

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAPITAL SCHOOL DISTRICT :
Petitioner :
: Representation Petition:
v. : 90-10-056
:
CAPITAL EDUCATIONAL SECRETARIES :
ASSOCIATION, DSEA / NEA :
Respondent

INTERIM DECISION ON PRELIMINARY MATTERS

The Capital School District (hereinafter "District" or "Petitioner") is a public employer within the meaning of section 4002 (u) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1990, hereinafter "Act"). The Capital Educational Secretaries Association (hereinafter "Association" or "Respondent") is the exclusive bargaining representative of the public employer's clerical/secretarial employees within the meaning of 14 Del. C., section 4002 (i), of the Act.

On October 22, 1990, the District filed a representation petition with the Delaware Public Employment Relations Board (hereinafter "PERB" or "Board") requesting an amendment of certification and/or a unit clarification of the clerical/secretarial bargaining unit initially certified in 1972 and recertified in January, 1989, by the Governor's Council, Department of Labor under Title 19,

Chapter 13. [1] The District's petition seeks to remove from the existing unit the positions of: (1) administrative secretary to the business manager; (2) administrative secretary to the assistant superintendent; and (3) senior secretaries to school principals for the reason that they are "confidential" employees within the meaning of 4002 (f), of the Act.

The Association's Answer, filed on November 15, 1990, disputes the petition on several grounds. Initially, the Association claims the petition was not timely filed within the 180 to 120 day period immediately preceding the expiration of the current collective bargaining agreement, as required by section 4010 (f), of the Act.

On January 23, 1991, the District refiled its petition. Because the current collective bargaining agreement expires on June 30, 1991, the refiling is within the window period set forth in section 4010 (f). [2] By letter dated January 31, 1991, the Association advised the PERB that its original answer of November 15, 1990, adequately responded to the District's resubmitted petition. The District filed no responsive pleading.

Consideration of the substantive issue was deferred pending a disposition of the Association's preliminary objections. The parties

[1] Prior to the amending of the Public School Employment Relations Act in July, 1990, the bargaining rights of the clerical and secretarial employees of the state's public school districts were governed by 19 Del. C., Chapter 13, administered by the Governor's Council, Department of Labor.

[2] The parties agree that timeliness is no longer an issue.

were afforded the opportunity to submit briefs supporting their respective positions. The purpose of this interim decision is to determine if the Petitioner is entitled to a consideration of the merits.

PRINCIPAL POSITIONS OF THE PARTIES

ASSOCIATION: The Association argues that a Petition to Amend Certification is intended for situations where current conditions surrounding a bargaining unit previously certified as appropriate have made the unit inappropriate. It cites the geographical separation of divisions, dramatic growth or shrinkage of the bargaining unit or loss of a community of interests as examples of conditions justifying an amendment of certification. The Association maintains that the District's internal allocation of confidential duties is not the type of change which justifies or supports a petition to amend certification. Because the District has alleged no other facts as a basis for the petition, the Association argues that the petition should be dismissed in so far as it relates to amending the existing certification.

The Respondent claims that a Petition for Unit Clarification is intended to clarify whether an existing certification of an exclusive bargaining representative is applicable to specific employees or groups of employees within the bargaining unit and is, therefore, the more appropriate procedure for resolving this matter. The Association contends that unit clarification proceedings require a showing that the essential duties of the disputed positions have changed so as to make their inclusion in the bargaining unit no longer appropriate or

possible.

While acknowledging that the application of res judicata to administrative proceedings has not received universal acceptance, the Association argues that the principle is valid and should be adopted by the PERB to bar the District's petition and dispose of the matter. Alternatively, the Association argues that if it is determined that the doctrine of res judicata does not apply and resolve this matter, the proof must necessarily be limited to changes in essential job duties occurring since March 3, 1989, when the Governor's Council on Labor recertified the unit as appropriate, including those positions which the District now seeks to exclude as inappropriate

Lastly, the Respondent argues that the plain meaning of the language of Title 40 must prevail. It argues that because Title 14, Chapter 40 contains no provision for the cancellation of prior certifications, the legislature's silence indicates a legislative intent that "many decisions of the Council would not become void by operation of the law".

DISTRICT: The District argues that the statutory framework of Title 14, Chapter 40 is significantly broader than that of Title 19, Chapter 13. Under Title 19, the Department of Labor, through the Governor's Council on Labor, is responsible for the determination and certification of appropriate bargaining units. Under Title 14, it is the PERB which has this responsibility in addition to resolving unfair labor practices and administering the statutory impasse resolution procedures. Additionally, the factors to be considered in determining what constitutes an appropriate unit are broader under Title 14 than

under Title 19. Title 14, Chapter 40, expressly addresses the subject of confidential employees by defining the term and excluding from coverage under the Act those employees who qualify, thereby making them ineligible for inclusion in any bargaining unit. Title 19, on the other hand, contains no provision addressing the subject of confidential employees. The only reference to confidential employees under Title 19 is found in the Rules and Regulations promulgated by the Governor's Council which require only a "general presumption" that confidential employees should be excluded from an otherwise appropriate unit.

The District also argues that when the Association voluntarily opted to remove itself from coverage under Title 19 to be governed by the provisions of Title 14, it became bound by all of the provisions contained therein, including the requirement to have unit determination questions resolved exclusively by the PERB.

Like the Association, the Petitioner argues that the plain meaning of the language of Title 14 must be given effect. The District, however, maintains that the statutory language clearly establishes that the legislature recognized that units electing coverage under Title 14 may have been previously certified under another statute and by a different administrative body. The District contends that the legislature addressed this precise situation by expressly providing that prior unit determinations would continue undisturbed until a party properly raised a unit question under Title 14. The District cites 14 Del. C. Sections 4010 (f) and 4018, arguing that in the Matter of Unit Clarification Petition of Fraternal Order of Police, Lodge No. 5, Representation Petition No. 86-12-008 (1987), the plain meaning of sections 4010 (f) and 4018 was interpreted by the PERB to mean "that

the Council's 'prior certifications under Title 19, Chapter 13 are controlling only until properly contested under the provisions of Section 1610 (f)'.[3]

The District also argues that it has a statutory right to an initial unit determination by the PERB, regardless of any change in circumstances.

Concerning the application of res judicata, the District contends that the doctrine has been misapplied by the Association and has no bearing on this matter for the following reasons: (1) there has been no prior decision by the PERB involving confidentiality; (2) there has been no prior final adjudication of the issue because unit determinations by the Governor's Council under Title 19 are not entitled to judicial review; (3) there is no identity of issue since a unit clarification petition was never filed with nor addressed by the Governor's Council; and, (4) only the position of Administrative Secretary to the Business Manager was ever addressed by the Governor's Council. The District maintains that res judicata clearly does not apply where, as here, different standards or criteria are considered and applied by two separate and distinct administrative bodies, each chartered under a separate and different statute.

The District contends that because the Rules and Regulations of the Governor's Council expressly provide that its decisions under Title 19 are not considered binding even as to its own subsequent determina-

[3] Section 1610 (f) of the Police and Firefighters Employment Relations Act, 19 Del. C. Chapter 16 (1986) is identical to Section 1410 (f) of the Public School Employment Relations Act.

tions, it would be inconsistent and illogical to consider those same decisions binding on the PERB when addressing a similar issue arising under Title 14. [4]

Finally, the Petitioner argues that even should the PERB accept the Association's res judicata argument, there have been changes in material portions of the relevant job responsibilities since the March, 1989 determination by the Governor's Council, which the PERB must consider.

ISSUES

1. Whether the District's petition requesting the deletion of certain positions from the current bargaining unit of clerical and secretarial employees for the reason that they qualify as confidential employees as defined in Section 4002 (f), of the Act, is properly filed in compliance with the requirements of the Act?

2. If it is determined that the petition is properly filed, does the 1989 determination by the Governor's Council bind the parties, in accord with the principle of res judicata, and resolve this matter?

[4] Section 2.7, paragraph 3, of the Regulations Under Title 19, Chapter 13, Del. C. provides, in relevant part: "Although past decisions may be considered, the Governor's Council on Labor will not be bound by those decisions."

OPINION

At the time this matter arose, and continuing to the present, there has been no significant case law applying the representation provisions of the Public School Employment Relations Act. In this regard, the issue presented here is one of first impression.

Subsequent to the amending of Title 14 in July, 1990, to include school support staff, but prior to the commencement of this action, the bargaining unit of clerical and secretarial employees exercised the available option to remove itself from coverage under Title 19, Chapter 13 and to have its employee relations governed by the PERB, as provided for in 14 Del.C. 4002 (m). It is, therefore, Title 14, chapter 40 which controls this matter.

In order to determine whether the petition was properly filed it is necessary to review the relevant portions of the Act. 14 Del. C., Section 4018, provides:

Any employee organization that has been certified as the exclusive representative of a bargaining unit deemed to be appropriate prior to the effective date of this chapter shall so continue without the requirement of an election and certification until such time as a question concerning representation is appropriately raised under this chapter in accordance with section 4011 (b) of this title, or until the Board would find the unit not to be appropriate in accordance with

section 4010 (f) of this Title [5]

This provision evidences a legislative intent that bargaining units determined to be appropriate prior to the passage of the Act are subject to modification by the Board under certain circumstances.

Section 4010 (f), establishes a procedure specifically for resolving questions concerning the status of units determined to be appropriate prior to the passage of the Act. It provides, in relevant part:

Any bargaining unit determined to be appropriate prior to the effective date of this chapter, for which an exclusive representative has been certified, shall so continue without the requirement of a review and possible redesignation until such time as a question concerning appropriateness is properly raised under this chapter. The appropriateness of a unit may be challenged by the public school employer, 30% of the members of the unit, an employee organization or the Board not more than 180 days nor less than 120 days prior to the expiration of any collective bargaining agreement in effect on the effective date of this chapter.

(emphasis added)

The Association acknowledges that the District's refiling of the

[5] Section 4011 (b), refers to the process by which employees may decertify an existing bargaining representative and is not at issue in this matter.

petition on January 23, 1991, complied with the statutory time requirements set forth in Section 4010 (f). Hence, the critical question is whether or not the petition is otherwise properly filed.

The Public School Employment Relations Act confers upon the PERB a general grant of authority to develop rules and regulations necessary for the orderly and efficient administration of the Act..

Section 4006, Public Employment Relations Board, provides at Section

(h): "To accomplish the objectives and to carry out the duties prescribed in this chapter, the Board shall have the following powers:
(1) To issue amend and rescind such rules and regulations as it deems necessary to carry out this chapter and to prevent any persons from engaging in conduct in violation of this chapter. Such rules and regulations shall be adopted in accordance with Chapter 101 of Title 29".

The Act also contains a specific directive for inclusion in the Board's rules. Article 4010, Bargaining Unit Determination, provides at

Section (e): Procedures for redefining or modifying a unit shall be set forth in the rules and procedures established by the Board.

Pursuant to these provisions, the PERB adopted the Rules and Regulations of the Delaware Public Employment Relations Board. Article 3, Representation Proceedings, of the Board's Rules and Regulations, provides at paragraph 3.4 (8), Modification of a Bargaining Unit:

In the event that there is a substantial

modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer or the bargaining representative may file a petition with the Board which shall include the following: (a) the name of the employer; (b) the name of the exclusive representative; (c) a description of the bargaining unit; (d) a brief statement explaining the reasons for a modification of the bargaining unit. (emphasis added)

The Association's argument that the burden of proof confronting the District is to establish "by a preponderance of the evidence that the previously certified and presumptively appropriate bargaining unit has become inappropriate" construes the requirements of rule 3.4 (8) too narrowly. Contrary to the Association's position, a substantial change in the nature of job duties is not the exclusive requirement or basis for the Board to consider modifying an existing bargaining unit. In addition to changed requirements, the creation of new positions (which is not alleged here) and other compelling circumstances are also sufficient grounds for the Board to review the appropriateness of an existing unit. Specifically, the critical question is whether the enactment of a new statute, under which the respondent voluntarily elected to be governed, constitute a compelling reason, as required by

Rule 3.4 (8), for the PERB to consider modifying the currently designated unit.

A comparison of the two statutes involved is determinative that the question must be answered affirmatively. The statutory definition of "confidential employee" under the Public School Employee Relations Act, is set forth at Section 4002 (f), as follows:

any employee whose functional responsibilities or knowledge in connection with the issues involved in the collective bargaining process would make membership in an appropriate bargaining unit incompatible with the employee's official duties.

The Rules of the Governor's Council, at Section 1.13, defines "Confidential Employee" as:

An employee who, in the course of his/her duties, possesses or has access to confidential information pertinent to the labor relations activity of the employer.

Clearly, the two tests are different. Under Title 19 the mere presence of either "access" or "possession" to confidential information pertinent to "labor relations" activity is sufficient to constitute confidential status. Title 14 not only requires the presence of "functional responsibilities" or "knowledge" in connection with issues involving the "collective bargaining process", but also conditions a finding of confidentiality on the requirement that the presence of the enumerated factors "make membership in an appropriate bargaining unit incompatible with the employee's official duties".

Not only are the definitions dissimilar but, as the District points out, the Rules of the Governor's Council raise only a general presumption that inclusion of confidential employees in a contested bargaining unit would be inappropriate. The impact of confidential status under Title 14, is significantly greater. Article II, Definitions, at Section (m), Public School Employee, provides: "'Public school employee' or 'employee' means any employee of a public school employer except public school administrators and confidential employees of a public school employer;...". Under Title 19, confidentiality raises an issue of appropriateness; i.e, whether the disputed positions may properly be included in the existing clerical/secretarial unit based upon the criteria set forth in section section 1.13 of the Rules of the Governor's Council on Labor. Under Title 14, however, the issue is one of eligibility, for confidential employees are exempted from the Act and their inclusion in any bargaining unit would be impermissible.

Where, as here, the issue involves a question of eligibility, rather than one of appropriateness, the fact that two different administrative bodies, empowered under different statutes to apply different standards or definitions, the result of which may have a significantly different impact upon the positions in question and, therefore, upon the composition of the current bargaining unit, constitutes a compelling reason for the Board to consider modifying the existing unit.

The application of res judicata, as argued by the Association, is not applicable to this particular fact situation. The principle of res judicata is based upon policy considerations including finality of litigation, prevention of needless litigation and avoidance of

unnecessary burdens of time and expense. When applied, res judicata precludes the relitigation of the same issue by the same parties in a separate action before a different judicial body. In order for the doctrine to apply, several standards must be met. The Association argues that the prior adjudication must provide:

1. Identity in thing sued for;
2. Identity in the cause of action;
3. Identity of the parties to the action;
4. Finality of the prior judgement; and,
5. Opportunity for full adjudication of the merits under conditions of due process. [6]

The absence of any one factor renders the prior decision inapplicable. Analysis of the current facts clear establishes that such is the case in this proceeding.

First, of the three positions for which a determination of confidentiality is sought, the only one at issue before the Governor's Council in 1989 was the Administrative Secretary to the Business Manager. The definitions for determining confidential status are different. Further, as previously discussed, the question before the Governor's Council was one of appropriateness of the disputed position for inclusion within an otherwise appropriate unit. The question before the PERB is one of eligibility.

Because it is clear that the 1983 ruling by the Governor's Council failed to satisfy the requirements for identity of thing sued for and

[6] Res Judicata and Collateral Estoppel in Administrative Proceedings, Mogel, Baylor Law Review, Vol. 30: 463, (1978)

identity in the cause of action, it is unnecessary to address the questions of whether the proceedings before the Governor's Council resulted in a 'final judgment' or provided the opportunity for "full adjudication". [7]

In determining that the petition was properly filed and the doctrine of res judicata does not apply, the preliminary issues are resolved. For the reasons set forth above, a hearing to determine whether the petitioned for positions are excluded from coverage of the PSERA because they qualify as confidential under the Act is to be scheduled at the earliest convenience of the parties. Because the

[7] Essential elements of adjudication include:

(a) Adequate notice to persons who are bound by the adjudication;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of application of rules with respect to specified parties concerning a specific transaction, situation, status or a specific series, thereof;

(d) A rule of finality, expressing a point in the proceeding when presentations are terminated and a final decision is rendered.

(e) Such other procedural elements as may be necessary to constitute the proceedings a sufficient means of conclusively determining the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions. Restatement of Law of Judgements, 2d, Ch. 6. section 83.

petition involves a question of eligibility under the statute, changes in essential job duties are not relevant. The purpose of the hearing will be to determine whether the positions in question fall within the statutory exclusion of confidential employees.

IT IS SO ORDERED.

Charles D. Long, Jr.

Charles D. Long, Jr.

Executive Director, PERB

D. Murray-Sheppard

Deborah Murray Sheppard

Principal Assistant, PERB

8 May 1991

DATE