

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CITY OF DOVER, DELAWARE,	:	Representation Petition
	:	
and	:	<u>No. 12-07-870</u>
	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND	:	(CERTIFICATION)
MUNICIPAL EMPLOYEES, COUNCIL 81, AFL-	:	
CIO.	:	

APPEARANCES

*Lance Geren, Esq., Freedman & Lorry, P.C., for AFSCME Council 81
Glenn C. Mandalas, Esq., and Michael J. Hoffman, Esq., Baird, Mandalas, LLC, for the City of
Dover*

The City of Dover, Delaware ("City") is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994, 2007).

The American Federation of State, County and Municipal Employees, Council 81 ("AFSCME") is an employee organization within the meaning of 19 Del.C. §1302(i) and has as one of its purposes the representation of public employees in collective bargaining.

On or about July 27, 2012, AFSCME filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative with the Delaware Public Employment Relations Board ("PERB"), seeking to create and represent a bargaining unit comprised of:

ALL FULL-TIME UNREPRESENTED EMPLOYEES OF THE CITY OF DOVER, INCLUDING BUT NOT LIMITED TO EMPLOYEES IN THE FOLLOWING JOB CLASSIFICATIONS, AND EXCLUDING ALL OTHER EMPLOYEES, DEPARTMENT HEADS, CONFIDENTIAL EMPLOYEES, SWORN POLICE OFFICERS AND ELECTED OFFICIALS:

911 Supervisor	Customer Service Supervisor	Principal Planner
Account Clerk III	Downtown Coordinator	Public Affairs Coordinator
Accountant II	Electrical Engineer I	Public Works Operation Manager
Administrative Assistant	Engineer Services & System Ops Supervisor	Records Unit Supervisor
Assistant Library Director	Field Service Rep. III	Recreation Center Coordinator
Billing Clerk	Field Supervisor I	Recreation Program Specialist
Building Supervisor	Fire Chief's Assistant	Residential Assessment Tech
Central Services Coordinator	GIS Technician	Senior Computer Program Analyst
Chief Building Inspector	Inspector III	Service Center Clerk
City Assessor	LAN Analyst	Sports Coordinator
Civil Engineer I and II	Librarian I & II	Superintendent of Grounds
Community Development Manager	Line Crew Superintendent	Victim Services Coordinator
Computer Operator/ AS400 System Administrator ¹	Payroll Specialist	Water Production Supervisor
Contract & Procurement Mgr.	Planner II	Water/Waste Maintenance Supervisor
Customer Service Manager	Police Resource Manager	

The petition was accompanied by a number of authorization cards signed by employees holding positions in the proposed bargaining unit in support of representation by AFSCME.

¹ During the hearing, the City clarified that the position of Computer Operator is included in the DOE bargaining unit. AFSCME agreed that the position in issue in this petition is the position held by Marlene Loomis and that the responsibilities her position includes administration of the AS400 System. At the time of the hearing there was no formal job or classification description available for this position. For purposes of clarity, the position will be referred to throughout the decision as the AS400 System Administrator, which is a different position from the Computer Operator included in the DOE bargaining unit.

On or about August 7, 2012, the City filed its response to the AFSCME petition. The City objected to the proposed bargaining unit, asserting it was inappropriate because the employees in the group do not share a community of interests and creating the unit as proposed would have an adverse effect on the efficient administration of government. The City also objected to the inclusion of 29 positions which it asserted were ineligible for representation because they were either “confidential” or “supervisory” as those terms are defined in 19 Del.C. §1302; the inclusion of five part-time positions because they do not fall within the proposed unit definition; and the inclusion of the Tax Assessor position because it is a Department Head.

The City also provided a list of employees in the positions AFSCME seeks to represent which was used to verify the petition was properly supported by at least thirty percent (30%) of the employees in the petitioned-for bargaining unit.

A prehearing conference was convened by the PERB in which the parties shared information and positions concerning specific classifications. A public evidentiary hearing was convened on October 19, 2012 in order to create a factual record on which a determination could be made as to an appropriate bargaining unit, as required by 19 Del.C. §1310(d).

Written closing argument was received from both AFSCME and the City on or about November 14, 2012. This decision results from the record thus created by the parties.

ISSUE

WHETHER THE PETITIONED-FOR BARGAINING UNIT IS APPROPRIATE WITHIN THE MEANING OF 19 DEL.C. §1310(D)?

APPLICABLE STATUTORY PROVISIONS

19 Del.C. 1310 (*in relevant part*)

- a. An employee organization desiring to be certified as the exclusive

representative shall file with the Board, accompanied by the uncoerced signatures of at least 30 percent of the public employees in the unit claimed to be appropriate, indicating a desire to be represented for the purposes of bargaining collectively with a public employer.

- b. If the Board or its duly authorized designee determines that a petition is properly filed and is accompanied by the requisite number of valid signatures, the Board or its designee shall proceed toward defining the appropriate bargaining unit by setting a date for hearing on the matter. If the petition is not properly filed and/or if it is not accompanied by the requisite number of valid signatures, the Board or its designee shall dismiss the petition.
- c. After holding such hearings as it deems necessary, the Board shall determine the appropriate bargaining unit. The Board may, by rule, delegate its unit definition authority to 1 or more of its members or to its executive director, provided that a unit definition order may be subject to review by the Board at the request of any party or upon the Board's own motion in accordance with rules and procedures established by the Board.
- d. In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as similarity of duties, skills and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties involved; the effect of overfragmentation on the efficient administration of government; and such other factors as the Board may deem appropriate. The Board or its designee shall exclude supervisory employees from all appropriate bargaining units created subsequent to September 23, 1994....

BACKGROUND

The City of Dover currently negotiates with three bargaining units which include a unit of police officers (currently represented by FOP Lodge 15), a unit of Electric Department employees (currently represented by IBEW Local 1238), and a unit of civilian clerical, financial, custodial, maintenance, and direct services employees (currently represented by Dover Employees Organization (“DOE”)).

Prior to 1991, the City recognized DOE for purposes of representation of a group of employees. The July 1, 1988 agreement between DOE and the City of Dover states, in Article

2, Recognition: “The City recognizes the Dover Organization of Employees, hereinafter referred to as “DOE”, as the representative of the City employees in various departments, except Electric, non-clerical, and sworn Police and for the purpose of dealing with the City in matters of collective bargaining. The represented membership of the Organization shall be eligible for the unit.” The agreement further states in Article 37, Definition of the unit: “...Not eligible are Administrative, Managerial, Supervisory, Professional employees and those employees privy to privileged and confidential information. Included in the exceptions are guards and/or security personnel. Administrative, Managerial and Supervisory employees shall be as defined in the National Labor Relations Act. Professional employees shall be ineligible unless they elect in writing to join the Association...” *City Exhibit H*. Although the National Labor Relations Act was never applicable to the City or its employees, at the time of the City’s recognition of the DOE, there was no state law governing collective bargaining for civilian municipal employees.

The DOE unit was originally certified by the Delaware Department of Labor following an election on May 9, 1991. *Union Exhibit 1, DOL Case 194*. At that time, the unit was defined to include:

All Full-time and Part-Time Permanent Employees who work more than twenty hours per week in the following classifications:

Clerk Typists I & II	Secretary I & II
Storekeeper	Account Clerk I
Keypunch Operator	Computer Operator I
Library Page	Library Clerk I & II
Library Assistant	Inspector I & II
Engineering Construction Inspector	Engineering Associate
Animal Control Officer	Parking Enforcement Attendant
Police Communications Officer	Fire Dispatcher
Surrey Controller	Surrey Driver

Paramedic	Custodian
Laborer I & II	Lead Laborer
Motor Equipment Operator I, II & III	Building Maintenance Craftsperson
Ground Tree Trimmer	Nurseryman
Sign/Street Painter	Water Serviceman
Public Works Plant Mechanic I & II	Public Works Dispatcher
Public Works Draftsman	Water Meter Reader I & II
Public Works Utility Locator	Auto Mechanic Helper
Auto Mechanic I & II	

The certified unit also included Library Clerk I and Library Page employees who worked less than twenty (20) hours per week. The Department of Labor’s summary noted the City had recognized DOE as the collective bargaining representative for this unit for several years prior to the passage of legislation in 1990 which extended the jurisdiction of the state’s Right of Public Employees to Organize law to municipalities with 100 or more full-time employees. *Union Exhibit 1.*

The DOE unit was subsequently modified in 1992 to include Planning Technician and Account Clerk II (excluding the Account Clerk II in the Payroll Department) positions.² Courier, Inspector Aide and Property Evidence Clerk positions in 1993³, and again in 1994 to include Customer Service Representatives I and II and Receptionist positions⁴. *Union Exhibit 1.* The DOE unit has not been modified or amended since 1994.

The City and DOE have included in their collective bargaining agreements at Article 2, the following Recognition Clause (in relevant part):

² DOL Case 194 (a).

³ DOL Case 194 (b).

⁴ DOL Case 194 (c).

The City recognizes the IUE-CWA and its affiliate Local 88315 Dover Organization of Employees (DOE)⁵ as the exclusive bargaining representative of the unit certified by the state of Delaware Department of Labor, Division of Industrial Affairs, under Chapter 13, Title 19, Delaware code under case number 194 including any subsequent amendments and job title changes. Included in such recognition are all full-time and part time employees who work twenty (20) hours or more per week included in the job classifications as set forth in appendix "A". Excluded from representation are all Confidential, Professional, Supervisory or Managerial employees; Temporary employees, guards, part time employees who work less than 20 hours per week (except those who work in the Library Clerk I and Library Page classifications), or who are not permanently employed.⁶

PRINCIPAL POSITIONS OF THE PARTIES

AFSCME:

AFSCME asserts the positions in the petitioned-for unit share a community of interest based on the common duties, skills and working conditions of their employment. The organization of these positions mirrors the departments in which the existing DOE bargaining unit positions work. The petitioned-for positions are differentiated from the DOE positions by the higher level of experience and education required to hold these positions and the exercise of discretion and judgment required by their work. The petitioned-for positions are on a common pay scale which is different from the negotiated DOE wage scale, and contribute to the cost of health care insurance at a different rate. The positions AFSCME seeks to represent have been unrepresented for the last twenty-two years and are the only eligible, unorganized employees of the City.

Creation of a new bargaining unit would not lead to overfragmentation and is consistent

⁵ The Hearing Officer notes the Department of Labor certified DOE as the exclusive bargaining representative in 1991. DOE later chose to affiliate with the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers ("IUE"). The IUE later merged with the Communication Workers of America ("CWA"). In 2011, DOE advised PERB that it had severed its affiliation with the IUE-CWA.

⁶ Joint Exhibit G, July 1, 2010 – June 30, 2012 collective bargaining agreement between DOE and the City of Dover.

with PERB's recognized presumption in favor of the creation of the fewest number of units as is consistent with efficient government operations. The City's argument that the petitioned-for positions should be included in the DOE unit should be rejected because the City has benefitted from having these positions remain unrepresented for more than twenty years (and therefore at-will employees) and has never suggested any or all of these positions should be included in the DOE unit. Secondly, the petitioned-for positions are professional employees⁷ and are readily distinguishable from the employees in the DOE unit. PERB found in *Lake Forest Education Assn.*⁸ the creation of a unit which includes professional and non-professional positions is inappropriate. Finally, AFSCME argues the City's argument should be rejected because the issue before PERB is whether the petitioned-for unit is appropriate, not whether the City has proposed a more appropriate unit.

City of Dover:

The City argues the list of job classifications AFSCME seeks to represent in a new bargaining unit lacks a coherent community of interest. It asserts finding the proposed bargaining unit appropriate will result in duplication and confusion because many of the classifications in this unit share a clear community of interest with positions in the existing

⁷ The NLRA defines professional employees to mean,

- (a) Any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical process; or
- (b) Any employee who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional employees as defined in paragraph (a).

⁸ *Lake Forest Education Assn. v. Board of Education*, Del.PERB, Rep. Pet. 91-03-060, I PERB 651 (1991)

bargaining unit currently represented by DOE.

The creation of a new bargaining unit would not contribute to the efficient administration of government and would create additional costs for the City. The City rejects AFSCME's residual unit analysis, arguing the PERB has not adopted that NLRB standard. It also rejects AFSCME's assertion that it is seeking to represent a "white collar" unit because there are currently traditional white collar clerical, financial and customer service positions in the existing DOE unit.

OPINION

The Public Employment Relations Act grants to public employees the right to organize for purposes of collective bargaining and to be represented by the exclusive bargaining representative of their choosing as certified through the representation process. *19 Del.C. §1303*. The statute also obligates public employers and certified bargaining representatives to enter into negotiations with the willingness to resolve disputes and to reduce their agreements to writing. These obligations are created pursuant to the State's policy 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. *19 Del.C. §1301*.

The Public Employment Relations Board is empowered to determine an appropriate bargaining unit of public employees for purposes of collective bargaining. *19 Del.C. §1302(a); §1310*. The determination of an appropriate bargaining unit results from a factual analysis of the specific facts and circumstances underlying and supporting a request to create or modify a bargaining unit, and there is no bright line standard that delineates appropriateness in every case. *AFSCME Council 81 and Delaware Turnpike Administration, Del.PERB, Rep. Pet. 95-06-140, II*

PERB 1189, 1193 (1995); *In RE: Rehoboth Police Dept. and IBT Local 326*, Del.PERB., Rep. Pet. 96-10-198, III PERB 1531 (1997); *In RE: FOP Lodge 7 and University of Delaware Div. of Public Safety*, Del.PERB., Rep. Pet. 00-10-292, III PERB 2137, 2140 (2001); *In Re: Sussex County and Communications Workers of America*, Del.PERB, Rep. Pet 07-02-557, VI PERB 3949, 3966 (2008).

The NLRB described the process for determining an appropriate unit in its 1991 decision on review in *Park Manor Care Center, Inc., and Local 1199, Drug, Hospital, and Health Care Employees Union*¹⁰:

[I]n exercising its discretion to determine appropriate units, the Board must steer a careful course between two undesirable extremes: If the unit is too large, it may be difficult to organize, and, when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining ... jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. The Board's goal is to find a middle-ground position, to allocate power between labor and management by "striking the balance" in the appropriate place, with units that are neither too large nor too small.

Consistent with the federal approach under the NLRB, the Delaware PERB has held a proposed bargaining unit need only be an appropriate unit under the criteria set forth in §1310(d) of the PERA; it is not necessary that a proposed unit be the most appropriate unit. *Lake Forest* (Supra., p. 655). It is not necessary that all employees in an appropriate bargaining unit perform the same duties or have identical responsibilities. There may be multiple appropriate units in any workplace.

Procedurally, PERB examines the petitioned-for unit first. If that unit is determined to be an appropriate unit with an identifiable community of interest, the inquiry ends there, consistent

¹⁰ 305 NLRB 872, 876 (1991)

with the right of self-determination granted to public employees. An employer who challenges the appropriateness of a proposed unit bears the burden of establishing the unit is clearly inappropriate under application of the statutory criteria; it is not sufficient to simply assert there may be an alternative or more appropriate unit. The City's argument in this case that it would be appropriate to include these positions in the existing DOE unit does not meet that burden.

Consideration of the statutory factors in this case supports the conclusion that a community of interest exists between the administrative support, managerial and professional employees which is separate and distinct from any common interest the group may share with the bargaining unit of employees currently represented by the Dover Organization of Employees.

Similarities of Duties, Skills and Working Conditions:

It is undisputed that the petitioned-for positions work closely with and do similar and related work to that performed by positions in the DOE unit. Indeed, if a wide angle lens or filter is used, it may logically be argued that all of the positions employed by the City work closely together and are related to each other. Such is the nature of an organization, particularly one created and maintained to meet the common goal of providing services to the citizens of the municipality.

It is important to recognize that the community of interest test focuses to a large extent on how the employer has chosen to organize and structure the workplace. The manner in which the employer has organized positions and utilizes the skills of the labor force is an important consideration in any unit determination. *International Paper Co.*, 96 NLRB 295, 298 (1951).

A careful review of the job descriptions, organizational chart, salary scales and testimony evidences that the petitioned for positions which are in departments where they work with DOE represented positions are distinguishable in some cases by the level of education (Librarian I and

II) and in all cases by the level of experience required to qualify for the position.

The Director of Human Resources testified that where there are ranked position titles (e.g., Accounting Clerk I, II, III; Field Service Representative I, II, III, etc.) they are not career ladders through which employees automatically advance, but rather are competitively filled through a hiring process when a position is vacant. That process does not guarantee promotion through the ranks to any employee, although the City Manager also testified that many of the employees in the higher ranked positions did advance through the ranks over time.

The duties and the responsibilities of the petitioned-for positions fall into four main categories which differentiate them from DOE positions. The following positions constitute a group of low to mid-management positions which are responsible for supervising operations, coordinating functions between divisions and/or departments, and/or developing, assigning and overseeing work methods and processes of other employees: 911 Supervisor, Accounting Clerk III, Chief Building Inspector, Field Service Representative III, Fire Chief's Assistant, Librarian I and II, Police Resources Manager, and the Records Unit Supervisor. Although these individuals may perform the responsibilities of other employees at times, it is the responsibility of these positions to oversee or direct work process, to provide training as needed to insure effective operations, and to coordinate functions either within their division or across divisions which distinguishes them.

The second group of positions has direct responsibility for oversight of a specific program, service or information, and include the following positions: Central Services Coordinator, Community Development Manager, Downtown Coordinator, Public Affairs Coordinator, Sports Coordinator, and Victim Services Coordinator. These positions are responsible for oversight and management of programs or services, including development and implementation of the programs, reporting results and resolving concerns. There is a component

of direct contact with citizens/customers and with executive level administrators.

Third, a group of technical and professional positions require higher level skills and professional training. The technical positions include Accountant II, AS400 System Administrator, GIS Technician, LAN Analyst, and the Senior Programmer Analyst. The Information Technology/Computer technical positions are responsible for application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional applications. The professional positions include the Electrical and Civil Engineer and Planner positions, which require specialized education and certifications.¹¹ The professional positions are defined by their advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. These groups are differentiated from DOE positions by the specific skills and expertise which they are required to apply to their duties across departments, programs and projects.

The final group includes administrative support positions which are differentiated from the positions in the DOE unit that do similar work by the higher level of technical skill and knowledge required to perform data collection, maintenance of records and drafting and formatting of reports to be used by executive superiors in developing policy and monitoring the operations of the City. Included within this group are Administrative Assistant and Residential Assessment Technician positions. The Human Resources Director testified the Administrative Assistants:

... work directly with the department head... They typically – they could be working in confidential positions or doing higher level clerical support, such as preparing annual reports, such as our budget, which is a very large document, or financial reports which is another very large

¹¹ I note that the 911 Supervisor, Records Unit Supervisor and Chief Building Inspector positions also require certifications as a condition of employment but do not require specialized education from an institution of higher education in a specialized field to qualify for those certifications.

document. It's just a higher level that the secretaries and the office assistants...¹²

When asked about the differences between a secretary and an administrative assistant, the Human Resources Director responded, "It typically comes down to the responsibility that they have... More responsibility is placed on the administrative assistant to directly assist the director, versus the secretary."¹³ The administrative support positions are responsible for office work directly related to and in support of an executive responsible for implementation of municipal policies.

The record does not support the inclusion of the Billing Clerk position into any of these groups and indicates the duties, skills, and working conditions of the Billing Clerk are more closely aligned with those of the Accounting Clerks I and II, which are positions in the DOE unit. The functions of these positions are essentially clerical. The Billing Clerk is responsible for preparing and processing utility bills and utility work orders. The Billing Clerk position requires less education than the Accounting Clerks. The Billing Clerk reports directly to the Account Clerk III, a position which is also included in this petition. *City Exhibit M*. For all of these reasons, I find the Billing Clerk does not share a community of interest with the other petitioned-for positions.

Considering other factors which are normally considered in evaluating the similarities of duties, skills and working conditions, it is noted that all of the petitioned for employees are paid according to a different wage and salary scale from the employees who work in the same departments but who are represented by DOE.¹⁴ The City operates under a "strong council"

¹² Transcript of October 19, 2012 hearing, p. 39.

¹³ Transcript, p. 44.

¹⁴ The fact that the petitioned-for employees are on a separate wage scale does have a major impact on this decision as the wage scales for the great majority of City employees were negotiated by the exclusive bargaining representatives of the three existing bargaining units.

form of municipal government, in which the City Council appoints the City Manager and the Controller/Treasurer. The Planning Director, Fire Chief and Tax Assessor report directly to the Council. There is also an elected Mayor, who oversees the Economic Development Office and the Police Department. The following Departments report directly to the City Manager: Customer Service, Human Resources, Information Technology, Library, Public Works, Electric, and Public Affairs and Emergency Management. Labor Relations and Personnel functions are coordinated citywide through the Human Resources Department. *City Exhibit M.*

History and Extent of Employee Organization:

The facts concerning the history and extent of employee organization in Dover is undisputed and is set forth in the preceding Background section of this decision. The existing DOE bargaining unit includes positions in each of the following departments within the City: the Office of Planning & Community Enhancement Services (including Life Safety, Code Enforcement and Inspections and Permitting divisions); Customer Service Department (including Customer Services/Collections; Cashiers, and Meter Reading divisions); Administrative Division of the Electric Department; Finance Department (including Finance and Procurement/Inventory divisions); Fire Department; Library; Parks and Recreation; Planning; Police; Public Works (including Sanitation, Grounds, Streets and the Water/Wastewater divisions); and the Public Services Administration. *City Exhibit M.* The petition filed by AFSCME seeks to represent City employees in most of these same departments and divisions.

The evidence presented concerning the history and extent of employee organization supports the conclusion that the City of Dover has effectively negotiated for more than twenty years over the terms and conditions of employment for a broad-based, city-wide bargaining unit which includes employees from a wide variety of departments and divisions. The group of

employees AFSCME seeks to represent in this petition work within those same departments.

Consequently, consideration of the history and extent of organization supports the creation of a city-wide bargaining unit of positions with share a community of interest.

Recommendations of the Parties:

AFSCME filed the petition seeking to create a bargaining unit including all full-time unrepresented employees of the City of Dover. The City has opposed the creation of the bargaining unit in its entirety.

Because the recommendations of the parties are directly opposed, this consideration does not affect the findings concerning appropriateness.

It is noted, however, that while the City opposed creation of the proposed bargaining unit, the parties did submit a stipulation which listed positions to which no questions of eligibility were raised. The Public Employment Relations Act specifically excludes from the definition of "public employees" (who are eligible to be represented for purposes of collective bargaining) certain groups of employees at 19 Del.C. §1302(o):

- (o) "Public employee" or "employee" means any employee of a public employer except: (1) any person elected by popular vote or appointed to office by the Governor; (2) any person who is a prisoner or inmate or who is otherwise held in lawful custody by an agency of the State; (3) any person appointed to serve on a board or commission; (4) any employee, as defined in Chapter 40 of Title 14 of a public school employer, as defined in Chapter 40 of Title 14; (5) any police officers and firefighters employed by the State or political subdivisions of the State or any agency thereof, or any municipal corporation, municipality, city or town located within the State or any agency thereof which, upon the affirmative legislative act of its common council or other governing body, has elected to come within Chapter 16 of this title, or which hereafter elects to come within Chapter 16 of this title. Any police officers and firefighters included in this subsection shall be subject to Chapter 16 of this title; (6) Confidential employees of the public employer; and (7) Supervisory employees of the public employer,

provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to September 23, 1994 shall so continue, unless said unit is decertified in accordance with § 1311(b) of this title, or is modified in accordance with procedures authorized by § 1310(e) of this title.

The parties memorialized their agreement concerning the eligibility of certain positions in correspondence addressed to this office. Those positions include:

911 Supervisor	Fire Chief's Assistant
Account Clerk II	GIS Technician
Accountant II	LAN Analyst
Administrative Assistant ¹⁵	Librarian I
Billing Clerk	Librarian II
Building Supervisor **	Planner II
Central Services Coordinator	Police Resources Manager
Chief Building Inspector	Public Affairs Coordinator
Civil Engineer I	Records Unit Supervisor
Civil Engineer II	Recreation Program Specialist
Community Development Manager	Residential Assessment Technician
Computer Operator/ AS400 System Administrator	Senior Computer Program Analyst
Downtown Coordinator	Service Center Clerk **
Electrical Engineer I	Sports Coordinator
Field Service Representative III	Victim Services Coordinator

Further, the parties also agreed during the processing of this petition that the following positions are outside of the scope of the petition:

Administrative Assistant to the City Manager
Administrative Assistant to the Finance Director
Administrative Assistant to the Director of Human Resources
Assistant Finance Director
Asst. City Clerk/Dpty. Director Council Affairs & Constituent

¹⁵ Three Administrative Assistant positions were specifically as noted in the list below.

** The Building Supervisor and the Service Center Clerk are both currently part-time positions, and are therefore outside of the petitioned for unit. AFSCME asserted in a post-hearing submission that the parties agreed that these positions would be included in the bargaining unit should they become full-time positions.

Services
Asst. to Director of Council Affairs & Constituent Services
Chief of Police
City Clerk/Director Council Affairs & Constituent Services
City Assessor
City Manager
Controller/Treasurer
Economic Development Manager
Electric Department Director
Financial Reporting & Accounting Manager
GIS Manager
Human Resources Director
Information Technology Director
Library Director
Mayor
Planning & Community Development Director
Police Major
Public Works Director

The parties certainly have knowledge and understanding of the nature and functions of the positions and employees affected by this petition which is more extensive than that which can be gained only by reviewing the evidence presented in a representation hearing. Consistent with PERB's long-standing practice, the parties' stipulations are accepted. Consequently, it is unnecessary in this decision to address questions of eligibility.

Effect of Overfragmentation on the Efficient Administration of Government:

Overfragmentation of bargaining units refers to the creation of numerous small, discrete bargaining units of narrowly focused constituencies. *Town of Smyrna & AFSCME Council 81*, Del.PERB, Rep. Pet. 06-02-510, VI PERB 3609, 3619 (2006). The consideration of “the efficient administration of government” requires PERB consider the designation of a limited number of appropriate units, when balanced against the right of employees to exercise their right to choose to be represented, to minimize the time, expenditure of resources and possible disruption of government operations. *Lake Forest* (Supra., p. 665).

As previously noted, the City currently negotiates with three certified representatives of units of police, electric department employees, and a direct services unit. The petitioned for unit would be the fourth and in all likelihood the last possible unit of City employees to be created.

The City has argued creation of a fourth unit separate from the unit currently represented by DOE would adversely affect the efficient administration of government and would result in overfragmentation, asserting this new unit would result in duplicate negotiations at the expense of the City's limited resources.

Overfragmentation might result from the creation of separate bargaining units for administrative, professional and managerial employees, or the creation of a series of departmental units of the petitioned for positions, any of which might also share a community of interest. This petition seeks to provide representation for the types of positions excluded from the DOE unit. While there are undoubtedly additional costs to the City (and to the employees and the union) associated with one more set of negotiations, it is reasonable to presume that three or any other number of additional units would be even more costly in time and resources.

Consideration of the effects of overfragmentation on the efficient operation of government mitigates toward acceptance of a fourth bargaining unit which includes positions excluded from the existing DOE unit which are entitled to be represented, should they so choose.

The City has expressed concern that there is significant overlap between the DOE bargaining unit and the bargaining unit proposed by AFSCME. While it is clear that many of the positions AFSCME seeks to represent work closely with positions that are in the DOE unit, the evidence of record supports the conclusion that there are also clear differences. The petitioned-for positions operate at a higher level and are responsible either for duties which require a greater level of technical or professional expertise or have oversight responsibility for the delivery

and/or coordination of services. These positions are not, however, at the level of making policy decisions. It is the higher level responsibilities that differentiate these positions from the DOE positions, regardless of the fact that they may be required for some portion of their work week to perform direct service duties side by side with DOE positions in their departments.

This decision is based upon careful review of the record and arguments made by the parties. Obviously the parties have a much deeper understanding of the duties, skills, and responsibilities of the City's employees. To the extent that there may be overlap between the DOE unit and this unit, the PERA does address the process by which positions may be transferred between bargaining units at 19 Del.C.§1310(g).

The appropriateness of the DOE unit is not placed in issue by this petition. The unit was certified by the Department of Labor, grandfathered as an existing unit to the PERB's jurisdiction, and consequently is a presumptively appropriate unit. The City asserts the diversity of the positions included in the DOE unit has caused great difficulties in negotiations for both the City and the union. The present record and the representational history of that unit do not expose such difficulties, nor has any action been taken by either the City or the union to restructure or modify that unit (except by adding positions) in more than twenty years.

The petition does not seek to create a duplicate of the DOE unit; rather it creates a unit of the positions that were excluded from that unit as it was first recognized by the City and then certified by the Department of Labor. Further, the right to choose to be represented accrues to employees under the PERA, who also have a right to collectively choose their representative. The record does not reveal that these employees have sought representation either within the DOE unit or that DOE and/or the City have sought to expand that unit over time to include the petitioned-for positions.

A certification petition is not a mechanism by which an existing bargaining unit is

modified. The sole issue before PERB at this time is whether the proposed bargaining unit is appropriate under the statutory criteria.

During his testimony, the City Manager noted that both the City and its employees have a mutual interest in the efficient and effective operation of the municipal government. I note that the scope of the proposed unit has been narrowed by the parties through thoughtful bilateral discussions which resulted in stipulations of agreement. This unit is not a “catch-all” or “residual” unit; rather, it reflects a reasonable effort to fashion a unit which balances the interests of the employees and the City, considering the exclusions from existing bargaining units.

For the reasons discussed above, the proposed unit (excluding the Billing Clerk position and based upon the stipulation of the parties) is determined to be an appropriate unit for purposes of collective bargaining, as required by the PERA.

DECISION

Based on the record created by the parties and the specific circumstances unique to this case, there is persuasive support to conclude that an appropriate bargaining of “administrative, professional and managerial employees” exists. At this time, the unit includes the following positions:

911 Supervisor	GIS Technician
Account Clerk III	LAN Analyst
Accountant II	Librarian I
Administrative Assistant	Librarian II
Central Services Coordinator	Planner II
Chief Building Inspector	Police Resources Manager
Civil Engineer I	Public Affairs Coordinator
Civil Engineer II	Records Unit Supervisor
Community Development Manager	Recreation Program Specialist

Computer Operator/ AS400 System Administrator	Residential Assessment Technician
Downtown Coordinator	Senior Computer Program Analyst
Electrical Engineer I	Sports Coordinator
Field Service Representative III	Victim Services Coordinator
Fire Chief's Assistant	

By agreement of the parties, the following positions are not included in the unit definition: Administrative Assistant to the City Manager, Administrative Assistant to the Finance Director, and Administrative Assistant to the Director of Human Resources.

I further find that the Billing Clerk position, as it was described and defined during the course of these proceedings, is more closely aligned to the clerical and financial positions included in the DOE unit, and is therefore not appropriate for inclusion in this unit.

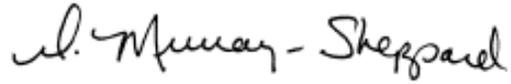
I note that “administrative” as used in this definition includes positions which are differentiated from the positions in the DOE unit who do similar work by the higher level of technical expertise required to perform their duties and their responsibilities for drafting and formatting of reports to be used by their superiors in developing policy and monitoring the operations of the City. “Managerial employees”, although that term is not defined in the statute, are differentiated from the positions in the DOE unit who do similar work by the higher level of responsibility these employees have for oversight of processes and other employees involved in direct services and coordination with other departments to ensure the effective and efficient delivery of services to the City’s residents. “Technical and professional employees” require higher level skills, specialized education and/or training in order to perform the functions of their positions.

WHEREFORE, an election will be scheduled within forty-five (45) days of the issuance of this decision to determine if and by whom the employees in the defined bargaining unit desire

to be represented for purposes of collective bargaining.

IT IS SO ORDERED.

DATE: December 21, 2012



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Delaware Public Employment Relations Board