

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DR. JOAN D'ALONZO, DR. JOHN T. PETERS AND ,	:	
DR. KATHLEEN M. PICCIANO,	:	
	:	
Petitioners,	:	Petition for Declaratory Statement
	:	<u>No. 98-10-244</u>
AND	:	
	:	
STATE OF DELAWARE, DEPARTMENT OF	:	
AGRICULTURE, THOROUGHBRED AND	:	
HARNESS RACING COMMISSIONS,	:	
	:	
Respondents.	:	

BACKGROUND

Dr. Joan D'Alonzo, Dr. John Peters, and Dr. Kathleen Picciano ("Petitioners") are veterinarians employed by Delaware Park and Dover Downs, the horse and harness racing tracks at which they work.

The State of Delaware Department of Agriculture is a public employer within the meaning of §1302(m) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13.

The Delaware Harness Racing Commission ("DHRC") is established under law by 3 Del.C. Chapter 100, Harness Racing, as a unit of the Department of Agriculture "to regulate and oversee the sport of harness racing within this State in the public interest." 3 Del.C. §10002; §10005.

Similarly, 3 Del.C. Chapter 101, Horse Racing, establishes the Delaware Thoroughbred Racing Commission ("DTRC") for the purpose of "regulating the conduct of all participants in any thoroughbred and/or Arabian racing meet authorized by the [Delaware Thoroughbred Racing] Commission within the State." 3 Del.C. §10103. The DTRC is also a unit of the Department of Agriculture.

On July 13, 1998, Governor Carper signed into law House Bill 475 which amended both the Horse and Harness Racing statutes. This legislation modified the manner in which track veterinarians would be employed for monitoring horse and harness racing events.

On or about October 9, 1998, the Petitioners filed a Petition for Declaratory Statement seeking a determination as to whether veterinarians, who may now be employed by the Harness and Thoroughbred Racing Commissions as a result of the modifying legislation, will be public employees within the meaning of 19 Del.C. §1302(m); and secondly as to whether these track veterinarians will be eligible for State of Delaware employment benefits.

The State filed its Answer to the Petition on or about October 29, 1998, moving for dismissal of the petition on the basis that it fails to meet the requirements of PERB Rule 6.1.

The Petitioners filed a Reply to the New Matter raised in the Answer on or about November 8, 1998.

This decision results from a review of these pleadings.

POSITIONS OF THE PARTIES

Petitioners:

The Petitioners state they are currently employed and paid by the racetracks at which they work. They act as regulatory officials at Delaware Park and Dover Downs, “supervising the obtaining of samples for drug testing as well as monitoring the health and soundness of the horses which are racing.” Petition ¶2, ¶3. The Petitioners allege the amendment of the Horse and Harness Racing statutes by HB 475 “changed the manner in which the veterinarians are to be employed.” Petition ¶6. As a result of these modifications, the Petitioners believe they may be public employees within the meaning of 19 Del.C. §1302(m).

While admitting their employment status has not yet changed, the Petitioners seek this ruling by the Public Employment Relations Board (“PERB”) to “determine [their] status as public employees in order to safeguard [their] interests during the upcoming changes.”

State:

The State denies the Harness and Thoroughbred Racing Commissions are public employers within the meaning of 19 Del.C. §1302(m) of the Act.

It asserts the current petition should be dismissed because it does not raise a controversy sufficient to meet the requirements of PERB Rule 6.1(c). The State asserts no changes have been made in the method by which track veterinarians are employed; consequently, there is no mature, ripe or real and adverse controversy between these parties at this time.

The State also argues because the amended statutes provide the employees, including veterinarians employed by the Harness and Thoroughbred Racing Commissions, “shall serve at the pleasure of the Commission,” the General Assembly has precluded these employees from negotiating over terms and conditions of employment, such as job security, discipline, layoff and seniority.

The State also argues the PERB should decline to assert jurisdiction over these type of employees because the National Labor Relations Board (“NLRB”) has not exercised jurisdiction over labor disputes involving the horse racing industry. The State alleges the NLRB has declined to assert jurisdiction over these employees because “the sporadic nature of employment in these industries encourages a high percentage of temporary, part-time workers and results in a high turnover of employees and a relatively unstable work force” and that “there is a pattern of short work hours and sporadic and short periods of active employment with any given employer.”

OPINION

This Petition for Declaratory Statement seeks a determination by the Public Employment Relations Board as to whether veterinarians who may be employed by the Harness and Thoroughbred Racing Commissions will be public employees with the meaning of 19 Del.C. §1302(m), which provides:

“Public employee” or “employee” means any employee of a public employer except: (1) any person elected by popular voter 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; (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 affirmative legislative act of its common council or other governing body has elected to come within Chapter 16 of this Title, or which hereafter elects to come within Chapter 16 of this Title; (6) confidential employees of the public employer; and (7) Supervisory employees of the public employer, provided, however, that any supervisory position in a bargaining unit deemed to be 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(c) of this title.

A Petition for Declaratory Statement filed pursuant to 19 Del.C. §1306¹ 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 the Regulation when:
 - (1) The controversy involves the rights and/or statutory obligations of the 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.

The Petitioners admit they are employed by Delaware Park and Dover Downs race tracks. No allegation is made that either of these tracks are public employers under the Public Employment Relations Act. The petition is filed, rather, in anticipation of the change in employment status which the Petitioners

¹ 19 Del.C. §1306 incorporates by reference the provisions of 14 Del.C. §4006, which provides in relevant part:

§4006(h) To accomplish the objectives and to carry out the duties prescribed by this chapter, the Board shall have the following powers:

- (4) To provide by rule a procedure for the filing and prompt disposition of petitions for declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedure shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining

assert is mandated by the modified statutes. The actual wording of 3 Del.C. §10007 and 3 Del.C. §10107 is, however, more ambiguous:

- (a) The Commission may appoint such officers, clerks, stenographers, inspectors, racing officials, veterinarians, and such other employees as it deems necessary, consistent with the purpose of this chapter... (*emphasis added*)

There is nothing in the literal interpretation of this language which would require these individuals to change employers, nor is there anything on this record which establishes these individuals would be entitled to Commission positions, should they be established. Consequently, these individuals have no standing at this time to raise this petition as the dispute is not ripe for resolution unless and until these individuals become employees of either the DHRC and/or the DTRC.

Whether or not track veterinarians employed by the DHRC and the DTRC are public employees within the meaning of 19 Del.C. §1302(m) is relevant only at the point when Commission employees seek to be represented for purposes of collective bargaining. Currently, there is no pending representation petition involving DHRC or DTRC employees. In the absence of a valid representation petition, this request for a declaratory statement does not present a controversy involving the rights and/or statutory obligations of the Petitioners as required by PERB Rule 6.1(c)(1).

PERB Rule 6.1(c)(4) requires the issue placed before PERB be "in a posture such that the issuance of the declaratory statement by the Board will facilitate the resolution of the controversy." Del. State Troopers Assn. and Del. Dept. of Public Safety, Del. PERB, DS 92-01-068 (1992, II PERB Binder 787). The issuance of a declaratory statement cannot facilitate the resolution of a controversy which does not exist. DOC v. FOP #10, Del. PERB, DS 98-10-240 (1999, III PERB Binder 1813).

This petition is dismissed solely because it is not ripe for resolution at this time. The arguments made concerning whether PERB has jurisdiction over public employees who are assigned to work at horse and harness racing tracks were not considered as they were not relevant to the resolution of this petition.

Secondly, the Petitioners seek a determination as to whether the track veterinarians in question are eligible for State of Delaware employment benefits. PERB is charged with administering the Public

Employment Relations Act which grants to public employees the right to collectively bargain, should they so choose, and obligates public employers and labor organizations which represent public employees to enter into collective bargaining and to reduce any agreements reached thereby to writing. PERB's authority relates specifically to facilitating the resolution of public sector labor disputes through and concerning the collective bargaining process. Consequently, whether or not track veterinarians are eligible for State employment benefits is not an issue within the jurisdiction of the Public Employment Relations Board.

DECISION

This petition is premature and does not present a ripe controversy involving the rights and/or statutory obligations of the petitioners because they are not employees of either the Delaware Harness Racing Commission or the Delaware Thoroughbred Racing Commission. Consequently the petition is not postured such that the issuance of a declaratory statement by the Public Employment Relations Board will facilitate the resolution of a valid controversy.

The Public Employment Relations Board has no authority in this matter to determine whether the individuals in question may be eligible for State of Delaware employment benefits should they be employed by the DHRC or the DTRC.

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

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

DATED: 24 February 1999