

"Board") reversed a decision by the hearing officer who had denied the District's petition. The PERB determined the senior secretaries to building principals in the Capital School District qualified as confidential employees and were, therefore, excluded from the coverage of the Act, under §4002(f). ¹ Board of Education of Capital School District v. Capital Educational Secretaries Assn., DSEA/NEA, Del:PERB, Request for Review, Rep. Pet. No. 90-01-056 (1991) at 731.

In June, 1992, the legislature amended §4002 of the Act to provide:

4002. Definitions

(f) "Confidential employee" means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit.

On September 2, 1992, a petition to amend the certification of the secretarial bargaining unit was filed by the Association with the Public Employment Relations Board. The petition requests that senior secretaries to building principals be included within the existing bargaining unit.

In its response, the District opposed the petition for several reasons, including that it was untimely filed under the Rules and Regulations of the PERB.

On October 9, 1992, the Association filed its answer to new matter raised in the District's response.

On October 22, 1992, the Executive Director requested the parties to submit legal argument concerning the timeliness issue. A briefing schedule was agreed upon by the parties and the final brief was filed on November 25, 1992.

¹ §4002. Definitions. (f) "Confidential employee" means any employee whose functional responsibility or knowledge in connection with the issues involved in the collective bargaining process would make membership in an appropriate bargaining unit incompatible with the employees official duties.

ISSUE

Whether the Petition to Amend the Certification of the Capital Educational Secretaries Association, DSEA/NEA, is untimely under the Rules and Regulations of the Public Employment Relations Board and must, therefore, be dismissed.

PRINCIPAL POSITIONS OF THE PARTIES

District: The District argues that Regulation 3.4(9) requires that a petition to modify an existing bargaining unit be filed within a sixty day window period occurring not more than 180 days nor less than 120 days prior to the expiration of a valid collective bargaining agreement.

Because the collective bargaining agreement currently in effect between the parties does not expire until June 30, 1994, the District contends the Association's petition will not be timely until December 30, 1993.

Association: The Association argues that the ultimate question in this matter is one of "eligibility", i.e., whether the senior secretaries to building principals are included within the definition of "employees", as provided in §4002(m) of the Act. If so, the Association maintains these secretaries are entitled to "the immediate right to participate fully in the rights guaranteed by the Act, including [subsection (2)] negotiating collectively and grieving, [subsection(3)] engaging in concerted activities, and [subsection (4)] being represented by their exclusive representative without discrimination". (Association's Answering Brief @ pg. 4)

The Association argues that to accept the District's position would leave the senior secretaries to building principals without the protections to which they are entitled under the Act.

OPINION

Section 4010 (e) of the Act, provides:

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

Pursuant to this statutory grant of authority, the Board promulgated Rules and Regulations, Public Employment Relations Board, State of Delaware, which govern the administration of the Act. Article III of the Board's Rules and Regulations, Representation Proceedings, provides in relevant part:

3.3 Contents of a Petition for Decertification

A petition for decertification may be filed by a public employee or a group of public employees. An employee organization or a public employer may not file a petition for decertification. A petition for decertification shall contain the following:

(3) Conform with time periods required by 14 Del.C. §4011(b) or 19 Del.C. §1611(b).

3.4 Petition Verification

(9) A petition for modification of the designated bargaining unit shall be decided in accordance with the procedures set forth in Regulations 3.3 through 3.5. ²

14 Del.C. §4011(b), as referenced in subsection (3) of Regulation 3.3 provides, in relevant part:

4011. Determination and Certification of Exclusive Representative

(b) If a lawful collective bargaining agreement of no more than 3 years duration is in effect, no petition shall be entertained unless filed not more than 180 days nor less than 120 days prior to the expiration of such agreement.

The time period established by Article 4011(b) of the Act is clear and unambiguous. It is expressly incorporated by reference into Regulation 3.3 which is incorporated by reference into Regulation 3.4, at subsection (9). With the adoption of

² Regulation 3.5, Posting of Notice of Petition, requires the public employer to post for ten (10) days a notice of the filing of a representation petition in places where notices affecting public employees involved in the proceeding are normally posted. It has no bearing on this matter.

Regulation 3.4 (9), the PERB established that the same 60 day period set forth in 14 Del.C. §4011(b) for the filing of a decertification petition also applies to the filing of a petition seeking the modification of an existing bargaining unit.

The requirement of Regulation 3.4 (9) is also consistent with other provisions of the Act. Section 4018, Status of Existing Exclusive Representative, provides:

An 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 accord with §4011(b) of this title, or until the Board would find the unit not to be appropriate in accordance with §4010(f) of this title.

Section 4010, Bargaining Unit Determination, subsection (f), concerns the composition and continuity of bargaining units designated as appropriate prior to the passage of the Act. (emphasis added) It provides:

(f) Any bargaining unit designated as 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 the 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 date of passage of this chapter....

The limited filing period established by PERB Regulation 3.4 (9) is the same as that set forth in §4010(f). Unlike §4010(f), the application of Regulation 3.4 (9) is not limited to bargaining units designated appropriate prior to the passage of the Act. There is no apparent reason why the filing requirements for a petition to amend a bargaining unit designated as appropriate after the passage of the Act should differ from those applicable to a petition to modify a bargaining unit designated as appropriate prior to the passage of the Act.

In three (3) prior cases involving a petition filed by a local association affiliated with DSEA/NEA, timeliness of the petition was not an issue. Lake Forest

Education Association v. Bd. of Education, Del.PERB, Rep. Pet. No. 91-03-060 (7/2/91); In Re: Kent Vo-Tech School District Special Education Instructional Assistants, Del.PERB, Rep. Pet. No. 91-06-065 (1/30/92); In Re: Caesar Rodney School District Instructional Aides, Del.PERB, Rep. Pet. No. 92-03-070 (12/8/92). In all three (3) instances the petition was properly filed within the designated window period. In this regard, the senior secretaries to building principals are being treated no differently than other groups of unrepresented employees seeking to become part of an existing bargaining unit.

The enforcement of the window period set forth in Regulation 3.4 (9) does not deprive the senior secretaries to building principals of immediate coverage under the Act, as the Petitioner claims. Unlike a petition to modify an existing bargaining unit, a petition filed by an organization seeking to be certified as the exclusive bargaining representative for a designated group of unorganized employees can be filed at any time. If, as the Association argues, the senior secretaries to building principals are no longer "confidential employees" and, therefore, entitled to the protections and rights provided by the Act, the representation process can go forward to determine whether there exists an appropriate bargaining unit and the possible certification of an exclusive representative following a representation election.

Nor am I persuaded by the Association's argument that, because the petition raises a question of eligibility, the time requirements of Regulation 3.4 (9) do not apply. Regulation 3.4 (8) provides:

(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 a 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 designated 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.

The Board has previously determined that a change in the statutory definition of "confidential employee" upon which eligibility is determined qualifies as a "compelling reason" for the Board to consider a request to modify an existing unit. Capital Educational Secretaries' Assn. (Supra.). The presence of a compelling reason, as required by Regulation 3.4 (8), however, does not waive the time constraints imposed by Regulation 3.4 (9).

In December, 1990, the District filed petitions to remove alleged supervisory employees from the custodial bargaining unit and, as previously discussed, to remove the senior secretaries to building principals from the secretarial bargaining unit. The Association there argued that because both petitions were filed outside the window period required by Regulation 3.4, there were untimely and must be dismissed. In response to the Association's position, the District withdrew both petitions and subsequently refiled them within the window period. Capital School District v. Capital Support Association, DSEA/NEA, Del.PERB, Rep. Pet. No. 90-10-055 (5/8/91); Capital School District v. Capital Educational Secretaries Association, DSEA/NEA, Del.PERB, Rep. Pet. No. 90-10-056 (5/8/91). The position of the Association in these prior cases represents the proper interpretation and application of Regulations 3.4 (8) and (9).

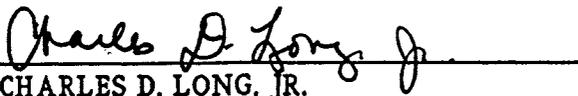
DECISION

For the reasons set forth above, the representation petition filed by the Association on September 2, 1991, requesting an amendment of the certification of the existing unit of the Capital Educational Secretaries Association, DSEA/NEA, to

include the senior secretaries to building principals is not properly filed within the window period required by PERB Regulation 3.4 (9).

The petition is, therefore, dismissed.

IT IS SO ORDERED.


CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment Relations Bd.


DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
Delaware Public Employment Relations Bd.

DATE: December 23, 1992