

**STATE OF DELAWARE**

**PUBLIC EMPLOYMENT RELATIONS BOARD**

DELAWARE PUBLIC EMPLOYEES COUNCIL 81,	:	
AFSCME, AFL-CIO,	:	
	:	
Petitioner,	:	
	:	Representation Petition
and	:	<u>No. 95-06-140</u>
	:	
STATE OF DELAWARE TURNPIKE ADMINISTRATION,	:	
	:	
Respondent.	:	

In the Matter of Delaware Turnpike Administration Toll Collectors

*Appearances:*      *Perry F. Goldlust, Esq. Heiman, Aber & Goldlust, For AFSCME*  
                              *Jeffrey M. Nayda, Office of State Labor Relations, For Employer*

BACKGROUND

The Delaware Turnpike Administration (hereinafter "DTA" or "Employer") is a public employer within the meaning of §1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994), (hereinafter "PERA"). Delaware Public Employees Council 81, AFSCME, AFL-CIO, (hereinafter "AFSCME" or "Union") is an employee organization within the meaning of §1302(h) of the Act.

AFSCME filed a certification petition on or about June 10, 1995, seeking to represent a bargaining unit of full-time and part-time Toll Collectors, Sergeants and Corporals. The petition was accompanied by the uncoerced signatures of at least thirty percent (30%) of the employees in the proposed bargaining unit as required by §1310(a) of the PERA.

The employer opposed the inclusion of Corporals and Sergeants, asserting they were supervisory employees and, therefore, ineligible for inclusion in the bargaining unit. The employer further opposed the inclusion of part-time toll collectors<sup>1</sup> in the bargaining unit.

A hearing was convened on August 1, 1995, for the purpose of receiving evidence concerning the appropriateness of the proposed bargaining unit. At the hearing, AFSCME modified its petition by removing the position of Sergeant from the proposed unit. The employer amended its position to remove its objection to the inclusion of corporals. With the parties' agreement that the bargaining unit should include Toll Collectors and Corporals, the remaining issue is whether or not durational positions are appropriate for inclusion in the bargaining unit. The record was closed at the conclusion of the hearing.

### **ISSUE**

Are durational employees appropriate for inclusion in the bargaining unit of Toll Collectors and Corporals of the Delaware Turnpike Administration?

### **POSITIONS OF THE PARTIES**

#### **AFSCME:**

The Union asserts that all toll collectors, whether working full-time or part-time in permanent or durational positions, share the same working environment, perform the same duties, are accountable to the same standards, have the same terms and conditions of employment and, therefore, share a community of interest. It argues that the only difference between these toll collectors is the number of hours they work. Because durational employees are not excluded from eligibility for representation under the PERA, the Union argues these employees can and should be included in the bargaining unit.

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<sup>1</sup> Although the petition was framed in terms of "full-time and part-time" positions, it is clear from the testimony and arguments presented that the positions in dispute are "durational" positions, which may work either full-time or part-time or on an "on-call" basis. For purposes of this decision, the disputed positions will be referred to as "durational positions."

EMPLOYER:

The employer argues that because employees are limited to working no more than two (2) years in a durational position, their long term interests are not the same as those of the permanent full-time employees. It further asserts that it is unnecessary to include these positions in the bargaining unit, relying upon a Memorandum of Agreement between the State of Delaware and AFSCME Council 81 <sup>2</sup> , which states in relevant part:

1. The employees of the State hired in seasonal, casual, durational, or any status other than Merit full-time who perform work of a like and similar nature to Merit full-time union employees who are covered by AFSCME collective bargaining agreements shall be subject to all the terms of such collective bargaining agreements during the periods such employees are actually employed ...

OPINION

The Public Employment Relations Act grants the rights of organization and representation to public employees. Section 1302(a) defines an appropriate bargaining unit as "... a group of public employees designated by the Public Employment Relations Board as appropriate for representation by an employee organization for purposes of collective bargaining." A "public employee" is defined at §1302(m):

... means any employee of a public employer except: (1) any person elected by popular 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. Any police officers and firefighters included in this subsection shall be subject to Chapter 16

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<sup>2</sup> This Memorandum of Agreement was executed on June 20, 1995. Paragraph 6 of the Agreement states: "This Agreement shall take effect on July 1, 1995 and shall renew automatically from year to year unless either party gives written notice to the other by April 30 of any succeeding year that it wishes to alter, modify or terminate the Agreement.

of this title; (6) Confidential employees of the public employer; (7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed 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 PERB has consistently broadly construed employees' representation rights as a fundamental premise of the Act. The statute neither defines nor excludes from its coverage durational, seasonal, casual, or any other category of less than full time employees. Consequently, these employees are eligible for representation under the law.

The issue is, therefore, whether or not durational employees are appropriate for inclusion in the bargaining unit with their permanent counterparts. The statute does not require that the unit designated by the PERB be the only appropriate bargaining unit. Lake Forest Education Assn. and Board of Education, Del. PERB, Rep. Pet. No. 91-03-060 (1991); affirmed by PERB, Rep. Pet. 91-03-060A (1991).<sup>3</sup> Section 1310(d) of the PERA requires:

In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as the similarities of duties, skills and working conditions of the employees involved; the history and extent of employee organization; the recommendations of the parties involved; the effect of overfragmentation of bargaining units 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 units created subsequent to September 23, 1994.

Numerous factors impact the determination of an appropriate bargaining unit and none alone is determinative. Of particular importance when grouping employees into an appropriate bargaining unit, however, is whether the positions share similar duties, skills and working conditions. The “community of interest” shared by various positions in a given work environment does not easily lend itself to precise definition which results in a mechanical

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<sup>3</sup> Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). Council 81, AFSCME, AFL-CIO, v. State of Delaware Div. of Highways, Del. PERB, ULP No. 95-01-111 (1995).

application of the law. The ultimate determination of appropriateness of a proposed bargaining unit generally depends more on a detailed factual analysis on a case by case basis than on the simple application of the rule of law.

The DTA toll collectors are not now nor have they previously been represented for the purposes of collective bargaining. The parties to this matter do not have a common recommendation as to the appropriateness of the bargaining unit concerning durational employees, nor has overfragmentation been raised as an issue in this matter. Consequently, the determination of appropriateness in this case is controlled by the extent to which the duties, skills and working conditions of these employees are similar.

The DTA Toll Administrator, Alan Cherrin, testified that durational and permanent toll collectors perform the same job. They are primarily responsible for "determining the correct classification of vehicles, collecting the corresponding toll and giving change and receipts to customers of the Delaware Turnpike." Job Description for Toll Collector, Class Code 19531, Employer Ex. 1. Both permanent and durational employees perform these functions in toll booths located on Interstate 95 ("I-95") and South Relief Route 1 ("SR1"). The DTA employs approximately ninety permanent toll collectors and approximately fifty-five (55) durational toll collectors. Of the durational positions approximately one-third (1/3) work five (5) days per week, approximately a third (1/3) work three (3) days per week, and the final third work two (2) days or less per week, including those who are "on-call".<sup>4</sup> Permanent employees receive a starting hourly wage of \$7.04 and a full State benefit package, including health insurance, holiday, sick and vacation time, and pension benefits. Durational toll collectors receive a starting hourly rate of \$6.25, and do not receive any benefits.<sup>5</sup> Durationals are limited to employment with the State of no more than two (2) years. Toll Administrator Cherrin further testified that the DTA "hires from within so it behooves a durational to be a good toll collector."

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<sup>4</sup>"On-call" employees do not work at all unless they are called in, usually either due to an unscheduled absence of another toll collector and/or a "heavy traffic day." Testimony of Toll Administrator Cherrin.

<sup>5</sup> Under the PERA, State employees are prohibited from negotiating wages and benefits.

Both permanent and durational employees are held accountable for the same standards of accuracy, courtesy and performance.

The State maintains that durational and permanent employees do not share a community of interest. It argues that because durational employees' length of employment is limited to two years or less, they do not share the same long term interests as permanent employees. This assertion is countered however, by Toll Administrator Cherrin's testimony that it is the practice of the DTA to hire from the durational pool for permanent positions. The PERB takes judicial notice of the fact that the State's allowable length of durational assignments was recently extended from less than 180 days to two years<sup>6</sup> also weakens the argument that these employees are significantly different from permanent employees. Employers are not guaranteed that even permanent employees will remain beyond two years. No evidence was presented regarding the employee turn-over rates in durational and permanent positions.

The State relies upon the June 20, 1995 Memorandum of Agreement between AFSCME and the State which extends the negotiated terms and conditions of existing collective bargaining agreements to "seasonal, casual, durational or any status other than Merit full-time who perform work of a like and similar nature to Merit full-time union employees who are covered by AFSCME collective bargaining agreements." The State asserts that it is unnecessary to include durational toll collectors in the bargaining unit because they will be covered by the terms of any negotiated agreement consistent with the Memorandum of Agreement.

This argument is not persuasive. The Memorandum of Agreement simply represents the agreement of the parties that durationals are covered by certain provisions of existing contracts negotiated by AFSCME and the State. Rather than support the State's positions, this Agreement supports a conclusion that the State and AFSCME have the ability to negotiate regarding durational employees and, in fact, negotiated contractual provisions affecting durational employees which are more limited than those which apply to permanent positions.

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<sup>6</sup>The permitted term of a durational assignment was extended from 180 days to two years during fiscal year 1995.

Finally, the petition before the Board is properly supported by at least thirty percent (30%) of permanent and durational toll collectors and corporals as required by the PERA. These employees are guaranteed the opportunity, consistent with their statutory rights, to vote by secret ballot for the exclusive representative of their choosing. Accepting the State's position that the Memorandum of Agreement supersedes the PERB responsibility for the determination of appropriate bargaining unit and certification of the exclusive bargaining representative under the statutory procedures would deny these employees their statutory rights.

The statute does not preclude durational employees from inclusion in bargaining unit with other employees with whom they share a community of interest. The record establishes that the durational toll collectors share a significant community of interest of permanent toll collectors and are, therefore, appropriate for inclusion in the bargaining unit.

### **DECISION**

The appropriate bargaining unit is determined to be: All permanent and durational Toll Collectors and Corporals employed by the Delaware Turnpike Administration.

An election will be scheduled within thirty days of this decision.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard  
**DEBORAH L. MURRAY-SHEPPARD**  
Principal Assistant/Hearing Officer  
Public Employment Relations Board

/s/Charles D. Long, Jr.  
**CHARLES D. LONG, JR.**  
Executive Director  
Public Employment Relations Board

Dated: September 14, 1995