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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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| DEPARTMENT OF CORRECTIONS, STATE OF DELAWARE, | ) | |
| Respondent Below-Appellant, | ) | |
| v. | ) | C.A. No. 19115 |
| DELAWARE CORRECTIONAL OFFICERS ASSOCIATION, | ) | |
| Charging Party Below, Appellee. | ) | |

MASTER'S REPORT
(Vacatur Issue)

Date Submitted: August 1, 2003
Draft Report: August 4, 2003
Final Report: August 28, 2003

Lawrence W. Lewis, Esquire, Sherry V. Hoffman, Esquire, Department of Justice, Wilmington, Delaware; Attorneys for Appellant State.

David A. Boswell, Esquire, Schmittinger & Rodriguez, Rehoboth, Delaware; Attorney for Appellee.

GLASSCOCK, Master

This matter involves an appeal by the Department of Corrections (the "State") from an order of the Public Employment Relations Board (the "PERB"). The PERB found that the State had engaged in an unfair labor practice by not providing the names and addresses of its prison guard employees to the Union representing those employees, the Delaware Correctional Officers Association ("DCOA"). The PERB directed the State to desist from withholding the names and addresses of its employees from DCOA.

During the pendency of this appeal,[1] the Union members in question voted to de-certify the DCOA. Those employees are now represented by the Correctional Officers Association of Delaware. I found that the de-certification of the DCOA rendered this matter moot. Department of Corrections, State of Delaware v. Delaware Correctional Officers Association, Del. Ch., No. 19115, Glasscock, M. (Dec. 23, 2002) (Report). The State has asked that I vacate [2] the order of the PERB which was on appeal at the time the matter was rendered moot.

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[1]The facts of this matter and the progress of the litigation are set out fully in previous reports.

[2]The State's request for vacatur came in connection with the briefing by the parties on the issue of whether the de-certification of DCOA had rendered this matter moot. I found that the vacatur issue was at that point premature, because the request for fees and costs by DCOA remained outstanding. I issued a draft report denying DCOA's request for fees and costs on August 1, 2003, thus making the vacatur issue, in my opinion, ripe.

Vacatur is an equitable remedy. Tyson Foods, Inc. v. Aetos Corp., Del. Supr. 818 A.2d 145, 147-48 (2003). The remedy is available only in narrow circumstances. The successful party applying for vacatur must demonstrate that, during the pendency of the appeal (1) the issue decided below became moot because of circumstances not acquiesced in by the party seeking vacatur, and (2) principles of equity and justice require the vacatur. *See id.* "The rule of vacatur is usually invoked, when there is companion litigation pending between the same parties to eliminate what would otherwise be the procedural bar of *res judicata*," which would arise absent a vacatur. Stearn v. Koch, Del. Supr., 628 A.2d 44, 47 (1993). That is, justice requires a vacatur where a party's intention to appeal a decision has been thwarted through no fault of its own, leaving the decision of an inferior tribunal in place in a way which will preclude the relitigation of the issue collaterally.

The State has failed to meet this standard here. There is no pending "companion litigation . . . between the same parties" subject to the bar of *res judicata*. *See* Stearn, 628 A.2d at 46-47. Should 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.

Because I find that the State has failed to demonstrate that the interests of justice require vacatur, the State's request must be denied.

Master in Chancery

oc: Register in Chancery (NCC)