IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DEPARTMENT OF CORRECTIONS, STATE OF DELAWARE	)	
Respondent Below-Appellant,	)	
v.	)	C. A. No. 19115
DELAWARE CORRECTIONAL OFFICERS' ASSOCIATION,	)	
Charging Party Below-Appellee.	)	

MASTER'S REPORT
(Appellant's Request for a Stay)

Date Submitted: March 26, 2002
Draft Report: March 26, 2002
Final Report: April 12, 2002

Sherry V. Hoffman, Esquire, Department of Justice, Wilmington, Delaware; Attorney for Appellant State.

David A. Boswell, Esquire, Schmittinger & Rodriguez, Rehoboth Beach, Delaware; Attorney for Appellee.

GLASSCOCK, Master

I. BACKGROUND

This matter involves an appeal from a decision of the Public Employee Relations Board (the "PERB"). The appellant is the Department of Correction of the State of Delaware (the "State"). The respondent is the Delaware Correctional Officers' Association (the "Union"). The Union is the exclusive bargaining agent for the uniformed prison guards in the State of Delaware. As the exclusive bargaining representative, the Union is charged with representing all the employees within its bargaining unit, without regard to whether those employees have chosen to join the Union. 19 Del. C., § 1304(a). As part of the collective bargaining process, the Union and the State entered a Memorandum of Understanding on February 1, 1996 (the "Agreement"). Under the terms of the Agreement, the State agreed to "provide the [Union] with a tri-monthly list of all employees in the [Union's] Department of Correction bargaining unit which contains the name, home address, position classification and employment date of each bargaining unit member . . . ." In return, the Union agreed "to indemnify and hold the State harmless against any and all claims, demands, legal actions and other forms of liability that arise out of or by reason of any action taken or not taken by the State to comply with any term of" the Agreement. The Agreement provided that the State was entering the Agreement "[i]n recognition of the

exclusive bargaining agent's obligation to represent all employees within the bargaining unit for collective bargaining purposes pursuant to 19 Del. C., Chapter 13 . . . ." The Union promised that "all information provided by the State pursuant to this Memorandum shall be used solely for official association purposes in its role as exclusive bargaining representative . . . ."

The State continued to abide by the Agreement and to provide the names and home addresses of employees from 1996 until February 2000. At that time, the State made a unilateral determination that it would no longer honor its agreement to provide this information. It is the State's contention that the privacy interests of its employees are a legal impediment preventing its compliance with the Agreement.

As a result, on July 25, 2000, the Union filed an unfair labor practice charge against the State with the PERB. The PERB referred two issues arising from the charge to its hearing officer: whether the unilateral decision to abrogate the Agreement amounted to an unfair labor practice, and whether, independent of the Agreement, it was an unfair labor practice for the State to fail to disclose the names of addresses of employees. In a decision dated May 18, 2001, the hearing officer found that under the undisputed facts, "home addresses, in this case, are reasonably necessary and relevant to [the Union] in the proper performance of its representation duties under the [Public Employment Relations Act, 19 Del. C., § 1307(a)]. Therefore, unless the release of

this information is otherwise contrary to law, the State is obligated to provide the addresses under its duty to bargain in good faith." Delaware Correctional Officers' Association v. Delaware Department of Correction, ULP No. 00-07-286, Murray-Sheppard, Hearing Officer (May 18, 2001)(Hearing Officer's Order) at 9. The hearing officer concluded that "by refusing to provide DCOA with the home addresses of bargaining Union employees . . . the State failed to bargain in good faith and violated 19 Del. C., § 1307(a)(1), (a)(5)." Delaware Correctional Officers (Hearing Officer's Order) at 12.

The State appealed the hearing officer's order to the PERB, which issued its decision on September 10, 2001. The PERB found that the State's unilateral action to disregard the terms of the agreement was a violation of its duty to bargain in good faith, that there was no evidence establishing a change in the law between the execution of the Agreement and the State's decision to abrogate it, and that there was no basis on which to overturn the hearing officer's decision. The PERB affirmed the hearing officer's decision "in its entirety" and ordered the State to "cease and desist from refusing to provide [the Union] with the home addresses of bargaining unit employees." Delaware Correctional Officers' Association v. Delaware Department of Correction, ULP No. 00-07-286 (Sept. 10, 2001) (Board Review of Hearing Officer's Decision) at 4-5.

The State argued below that Federal case law, particularly Sheet Metal Workers' International Association v. United States Department of Veterans' Affairs, 3d Cir., 135 F.3d 891 (1998) interpreted federal statutes so as to operate as a prohibition against the disclosure of employee home addresses by the State to the Union. *See* Delaware Correctional Officers (Hearing Officer's Order) at 4. This argument, that a change in the law had made the agreement between the parties unenforceable and relieved the State of its obligation to provide employee addresses to the Union, was rejected by, first, the PERB's hearing officer and then the PERB itself. Based upon the same contentions it had raised below, the State sought a stay of the PERB's order that it release employee addresses pending the appeal in this Court. Based upon that understanding of the issues on appeal, I issued a draft report recommending that the stay be granted on October 25, 2001 (the "October report"). Because resolution of the issues in the appeal appeared imminent in this Court, the parties agreed to reserve any exceptions to the October report on the stay issue and proceed directly to the merits. I entered an expedited briefing scheduled, and the substantive issues have now been briefed.

On examining the State's arguments in its briefs, it became clear that the State was no longer pursuing the argument it had made below under Sheet Metal Workers and associated case law, except by analogy. Instead, the State relies on a common law

doctrine of privacy which it argues now prevents (and, in fact, has always prevented) the State from lawfully releasing employee home addresses to the Union. Because this issue had not been considered by the hearing officer or the PERB, and for the reasons set forth in my order, I remanded this issue to the PERB to consider the new issues under Delaware common law raised by the State. Department of Corrections v. Delaware Correctional Officers' Association, Del. Ch., No. 19115, Glasscock, M. (April 1, 2002)(Order). Because the matter was remanded, I found it appropriate to revisit the issue of the stay. On March 26, 2002 I withdrew my previous draft report on the stay issue and issued a draft report from the bench, recommending that the request for a stay be denied.[1] The parties entered into an expedited schedule for providing memoranda of exceptions on this issue, which is now complete. After having reviewed the record in this case, including the memoranda of exceptions filed by the parties, I have withdrawn my draft bench report of March 26, 2002 and issued this final report recommending that the stay be denied.[2]

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[1]The draft bench report was issued during a recorded telephone conference.

[2]Although I reach the same conclusion as in the draft bench report, in the interest of clarity for purposes of review I am withdrawing that report and substituting this written report.

II. ANALYSIS

The State seeks a stay under 19 Del. C. §1309(a). As that statute makes explicit, an order of the PERB is not automatically stayed by appeal to this Court. Rather, this Court may grant a stay upon motion, on equitable grounds. *See* Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission, Del. Supr., 741 A.2d 356 (1998) (involving analysis of motion for stay pending appeal to the Supreme Court). The parties here agree on the issues which must be examined in considering a motion for a stay of a decision of the PERB. The Court must consider the following factors: (1) the likelihood of success on the merits of the appeal and whether the appeal involves a "fair ground" for further litigation; (2) whether the movant will suffer irreparable harm absent the stay; (3) whether any other interested party will suffer substantial harm if the stay is granted, and; (4) whether the public interest supports entry of the stay. *See* Kirpat, at 357-58; Excomp, Inc. v. Ropp, Del. Ch., No. 17075, Jacobs, V.C. (May 19, 2000)(Mem. Op.) at 4-6. The burden is on the movant to demonstrate that a stay is warranted.

Does this appeal involve a "fair ground" for further litigation?

In the October report, recommending a stay, I determined this factor to be neutral, since the issue presented was purely legal and, I felt, could be determined

quickly. Given my current understanding of the issues which the State wishes to raise on appeal, however, my view has changed. The State does not seek further litigation on meritorious issues raised below. It seeks to litigate *for the first time* the common law privacy issues it raises on appeal. Because these issues were not fairly presented below, I have remanded this matter to the PERB for its consideration. The State has failed to explain why it could not have raised the common law privacy issues in its initial appearance before the PERB. Because I desire the guidance of the PERB, I will make no judgment here on the merits of the new issues sought to be raised by the State. Since this matter does not involve "further" litigation of those issues which were fairly raised below, this factor does not support the State's request for a stay.

Will the movant suffer irreparable harm absent the stay?

The only issue raised by the State with respect to this factor involves its contention that, if it wrongfully releases the addresses of its employees it is liable to suit by those employees for civil redress of that wrong. As I found in the October report, this argument is not persuasive. In re-examining this factor under the current state of the appeal, moreover, I am yet more firmly convinced that the State faces no irreparable harm if it is required to disclose employee addresses. First, under the terms of the Agreement the Union will "indemnify and hold the State harmless against any

and all claims, demands, legal actions and other forms of liability that arise out of or by reason of any action taken or not taken by the State to comply with any term of" the agreement. Second, even absent the hold-harmless provision of the agreement, it is not clear that a successful suit could be maintained, in the face of sovereign immunity, based upon the State's compliance with an order of the PERB or of this Court. Third, as I understand the State's argument now, it contends that release of the home addresses of employees has been unlawful *throughout* the term of the agreement, and yet the State has not been sued, and in fact candidly admits that no employee has ever complained about the release of his address to the Union. For the foregoing reasons, it is clear that this factor does not support issuance of a stay.

Will the Union suffer substantial harm if the stay is granted?

In my October report, recommending that a stay be issued, I found this factor to be neutral because the Union has alternate, albeit less convenient and effective, ways of contacting employees of the State if the State does not provide addresses in compliance with the agreement. The Union urges that I reconsider this decision, both because (the Union argues) its methods of communication with State employees absent provision of home addresses are not comparable to its ability to communicate with those employees *with* the addresses, and because it urges that I take judicial notice of

the fact that another Union may be attempting to be certified as sole bargaining agent for these employees, making it imperative that it be able to contact employees effectively. It is quite possible that the Union is facing substantial, perhaps irreparable, harm. Because I do not need to reach the factual allegations of the Union on this issue to decide that a stay should not enter, however, I have declined to revisit this factor.

Will third parties or the public be harmed absent entry of the stay?

In my October report, I found this factor (in light of the neutrality of the other factors) to be dispositive. My rationale was that if federal case law or statutes had created privacy rights in the information which the State had obligated itself by agreement to provide to the Union, the potential harm of refusing the stay was that these new-found privacy rights might be abrogated. With my current understanding of the State's arguments on appeal, however, this concern is, in my opinion, greatly lessened. The State's argument now is that it is and always has been unlawful for it to release employee addresses. The State, however, entered an agreement to do just that on February 1, 1996. For the next four years, it periodically released the home addresses of all its employees to the Union *without a single complaint from an employee being made about this supposedly unlawful practice*. Of course, if the State proves correct in its assertion that state common law prohibits release of the names of

its employees, then release of the names during the pendency of this appeal will create some indicia of harm to the employees. However, it seems to me that whatever harm may result in that instance would be simply cumulative to the "harm" which theoretically will have resulted from the State's practices for the four years between 1996 and 2000, harm which did not result in a single complaint from those suffering it. For this reason, I find that the potential of harm to third parties is not dispositive of this issue.

III. CONCLUSION

This matter has been remanded to the PERB because the State sought to raise an issue on appeal that was not fairly presented below. As a result, this appeal will be more prolonged than would otherwise be the case.[3] Because the State itself will suffer no irreparable harm if the request for a stay is denied, because the only potential harm absent a stay is an attenuated risk to the State's employees, and because the appeal itself cannot move forward until the PERB resolves issues which could have been but were not presented by the State below, the State has failed to demonstrate that the equities require entry of a stay. I do note, however, that the merits of the common law

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[3]The State points out in its memorandum of exceptions that it has cooperated fully with the Union and the Court to expedite this Court's review of issues on appeal. I agree that the State has been commendably cooperative in this regard.

privacy argument sought to be raised for the first time on appeal are now before the PERB. That body, not this Court, is in the best position to determine whether those issues have merit such that the PERB is persuaded that it should stay or modify its order of September 10, 2001 pending its resolution of the issues on remand. Therefore, this report should not take effect for a period of one week, to provide the State with an opportunity to seek action from the board as it finds appropriate.

Master in Chancery

oc: Register in Chancery (NCC)