

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

In RE:

STATE OF DELAWARE	:	
AND	:	Declaratory Statement
AMERICAN FEDERATION OF	:	00-05-284
STATE, COUNTY AND MUNICIPAL	:	
EMPLOYEES, COUNCIL 81, AFL-CIO.	:	

Appearances

Jerry M. Cutler, State Office of Labor Relations, SPO
Perry M. Goldlust, Esq., for AFSCME Counsel 81

Background

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §1302(n). The American Federation of State, County and Municipal Employees, Council 81, AFL-CIO (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(h). Its affiliated locals represent a large number of Delaware public employees for purposes of collective bargaining.

AFSCME filed a representation petition in March, 2000, seeking to modify an existing bargaining unit of Delaware Department of Health and Social Services employees to also include Dental Assistants who were not represented for purposes of collective bargaining. In RE: AFSCME and Del. DHSS, Rep. Pet. 00-03-278. On April 19, 2000, the Public Employment Relations Board ordered an election be held in order to determine whether the Dental Assistants working in State Service Centers desired to be represented for purposes of collective bargaining within the existing bargaining unit represented by AFSCME Locals 1832, 2030, and 2031.

By letter dated April 19, 2000, the State was advised of its obligation to provide the PERB and AFSCME with the names and home addresses of all eligible voters. The letter provides:

PERB Regulation 4.3(a) provides:

Excelsior List

Within seven (7) days after the Executive Director has issued a Bargaining Unit Determination or Notice of Decertification Petition or otherwise directed that a representation election be conducted, the employer must file with the Executive Director an election eligibility list, containing the names and addresses of all eligible voters. The employer shall simultaneously provide copies of this list to all other parties to the election. Failure by the employer to comply with this requirement may be grounds for setting aside the election whenever proper objections are filed.

Wherefore, the State is required to provide [PERB] and AFSCME Council 81 with the names and home addresses of all persons, employed as DHSS/DPH Dental Assistants. The list must include those employees who were on approved leave of absence at the end of the immediately preceding pay period. This list must be provided within seven (7) days of the receipt of this letter, but not later than 4:30 p.m. on Friday, April 28, 2000. A copy must be simultaneously provided to [AFSCME].

By electronic mail on April 26, 2000, the State responded:

Due to privacy concerns, the State is unable to comply with your request to provide the home addresses of employees in the cases identified above to the Union. We have, however, attached the names and work addresses of the affected employees.

The State would be willing to provide home addresses to the PERB for its sole and exclusive use, so long as the PERB furnishes us with written assurance that the home addresses will not be released to the Union or any other individual or entity outside of State government...

PERB responded to the State's position on May 1, 2000, resolving the immediate issue raised as follows:

... As you are aware, the PERB attempts to process representation petitions expeditiously. In an effort not to delay the casting of ballots in this election, PERB agrees not to release the home addresses of the eleven employees but will use them exclusively for mail ballots. Please provide the home addresses by noon on Friday, May 5, 2000. The ballots will be mailed, as scheduled, on Monday, May 8.

The State's position, however, raises a legal issue which will have consequences for future representation elections. Therefore, please provide the legal basis for the State's conclusion that providing home addresses of employees for the purpose of representation elections under the Public Employment Relations Act, as required by PERB Rules, violates a privacy concern. Please cite any legal precedent relied upon in reaching this conclusion. The State's response will be processed as a request for declaratory statement, questioning the application of PERB Regulation 4.3, pursuant to PERB Regulation 6. The State's position will be forwarded to AFSCME for response...

By letter dated May 19, 2000, the State provided a letter memorandum in support of its position. AFSCME responded with a letter memorandum in opposition to the State's position, dated June 1, 2000.

ISSUE

Does the requirement of PERB Regulation 4.3(a) violate privacy protections under the Delaware Freedom of Information Act, 29 Del.C. Chapter 100?

POSITIONS OF THE PARTIES

State of Delaware:

The Deputy Attorney General representing the State Personnel Office advised the Office of Labor Relations "... not to disseminate employees' home addresses due to privacy protections they have been afforded under federal case law and the Delaware Freedom of Information Act" ("FOIA"). The State bases its argument on the United State's Supreme Court decision in U.S. Dept. of Defense v. Federal Labor Relations Authority (510 U.S. 487 (1994) ("US DoD") and the 3rd Circuit Court's decision in Sheet Metal Workers Union v. US Dept. of Veteran's Affairs (135 F.3d 891 (1998)). The State argues the privacy interest in the employees' home addresses outweighs the weak public interest in disclosure under FOIA.

The State also relied on its own Advisory Opinion to the Secretary of Labor, dated July 30, 1998, in which a Deputy Attorney General advised the Department of Labor that the names and addresses of employees contained in sworn payroll statements filed by contractors pursuant

to 29 Del.C. §6912(c) were not public records within the meaning of the Delaware Freedom of Information Act. Specifically, the Secretary was advised:

“...the request for names, addresses, and social security numbers of employees submitted in sworn payroll information to the DOL is not a ‘core purpose’ of the regulation of state prevailing wage laws that would outweigh the employee’s personal privacy interest in [29 Del.C.] Section 10002(d)(1). Therefore, we conclude that a Delaware court facing this issue would uphold the non-disclosure of names, addresses and social security numbers of employees contained in sworn payroll information submitted to the DOL on the basis of the overwhelming persuasive authority in Sheet Metal Workers as well as case decision in other Federal Circuits and the United States Supreme Court.” [citations omitted].

AFSCME:

AFSCME argues PERB is empowered to promulgate rules and regulations necessary to carry out its responsibilities under the Public Employment Relations Act, 19 Del.C. Chapter 13, specifically those responsibilities relating to the procedures for representation elections. PERB Regulation 4.3(a) is firmly rooted in the logic and history of the National Labor Relations Board’s decision in Excelsior Underwear (156 NLRB 1236, 61 LRRM 1217 (1966) which has successfully survived numerous legal challenges. There is no sufficient reason cited by the State for departing from this long-standing procedure.

AFSCME argues the Supreme Court’s decision in US DoD is not applicable to the current issue because it involves federal employees, a Privacy Act not applicable to state and local employees, and does not involve the pre-election process. AFSCME notes Delaware does not have a privacy protection statute. AFSCME further argues the Delaware Freedom of Information Act, upon which the State bases its argument, is unrelated to the purpose for which the Excelsior list is required by the PERB and, therefore, does not control the resolution of the current dispute.

AFSCME argues the distinctions between the cases decided under federal law on which the State relies and the issue of PERB pre-election processes are so significant that the State’s arguments should be rejected and the PERB Regulation 4.3(a) upheld.

OPINION

A Petition for Declaratory Statement filed pursuant to 19 Del.C. §1306 ¹ permits the expeditious processing of questions relating to the applicability of any provision of the statute or any rule or order of the Public Employment Relations Board (“PERB”). PERB Regulation 6, Petitions for Declaratory Statements provides, in relevant part:

6.1 Filing a Petition

- a) A public employer, an 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 claim or right.
 - 3) This 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.

Both the State and AFSCME are routinely involved in representation matters before the Public Employment Relations Board which require an election. Pursuant to PERB Regulation

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

(h) To accomplish the objectives and to carry out the duties prescribed by this chapter the [Public Employment Relations] 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.

4.3(a), during the pre-election procedures PERB requires public employers to provide an Excelsior list, including the names and home addresses of all eligible voters, to PERB and to any and all labor organizations on the representation election ballot. This list is used by the labor organizations to verify that all eligible voters are listed and to challenge the validity and/or completeness of the list if it believes otherwise. The list is also often used in the labor organization's public relations and informational campaign prior to the election. Consequently, the issue of whether Delaware public employers are prohibited from releasing home addresses of employees is mature and ripe for resolution because it poses a recurring issue, requiring the review and application of a PERB Regulation.

The State argues it is prohibited from releasing the home addresses of employees "due to the privacy protections [the employees] have been accorded under federal case law and the Delaware Freedom of Information Act." It relies primarily on the US Supreme Court's decision in US Dept. of Defense v. FLRA, Supra. The issue before the Supreme Court in that case did not involve pre-election representation procedures. Rather, it addressed the question of whether the home addresses of federal agency bargaining unit employees were protected from disclosure to the union which was certified to represent those employees. In resolving the issue, the Supreme Court followed a three part analysis, namely, examining the requirements of the applicable federal labor statute, which led to an examination of the federal Privacy Act of 1974, and ultimately to consideration of the exceptions to the federal Freedom of Information Act.

The Federal Labor Relations Act ("FLRA") (which is similar in scope and purpose to the three statutes administered by the Delaware PERB) requires federal agencies to furnish exclusive bargaining representatives with data, upon request which is "normally maintained by the agency in the regular course of business", which is "reasonably available and necessary for full and proper discussion, understanding and negotiation of the subjects within the scope of collective bargaining," and "to the extent not prohibited by law." 5 USCA §7114(b)(4). The Court noted the home addresses of employees were normally maintained by the employing agencies, were reasonably available to the employer, and had been held in other decisions to be necessary to the

collective bargaining process to allow unions to effectively communicate with employees. US DoD, at 493. Therefore, unless the disclosure of the requested home addresses was otherwise prohibited by law, the employing federal agencies would be required under the FLRA to release this information to the exclusive bargaining representative, upon request.

In order to determine whether the disclosure of home addresses was otherwise prohibited by law, the Court then turned its attention to the federal Privacy Act of 1974, which provides:

No [federal] agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any other agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be ... (2) required under §552 of this title [federal FOIA]. 5 USC §552 a (b)(2).

The Court found the requested addresses to be “records” covered by the “broad terms of the Privacy Act.” US DoD, at 494. Because the written-consent provisions of the statute were not in issue, the Privacy Act would unquestionably prohibit the release of the employee’s home addresses, unless the federal Freedom of Information Act required their release.

The Supreme Court then focused on the scope of the federal FOIA and its exceptions. Consistent with its decision in US Dept. of Justice v. Reporters Committee for Freedom of Press, 489 US 749 (1989), the Court ruled the disclosure of the requested home addresses was not required by FOIA.

Thus, although this case requires us to follow a somewhat convoluted path of statutory cross-references, its proper resolution depends upon a discrete inquiry: whether disclosure of home addresses ‘would constitute a clearly unwarranted invasion of [the] personal privacy’ of bargaining unit employees within the meaning of FOIA.

... First in evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6², that bars disclosure when it would amount to an invasion of privacy that is to some degree ‘unwarranted’, ‘a court must balance

² Exemption 6 of the Federal FOIA exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal property.” 5 USC §552(b)(6).

the public interest in disclosure against the interest Congress intended the [e]xemption to protect.’

Second, the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA’, which is ‘contributing significantly to public understanding of the operations or activities of the government.’ [citations omitted] US DoD, at 495.

In US DoD, the Court noted the ultimate resolution of the matter was decided by the FOIA, but reached this point only through a sequential consideration of applicable FLRA provisions, followed by consideration of the federal Privacy Act prohibitions, which led to consideration of the FOIA exemption. The State does not assert there is a Delaware corollary to the federal Privacy Act, but rather jumps directly to the question of whether the home addresses of eligible voters would be subject to disclosure under the Delaware FOIA. Doing so, however, ignores the fundamental premise of the U.S. Supreme Court’s decision in US DoD, i.e., that federal agencies are specifically and explicitly prohibited from releasing the home addresses of their employees by the federal Privacy Act, and no exception to this prohibition exists under the federal FOIA exceptions.

It is undisputed that state and local governments are not subject to the overriding prohibition created by the federal Privacy Act. “Overview of the Privacy Act of 1974”, 1997 Edition, U.S. Dept. of Justice, <http://www.oalj.dol.gov>, citing: Ortez v. Washington County, Or., 88 F.3d 804 (9th Cir., 1996); Brown v. Kelly, No. 93-5222, slip op. at 1 (D.C. Cir., 1994)(per curiam); Monk v. Teeter, No. 89-16333, slip op. at 4 (9th Cir., 1991); Davidson v. Georgia, 622 F.2d 896 (5th Cir., 1980); Ferguson v. Alabama Criminal Justice Info. Ctr. 962 F.Supp 1446 (M.D. Ala. 1997); Williams v. District of Columbia, No. 95 CV 0936, 1996 WL 422328 at 2 (D.D.C., 1996); Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 411590 at 1 (D.D.C., 1996), summary affirmance granted, No. 96-5262 (D.C. Cir., 1997); Mamarella v. County of Westchester, 898 F. Supp 236 (S.D.N.Y., 1995); Reno v. United States, No.

4:94VC243, 1995; Connolly v. Beckett, 863 F. Supp. 1379 (D.Colo. 1994); MR by RR v. Lincolnwood Bd. of Education, District 74, No. 94-1357, 1995 U.S. App. LEXIS 10781 (7th Cir., 1995); Malevich v. United States Postal Service, No. 91-4871, slip op. at 19 (D.N.J., 1993), aff'd 27 F.3d 557 (3d Cir., 1994); Shields v. Shetler, 682 F.Supp. 1172 (D. Colo., 1988); Ryans v. New Jersey Commission, 542 F.Supp. 841 (D.N.J., 1982).

No supporting case law is offered for the premise that releasing home addresses of eligible voters in representation elections conducted by labor boards is illegal. In fact, agencies within other jurisdictions with similar responsibilities to those of the Delaware PERB have in the past and continue to provide to labor organizations the home addresses of eligible voters during the course of routine pre-election representation proceedings. These agencies include the National Labor Relations Board, the Pennsylvania Labor Relations Board³, and the New Jersey Public Employment Relations Commission.⁴

The rule requiring names and home addresses be provided to labor organizations prior to a representation election was first enunciated by the National Labor Relations Board in Excelsior Underwear, Inc., 156 NLRB 111, 61 LRRM 1217 (1966), in which the Board reasoned:

As a practical matter, an employer through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party might be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious – that the access of all employees to such communications can be insured only if all parties have the names and addresses of all voters. In other words, by providing all parties

³ See Rule 95.16, Names and addresses of employees, PaLRB.

⁴ See Rule 19:11-10.1 (a), Eligibility list, NJ PERC

with employees' names and addresses, we maximize the likelihood that all voters will be exposed to the arguments for, as well as against, union representation.

The "Excelsior list" requirement was approved by the Supreme Court in NLRB v. Wayman-Gordon Co. , 394 US 759, 70 LRRM 3345 (1969).

Like the National Labor Relations Board, the Delaware General Assembly entrusted to the PERB alone the responsibility for conducting representation elections free from interference, restraint, coercion and other elements that might impede a free and reasoned choice by eligible voters.

Among the elements which undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available. An employee who has had an effective opportunity to hear arguments concerning representation is in a better position to make a fully informed and reasonable choice. Excelsior, at 1240.

This logic is compelling and was central to the Delaware PERB's adoption of Regulation 4.3(a).

Section 4006 (h)(5) of the Public School Employment Relations Act⁵, provides PERB with the powers necessary to accomplish the objectives and to carry out the duties prescribed by the law, including, "...to request from any public agency such ... data as will enable the [Public Employment Relations] Board to carry out its functions and powers." PERB requires employers to provide names and home addresses of eligible voters to the PERB and to labor organizations on the ballot within seven days of an Election Order. This requirement is consistent with the best practices of similar agencies and is not otherwise prohibited by law.

Whether names and home addresses included in an Excelsior list are subject to FOIA disclosure is not dispositive of this petition. In this case, there is no FOIA request in issue, unlike the case of Sheet Metal Workers International Assn. v. U.S. Dept. of Veteran Affairs (135

⁵ 14 Del.C. Chapter 40. This section of the Public School Employment Relations Act is incorporated by reference into both the Public Employment Relations Act at 19 Del.C. §1306, and the Police Officers and Firefighters Employment Relations Act at 19 Del.C. §1606.

F.3d 891 (3rd Cir., 1998)) or in the matter of the Deputy Attorney General's Opinion of July 30, 1998, on which the State has relied.⁶

If a FOIA request for an Excelsior list were to be received, there is support for the State's contention that the list would not be subject to disclosure, based upon an application of similar federal FOIA language. The D.C. Circuit Court of Appeals in Reed v. NLRB, 927 F.2d 1249, 136 LRRM 2803 (1991), held that NLRB Excelsior lists are protected from FOIA disclosure because they contain employee names and home addresses, which are exempted from disclosure under the federal FOIA by exemption 6.⁷ The Court rejected the appellant's claim that the NLRB's prior disclosure of the list to unions during routine pre-election proceedings and the Board's failure to place restrictions on the union's use of the information undermined the significance of the asserted privacy rights of the named individuals. Relying on Reporters Committee, Supra., the D.C. Circuit Court held the disclosure of Excelsior lists pursuant to a FOIA request would constitute an unwarranted invasion of personal privacy in that it would not further the public interest in understanding the workings of government, specifically the NLRB. This decision did not, however, prohibit the NLRB from requiring home addresses during the pre-election process nor the distribution of this information to labor organizations on the ballot. Similarly, the Delaware FOIA does not prohibit the application of PERB Regulation 4.3(a) during the representation election procedures, which is a necessary component to the conduct of free and fair representation elections.

⁶ The issue in the Deputy Attorney General's opinion to the Secretary of Labor (which was attached to the State's memorandum) concerned whether the Department of Labor should release, in response to a FOIA request, 1) the names and addresses of employees contained in sworn payroll records submitted under the Prevailing Wage law; and 2) apprenticeship and training agreements supplied pursuant to 19 Del.C. Chapter 2.

⁷ See footnote 2.

DECISION

For the reasons stated herein, Delaware PERB Regulation 4.3(a), which requires public employers to provide names and home addresses of all eligible voters in PERB representation elections does not violate Delaware law.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Hearing Officer, Delaware PERB

DATED: 17 November 2000