

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

AFSCME LOCAL 439,	:	
	:	Representation Petition
and	:	<u>No. 05-04-476</u>
	:	
UNIVERSITY OF DELAWARE	:	Bargaining Unit Clarification

APPEARANCES

Phillip S. Williams, Sr., for AFSCME Local 439

*Alfred J. D'Angelo, Jr., Esq., Klett, Rooney, Lieber & Schorling,
for University of Delaware*

BACKGROUND

American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) Council 81, through its Local Union 439 is an employee organization within the meaning of 19 Del.C. §1302(i).¹ Local 439 is the exclusive bargaining representative of a unit of University of Delaware “blue collar” employees as defined by DOL Case 16. The bargaining unit covers a number of departments, including Facilities,

¹ "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.

Dining Services, and Supporting Services Departments. The employees involved in this matter perform Dining Services functions.

The University of Delaware (“University”) is a public employer within the meaning of within the meaning of §1302(p)² of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).

AFSCME and the University are parties to a current collective bargaining agreement, which has a term of January 1, 2003 through December 31, 2005. Article 2, subsection 2.2 (in relevant part) describes food service classifications included in the bargaining unit:

For the purpose of this Agreement, the term “employee” shall include all employees in the job classifications covered in the bargaining unit as follows:

. . . Baker A, Baker Helper, Catering Attendant/Driver, Cook A, Cooke B, Dining Room Assistant, Driver, Baker B, Food Service Pizza/Cashier/Worker, Food Service Utility Worker, Food Service Worker, Food Service Worker/Cashier, Laundry Worker A, Laundry Worker B, Storeroom Clerk in Dining Services; . . . and all employees hired in trainee positions to support any of the aforementioned classifications. The above categories are subject to the following exclusions: (1) temporary employees, being persons hired without expectation of or arrangement for permanent employment (i) to perform a specific job or (ii) to be employed for a limited period of time; (2) student employees enrolled in a full-time course of studies; (3) campus police and security officers; (4) all supervisors, being all individuals having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, to adjust their grievances, or effectively to recommend such action; and (5) all other employees of the University of Delaware, including personnel working on contract or subcontract as may be hired on an intermittent basis.

On or about April 25, 2005, AFSCME filed a Bargaining Unit Clarification petition which requested PERB investigate and determine whether ‘part-time workers

² “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.

employed by the University of Delaware in the Dining Services Department” were excluded from the bargaining unit of blue collar employees represented by AFSCME Local 439 as certified on May 26, 1966.

The University responded to the petition, asserting that PERB did not have jurisdiction over the part-time employees in question because they are not employed by the University. The University moved to have the motion dismissed arguing the employees in question are private sector employees of ARAMARK, with whom the University contracts for dining services.

AFSCME denied the material allegations in the University’s motion, asserting that ARA and the University were joint employers of all dining services employees pursuant to a 1991 Agreement executed by ARA, the University and AFSCME.

A hearing was convened on August 23, 2005. AFSCME and the University filed written closing argument, with the final submission received on October 7, 2005. The decision reached herein results from the record created by the parties.

JOINT STIPULATION OF FACTS³

1. The University of Delaware and AFSCME Local Union 439 are parties to a collective bargaining agreement covering blue collar employees, including food service employees.

2. Sometime prior to 1991, the University subcontracted its food service operation to ARA Serve⁴.

³ The Stipulation of Fact was offered as the joint agreement of the parties as to the facts included therein, which constitute part of the relevant facts behind this dispute. Testimony and evidence were offered on disputed facts. TR p. 5

3. Beginning July 22, 1991, ARA Service was responsible to hire all food service employees thereafter employed at the University (hereinafter called the ARA Serve employees). Food service employees hired prior to July 22, 1991, remained employees of the University.

4. On or about September 11, 1991, the Union, ARA Serve and the University signed a Letter of Understanding and Addendum to the collective bargaining agreement, which provides:

LETTER OF UNDERSTANDING AND
ADDENDUM TO COLLECTIVE BARGAINING AGREEMENT

WHEREAS, the University of Delaware (hereinafter "University") is a party to a Collective Bargaining Agreement (hereinafter "Agreement") with Local 439, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter "Union"), which Agreement covers certain of the University's food service employees and expires on December 31, 1992; and

WHEREAS, the University entered into a contract with ARASERVE, Inc., a subsidiary of ARA Services, Inc. (hereinafter "ARA") to manage the University's food service operations, including, without limitation, the supervision of the food service employees represented by the Union; and

WHEREAS, ARA, the University, and the Union wish to maintain harmonious relations and provide the employees with the wages, hours and working conditions provided in the Agreement;

IT IS THEREFORE AGREED:

1. This letter of Understanding and Addendum to Collective Bargaining Agreement shall become a part of the Agreement, and ARA shall be treated as an additional party employer under

⁴ The entity which supplies employees the employees who work in the University's dining services operations is referred to in the record by a variety of names, including "ARA", "ARAMARK", "ARASERVE, Inc." and "ARA Serve". For purposes of this decision, the entity shall simply be referred to as ARA, except to the extent that direct quotes from relevant documents refer to it by another name. Readers should be aware that there is only one entity which is involved in this matter, regardless of its many names.

the Agreement from the date hereof.

2. All wages, hours, and working conditions specified in the Agreement shall continue without change, except as specifically stated herein.
3. Employees hired on or after July 22, 1991, shall be placed on the ARASERVE, Inc. payroll and shall receive the following benefits in lieu of those like benefits provided under plans created by the University and/or State of Delaware. These benefits will be under ARA established and administered benefit plans:
 - a. Life insurance and accidental death and dismemberment insurance - \$10,000
 - b. Weekly sickness and accident insurance in lieu of total disability insurance – 1st day accident, 8th day illness - \$100 per week for 26 weeks.
 - c. Medical insurance – ARA Medical Plan with the employee paying 20% of the premium through payroll deduction on a pre-tax basis.
 - d. Dental insurance – ARA Dental Plan for those employees who choose the Basic or Advantage plan options at no cost to the employee.
 - e. ARA Money Purchase Retirement Plan – administered according to the plan description with the employer making a 6% contribution after the employee has made a 3% contribution.
 - f. Employees will not be eligible for the education benefits outlined in Article 16.7
4. Employees hired before July 22, 1991 shall continue to participate in all benefit plans outlined in the Agreement.
5. Employees hired before July 22, 1991, who elect to be placed on the ARASERVE, Inc. payroll will be covered by the benefits outlined in No. 3 above, subject to the following exceptions:
 - a. Seniority will be preserved as of their date of hire with the University.

- b. ARA Medical Plan – the employee will be reimbursed for all out of pocket expenses up to \$1,000 after the deductible is met.
 - c. ARA Money Purchase Retirement Plan – the employee will be given past service credit for purposes of vesting from date of hire with the University.
 - d. Employees will continue to be eligible for the education benefits outlined in Article 16.7.
6. Employees hired on or after July 22, 1991, shall not be permitted to exercise rights under Articles VI, VII, VIII, or IX of the collective bargaining agreement by transferring, being reassigned, promoted or otherwise moving from the ARASERVE, Inc. payroll to any bargaining unit position on the University payroll. Such employees may exercise all of the above rights within Dining Services only.
 7. ARA and the University are joint employers of all employees performing food service work at the University in the job classifications specified in the Agreement, regardless of the employee’s date of hire.
 8. Any grievances under the Agreement which arose prior the date ARA assumed responsibilities for managing the food service operation shall be the responsibility of the University. Any grievances under the Agreement arising after the date ARA assumed management of the food service operation shall be the responsibility of ARA and the University, and ARA shall cooperate with the Union in processing all grievances regardless of the date they arose.

DATE: 9/12/91 /s/ Maxine Colm
Vice President for Employee Relations, U/D

DATE: 9/11/91 /s/ Randle W. Clay
District Manager, ARASERVE, Inc.

DATE: 9/11/91 /s/ Gwen M. Smith
President, Local 439, AFSCME

5. The Letter of Understanding provides that employees hired after July 22, 1991 would be on ARA Serve’s payroll and would be covered by the ARA Serve benefits

listed in paragraph 3. Food service employees hired prior to July 22, 1991 would remain covered by University benefits as set forth in the collective bargaining agreement unless they elect to be covered by ARA Serve benefits. (See ¶¶4 and 5 of Agreement above).

6. The ARA Serve employees are prohibited from transferring, being reassigned, promoted or otherwise moving from ARA Serve's payroll to any bargaining unit position on the University payroll. (¶6 of Agreement above).

7. ARA Serve and the University are deemed joint employers of all food service employees.

8. [The Agreement above] has been part of the parties' collective bargaining agreement since September 11, 1991 through December 31, 2005.

9. As of July, 2005, there are approximately one hundred seventy-seven (177) full-time dining service employees of which approximately one hundred thirty-four (134) are ARA Serve employees and forty-three are University employees.

10. All part-time dining service employees are ARA Serve employees supervised exclusively by ARA Serve supervisors and are governed by ARA Serve procedures, benefits, if any, and are paid an hourly rate set by ARA Serve.

11. All dining services employees (full-time and part-time) are supervised by ARA Serve supervisors and managers.

ISSUE

ARE PART-TIME WORKERS IN THE UNIVERSITY OF DELAWARE'S DINING SERVICES DEPARTMENT SUBJECT TO COVERAGE BY THE DELAWARE PUBLIC EMPLOYMENT RELATIONS ACT, 19 DEL.C. CHAPTER 13?

OPINION

The clarification petition filed by AFSCME essentially asks whether part-time dining services workers jointly employed by the University and ARA are eligible for representation for purposes of collective bargaining under the Public Employment Relations Act. It is undisputed that part-time dining services workers have never been covered by the terms of the collective bargaining agreement between the University and AFSCME Local 439. It is also undisputed that the full-time dining services workers covered by the agreement are supervised and managed by ARA.

The University has taken the position that it does not employ the part-time dining services workers.⁵ It argues the part-time employees are hired, supervised, directed, assigned, paid, and provided benefits through a sub-contractor, ARA. Because ARA is the primary employer and is not a public employer, any organizational rights the part-time dining services employees have arise under federal law and fall within the jurisdiction of the National Labor Relations Board.

It is undisputed that ARA is not a public employer within the meaning of 19 Del.C. §1302(p), and is a private enterprise, to whom the University has sub-contracted dining services operations. The Assistant Vice President for Labor Relations and Human Resources testified, without dispute, to the following:

- He has been employed in labor relations and human resources at the University of Delaware since 1981. (TR p. 35)
- At the time he was hired in 1981, the University employed both full-time and part-time employees in the Dining Services Department. There have continued

⁵ “Dining services operations” includes food service functions performed in the University’s seven dining facilities, five carts, three convenience stores, concessions at the University athletic facilities, and catering functions.

to be both full-time and part-time positions working in dining services operations at all times since 1981. (TR p. 36)

- At some time prior to 1991, the University decided to contract out for dining services operations, because it wanted to focus its resources on research and education. Dining Services was becoming a very big operation and the University decided it was more effective to contract this function out to professionals. (TR p. 39)
- In 1991, the University, ARA, and AFSCME entered into the Letter of Understanding, by which all University dining services employees were “grandfathered” and remained University employees in order to be sure those existing employees could retain their rights to a State pension. (TR p. 39)

The Assistant Vice President also testified that he drafted the 1991 Letter of Understanding which included a provision that individuals hired after July 1, 1991, by ARA could not transfer out of dining services in order to accentuate the difference between the ARA employees and other University of Delaware employees included in the bargaining unit. He testified the parties discussed the possibility that once the majority of dining services employees was ARA employees there might eventually be a separate bargaining agreement. (TR p. 40). That has not occurred as of the date of this decision.

It is not disputed that part-time employees have never been covered by the collective bargaining agreement between the University and AFSCME Local 439. It is undisputed that full-time dining services employees are supervised and managed by ARA and are jointly employed by the University and ARA “regardless of their date of hire”.

The concept of “joint employers” is neither new nor unique in labor law and has been dealt with extensively by the National Labor Relations Board and the courts under the Labor Management Relations Act. NLRB v. Browning-Ferris Industries, 3rd Cir., 691 F.2d 1117 (3rd Cir. 1982), 111 LRRM 2749); Boire v. Greyhound Corp., 376 US 473, 55 LRRM 2694 (1964). Although this issue is a question of first impression before the Delaware PERB, as often stated, case law under the NLRB provides useful guidance where the issues and law in dispute are substantially similar, and Delaware can be expected to follow federal precedent in analogous cases. Cofrancesco v. City of Wilmington, D. Delaware, 419 F.Supp. 109 (D. Del. 1976), 93 LRRM 2387 (1976).

I note that the University and AFSCME stipulated “ARA Serve and the University of Delaware are deemed joint employers of all food service employees.” [Joint Exhibit 1, ¶7, emphasis added]. The stipulation reflects the September, 1991, Letter of Understanding and Addendum to the Collective Bargaining Agreement (Joint Exhibit 3), which was signed by the University’s Vice President for Employee Relations, ARASERVE, Inc.’s District Manager, and AFSCME Local 439’s President, which provides at ¶7,

ARA and the University are joint employers of all employees performing food service work at the University in the job classifications specified in the Agreement, regardless of the employee’s date of hire. [emphasis added]

The agreement is clear and unambiguous on its face and it can reasonably be presumed that these parties, with an extensive bargaining history dating back to 1966 and able counsel, understood the agreement into which they entered. The preamble to the Letter of Understanding evidences their sophistication and understanding of the collective bargaining relationship.

Having so agreed, it is disingenuous now to assert that part-time employees employed by ARA to work in the University's dining services operation beside full-time employees who are similarly hired, directed, disciplined and managed, do not fall under the umbrella of "all employees performing food service work at the University" and are, therefore, distinct and "primarily employed" by ARA. To the contrary, the agreement covers "all food service employees" and is clear on its face.

The evidence presented in this case clearly establishes that the University and ARA act as joint employers with respect to the full-time employees. The University negotiates the collective bargaining agreement, but a representative of ARA sits as a member of the negotiating team. The grievance process is handled through the first three steps by ARA personnel, but is appealable at the fourth step to the University's Office of Labor Relations. In comparison, the differences in terms and conditions of employment between the full-time and part-time dining services employees result directly from the negotiated agreement which covers the full-time dining services workers.

The focus of the analysis in this case is too narrowly drawn by the University. The bargaining unit which currently exists includes blue collar employees from the Facilities, Dining Services and Supporting Services departments. The unit includes positions that are solely employed by the University (Facilities and Supporting Services positions), as well as positions that are jointly employed by the University and ARA. The inclusion of the jointly employed dining services workers in the unit is with the express and specific consent of ARA and the University as memorialized in the 1991 Agreement.

The University has already submitted to the Delaware PERB in representation matters concerning this bargaining unit. Delaware Public Employees Council 81, AFSCME, AFL-CIO, Local 439 and University of Delaware, Del.PERB, Rep. Pet. 95-04-126, II PERB 1207, 1210 (1995). In that case, PERB held:

The PERB has broadly construed employee representation as a fundamental right under the Act. The statute neither defines nor excludes from its coverage part-time, temporary, or other category of less than full-time employees. Consequently, these employees are eligible for representation under the law. Del. Public Employee Council 81 and Del. Turnpike Administration, Del.PERB, Rep. Pet. 95-06-140, II PERB 1189 (1995).

Consequently, the issue of PERB jurisdiction concerning this bargaining unit has been previously established.

If the circumstances involving Dining Services employees have changed significantly since 1991, such that the University now believes that the Dining Services employees are no longer jointly employed, but rather are solely employed by the subcontractor, ARA, it could petition this Board to resolve that issue and sever those employees from the bargaining unit because they are no longer public employees under the PERA. A change in employer status is undoubtedly the type of situation in which an employer could file a clarification petition of that type.

That issue is not, however, properly before PERB at this time. The status of the part-time Dining Services employees does not differ from the majority of the full-time Dining Services employees, who are also hired, supervised, managed, assigned, disciplined, and paid by ARA. The statutory protection of employees' rights to organize and be represented for purposes of collective bargaining is not diminished in this case by the number of hours worked.

DECISION

By the agreement of the University, ARA, and AFSCME Local 439 in the 1991 Letter of Understanding and Addendum to the Collective Bargaining Agreement, and the Stipulation of the Parties in this representation matter, the University of Delaware and ARA are “joint employers” of all food service employees.

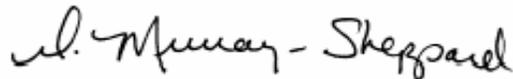
The existing bargaining unit defined by DOL Case 16 and currently represented by AFSCME Local 439 includes employees who are solely employed by the University (Facilities and Supporting Services departments) and employees who are jointly employed by the University and ARA in the Dining Services Department.

The University has acceded to the jurisdiction of the Delaware PERB in prior cases involving this bargaining unit, including the representation matter involving its full-time and miscellaneous wage bus drivers in 1995, at which time, the bargaining unit included the jointly employed Dining Services employees.

WHEREFORE, the part-time employees in Dining Services are determined to be jointly employed by the clear and unambiguous language of the parties’ 1991 agreement. Part-time employees have a right to organization and representation under 19 Del.C. §1301, and to petition PERB to secure those rights. Such petition, if filed, will be processed in accordance with the Board’s unit modification procedures.

IT IS SO ORDERED.

DATE: 26 January 2006



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.