2003, AFSCME filed its response to the New Matter, denying the State's assertions.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

The issue of whether a public employer has an obligation under the PERA to provide home addresses to an exclusive bargaining representative was addressed by PERB in Delaware Correctional Officers Assn. v. Delaware Dept. of Correction, Del. PERB, ULP 00-07-286, III PERB 2209 (2001) (Decision of the Hearing Officer); PERB Decision on Review, IV PERB 2355 (2001); Order of Remand, C.A. 19115, IV PERB 2589 (April 2002); Master's Report, C.A. 19115, IV PERB 2591 (April 2002); Hearing Officer's Decision on Remand, IV PERB 2639 (July 2002); PERB Decision on Review of the Hearing Officer's Decision on Remand, IV PERB 2685 (July 2002); Master's Report, C.A. 19115, IV PERB 2755 (December 2002);

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

Master's Report on Application for Attorney's Fees, C.A. 19115 (August 2003) (*Unreported*);
Master's Report on Vacatur Issue, C.A. 19115 (August 2003) (*Unreported*).

That case involved a charge by the Delaware Correctional Officers' Association ("DCOA") for enforcement of an identical Memorandum of Understanding, which the State and DCOA entered into on or about February 1, 1996. The State had provided home addresses to DCOA pursuant to that Memorandum until February 25, 2000, at which time the State advised DCOA it would no longer provide employee home addresses based on advice from the Attorney General's Office that to continue to do so may violate the employees' privacy rights.

The decision of the Hearing Officer in DCOA v. Dept. of Correction (*Supra*) found that DCOA had a right to the home addresses of bargaining unit employees as a matter of law, under the circumstances presented which included recent rapid increases in the size of the bargaining unit, a high employee turn-over rate, and the timing of the charge, namely that the State and DCOA were engaged in negotiations for a successor agreement. The decision specifically held:

Home addresses of bargaining unit employees are reasonably relevant and necessary to DCOA in properly performing its statutory duties to represent those employees, and the disclosure of home addresses to the exclusive bargaining representative as part of the collective bargaining process is not prohibited by 19 Del.C. Chapter 100.

By refusing to provide DCOA with the home addresses of bargaining unit employees which are reasonably relevant and necessary to DCOA properly performing its statutory duties to represent those employees, the State failed to bargain in good faith and violated 19 Del.C. §1307(a)(1) and (a)(5).

On review, the full PERB affirmed the Hearing Officer's decision and further found:

The State could not unilaterally decide to disregard the terms of the parties' 1996 Memorandum of [Understanding]. When one party to an agreement believes, after the execution of an agreement, that a change has occurred which necessitates that the agreement be modified, there is a process to be followed. The State could have either petitioned this Board for a declaratory statement concerning its obligation to continue to provide home addresses, or it could have negotiated with DCOA directly. By failing to do either, the State violated its duty to bargain in good faith.

The State appealed the Board's decision to the Chancery Court. The Court remanded the case back to PERB "because the State sought to raise an issue on appeal that was not fairly presented below," namely consideration of whether a common law right to privacy existed that impacted the Memorandum of Agreement. (Masters Report, IV PERB 2601). In his decision on remand, the Executive Director declined to address the State's argument that the MOU was inherently defective because it contained no termination date, and was, therefore, subject to unilateral termination by either party at any time, holding that issue was beyond the scope of the limited issue on remand.

During the processing of the appeal in that case, DCOA was decertified as the exclusive bargaining representative of the unit of Correctional Officers. The Court then found the matter to be moot, but declined to grant the State's motion for vacatur. The Master's report states, "[s]hould a similar case arise involving the State and other parties, the existence of the board's decision below would neither preclude relitigation of the issue there nor in anyway bind this court on appeal." Master's Report (Vacatur Issue) at 3.

The instant unfair labor practice charge is the case the Master predicted.

DETERMINATION

Construed in a light most favorable to the Charging Party and based upon PERB decisions concerning an exclusive representative's right to home addresses for representational purposes, the pleadings constitute reason to believe that an unfair labor practice may have occurred. Specifically, the issue is whether the State violated 19 Del.C. §1307 (a)(1), (a)(2), and/or (a)(5) when it refused to provide AFSCME with the home addresses of bargaining unit employees.

The pleadings raise factual questions which must be resolved on a record created by the parties. Specifically, the pleadings do not adequately define the bargaining units in issue or the circumstances surrounding AFSCME's representational need for the home addresses of those employees.

Further, the legal question raised by the State in its Answer concerning enforceability of the Memorandum of Understanding has also not been addressed by PERB.

An informal conference will be convened with the parties in order to discuss whether a hearing is necessary or whether the parties can agree to a stipulated set of facts upon which argument can be made and a decision rendered in lieu of a hearing.

DATE: 9 September 2003

/s/Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.