

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

AMERICAN FEDERATION OF STATE,	:	
COUNTY, AND MUNICIPAL EMPLOYEES,	:	
COUNCIL 81, AFL-CIO,	:	REPRESENTATION PETITION
	:	
Petitioner,	:	
	:	<u>No. 98-12-249</u>
and	:	
	:	
DELAWARE DEPARTMENT OF HEALTH AND	:	
SOCIAL SERVICES, DIVISION OF MENTAL	:	
RETARDATION,	:	
	:	
Respondent.	:	

APPEARANCES

*For AFSCME: John W. Schmid, AFSCME Council 81*  
*For State: Jerry M. Cutler, Office of Labor Relations/SPO*

**BACKGROUND**

The Division of Mental Retardation (“DMR”) is an agency of the government of the State of Delaware and is a public employer within the meaning of §1302(n) of the Public Employment Relations Act (19 Del.C. Chapter 13, “PERA”). DMR is one of eleven divisions within the Department of Health and Social Services (“DHSS”). The Division of Social Services (“DSS”) and the Division of Social Service Centers (“DSSC”) are also DHSS divisions.

The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(h) AFSCME is the exclusive bargaining representative of a number of units of DHSS employees.

Included in one of these units are Senior Social Workers/Case Managers employed by the Division of Social Services, represented by AFSCME Locals 1832, 2030, and 2031.<sup>1</sup>

On December 8, 1998, AFSCME filed a certification petition with the Public Employment Relations Board (“PERB”) seeking to represent a new bargaining unit comprised exclusively of Senior Social Workers/Case Managers employed by the Division of Mental Retardation. The State objected to the creation of a new unit, asserting it was inappropriate within the meaning of the Act because it would constitute over-fragmentation of bargaining units.

On January 12, 1999, AFSCME advised PERB the parties had “agreed that Senior Social Workers/Case Managers of the Department [*sic*] of Mental Retardation may elect to be accreted into the existing agreement between the State of Delaware and Council 81, Locals 1832, 2030, and 2031.”

By letter dated February 9, 1999, AFSCME “withdrew” the petition seeking to organize the Senior Social Workers/Case Managers employed by the Division of Mental Retardation. On February 11, AFSCME requested the petition be “restored to the Hearing level of the PERB certification process.” The State objected to AFSCME’s request for restoration, arguing PERB procedures did not allow for the restoration of petitions and that there was no issue of unit appropriateness properly before PERB.

In a March 10, 1999, letter to the parties, the Hearing Officer responded:

The State’s interpretation of PERB Rule 3.4 (5) is overly narrow. Rule 3.4(4) defines the process to be used where parties are able to mutually agree and stipulate as to bargaining unit composition. These procedures were adhered to, including the scheduling of an election, until Mr. Schmid [*AFSCME representative*] notified PERB that AFSCME was “withdrawing” its petition. He quickly clarified AFSCME’s intent by requesting the petition be restored to the “hearing” level. Although the language used may be ambiguous on its face, it is clear to me that the stipulation or agreement of the parties as to the appropriateness of including Division of Mental

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<sup>1</sup> The certification for this unit was created and administered by the Governor’s Council on Labor and was grandfathered to PERB in 1994. Three locals were established to represent DSS employees in the three Delaware counties.

Retardation Senior Social Workers/Case Managers in the existing bargaining unit is no longer mutual and that AFSCME is withdrawing its agreement.

AFSCME's withdrawal from this agreement returns the petition to its original status, i.e., it requests a unit be created comprised exclusively of Senior Social Workers/Case Managers employed by the Division of Mental Retardation. The State has objected to this unit.

The cards filed in support of the original petition are valid for a period of twelve months. Should the petition be dismissed by PERB, AFSCME would simply refile the petition using the same cards for support. Reverting the petition back to its status before the parties reached agreement simply saves time in reaching the same result. The statute grants to public employees the rights of organization and representation where they so choose. 19 Del.C. §1301; §1303. It is not the intent of the PERB rules nor the purpose of the PERB to thwart the overriding purpose of the Public Employment Relations Act.

As PERB has already determined this petition is properly filed and accompanied by a sufficient number of valid signatures, the petition is properly postured to proceed toward defining the appropriate unit by setting a date for hearing in this matter.

A hearing was held on April 28, 1999, at which time the parties were afforded full opportunity to present evidence in support of their positions. The record closed with the filing of letter memoranda, the last of which was received on June 1, 1999.

This decision results from the record created by the parties.

#### **ISSUE**

Whether a bargaining unit composed exclusively of Senior Social Workers/Case Managers employed by the DHSS, Division of Mental Retardation constitutes an appropriate bargaining unit within the meaning of 19 Del.C. §1310(d)?

#### **POSITIONS OF THE PARTIES**

##### **AFSCME Council 81:**

AFSCME argues Senior Social Workers/Case Managers in the Division of Mental Retardation constitute a unique group of professional employees, with no bargaining or

representational history. These employees fear their professional interests and focus will be diluted if they are included in a bargaining unit of DSS employees which includes many non-professional positions (e.g., secretaries, clerks, account technicians, telephone operators, etc.), who report to different management, perform different functions and serve a different client base.

State:

The State argues Senior Social Workers/Case Managers employed by the Division of Mental Retardation should be included in the bargaining unit of employees of the Division of Social Services (currently represented by AFSCME Locals 1832, 2031, and 2032) because that unit includes employees holding the classification of Senior Social Worker/Case Manager. The State asserts that because the Senior Social Worker/Case Managers employed by each of these divisions work under one job description, there exists a documented community of interest in which they share identical nature and scope of responsibilities, principal accountabilities, requisite knowledge, skills, and abilities and minimum qualifications. The State further argues these positions have similar working conditions as the Senior Social Workers/Case Managers in each division serve vulnerable populations and “assess needs, provide services or direct their clients to those services.”

The State argues creating a separate unit comprised exclusively of DMR Senior Social Workers/Case Managers would cause overfragmentation of bargaining units. Creating a new unit is unnecessary as the two divisions involved (DMR and DSS) are both located within the Department of Health and Social Services. The State asserts the human resource and labor relations functions for DHSS are centralized in the Department’s Human Resource office, which is responsible for classification, recruitment, applicant services, benefits, pension administration, grievance handling, and discipline and discharge. Employees in this position can apply for and transfer between the two divisions in question. Creating a single classification unit would

“undermine the efficient administration of the State by requiring additional resources be expended by creating a proliferation of contracts to negotiate and administer”.

Finally, the State argues that should PERB find the DMR Senior Social Workers/Case Managers are not appropriate for inclusion in the unit with DSS employees, there are two other existing bargaining units of DMR employees represented by AFSCME into which the Senior Social Workers/Case Managers can be placed.

### OPINION

While a number of factors impact the determination of an appropriate bargaining unit, none alone is determinative. The statute mandates the PERB consider the following:

- The similarity 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 on the efficient administration of government; and
- Such other factors as the Board may deem appropriate. (19 Del.C. §1310(d).

Of particular importance in grouping employees together into an appropriate bargaining unit is a consideration of whether they share similar duties, skills, and working conditions. Lake Forest Education Assn. v. Bd. of Education, Del.PERB, Rep. 91-03-060 (II PERB Binder 651 (1991)).<sup>2</sup> AFSCME has petitioned to represent a homogeneous unit comprised of the single classification of Senior Social Workers/Case Managers employed in the Division of Mental Retardation. A single classification of employees within one department, reporting to the same management structure and performing work within that classification, necessarily share a

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<sup>2</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). AFSCME v. Delaware DOT, Del.PERB, ULP 95-01-11 (II PERB Binder 1279 (1996)).

community of interest. The issue in this case, therefore, is whether application of other statutory factors require a finding that certifying this group of employees as a single, independent bargaining unit is inappropriate.

The State argues DMR Senior Social Workers/Case Managers should be included in the bargaining unit represented by AFSCME Locals 1832, 2030, 2031.<sup>3</sup> This unit includes employees of DHSS Division of Social Services in the following classifications:

- Account Technician
- Medicaid Out of State Coordinator
- Office Clerk
- Receptionist
- Secretary
- Administrative Secretary
- Social Worker (DSS)
- Social Workers/Case Manager
- Medicaid Restricted Recipient Program Specialist
- Medicaid Facility Compliance Reviewer
- Medicaid Policy Technician
- Social Service Aide
- **Senior Social Workers/Case Managers<sup>4</sup>**;
- Quality Assurance/Error Reduction Analyst
- Public Information Clerk
- Unit Operation Clerk
- Typist
- Senior Secretary
- Social Worker Assistant
- Senior Social Worker (DSS)
- Medicaid Third Party Liability Analyst
- Support Specialist
- Telephone Operator
- Vehicle Operator
- Data Technician

The State argues that because this unit includes Senior Social Workers/Case Managers employed by a DHSS division, working under the same job description, it is presumptively appropriate to

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<sup>3</sup> These AFSCME Locals also represent a second bargaining unit of Division of Social Service Center employees, as certified in DOL Case 166. AFSCME and the State negotiated a single contract covering both the DSS and the DSSC units for the 1998-2001 term. The fact that these two units are covered by a single contract and represented by the same union locals does not alter the fact they are separate and distinct statutory bargaining units, as evidenced by the representation records in DOL cases #47 and #166.

<sup>4</sup> Source: Article 2, Recognition, Section 2.2, Agreement between State of Delaware and DHSS, Division of Social Services and Division of State Service Centers and AFSCME Locals 1832, 2030 and 2032 (1998-2001).

include another group of DHSS employees working within the same classification (although employed by a different division) in this unit. It asserts divisional lines are irrelevant to a consideration of appropriateness in this case because all personnel and labor relations functions are centrally provided by the Department of Health and Social Services through its Human Resources Department.

While a shared job description documents that employees are hired to perform the same generic job duties and have a standard minimum skill set, that document, standing alone, is insufficient to establish a community of interest among commonly classified employees. Critically missing from a job description is context, e.g., employees' working conditions, to whom they report, how their responsibilities fit into the mission and goals of the employing agency. In this particular case, the record is void of evidence establishing what Senior Social Workers/Case Managers employed by either the Division of Mental Retardation or the Division of Social Services do during the course of a normal work day. No witnesses testified who were familiar with the work performed by Senior Social Workers/Case Managers in the Division of Mental Retardation.<sup>5</sup> While it was established that both DSS and DMR employees, work with "vulnerable populations", no further detail was provided.

The existing DSS bargaining unit includes all positions below mid-management and constitutes a divisional unit which was established and certified by the Governor's Council on Labor, and grandfathered to PERB in 1994 with the enactment of the Public Employment Relations Act. As such, that unit is presumptively appropriate and those positions share a community of interest. The record in this case, however, is insufficient to conclude that DMR Senior Social Workers/Case Managers share that community of interest.

No evidence was presented to either establish or refute a divisional community of interest between the DMR Senior Social Workers/Case Managers and any of the other existing units of

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<sup>5</sup> Transcript, p. 28.

DMR employees.<sup>6</sup> Considering only the community of interest, the record establishes no basis upon which to conclude that a single classification unit of DMR Senior Social Workers/Case Managers is inappropriate.

The statute also requires a consideration of “the history and extent of employee organization.” There is no history of either representation or collective bargaining involving DMR Senior Social Workers/Case Managers. Unlike many other states, including New Jersey and Florida, there is no statutory mandate or organizational history compelling the creation of comprehensive statewide or even department-wide bargaining units. To the contrary, the State of Delaware has a long-standing history under the Governor’s Council on Labor of certifying multiple units within departments and even within divisions (as evidenced by the three existing units within DMR), and of interpreting “appropriateness” narrowly, rather than broadly. For this reason, consideration of the history and extent of employee organization favors the creation of a new unit in this case.

The recommendations of the parties in this case are opposed, and this consideration does not impact the determination of appropriateness in this case.

Overfragmentation of bargaining units is a relative consideration depending upon the circumstances under which it arises. County of Ocean and CWA (NJPERC, D.R. 96-2 (1995)). The Delaware PERB has established a policy favoring creation of the fewest possible bargaining units as is consistent with the statutory purposes of promoting “harmonious and cooperative relationships between public employers and their employees”, and protecting “the public by assuring the orderly and uninterrupted operations and functions of the public employer.” While

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<sup>6</sup> Currently there are three certified and represented bargaining units within DHSS, Division of Mental Retardation, all of which include employees working at the Stockley Center (a residential facility providing care to mentally disabled persons): 1) A unit of Habilitation Facilitators represented by Laborers International Union of North America, AFL-CIO, Local 1029; 2) a unit of Habilitation Supervisors represented by AFSCME, Council 81, AFL-CIO; and 3) a unit of Nurses, Nurse Supervisors and Community

the Public Employment Relations Act does not provide the relative weight to be assigned to a consideration of overfragmentation, it does define the context in which it must be considered, i.e., the effect of overfragmentation on the efficient administration of government. Except for the State's preference for negotiating with fewer rather than more bargaining units, no evidence was presented supporting the claim that creation of a new unit would adversely affect the efficiency of the division, department, or the State. The simple assertion that a modified existing unit would be preferable to the creation of a new unit as a matter of time and expediency falls short of establishing an adverse effect upon the operations of the employer.<sup>7</sup>

The statute does not define "professional employees", nor does it limit their right to be represented for purposes of collective bargaining. In cases where PERB has declined to include public employees in units based on their professional status, there has been a clear differentiation of professional and non-professional employee functions, backgrounds and interests. That is not the case in this matter. AFSCME refers to the DMR Senior Social Workers/Case Managers as "professional employees". The probative value of AFSCME's opinion as to whether these are professional employees, is no greater than the soundness of the reasons given for that opinion, which, in this case, are none.<sup>8</sup>

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Mental Retardation Program Nurses represented by AFSCME, Council 81, AFL-CIO, Local 3514.

<sup>7</sup> This holding is consistent with that of IAFF and AFSCME v. City of Montpelier, Vt., Vermont Supreme, 332 A.2d. 795 (1975).

<sup>8</sup> City of Montpelier, (Supra).

**DECISION**

Based upon the record created by the parties and for the reasons set forth herein, the appropriate bargaining unit, considering the criteria set forth in 19 Del.C. §1310(d), is determined to be:

ALL SENIOR SOCIAL WORKERS/ CASE MANAGERS EMPLOYED BY  
DHSS, DIVISION OF MENTAL RETARDATION.

An election will be scheduled forthwith to determine if and by whom these employees desire to be represented for purposes of collective bargaining.

**It is so ordered.**

*/s/ Deborah L. Murray-Sheppard*  
DEBORAH L. MURRAY-SHEPPARD  
Hearing Officer  
De.Public Employment Relations Bd.

DATED: 26 July 1999