

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**STATE OF DELAWARE**

<b>AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, COUNCIL 81, LOCAL 837,</b>	)	<b>PERB DECISION ON REQUEST FOR REVIEW</b>
<b>Appellant,</b>	)	
<b>v.</b>	)	
<b>STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION,</b>	)	
<b>Appellee.</b>	)	
	)	<b><u>ULP No. 10-12-780</u></b>

**Appearances**

*Perry F. Goldlust, Esq., for AFSCME Local 837*

*Aaron Shapiro, SLREP/HRM/OMB for DOT*

**BACKGROUND**

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

The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, through its affiliated Local 837, is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of certain employees of DOT within the meaning of §1302(j), of the Act.

On or about December 15, 2010, the Appellant filed this unfair labor practice charge alleging conduct by the State in violation §1307(a)(2) and (a)(3) of the PERA.

The Appellant charged<sup>1</sup> DOT was involved in the preparation and distribution of a letter addressed to Local 837 bargaining unit employees encouraging them to stop paying membership dues and to decertify AFSCME. The letter was addressed to “Dear Fellow Union Member” and was signed by four (4) individual DOT employees who identified themselves as North District Supervisors

On or about December 28, 2010, the State filed its Answer denying any violation of the PERA by DOT. Under New Matter, the State asserted the Charge failed to allege sufficient facts to state a claim for relief. AFSCME denied the New Matter in its responsive pleading filed on January 5, 2011.

A probable cause determination was issued by the PERB Hearing Officer on May 24, 2011, which found:

... when considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish probable cause to believe that an unfair labor practice, as alleged, may have occurred. This probable cause relates exclusively to allegations concerning DOT’s involvement, if any, in the creation, distribution and/or content of the November 10, 2010 letter from the four bargaining unit supervisors to other Local 837 bargaining unit members, urging decertification of the union. *AFSCME, AFL-CIO, Council 81, Local 837 v. State of Delaware, DOT*, Probable Cause Determination, ULP No. 10-12-780, VII PERB 5023 (2011).

A hearing was held on September 12, 2011, at which time AFSCME requested all the documents appended to its pleadings be admitted into the record and submitted one additional document<sup>2</sup> which was also admitted. Neither AFSCME nor the State presented any other documentary or testimonial evidence at the hearing. The record

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<sup>1</sup> Additional allegations were dismissed in the probable cause determination based upon a finding that, even when viewed in a light most favorable to the Charging Party, the pleadings provided insufficient information on which it could reasonably be concluded that an unfair labor practice may have occurred.

<sup>2</sup> Executive Order 10, “State Employees and the Right to Organization and Effective Union Representation”

closed upon receipt of closing argument from the parties.

Upon review of the record, the Hearing Officer dismissed the charge in its entirety on January 13, 2012, finding the record insufficient to establish “that DOT was involved with the creation and/or distribution of the November 10, 2010 letter or that it condoned the use of supervisory titles or the representation of union membership status by its authors.” *AFSCME, AFL-CIO, Council 81, Local 837 v. State of Delaware, DOT*, Decision on the Merits, ULP No. 10-12-780, VII PERB 5337, 5344 (2012)

On or about January 19, 2012, the Appellant requested the full Public Employment Relations Board review the Hearing Officer’s decision, asserting Hearing Officer erred as a matter of law and that the decision was not supported by the record. The State responded on January 19, 2012, requesting the appeal be denied and that the Hearing Officer’s decision dismissing the Charge be affirmed. On or about February 10, 2012, the Appellant, *sua sponte*, submitted written argument in support of its request for review.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on February 15, 2012, at which time the full Board met in public session to hear and consider this request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

### **DISCUSSION**

The Board’s scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the

parties on appeal, the Board must vote to affirm, overturn, or remand the decision to the Executive Director for further action.

AFSCME disputes the Hearing Officer's conclusion that no evidence was presented to support its allegations. While AFSCME conceded it had no direct evidence of DOT involvement, it argues there was circumstantial evidence. It argues the timing of the letter, the questions that DOT Human Resource managers asked of AFSCME concerning its dues structure, and the record of past support the State has provided to former Turnpike Administration employees to remain outside the bargaining unit all support the reasonable inference that the State was involved. AFSCME asserts the Hearing Officer did not give due consideration to the law in terms of what evidence is sufficient to establish a *prima facie* case and to shift the burden to the State to justify its actions. It argues documentary evidence is sufficient and that it is unreasonable to expect the Union to be able to support its case in any other manner.

The State argued the Appellant failed to establish any basis on appeal for the Board to conclude the Hearing Officer's decision was contrary to law or unsupported by the record. AFSCME's efforts to create a history of anti-union animus is unpersuasive. It argues there is nothing in the record that puts the November 10, 2010 letter in DOT's hands, or supports a conclusion that DOT management aided, abetted or assisted in the creation and/or distribution of the letter. It is also clear that DOT had no knowledge of the letter's existence until AFSCME brought it to management's attention. Once it became aware of the letter, DOT took appropriate steps to investigate and deal with the employee who admitted to distributing a few letters in the workplace.

AFSCME argues that employees should not be able to use the title of "supervisor" when signing a letter that does not directly relate to their job duties. It asserts most

employees believe supervisors act with the authority of management. If the authors of the letter were not acting as DOT agents, when DOT became aware of the letter it should have contacted everyone who received the letter to let them know that the authors were not acting as agents of the State. By failing to publicly disavow the implied agency relationship, AFSCME asserts DOT condoned it.

The State also argues the record is void of any evidence on which it could reasonably be concluded that the authors of the letter were acting as DOT agents. Having or using the title of “supervisor” does not mean employees are designated agents of the employer. There is literally no evidence in the record that DOT knew of or supported the creation or distribution of the letter.

The letter is clearly written from the perspective of bargaining unit members. There is nothing in the letter which suggests or implies that the authors are acting in a managerial or supervisory function. When the authors describe themselves as North District Supervisors it clarifies that they hold bargaining unit positions. Upon careful review, the Board concludes the Hearing Officer correctly concluded the record is insufficient to support the conclusion that the authors were acting as DOT agents.

The Board also rejects AFSCME’s assertion that because the State did not object to the introduction of documents into the record, that those documents are therefore uncontradicted and the burden then shifted to the State to rebut the reasonable inferences AFSCME drew from those documents. The question here turns upon a determination of reasonableness. Even when viewed in context, the inference AFSCME has drawn that DOT had to have been involved in creation of the November 10, 2010 letter is not reasonable or supported by evidence of record.

The PERA protects employees in their right to act collectively, whether that right

is exercised to organize and seek representation, or to seek to decertify a certified bargaining representative. The record considered by the Hearing Officer and reviewed by this Board is insufficient to support the conclusion that DOT was involved in the creation or distribution of the letter or in authorizing the authors to act as its agents.

For these reason, the Appellant has failed to establish the Hearing Officer's decision was either contrary to law or unsupported by the record.

### **DECISION**

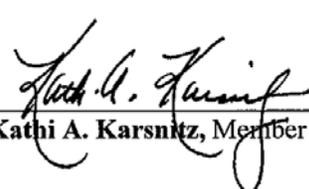
After reviewing the record, and considering the arguments of the parties, the Board unanimously affirms the decision of the Hearing Officer finding the record evidence fails to establish a sufficient basis on which to conclude that DOT was involved in the creation and/or distribution of the letter to bargaining unit employees urging decertification of the union, that it condoned the use of supervisory titles or the representation of union membership status by the letters authors, or otherwise committed unfair labor practices, as alleged.

Wherefore, the dismissal of the Charge is affirmed.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**

  
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**R. Robert Currie, Jr., Member**

  
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**Kathi A. Karsnitz, Member**

**DATED: April 20, 2012**