

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

IN THE MATTER OF:

DELAWARE SOLID WASTE AUTHORITY,)	
)	PERB Review of the
Appellant,)	Hearing Officer's
)	Decision
v.)	
)	<u>REP. PET. 07-02-554</u>
INTERNATIONAL UNION OF OPERATING ENGINEERS,)	
AFL-CIO, LOCAL 542,)	
Appellee.)	

Appearances

*Jeremy W. Homer, Esq., Parkowski, Guerke & Swayze, for DSWA
Louis Agre, for IUOE Local 542*

BACKGROUND

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

The appellee, International Union of Operating Engineers, AFL-CIO, Local 542 (“IUOE”) is an employee organization and has as a purpose the representation of public employees in collective bargaining, pursuant to 19 Del.C. §1302(i).

On February 8, 2007, the IUOE filed a Petition for Bargaining Unit Determination and Certification seeking to represent a bargaining unit of DSWA Recycling employees at the Lambsons Lane facility located in New Castle, Delaware.¹

On February 20, 2007, the DSWA filed its response in opposition to the Petition objecting to the creation of a single facility bargaining unit. It proposed that the bargaining unit should include all DSWA employees statewide who hold recycling positions. DSWA included in this alternative unit employees working at the Delaware Recycling Center, the Intermediate Processing Facility, the Mercantile Store, the Cheswold Facility and the Recycling employees in the Authority's administrative office in Dover. Alternatively, DSWA asserted the appropriate unit should include the 30 Recycling employees assigned to the Lambsons Lane facility and the 14 Recycling employees at the Cheswold facility.

A hearing before a PERB Hearing Officer was held on April 12, 2007 and written argument was received from the parties. By decision dated June 18, 2007, the Hearing Officer determined:

Based upon the record created by the parties and the specific circumstances unique to this case, there is persuasive support to conclude that the unit of blue collar DSWA employees working at the Lambsons Lane facility in the Materials Collection and Materials Processing units is an appropriate unit within the meaning of 19 Del.C. §1310(d). The statute requires PERB identify an appropriate bargaining unit; there is no requirement that the designated unit be the most appropriate. Consequently, unless evidence and/or argument are produced which support a finding that the petitioned for unit is not appropriate, consistent with PERB practice, the desires of the employees who seek representation was evaluated first.

Because the petitioned for unit is appropriate, there is no need to balance the relative appropriateness of the employer's proposed unit, to make a determination as to whether Recycling Coordinators are statutory supervisors, or whether office and Mercantile Store employees share a community of interest with the operational employees at the DRC.

¹ Both the Delaware Recycling Center and the Intermediate Processing Facility are located at the Lambsons Lane facility.

There is no prohibition on modifying this bargaining unit in the future, should employees holding similar positions at other DSWA facilities or divisions seek to be represented for purposes of collective bargaining.

THEREFORE, based on the circumstances presented by this petition, the appropriate bargaining unit is determined to be:

ALL DELAWARE SOLID WASTE AUTHORITY EMPLOYEES WORKING
AT THE LAMBSONS LANE RECYCLING FACILITY WITHIN THE
MATERIALS PROCESSING AND THE MATERIALS COLLECTION
UNITS.

This unit currently includes employees in the following positions:

Recycling Technician I	Recycling Curbside Technician
Recycling Technician I – oil	Recycling Skilled Laborer/Sorter
Recycling Technician I - electronics	Recycling Laborer
Recycling Skilled Laborer I and II	Truck Operator I and II
Plant Operator/ Mechanic III ²	

In Re: Delaware Solid Waste Authority and International Union of Operating Engineers, AFL-CIO, Local 542, Decision of the Hearing Officer, Rep. 07-02-554, VI PERB 3803, 3816 (2007).

By letter dated June 27, 2007, DSWA sought to stay the Order requiring that it post the Notices of Bargaining Unit Determination and to provide a copy of the Excelsior List of eligible voters to the union and to the PERB, in anticipation of filing a Request for Review. Because there was no appeal pending before the full PERB at that time, the Hearing Officer denied the motions to stay because the Notices had been publicly posted by PERB on its website and had been provided to and distributed by the union. Consequently, there was no basis on which to conclude that posting the notice in the workplace would result in immediate, irreparable or prejudicial harm to the employer or its employees. Further, DSWA was not released from its obligation to provide the Excelsior List because the unit found to be appropriate was a subset of the unit DSWA believed was appropriate. As a result, even if DSWA prevailed in its anticipated appeal, it would have to provide this information in the future.

² DSWA Exhibit 2, DSWA Organizational Chart, March 15, 2007.

By letter dated July 5, 2007, DSWA requested review of the Hearing Officer's decision and determination. The Public Employment Relations Board received written argument on review from the parties on July 19, 2007. A copy of the complete record in this matter was provided to each member of the PERB.

The full PERB convened in public session on July 26, 2007, to consider DSWA's Request for Review of the Hearing Officer's decision. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

The Delaware Solid Waste Authority argues that the Hearing Officer erred as a matter of law in not adequately considering the issue of overfragmentation in reaching the determination that the single facility unit the IUOE seeks to represent is appropriate. It asserts that overfragmentation must be specifically considered because it is one of the statutory factors and that PERB has established a presumption that the proposed bargaining unit which creates the fewest possible units is appropriate. *RE: FOP Lodge 7 and University of Delaware, Del PERB, Pet. 00-10-292, III PERB 2137, 2140-42 (HO Dec 2001)*. DSWA argues that National Labor Relations Board decisions also support the finding that the creation of a multi-facility bargaining unit of Recycling Division employees is appropriate.

Upon review of the record, the argument of the parties and cases cited in support of those arguments, the Board finds the Hearing Officer followed a correct process in first determining that the petitioned for bargaining unit was appropriate. While there might be a "better unit" from management's perspective, there is no evidence in this record to support a finding that the single unit of Lambsons Lane employees is not appropriate under the statutory criteria.

DSWA places too fine a point on its overfragmentation argument. Other than speculation that it will be more difficult to bargain with a group of represented employees concerning terms and conditions of employment (as opposed to its ability to unilaterally establish the same over the last 30 years), there is no evidence in the record addressing the effect of the alleged overfragmentation on the efficient administration of the Authority. An unrepresented workforce is always fragmented once a group of employees chooses to seek representation. The statute establishes the purpose of promoting harmonious and cooperative relationships in public employment and assuring orderly and uninterrupted public operations and functions is best effectuated by granting public employees the right to organize and be represented, and by obligating employers and unions to collectively bargain. *19 Del.C. §1301*. In this case, although the workforce may be fragmented, there is no evidence supporting the conclusion that it will be overfragmented by the creation of a single bargaining unit.

DSWA also argues that this petition should be remanded back to the Hearing Officer to consider the impact of the pending modification of the Public Employment Relations Act by Senate Bill 36. The Board notes that as of the July 26 2007, review hearing, SB 36 had not yet been signed into law by the Governor. This petition was filed, processed and decided under the PERA as it existed prior to the SB 36 modifications. To delay the processing of this petition to election while waiting for a bill to become law and for rules and processes to be developed by which it will be implemented would be illogical and is unsupported by any authority.

This Board has consistently held that the statute provides a fundamental right to public employees to choose whether they wish to be represented for purposes of collective bargaining. This right is protected by the Board's directive to its staff to expedite representation petitions in order not to interfere with that right.

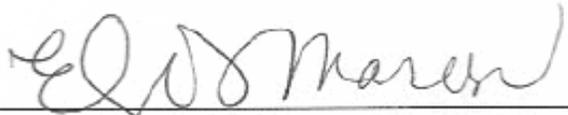
The Board finds the Hearing Officer's rationale and determination is legitimate, rational, reasonable, and supported by the record. The Hearing Officer correctly applied both the

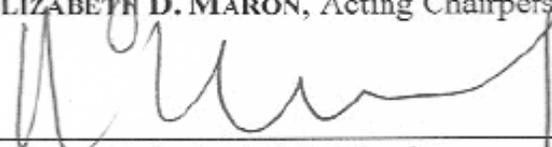
statutory criteria and this Board's precedent in determining that the unit the IUOE seeks to represent is an appropriate unit under the PERA.

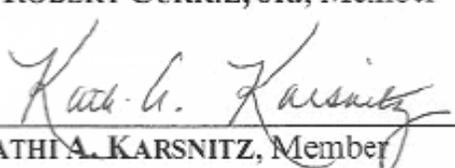
DECISION

Consistent with the foregoing discussion, the Board unanimously affirms the decision of the Hearing Officer and directs that an election be conducted forthwith to determine whether Delaware Solid Waste Authority employees working at the Lambsons Lane Recycling Facility in the Materials Processing and the Materials Collection units wish to be represented for purposes of collective bargaining.

IT IS SO ORDERED.


ELIZABETH D. MARON, Acting Chairperson


R. ROBERT CURRIE, JR., Member


KATHIA A. KARSNITZ, Member

Dated: 7 August 2007