

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

BROTHERHOOD OF RAILROAD SIGNALMEN,	:	
	:	
Petitioner,	:	<u>Rep. No. 95-04-125</u>
	:	
v.	:	
	:	
DELAWARE ADMINISTRATION FOR	:	
SPECIALIZED TRANSPORTATION,	:	
	:	
Respondent.	:	

DECISION ON MOTION TO DISMISS

On April 13, 1995, the Brotherhood of Railway Signalmen (hereinafter "Petitioner") filed a representation petition with the Public Employment Relations Board (hereinafter "PERB" or "Board") seeking to be certified as the exclusive bargaining representative for the bus drivers employed by Central Delaware Transit Corporation (hereinafter "CDTC").

On May 8, 1995, CDTC filed a motion to dismiss the petition claiming that the affected employees are not subject to the jurisdiction of the *Public Employment Relations Act*, 19 Del.C. Chapter 13 (1994) (hereinafter "Act" or "PERA") for the reason that the Central Delaware Transit Corporation is not a public employer, as defined by §1302(n) of the Act.

The Respondent subsequently asserted that the bus drivers on whose behalf the petition was filed are, in fact, employed by the Delaware Administration for Specialized Transportation (hereinafter "DAST") rather than CDTC, as alleged in the petition. In order to expedite the processing of the petition, but without waiving its position that the original petition was properly filed, the Petitioner amended the Petition on June 2, 1995, naming DAST as the employer.

In response to the amended petition, DAST argues that because it is not a public employer within the meaning of §1302(n) of the Act, the bus drivers on whose behalf the petition was filed are not public employees, as defined in §1302(m) of the Act.

Argument concerning the Respondent's Motion to Dismiss was submitted by the parties in the form of written briefs.

### APPLICABLE STATUTORY PROVISIONS

#### Section 1302. Definitions

(m) 'Public employee' or 'employee' means any employee of a public employer except...<sup>1</sup>

(n) 'Public employer' or 'employer' means the State, any county of the State or any agency thereof, and/or any municipal located within the State or any agency corporation, municipality, city or town thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full time employees.

### PRINCIPAL POSITIONS OF THE PARTIES

Respondent: The Respondent argues that public employers fall into one (1) of three (3) categories:

- (1)the State;
- (2)any county of the State or any agency thereof; and
- (3)any municipal corporation, municipality, city or town located within the State or agency thereof

The Respondent maintains that DAST is not "the State" but an independent "body politic and corporate of the State" created pursuant to the Delaware Transportation Authority Act, 2 Del.C. §1307(a). The Respondent contends the

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<sup>1</sup> The enumerated exceptions have no bearing upon the resolution of this matter and are, therefore, omitted.

separate identity of DAST was recently confirmed by the Delaware Superior Court in Kennerly v. Eipper (Del.Super., C.A. No. 87C-02-082 (1994)). The Respondent also cites Harvey & Harvey v. Delaware Solid Waste Authority, (D.Del., 600 F.Supp. 1369 (1985)) as precedent for concluding that DAST is an independent entity separate and distinct from the State.

In support of its position, the Respondent also cites 2 Del.C. §1325(3), which excludes employees of subsidiaries of the Delaware Transportation Authority from the status of state employees "for

purposes of wages, salaries, fringe benefits or for purposes of any other benefits which may accrue to state employees whether exempt or merit. . ."

Petitioner: The Petitioner argues that the intent of the Public Employment Relations Act, (19 Del.C. Chapter 13 (1994)), enacted by the legislature as a replacement for the previous Title 19, Chapter 13, was intended to expand the bargaining rights of covered employees. The Petitioner maintains that consistent with the prior law, the PERA creates two (2) classes of public employers: those automatically covered under the Act (i.e., the State and counties and agencies thereof), and those for which coverage is elective (i.e., municipalities and agencies thereof). According to the Petitioner, the only change in the scope of coverage is to extend automatic coverage under the PERA to municipalities which employ 100 or more full-time employees.

In support of its position that DAST is, in fact, a State agency, the Petitioner cites the cases of Kennerly v. Eipper, (Supra.) and Wilmington Housing Authority v. Williamson, (Del.Supr., 228 A.2d 2782, 787 (1967)) and Sandt v. Delaware Solid Waste Authority, (Del.Supr., 640 A.2d 1030 (1994)).

### ISSUE

Are the bus drivers employed by the Delaware Administration for Specialized Transportation "public employees" within the meaning of 19 Del.C. §1302(m) and, therefore, subject to the jurisdiction of the Public Employment Relations Board?

### DISCUSSION

The Respondent acknowledges that "In interpreting a statute such as the PERA, there must be a search for legislative intent." Alfieri v. Martelli, Del.Supr., 647 A. 2d 52, 54 (1994) (citing State v. Cephas, Del.Supr., 637 A.2d 20 (1994)). In concluding that State agencies are not included in the term "State", the Respondent relies upon the "plain meaning rule", a principle of statutory construction. In this matter, however, neither the term "State" nor the term "agency" is defined in the statute. Therefore,

the intent of the General Assembly as to the scope of coverage of the Act is not as clear and unambiguous as the Respondent contends.

The Respondent correctly acknowledges that while the test of a statute is the primary essential source of a statute's meaning, other factors are sometimes considered. (Respondent's Opening Brief at Page 8). In the absence of a statutory definition of the critical terms, the historical setting and the circumstances existing at the time the PERA became law are relevant considerations in resolving scope of the PERA's coverage.

The effort to expand the bargaining rights of public sector employees and to standardize the various laws regulating public sector labor-management relations has been on-going since the passage of the *Public School Employment Relations Act*. 14 Del.C. Ch. 40 (1983) (hereinafter "PSERA"). The PSERA replaced the prior Chapter 40 and in doing so expanded the bargaining rights of the certificated professional employees of the State's public school districts to include for the first time, extended impasse resolution procedures and statutory unfair labor practices. The PSERA also created the Public Employment Relations Board and charged it with responsibility for administering the new law.

In 1986, the *Police Officers' and Firefighters' Public Employment Relations Act*, (19 Del.C. Chapter 16 (1986)) was enacted. This Act provides the eligible police officers and firefighters with the same extended impasse resolution procedures and statutory unfair labor practices, contained in the PSERA.

The *Public School Employment Relations Act* was amended in 1989 by extending coverage beyond the certificated professional employees of the local school districts to include nearly all employees of the public school districts.<sup>2</sup>

Prior to the passage of the *Police Officers' and Firefighters' Employment Relations Act* and the amending of the *Public School Employment Relations Act*, the affected employees were covered by the prior 19 Del.C. Chapter 13, entitled *The Right of Public Employees to Organize*. Under that Act, the employees were within the jurisdiction of the Governor's Council on Labor with access only to a limited impasse resolution procedure but no unfair labor practice protections.

The effort culminating in extending the provisions of the *Public School Employment Relations Act* to virtually all employees of the public school districts was initially intended to bring all public sector employees within the jurisdiction of the Public Employment Relations Board. The primary force leading this effort was a labor coalition of the American Federation of State, County and Municipal Employees, District Council 81 (hereinafter "AFSCME"), and the Delaware State Education Association/NEA (hereinafter "DSEA"), the two (2) labor organizations prior 19 Del.C. Chapter 13, and the jurisdiction of the Governor's Council on Labor

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<sup>2</sup> Administrators and confidential employees, as defined in the Act, are excluded from coverage under the PSERA.

representing the majority of the State's organized employees. For reasons not relevant to this proceeding, only public school employees were removed from the and placed under 14 Del.C. Chapter 40, and the jurisdiction of the Public Employment Relations Board.

Thereafter, dialogue continued concerning the objective of providing consistency and uniformity in the State's public sector labor laws by including all eligible public sector employees under the jurisdiction of the PERB. As the primary representative of the remaining organized employees still subject to the prior 19 Del.C. Chapter 13, AFSCME was the key labor organization responsible for accomplishing this objective when, in 1994, the *Public Employment Relations Act* was passed by the General Assembly and enacted into law by the Governor.

The *Public Employment Relations Act* of 1994, replaced the prior 19 Del.C. Chapter 13. The PERA is essentially the same as the *Public School Employment Relations Act* of 1983, as amended in 1989, and the *Police Officers' and Firefighters' Employment Relations Act* of 1986. Each of the three (3) Acts mandates expanded impasse resolution procedures when collective bargaining negotiations fail to achieve a mutually acceptable settlement and establish statutory unfair labor practices for the purpose of regulating the employer/employee relationship.

Furthermore, at the time the PERA was enacted, the responsibilities and functions of State government were, as now, for the most part distributed throughout various departments organized into

divisions and/or agencies responsible for administering functions and providing the services of State government to the people. For all practical purposes, divisions and agencies collectively constitute the core of State government.

From the history of reform in the State's public sector labor laws culminating with the passage of the PERA in 1994, it is apparent that the *Public Employment Relations Act* was not intended to strip away the limited rights which all State employees enjoyed under the prior law while at the same time depriving them of the expanded rights previously accorded other public sector employees by the General Assembly under mirror legislation.

Further support for a broad construction of the term "State" is found in the Delaware Code. Specifically, 19 Del.C. Chapter 58, *Laws Regulating the Conduct of Officers and Employees of the State*,<sup>2</sup> defines the State as "the State of Delaware and includes any state agency."

A thorough review of the record fails to establish that the General Assembly, by its use of the term "State" in §1302(n) of the PERA, intended to exclude from the scope of the Act all agencies of the State.

It is, therefore, necessary to determine whether DAST is, in fact, a State agency. The General Assembly also created "Authorities" for the purpose of providing the essential services of State government. The Respondent cites Harvey & Harvey v. Delaware Solid Waste Authority (Supra.), and an unreported decision from the Delaware Superior Court in Kennerly v. Eipper (Supra.) as authority that DAST is an entity separate and distinct from the State.

In Harvey v. Harvey, the District Court refused to find that the Delaware Solid Waste Authority was "an arm of the State" for Eleventh Amendment purposes and immune from suit. In the text of the decision, however, the Court acknowledged that a record could be developed establishing the ultimate financial responsibility for the Authority which would be an important factor in deciding whether the Authority is an arm of the State. However, in the absence of evidence concerning financial responsibility, the Court was compelled to rule exclusively from the language of the Act, itself.

Because the underlying facts in Harvey raise a question of sovereign immunity under the eleventh amendment of the United States Constitution, the holding in Harvey does not require a similar ruling concerning the status of DAST for purposes of determining whether the employees upon whose behalf the representation petition was filed are public employees within the scope of coverage of the *Public Employment Relations Act*.

Kennerly v. Eipper (Supra.) involved an issue of whether an insurance policy purchased by DAST covered only DAST or both DAST and the State. In ruling that the policy covered only DAST, the Court concluded:

As a subsidiary of the Transportation Authority, DAST filed, independently, a certificate of incorporation with the Secretary of the State of Delaware, thereby becoming an entity distinct from the State, see 2 Del.C. §1307(a) (1985), even though it remained a state agency. (emphasis added) (Employer's Opening Brief at Page 5)

In Kennerly v. State, (Supra.), 580 A.2d 561 (1990), an appeal arising out of the same facts, the Delaware Supreme Court, in defining the issue before it, stated:

This is an appeal from a grant of summary judgment in the Superior Court which terminated a suit for personal injuries brought by appellant, Norma J. Kennerly ("Kennerly"), against Delaware Authority for Specialized Transit ("DAST"), an agency of the State of Delaware. . . (emphasis added)

Clearly, both the State Superior Court and the State Supreme Court considered DAST to be a State agency insofar as the specific issue(s) before them.<sup>3</sup>

Although the Delaware Code does not define an agency of State government in a generic sense, the term is defined throughout the Code in numerous individual chapters.

Section 10102. Definitions, paragraph 1, of the Administrative Procedures Act, 29 Del.C. Chapter 101 provides, in relevant part:

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<sup>3</sup> The terms "agency of the State" and "State agency" are synonymous.

"Agency" means any authority, department, instrumentality, commission, officer, board or other unit of the state government authorized to make regulations, decide cases or issue licenses... (emphasis added)

Section 10202. Definitions, paragraph 1, of the Delaware Sunshine Act, 29 Del.C. Chapter 102, provides, in relevant part:

"Agency" shall mean any regulatory, administrative, advisory, executive legislative body of this State including, but not limited to, any board, bureau, commission, department, committee, council, association, authority or any other entity established by any act of the General Assembly of this State which:

- (a) Is given authority in the Delaware Code to regulate any business, occupation or profession;
- (b) Is supported in whole or in part by public funds;
- (c) Expends or disburses public funds;
- (d) Is specifically charged by a public body to advise or make recommendations.  
(emphasis added)<sup>4</sup>

Consistent with the broad definition of the term "agency" as defined in the Code, the Courts have held other authorities to be agencies of the State. In Wilmington Housing Authority v. Williamson (Supra.), the Supreme Court of Delaware held the Wilmington Housing Authority to be an agency of the State. The Court commented that:

The terms "public corporate body" or "public corporation" are generic; they describe any corporate instrumentality created by the State for public purposes and with the object of administering a portion of the powers of the State.

In Sandt v. Delaware Solid Waste Authority (640 A.2d 1030 (1994)), the Supreme Court of Delaware, citing Williamson (Supra.) and the legislative intent gleaned from definitions of "agency" elsewhere in the Delaware Code, held the Delaware Solid Waste Authority to be an agency of the State for purposes of the Tort Claims Act. The

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<sup>4</sup> See also 29 Del.C. §5804(9) and 29 Del.C. §6101.

Court observed that the language of the Delaware Code used to describe DSWA is similar to that used to describe other "authorities", including the Delaware Transportation Authority. The Court concluded that "[t]he General Assembly's description of the DSWA in 7 Del.C. §6403(a) strongly suggests that the General Assembly intended it to be a State agency."

The other arguments offered by the Respondent, although considered, likewise fail to support the Respondent's position. While 2 Del.C. §1325, provides that DAST employees are not State employees "for purposes of wages, salaries, fringe benefits or for purposes of any other benefits which may accrue to State employees whether exempt or merit employees...", the same section also provides that "[s]uch employees shall be considered State employees for the purposes of participating in the group medical insurance and deferred compensation plans available to state employees." Considering the record, as a whole, the language of §1325 is not dispositive of the question of whether the bus drivers employed by DAST are public employees for the purpose of coverage under the PERA.

Nor does the fact that the definition of public employer in the PERA is not identical to the definition of public employer in the prior act require a finding that the legislature intended to exclude agencies of the State from the definition of public employer thereby disqualifying virtually all State employees from coverage under the Act.

#### DECISION

For the reasons discussed, the record provides no valid support for the proposition that for the purpose of determining the scope of the *Public Employment Relations Act* State agencies are separate and apart from the State or that DAST does not qualify as an agency of the State.

Therefore, the bus drivers employed by the Delaware Authority for Specialized Transportation are public employees within the meaning of 19 Del.C. §1302(m) of the Act and within the jurisdiction of the Public Employment Relations Board.

Accordingly, the Respondent's Motion to Dismiss is denied.

/s/ Charles D. Long, Jr.  
Charles D. Long, Jr.  
Executive Director

/s/ Deborah Murray-Sheppard  
Deborah Murray-Sheppard  
Principal Assistant

DATED: August 9, 1995