STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

Barry R. Newman, Jr., CHARGING PARTY,	:	
v.	:	ULP No. 02-12-374
Delaware Correctional Officers Association ("DCOA"),	:	
Correctional Officers Association of Delaware ("COAD"), AND	:	
State of Delaware, Department of Correction ("DOC"), RESPONDENTS.	:	

BACKGROUND

The Department of Correction of the State of Delaware ("State") is a public employer within the meaning of section 1302(p)[1] of the Public Employment Relations Act, 19 Del.C. Chapter 13.

Barry R. Newman was employed by the Department of Correction until his termination on or about June 22, 2001. His efforts to have this termination reviewed through grievance arbitration is the subject of this charge. As such, the Charging Party is a "public employee" within the meaning of 19 Del.C. §1302(o).[2]

[1] 19 Del.C. §1302(p): "Public employer or "employer" means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees.

[2] 19 Del.C. §1302(o): "Public employee" or "employee" means any employee of a public employer except: (1) any person elected by popular vote 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 of a public school employer, as defined in Chapter 40 of Title 14; (5) any police officers and firefighters employed by the State or any 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 the

At the time of his termination, Charging Party was a member in good standing of the Delaware Correctional Officers Association.

Delaware Correctional Officers Association ("DCOA") is an "employee organization" within the meaning of 19 Del.C. §1302(i) [3] and was the "exclusive bargaining representative" of the bargaining unit of DOC Correctional Officers at all times relevant to this dispute prior to June 13, 2002. 19 Del.C. §1302(j).[4]

Correctional Officers Association of Delaware ("COAD") is an employee organization within the meaning of 19 Del.C. §1302(i). COAD was certified as the exclusive bargaining representative of the bargaining unit of DOC Correctional Officers on June 13, 2002, replacing DCOA in that capacity as a result of a decertification election conducted by the PERB. 19 Del.C. §1302(j).

On December 17, 2002, the Charging Party filed an unfair labor practice complaint against the Respondents alleging that by failing and refusing to represent Mr. Newman in the arbitration of his termination, DCOA and/or COAD violated 19 Del.C. §1307(b)(1) and §1307(b)(3), which provide:

> (b) It is an unfair labor practice for a public employee or for an employee organization or its designated representative to do any of the following:

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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. Any police officers and firefighters included in this subsection shall be subject to 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(e) of this title.

[3] 19 Del.C. §1302(i): "Employee organization" means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative or agent of said organization.

[4] 19 Del.C. §1302(j): "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent for all employees in that bargaining unit.

> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
>
> (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

The Complaint requested that the Public Employment Relations Board ("PERB") find the Respondents had violated the statute and committed unfair labor practices and order the responsible party or parties to proceed with the grievance arbitration. Alternatively, Charging Party joined the employer, DOC, as a party and requested that if PERB found the complained of conduct did not constitute an unfair labor practice, that the PERB order that Charging Party's termination case be heard before the Delaware Merit Employee Relations Board.

On December 19, 2002, the State filed a Motion to be dismissed as a party to the action, asserting that the Complaint included no allegations that the State had violated its obligations under the Public Employment Relations Act. Charging Party clarified its inclusion of the State as a party by letter dated December 23, 2002:

> The purpose of this letter is to clarify the Charging Party's position concerning the Motion to Dismiss filed by the State. Count I of this Complaint does not allege any unfair labor practice on the part of the State. Thus, there is really nothing that needs to be dismissed. The State was joined as a party only because they have an interest with respect to the allegations in Count II (Request for Declaratory Statement). [5]

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[5] Paragraphs 15 – 17 of the Complaint include the substantive portions of the Charging Party's "Count II":

15. The facts set forth below amount to a "controversy" within the meaning of Board Rule 6.1(c) concerning the interplay between the Act and the merit system statutes and that a declaratory statement will assist in the resolution of the controversy.
16. As a consequence of decertification of DCOA, Newman's rights under the CBA [*collective bargaining agreement*] defaulted to the grievance procedures set forth in 29 Del.C. §5913(a), which provides for a hearing before the Merit Employee

By letter dated December 26, 2002, the State withdrew its Motion, on the basis that "the Charging Party is not asserting an Unfair Labor Practice Charge against the State and that the State therefore has no liability with respect to the Charge."

On January 13, 2003, COAD filed a Motion requesting to be dismissed as a party to this action. The Motion was denied by the PERB Executive Director on January 16, 2003. COAD filed an Answer to the Complaint on February 26, 2003, denying the allegations and requesting the charge be dismissed.

DCOA filed its Answer to the Complaint on January 15, 2003, denying the allegations and requesting the charge be dismissed.

An evidentiary hearing was conducted before the Executive Director of the Public Employment Relations Board on April 3, 2003, at which time all parties were afforded the opportunity to present evidence, present and examine witnesses, and make argument.

Additional written argument was accepted from the parties. The Charging Party, DCOA and COAD each provided written argument; the State waived its right to do so. The final memorandum was received from COAD on May 23, 2003.

This decision results from the record created by the parties as described above.

Relations Board. *See Department of Correction v. Correctional Officer Supervisors,* 514 A.2d 405, 407 (Del. 1986).

17. Thus, if the Board finds that the actions of DCOA and/or COAD do not amount to an unfair labor practice, or if the Board fails to order DCOA and/or COAD to proceed with the Arbitration Case, then Charging Party requests that the Board declare that his grievance arising from the termination of his employment shall be heard before the Merit Employee Relations Board.

FACTS

The material facts in this case are not is dispute.

On or about June 22, 2001, the State terminated the employment of Charging Party, Barry R. Newman. The Delaware Correctional Officers Association ("DCOA") which was, at that time, the exclusive bargaining representative of the bargaining unit of State Correctional Officers, initiated a grievance on Mr. Newman's behalf protesting his termination. Unable to resolve the matter in the lower steps of the contractual grievance procedure, DCOA filed for arbitration with the American Arbitration Association, and entered into the process of selecting an arbitrator and arbitration date with the State.

On November 1, 2001, the arbitration was scheduled to be heard on June 26, 2002.

As a result of a secret ballot election conducted by the Public Employment Relations Board, on June 13, 2002, DCOA was decertified as the exclusive representative of the bargaining unit of Correctional Officers. Correctional Officers Association of Delaware ("COAD") succeeded DCOA as the exclusive representative of the unit as the result of that election.

By letter dated June 13, 2002, DCOA President Robert Proctor, advised Charging Party, "Due to the De-certification, DCOA will no longer be able to represent you in your arbitration that has been scheduled for June 26, 2002. If you would like to still pursue your grievance, please Contact State Personnel." *Charging Party Exhibit 4.*

COAD President William Gosnell attempted to formally contact DCOA President Proctor by letter dated July 19, 2002:

1. Sir, I have been trying to set up some kind of arrangement with your Treasurer and or your First District Rep. to discuss the possibility of COAD taking your case load that need to go to pre-arbitration and arbitration. As of this date and time, I have not met with either of these individuals.

2. I request an immediate reply from your office of dates and times that you will be able to sit down and discuss this with myself and my service provider. Time is of the essence. Many of these cases need immediate attention before they are out of timely guidelines. *Charging Party Exhibit 5.*

The record includes no evidence of a response to COAD's request from DCOA.

On September 27, 2002, the State sent a letter to Charging Party advising him:

> On July 29, 2002, the Delaware Correctional Officers Association (DCOA) advised the American Arbitration Association (AAA) that it would not be responsible for any outstanding arbitration cases (including yours) that were filed prior to its decertification. As a result, your arbitration case has not been rescheduled with AAA and our office has taken no further action with respect to it.
>
> If you have any questions or would like to pursue this matter further, please contact Jerry M. Cutler at (302) 577-8977. *State Exhibit 3.*

On September 30, 2002, Charles R. Wood, DCOA Executive Board Grievance Representative, addressed a letter to AAA Case Manager Naida which stated:

> This letter is to confirm that files listed in DCOA Exhibit B have been sent to the Correctional Officers Association of Delaware (COAD) on this date. With this letter is a copy of the receipt and notarized statement the files being sent from Windswept Enterprises, LTD., INC via UPS.
>
> There is one correction to the mailing address of COAD. Their mailing address is 19 South State Street, Dover, DE 19901 not 12 South State Street as stated in their newsletter. Their phone number is ...

> Also included with this letter is a brief chronology of events involved with the exchange of these files. If you should have any questions or need additional information you can contact me at work ...or at home... You may also send me an e-mail ...
>
> I thank you for your time and help during this difficult time for the DCOA executive board.

This letter was attached to the Complaint as Exhibit A; however only one document was attached to the letter, namely a list entitled, "INDIVIDUAL CASES THAT WERE OUTSTANDING AT THE TIME OF DECERTIFICATION AND LISTED AS EXHIBIT B WITH THE AMERICAN ARBITRATION ASSOCIATION". Information was redacted from this document, presumably the names of individual grievants. The exhibit did not include the "brief chronology of events involved with the exchange of these files" referenced in the letter, and that document was not otherwise placed on the record.

Charging Party Newman testified that at some point he received a copy of his grievance file from COAD former-President William Gosnell. The current [6] COAD President testified he had never seen Charging Party's grievance file, to his knowledge COAD never received the file from DCOA and that he has no knowledge of the current location of the file.

ISSUE

WHEN A GRIEVANCE IS FILED AND SCHEDULED FOR ARBITRATION, AND THE EXCLUSIVE BARGAINING REPRESENTATIVE IS SUBSEQUENTLY DECERTIFIED AND REPLACED BY A SUCCESSOR REPRESENTATIVE BEFORE THE SCHEDULED HEARING DATE, WHAT OBLIGATIONS, IF ANY, DO THE TWO ORGANIZATIONS RESPECTIVELY

[6] COAD President Alan Deal testified he took office in January, 2003. Prior to that time, he served as a Vice President since COAD's creation.

HAVE TO REPRESENT THE GRIEVANT UNDER THE PUBLIC EMPLOYMENT RELATIONS ACT (19 DEL.C. CHAPTER 13)?

POSITIONS OF THE PARTIES

Charging Party:

Charging Party asserts DCOA committed an unfair labor practice, based on decisions under parallel federal labor laws, when it declined to process Mr. Newman's grievance to completion through arbitration. It asserts that DCOA was responsible for processing the grievance through arbitration. In order to insure that the grievance is effectively arbitrated, Charging Party requests PERB find DCOA committed an unfair labor practice, but to then direct COAD to review the case to determine whether it is willing to assume responsibility for processing it through arbitration. If COAD is willing, Charging Party requests PERB "order DCOA to pay to COAD all legal fees, costs and expenses involved in completing the case."

Alternatively, Charging Party argues that as a result of DCOA's decertification, his rights under the collective bargaining agreement reverted to the Merit System grievance procedure which is available to all State merit system employees who are not represented by labor unions. If PERB finds no unfair labor practice was committed, Charging Party requests PERB provide the option for Mr. Newman to bring his case before the Merit Employee Relations Board for a hearing on the merits of the dismissal.

Delaware Correctional Officers Association ("DCOA"):

DCOA argues it had no responsibility to continue to process the grievance filed on behalf of Charging Party after it was decertified as the exclusive

representative of the bargaining unit. On June 13, 2002, when COAD replaced DCOA as the exclusive representative for the unit, DCOA lost its legal ability and obligation to represent Charging Party in the arbitration process.

DCOA argues that requiring it to process grievances after decertification creates the untenable impression of there being two representatives, a situation which is at odds with the statute's mandate of "exclusive" representation. It asserts that once the decertification results were finalized, DCOA essentially ceased to exist in so far as the bargaining unit was concerned.

Correctional Officers Association of Delaware ("COAD"):

COAD, as the newly certified exclusive bargaining representative, asserts DCOA had a continuing obligation to complete any pending grievances either by representing or providing for representation after DCOA was decertified. COAD notes Charging Party was never a member of COAD, nor in the bargaining unit at any time since COAD was certified to represent the unit on June 13, 2002.

COAD argues DCOA reaped the benefits of Charging Party's union membership up through the time of his termination on June 22, 2001. DCOA investigated Charging Party's termination, filed the grievance on his behalf under the terms of the collective bargaining agreement between DCOA and the State, represented him through each step of the contractual grievance procedure, made the decision to arbitrate the case, and engaged with the State in selecting the arbitrator and scheduling the hearing date through the American Arbitration Association.

COAD made a good faith effort to ensure that Charging Party's rights were protected when it became aware of the pending grievance by contacting DCOA.

COAD could not and should not be forced to represent Charging Party unless DCOA cooperates in turning over the necessary documentation and in meeting the financial obligations of such representation, which DCOA did not do.

COAD also argues, in the alternative, that because the Charging Party was charged with and convicted of criminal offenses and was represented by private counsel, both COAD and DCOA are alleviated of their representational duties.

Delaware Department of Correction ("State"):

The State moved to be dismissed as a party to this Charge, asserting the issue raised was one concerning the duty of an exclusive bargaining representative to fairly represent a bargaining unit member in the grievance process. The pleadings raised no allegation that the State participated in any violation of the Charging Party's rights under the Public Employment Relations Board. The State withdrew its Motion following clarification from the Charging Party that the State was only joined in the Charge to provide an alternative requested remedy to order that the substance of Mr. Newman's grievance be heard before the Merit Employee Relations Board.

The State attended the hearing in this mater but did not present witnesses or offer argument. The State entered into the record three documents evidencing its continued willingness to proceed with the arbitration of the Charging Party's grievance.

OPINION

The PERB has looked for guidance to the federal labor law, as well as to decisions rendered under similar public sector labor laws, in interpreting

Delaware's public sector collective bargaining law. Seaford Ed. Assn. v. Bd. of Education, Del.PERB, ULP 2-2-84, I PERB 1 (1984); Appoquinimink Ed. Assn. v. Board of Education, Del.PERB, D.S. 1-3-84-3-2A, I PERB 35 (1984); Williams v. Norton, Del.PERB, ULP 85-10-006, I PERB 159 (1986).

An exclusive bargaining representative's duty of fair representation to bargaining unit members is well established under private sector labor laws and was formally recognized by the United States Supreme Court in Vaca v. Sipes, 386 US 171 (1967). PERB first addressed the scope of a union's duty of fair representation in Williams v. Norton, (Supra., p. 166). The question concerning the limits of that duty following a decertification election is one of first impression for this Board.

The 5th Circuit Court of Appeals addressed the rights of employees, *vis-à-vis* an exclusive bargaining representative following its decertification, in U.S. Gypsum v. United Steelworkers of America, AFL-CIO, 384 F.2d 38, 66 LRRM 2232, 2235 (1967),

> It must be borne in mind that what we are talking about relates only to the right of the Union to act as the champion for the employees to assert their substantive rights under the contract. The duration in time of the substantive rights themselves is not affected by decertification. Decertification cannot ordinarily extinguish substantive rights. But it might have a powerful effect on whether the union can champion those rights...
>
> Since the union has presumably obtained the disputed "right" in the first instance by getting it in the contract, there does not seem to be any reason why it should not be the champion of that right when the controversy comes alive, certainly not where there is then no competing union claiming to be the contemporary bargaining representative.

> This result obviously is called for as to those substantive rights which arise under the contract and ripen into some relief which becomes operative prior to decertification. Such grievances ... are ones which arose under the contract and for breach of which effective relief was available prior to decertification. With respect to grievances relief for which is operative up to the time of decertification, the Union clearly has the right to assert them.

The 10th Circuit Court of Appeals held in International Union, UAAIWA v. Telex, 816 F.2d 519, 523; 125 LRRM 2163 (1987),

> ...[D]ecertification does not retroactively obliterate contract rights. Events which may change relations between and among employer, union, and employees may impact but do not destroy the right of redress arising under and relating to a valid preexisting contract.
>
> . . . The Union negotiated this contract, administered it during its term, and is best situated to interpret and enforce its provisions advantageously for the employees . . . It also brought the grievance in question and is in the best position knowledgeably and efficiently to see it to completion, absent a showing that some other organization can and will do so. Since the Union is the named party to the contract, it is accorded the *prima facie* right to proceed under the contract against the employer. Further delays, confusion and legal entanglements await any attempt to substitute parties or permit intervention by one or more employees who may be proceeding on an individual rather than collective interest basis.

Although the bargaining unit in Telex did not choose a successor union to represent it after decertifying the union, the case clearly establishes decertification does not deprive the union of its standing to pursue grievances under and according to the terms of the prior collective bargaining agreement which arose prior to decertification.

These cases are representative of the federal decision line which specifically holds that an employer may not refuse to complete the processing of

grievances after decertification of the union where those grievances were filed prior to the decertification. A bargaining unit employee's rights under the collective bargaining agreement, including the right to have a viable grievance processed the contractual grievance procedure by the exclusive representative, are not altered by the subsequent decertification of that representative.

Applying the logic of the Telex decision, it was DCOA which negotiated the collective bargaining agreement which the grievance alleges was violated; DCOA investigated and filed the grievance; represented Mr. Newman in the earlier steps of the contractual grievance procedure; DCOA decided to arbitrate the grievance, and with the State selected the arbitrator and set the date for the arbitration. There can be no question but that DCOA is in the best position to see this grievance to its completion. DCOA was the exclusive bargaining representative of the Charging Party at the time his employment was terminated, and owed to him a duty of fair representation. DCOA's obligation to fairly discharge that duty did not change in the year that followed the filing of the grievance, and has not changed as a result of DCOA's subsequent decertification.

DCOA argues that PERB should rely upon the decision of the U.S. District Court for the Western District of Tennessee in Newsome v. Northwest Airlines (225 F.Supp 2d 822, 2002, US Dist. LEXIS 19348) to decide this case. Newsome, however, addresses a significantly different factual situation on two fronts.

First, the facts of that case concern a decertification effort in which prior to 1999, IAM represented Northwest Airlines employees in the Mechanics and Related crafts class. On June 1, 1999, AMFA became the certified exclusive representative of this group of employees as a result of the decertification election. AMFA thereafter assumed responsibility for administering the collective

bargaining agreement that existed between Northwest Airlines and IAM, until Northwest and AMFA negotiated a successor agreement. Northwest and AMFA resolved their negotiations and entered into a new agreement in 2001. In contrast, COAD did not affirmatively assume the DOC/DCOA collective bargaining agreement, but soon after being certified as the exclusive representative, entered into negotiations with the State which resulted in an agreement on October 10, 2002. *Testimony of COAD President Deal, Transcript @ p. 17.* This negotiation process is consistent with the rights of a successor representative as described by the Delaware Supreme Court in DOC v. Correctional Officer Supervisors, Del. Supr., 514 A.2d 405, 407 (1986),

> When the union that has signed a collective bargaining contract is decertified, the succeeding union certified by the Board is not bound by the prior contract, need not administer it, and may demand negotiations for a new contract even if the terms of the old contract have not yet expired. *citing, NLRB v. Burns International Security Services, Inc., 406 US 272, 92 S.Ct. 1571, 32 L.Ed. 2d 61 (1972).*

Second, the issue in the Newsome case arose more than two years after IAM was decertified and replaced by AMFA as the exclusive bargaining representative. At the time the issue in that case arose, AMFA was clearly and unquestionably the exclusive representative of the bargaining unit, and signatory to the existing collective bargaining agreement. In the COAD/DCOA case, Mr. Newman's grievance was filed by DCOA approximately one year before DCOA was decertified.

Because Charging Party's grievance predates DCOA's decertification, COAD had neither the legal authority nor obligation to substitute itself as the grievant's representative. Indeed, Charging Party has never been nor had the opportunity

to be represented by COAD, as his employment had been terminated approximately one year prior to the COAD's certification as the bargaining unit representative. Following federal labor law, the State would not have been obligated to arbitrate this grievance had COAD unilaterally demanded to step in as the grievant's representative. Arizona Portland Cement Co., 302 NLRB 5, 137 LRRM 1228 (1991).

Finally, the issue in this case concerns the processing of a contractual grievance. The duty of representation accrued to the exclusive representative at that time. The arbitration process is contractual in nature, while criminal proceedings are statutory. The fact that the grievant was represented in his criminal proceeding has no bearing on his right, as a bargaining unit member, to be represented in the grievance and arbitration procedure.

For the reasons set forth above, DCOA is found to have violated its duty to fairly represent Charging Party by failing to pursue the grievance which was pending arbitration at the time of the decertification election on June 13, 2003.

CONCLUSIONS OF LAW

1. State of Delaware, Department of Correction is a public employer within the meaning of 19 Del.C. §1302(p).

2. Charging Party, Barry R. Newman, Jr., was a public employee within the meaning of 19 Del.C. §1302(o) at all times relevant to this Charge.

3. Delaware Correctional Officers Association ("DCOA") is an employee organization within the meaning of 19 Del.C. §1302 (i) and was the exclusive bargaining representative of the bargaining unit of Correctional Officers at all times relevant to this Charge prior to June 13, 2002.

4. DCOA filed a grievance on Charging Party's behalf following the termination of his employment on June 22, 2001. DCOA provided representation to the Charging Party during the processing of this grievance, including the selection of an arbitrator and scheduling of an arbitration hearing for June 26, 2002.

5. On June 13, 2002, the date that DCOA was decertified as the exclusive representative of the bargaining unit, DCOA President Proctor wrote a letter to Charging Party stating that DCOA (as a result of its decertification) would no longer be representing him in the arbitration hearing scheduled for June 26, 2003.

6. Correctional Officers Association of Delaware ("COAD") is an employee organization within the meaning of 19 Del.C. §1302 (i) and is and has been the current exclusive bargaining representative of the bargaining unit of Correctional Officers since June 13, 2002.

7. By failing to bring Charging Party's grievance (which was filed prior to decertification) to completion, DCOA violated 19 Del.C. §1302(b)(1) and (b)(3) in derogation of its duty to provide fair representation under the Public Employment Relations Act to the grievant.

8. COAD as the successor exclusive representative did not violate the statute as it had no duty or obligation relating to grievances filed prior to its certification as the exclusive representative of the bargaining unit in question.

WHEREFORE, DCOA is herewith ordered to provide for the processing of Charging Party's grievance through arbitration with all deliberate speed and to advise the Public Employment Relations Board within thirty (30) days of the receipt of this decision of all steps taken to comply with this Order.

DATE: 24 June 2003

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
DELAWARE PERB