

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE UNIVERSITY CHAPTER	:	
OF THE AMERICAN ASSOCIATION OF	:	
UNIVERSITY PROFESSORS,	:	
	:	
Charging Party,	:	
	:	Unfair Labor Practice Charge
v.	:	<u>No. 95-10-159</u>
	:	
DELAWARE STATE UNIVERSITY,	:	
	:	
Respondent.	:	

Decision on Motion to Dismiss

On or about October 5, 1995, the Delaware State University Chapter of the American Association of University Professors ("AAUP") filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging that by and through its actions, Delaware State University had violated §§1307(a)(5) and (a)(8) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994).

On or about October 23, 1995, Delaware State University ("DSU") filed an Answer to the Charge. As a part of its pleading, DSU requested Dismissal of the Charge on the basis that PERB lacked jurisdiction to hear the complaint because DSU is not a public employer within the meaning of 19 Del.C. §1302(n).

The AAUP filed its Reply on or about November 11, 1995, asserting that DSU had acceded to the jurisdiction of the PERB by the language of the parties collective bargaining agreement found at Article 1.1, 3.13, and 4.1. ¹ The AAUP further asserted that the jurisdiction of the PERB over these parties had been established by the decision in Brotherhood of Railroad Signalmen and Delaware Administration for Specialized Transportation (Del.PERB, Decision on Motion to Dismiss, Rep. Pet. No. 94-04-125 (1995)).

¹ AAUP and DSU are parties to a collective bargaining agreement which term extends from 1994 through August 31, 2000.

By letter dated December 1, 1995, the PERB requested that the parties brief the preliminary issue of jurisdiction. A briefing schedule was mutually agreed upon, with the final brief being received on or about January 26, 1996. This is the decision on jurisdiction which results therefrom.

Relevant Statutory Provisions

19 Del.C. §1302, Definitions, provides in relevant part:

(m) "Public employee" means any employee of a public employer....

(n) "Public employer" or "employer" means the State, any county of the State or any agency thereof, and/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 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

Delaware State University:

DSU maintains that the Public Employment Relations Act applies only to "public employers" as defined at 19 Del.C. §1302(m). It argues that this definition applies to DSU only if it is an agent or representative of the State. It asserts that DSU is a corporation which receives some public funds but which is autonomous in matters of fiscal and educational policy, and not, therefore, an agency of the State in any formal or actual sense. DSU argues that by defining "public employer" as "... the State, any county ... and/or municipal corporation," the General Assembly intended that only those entities which are representatives or arms of the State in the strictest sense are public employers under the Act.

DSU argues that the Eleventh Amendment test ¹ for State action is appropriate for determining employer status under the PERA. Enumerating similarities between DSU and the University of Delaware ("U. of D."), it argues that like the U. of D., DSU is not a State agency for purposes of the Eleventh Amendment. It asserts that DSU, like the U. of D., "is an independent corporation exercising virtually

¹ Citing Urbano v. Bd. of Managers of N.J. State Prison, 3rd Cir., 415 F.2d 247 (1969).

complete fiscal and educational autonomy and that it is not an arm or alter ego of the State. Gordenstein v. U. of D., D.Del., 381 F.Supp. 718 (1974).

DSU distinguishes PERB's ruling in Brotherhood of Railroad Signalmen v. Delaware Administration for Specialized Transportation (Del.PERB, Rep. Pet. 95-04-125 (1995)), asserting DSU does not constitute an "authority" or otherwise meet the statutory definition of a State agency found at 29 Del.C. §§10102, 10202. DSU argues that it does not exercise State power as described in Wilmington Housing Authority v. Williamson (Del.Supr., 228 A.2d 782 (1967)) which is a necessary function of a "public corporate body" or "public corporation."

DSU argues that although all four of its bargaining units were certified by the Department of Labor, Governor's Council on Labor, under the predecessor Chapter 13 of Title 19, the issue of whether DSU was indeed a public employer was neither raised nor addressed. It asserts that the Governor's Council could not perform the quasi-legislative function of transforming DSU into a "public employer" simply by establishing bargaining units under its administrative processes.

Similarly, DSU argues that the contractual language of the existing collective bargaining agreement, to which DSU and the AAUP have mutually agreed, does not subject DSU to PERB jurisdiction nor transform DSU into a "public employer" within the meaning of §1302(n) of the Act.

AAUP:

The AAUP argues that DSU's reliance on adoption of an Eleventh Amendment test to determine whether an entity is a state agency under the PERA is transparent, in that it serves DSU's own ends. It asserts that DSU has conceded that the definition of a public employer under the PERA is essentially the same as the definition which existed under the predecessor statute, Right of Public Employees to Organize. The AAUP argues that DSU was clearly covered by the prior statute as at least 21 cases were processed by the Governor's Council on Labor which established and modifies bargaining units of DSU employees according to the procedures established under that statute. The AAUP further notes that DSU was the moving party in at least four petitions filed with the Governor's Council.

Finally, the AAUP cites Articles 1.1, 3.13 and 4.1 of the current collective bargaining agreement between these parties in support of its position that DSU has acceded that it is a public employer within the meaning of §1302(m). Article 3.13 provides:

- 3.13 "University" refers to Delaware State University, a public land grant institution of higher learning, chartered by the State of Delaware, whose principal office is located in Dover, Delaware. It is also considered to be the employer as mentioned in the Public Employees Law of the State of Delaware....

OPINION

Delaware State University argues that the strict test applied by the courts to determine whether an entity has an agency relationship to a state sufficient to entitle it to the sovereign immunity protections afforded to states by the Eleventh Amendment to the United States Constitution is the appropriate test for determining whether an entity is a public employer within the meaning of 19 Del.C. §1302(n). The PERB held in Brotherhood of Railroad Signalmen v. Delaware Administration for Specialized Transportation (Del.PERB, Ruling on Motion to Dismiss in Representation Petition 94-04-125 (1995), PERB Binder II @ p. 1146), that a finding by the courts that an entity is not entitled to the State's sovereign immunity does not require a similar finding for purposes of determining whether the employees are public employees within the scope of the PERA. Consequently, the Eleventh Amendment test which DSU argues the PERB should apply in this matter, has previously and specifically been rejected for those purposes by the PERB.

In the Brotherhood of Railroad Signalmen case (Supra.), because neither the term "State" or "agency" was defined, the PERB looked beyond the simple words of the statutory definition of "public employee" and "public employer" to the intentions of the General Assembly in enacting the Public Employment Relations Act, in order to determine the scope of its jurisdiction. In finding that state agencies were included within the term "State" as used in the definition of "public employer", it held:

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 prior laws while at the same time depriving them of the expanded rights previously accorded other public sector employees by the General Assembly under mirror legislation [*the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982,1989) and the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986)*]

Records maintained by the Department of Labor during the period in which it supported the operations of the Governor's Council on Labor in administering the predecessor to the PERA, i.e., The Right of Public Employees to Organize (19 Del. C. Chapter 13), clearly evidence that then Delaware State

College ³ believed itself to be subject to the provisions of that statute. All four of DSU's existing bargaining unit of employees were created and certified by the Governor's Council. No less than twenty-one separate petitions with the Governor's Council which involved DSU and its employees. On at least four occasions, DSU filed petitions to modify existing bargaining units. There is no evidence to suggest that DSU ever attempted to unilaterally alter a bargaining unit, refused to participate in proceedings before the Governor's Council, refused to recognize a unit established under that statute or otherwise evidenced a belief that it was not bound by that statute. In fact, while DSU did challenge the constitutionality of the provisions of the predecessor statute, Right of Public Employees to Organize, it did not contest whether DSU was covered by that statute.

A review of the specific facts surrounding the establishment, administration and funding of Delaware State University reveals there is a direct relationship between DSU and the State of Delaware. DSU was established by the Delaware General Assembly in 1891. 14 Del.C. Chapter 65. The majority of the eleven members of the Board of Trustees of the institution are appointed directly by the Governor. The remaining five Trustees are selected by the Governor's six appointees. The Governor also serves as an ex-officio member of the Board, as does the President of the University. It is clear that control of the governing Board of Trustees is directly tied to the elected executive branch of the State, and, therefore, ultimately to the public electorate.

Further, in his affidavit filed in support of DSU's Answer to the unfair labor practice charge, the President of DSU acknowledges that the scope of the University's authority is controlled by statute. He states:

The Board of Trustees has complete autonomy, within the bounds of the statutory framework, to determine fiscal and educational policy for DSU. [*emphasis added*].

DSU is statutorily required to provide summer school for Delaware's public school teachers tuition free each summer. The State, obviously has a direct and important interest in assuring that its employees who provide education to the State's school children are well prepared and have adequate opportunities to improve their skills and knowledge through continuing education. While the State might

³ Delaware State University was previously known as Delaware State College. The General Assembly changed its title in 199 . For purposes of this decision, all references will be to Delaware State University or DSU; however, the existing records of the Governor's Council on Labor refer to this entity as Delaware State College.

contract with a private institution to provide these services, it clearly could not pass a statute which required a private institution to provide these services.

DSU became one of Delaware's two land grant institutions of higher learning in 1899. Annually it receives 20% of land grant monies which the State receives from the federal government. DSU is a member of the National Association of State Universities and Land Grant Colleges.

DSU prepares budgetary requests for each session of the Delaware General Assembly. The State annually appropriates large sums of money for the operation of the University out of its General Fund. In Fiscal Year 1996 (July 1, 1995 - June 30, 1996) the total State General Fund appropriation was for \$24.8 million, of which \$18.6 million (75% of the total) was designated as operating funds. An additional twenty percent (20%) of the appropriation was designated for energy costs and debt service.

Additionally, \$240,000 was appropriated in §259 of the FY96 Budget Epilogue "to enhance faculty salaries so that they are more in accordance with other comparable institutions in the region." The Epilogue further provides for review of DSU's accounting procedures. Section 260 provides, in relevant part:

The University shall comply with specific procedures developed and prescribed by the [State] Office of the Budget and the [State] Department of Finance, Division of Accounting. In addition, the University shall fully cooperate with the [State] Office of the Auditor of Accounts to aid in any review or examination of the University's procedures, records, and systems.

With this language, the State has mandated that DSU follow a particular policy and submit to State oversight in both the area of faculty compensation and internal fiscal control.

Through the years since its statutory origin, DSU's activities have been directed by the General Assembly in material matters of policy and operations. The fact that DSU may also receive large sums of money from sources other than the State does not prevent it from being considered a State agency. Parker v. University of Delaware, Del.Chan., 75 A.2d 225 (1950).

Consistent with the foregoing discussion and the decision in Parker v. U. of D. (Supra.), Delaware State University is an agency of the State of Delaware under the common law and, therefore, a "public employer" within the meaning of 19 Del.C. §1302(n).

This conclusion is further supported by the contractual language to which DSU agreed on June 8, 1995, nine months after the effective date of the Public Employment Relations Act. The existing

agreement states at Article 3.13 that "... the University is considered to be the employer as mentioned in the Public Employees Law of the State of Delaware." The only "Public Employees Law" which exists and would be applicable to the collective bargaining processes of these parties is, in fact, the instant PERA. Article 1.1 further states that the existing contract "... sets forth the agreement of the parties on matters of collective negotiations pursuant to the Public Employee Bargaining Provisions of the Delaware Code." Despite the inaccuracy of the specific title, only the Public Employment Relations Act establishes bargaining provisions for this public employer and employees. By these contractual provisions, it is clear that DSU believed itself to be a public employer covered by the PERA. Considered in concert with the overwhelming evidence that DSU is indeed a public employer and an arm of the State, equity and good faith also dictate that the University be bound by the underlying premise of its agreement with the AAUP.

DECISION

For the reasons stated above, it is determined that Delaware State University is a public employer within the meaning of 19 Del.C. §1302(n). The PERB shall forthwith proceed with the processing of the underlying unfair labor practice charge and shall schedule a date for the matter to be heard.

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

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

DATED: April 1, 1996