

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE DEPARTMENT OF CORRECTION,	:	
BUREAU OF COMMUNITY CORRECTIONS,	:	
	:	
Petitioner,	:	Petition for Declaratory Statement
	:	<u>No. 98-08-240</u>
AND	:	
	:	
FRATERNAL ORDER OF POLICE, LODGE 10,	:	
	:	
Respondent.	:	

BACKGROUND

The Delaware Department of Correction, Bureau of Community Corrections (“DOC”) is a public employer within the meaning of §1302(m) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (“PERA”) (1994). Fraternal Order of Police Lodge No. 10 (“FOP” or “Lodge 10”) is an employee organization within the meaning of 19 Del.C. §1302(h). The FOP is the exclusive bargaining representative of employees in the State’s Bureau of Community Corrections within the meaning of §1302(i).

On or about August 7, 1998, DOC filed a Petition for Declaratory Statement seeking a determination as to whether Probation and Parole Supervisors fall within the statutory definition of “supervisory employee” as that term is used in 19 Del.C. §1302(p). FOP Lodge 10 filed its Answer to the Petition on or about August 21, 1998, denying the employees in question meet the statutory definition of supervisory employees.

This decision results from a review of the pleadings.

FACTS

The Hearing Officer takes note of the fact the DOC Bureau of Community Corrections and FOP Lodge 10 negotiated a collective bargaining agreement for a two (2) year period extending from July 15, 1991, through July 15, 1993. Article 22, Duration of Agreement, provided that the Agreement “shall be automatically renewed from year to year thereafter, unless either party shall give the other party written notice of desire to terminate, modify or amend this Agreement 90 days prior to expiration of this Agreement.”

Article 2, Recognition of the Bargaining Agent, of that Agreement provides:

2.1. The Employer recognizes the Lodge as the exclusive bargaining representative for all unit employees covered by this Agreement for collective bargaining purposes.

2.2 The term “unit employee” as used in this Agreement shall include the following positions: Probation/Parole Officers and Senior Probation and Parole Officers as certified by the State Department of Labor in Case No. 165. All other positions are excluded.

On or about January 22, 1998, representatives of the parties met for the first time to begin negotiation of a successor agreement. In preparation for the opening of negotiations, the DOC management team met on November 21, 1997. Present at this meeting were employees holding the position of Probation and Parole Supervisor. During the meeting of January 22, 1998, the FOP “announced the membership of [Probation and Parole] supervisors in its organization and an intention to seek to become the collective bargaining exclusive representative...” (FOP’s Answer).

As of the date of this decision, no petition has been filed either by FOP Lodge 10 or any other employee organization seeking to represent these employees. Following the January 22, 1998 negotiation meeting, DOC removed from its bargaining team all employees holding Probation and Parole Supervisor positions.

POSITIONS OF THE PARTIES

DOC: The employer asserts, “Certain rights and/or statutory obligations of the State (ex. the ability to rely upon first level supervisory employees as part of the management team to assist in conducting negotiations and administering the collective bargaining agreement) are being adversely impacted by this controversy and the failure of the Lodge to file a petition to bring this controversy to a timely resolution.”

DOC argues the Probation and Parole Supervisors are “first line agents of management responsible for exercising independent judgment in the recruitment, selection, promotion, assignment and discipline of employees represented by the Lodge.” These employees “perform an important function in the bargaining process, in the administration of the collective bargaining agreement resulting from the bargaining process and in other labor/management matters.” The employer holds they are supervisory employees within the meaning of 19 Del.C. §1302(p) and are, therefore, ineligible for inclusion in the bargaining unit.

FOP: FOP Lodge 10 denies Probation and Parole Supervisors are “supervisory employees” within the meaning of 19 Del.C. §1302(p) and that its failure to file a petition to represent these employees has impacted the employer. Furthermore, it asserts it postponed the filing of such a petition at the employer’s request in order to allow the parties to meet to discuss and review the supervisors’ responsibilities.

OPINION

The Petition for Declaratory Statement filed by the State seeks a determination by the Public Employment Relations Board as to whether or not Probation and Parole Supervisors employed by the Department of Correction, Bureau of Community Corrections, are supervisory employees within the meaning of 19 Del.C. §1302(p), which provides:

“Supervisory employee” means any employee of a public employer who has the authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

The PERB is required to exclude employees in positions which meet this supervisory standard from all appropriate bargaining units created after September 23, 1994. 19 Del.C. §1310(d).

A Petition for Declaratory Statement filed pursuant to 19 Del.C. §1306 (which specifically incorporates §4006 (h)(4) of the Public School Employment Relations Act, 14 Del.C. Chapter 40), permits the expeditious processing of questions relating to the applicability of any provision of the statute or any rule or order of the Board. PERB Regulation 6, Petitions for Declaratory Statements, provides, in relevant part:

6.1 Filing a Petition

- (a) A public employer, exclusive representative or a public employee may file a petition with the Board for a declaratory statement.
- (b) A petition may be filed when there exists a controversy concerning:
 - (3) The application of any statutory provision or regulation or order of the Board.
- (c) A controversy exists within the meaning of this Regulation when:
 - (1) The controversy involves the rights and/or statutory obligations of a party seeking a declaratory statement;
 - (2) The party seeking the declaratory statement is asserting a statutory claim or right against a public employer, an exclusive representative, or a public employee who has an interest in contesting that right.
 - (3) The controversy is between parties whose interests are real and adverse; and
 - (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

Probation and Parole Supervisors are not part of the existing bargaining unit,¹ and can only be represented as a bargaining through the procedures set forth in §1310 and §1311 of the PERA. No petition has been filed before PERB by which these employees seek to be represented for purposes of collective bargaining by the FOP or any other labor organization. Only the employees can chose whether they wish to be represented, and no petition can be filed without the employees' support. 19 Del.C. §1303.

¹ The Fraternal Order of Police is both a professional and a labor organization. There may be members of the professional organization who are not represented within bargaining units for purposes of collective bargaining by the FOP as a labor organization. It appears from the pleadings that the organizational structure of FOP Lodge No. 10 may have been changed such that Probation and Parole Supervisors were now eligible to join as professional associates, should individuals so chose under the protected freedom of association. This change, which was internal

In the absence of a validated representation petition, whether Probation and Parole Supervisors are included on the management bargaining team is not a function of whether or not these employees are eligible for representation under the PERA. Consequently, the composition of the employer's bargaining committee is exclusively within its control.

Similarly, in the absence of a valid representation petition, DOC's request for a declaratory statement does not assert a statutory claim or right of the public employer against the union. There is, therefore, no "controversy" between the parties as required by PERB Rule 6.1(c)(2).

Furthermore, Rule 6.1(c)(4) requires that "The matter has matured and is in such a posture that the issuance of the declaratory statement by the Board will facilitate the resolution of the controversy." Delaware State Troopers Assn. and Del. Dept. of Public Safety, Del. PERB, DS 92-01-068 (1992, II PERB Binder 787. Clearly, the issuance of a declaratory statement by the Board pursuant to PERB Rule 6.1(c)(4) cannot facilitate the resolution of a controversy which does not exist.

The proper vehicle for resolution of the issue presented is through the statutory certification process when, and if, the Probation and Parole Supervisors seek to be represented for purposes of collective bargaining.

DECISION

This petition does not arise from a "controversy", as required by PERB Rule 6.1(c)(2) in that it does not assert a statutory claim or right against the FOP. Consequently the petition is not postured such that the issuance of a declaratory statement will facilitate the resolution of a valid controversy, as required by PERB Rule 6.1(c)(4).

WHEREFORE, for the reasons stated herein, the petition is dismissed

/s/ Charles D. Long, Jr.

to the union, did not, however, change the bargaining unit or the fact that the FOP does not represent Probation and Parole Supervisors for purposes of collective bargaining.

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

DATED: 6 January 1999