

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE, DEPARTMENT OF JUSTICE	:	
Petitioner,	:	
	:	Declaratory Statement
AND	:	
	:	<u>D.S. No. 06-10-542</u>
DELAWARE ATTORNEY GENERAL INVESTIGATOR’S	:	
ASSOCIATION,	:	
Respondent.	:	

Appearances

Jerry M. Cutler, State Labor Relations Services/HRM/OMB, for Petitioner

Thomas F. Penozza, DAGIA President, for Respondent

The State of Delaware is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (19 Del.C. Chapter 13, “PERA”) and of §1602(l) of the Police Officers and Firefighters’ Employment Relations Act (19 Del.C. Chapter 16, “POFERA”). The Department of Justice is an agency of the State of Delaware.

The Delaware Attorney General Investigator’s Association (“DAGIA”) is an “employee organization” which admits public employees to membership and has as one of its purposes the representation of those State employees in collective bargaining. 19 Del.C. §1302(i); §1602(g). Specifically, the DAGIA admits to membership “any appointed full-time employed Investigator or State Detective of the Delaware Attorney General’s Office.”¹

On or about October 3, 2006, DAGIA filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative seeking to represent Delaware Department of Justice Investigators, “including all investigators with arrest powers in the Fraud

¹ Constitution and By-Laws of the Delaware AG Investigator’s Association, Article 3, Membership

Division, State Detectives, the school ombudsperson, and the investigator assigned as the AG's driver."²

The State responded to the petition on October 23, 2006, objecting to the inclusion of supervisory and/or confidential employees in the bargaining unit, and proposing the inclusion of employees performing other investigative, accounting and auditing type functions in an investigative role, asserting these employees share a community of interest.

By letter dated October 23, 2006, the Public Employment Relations Board ("PERB") advised the DAGIA of the State's objections and sought its position with respect thereto:

The State has excluded from the list of employees any supervisory or confidential employees and has included Investigators who do not meet your stated criteria of having "arrest powers." Supervisory and confidential employees have different rights to organize under the Public Employment Relations Act (19 Del.C. Ch. 13) and the Police Officers' and Firefighters' Employment Relations Act (19 Del.C. Ch. 16). Those differences affect the handling of this petition, and may also affect whether Investigators without arrest powers are eligible for inclusion in the bargaining unit.

PERB further defined the differences between the PERA and the POFERA in an October 26, 2006 letter to the parties:

Although the statutes are nearly identical in most respects, there is a significant difference in the manner in which positions which meet the statutory definition of "supervisory employee" are handled. Under the PERA, supervisory employees are excluded from the definition of "public employee" and are not eligible for representation in bargaining units created after September 23, 1994. 19 Del.C. §1302(o)(7). Under the POFERA, the term "supervisory employee" is not defined nor is there a prohibition on their eligibility for representation for purposes of collective bargaining.

The DAGIA responded on October 23, 2006:

We are filing under the Police Officers' and Firefighters' Employment Relations Act (19 Del.C. Ch. 16). Under this act supervisors can be included in the bargaining unit and the two employees added ... could not be included in the bargaining unit.

Each of the employees on the list, including supervisors, has arrest

² RE: DAGIA and Del. Dept. of Justice, Representation Petition 06-10-540 (Cert.)

powers and can conduct investigations, sign warrants and make arrests. They should be included in the bargaining unit. [The two other employees included by the State] do not have arrest powers and can not sign warrants or make arrests. If the State advises that they do have arrest powers, can sign warrants, and make arrests, we will add them to the list.

On October 27, 2006, the State filed a formal Petition for Declaratory Statement, asserting:

There exists a controversy within the meaning of PERB Regulation 6.1(b)(3) and 6.1(c) as to whether a representation petition filed by the DAGIA with the PERB should be processed under the PERA, or the Police Officers' and Firefighters' Employment Relations Act. . . While the DAGIA has taken the position that the representation petition should be processed under the POFERA, the Department of Justice believes the petition should be processed under the PERA. Central to the resolution of this controversy is deciding whether employees who become part of the bargaining unit fall within the meaning of "police officer" or "police officers" as those terms are used in 19 Del.C. §1302(o) and 19 Del.C. §1602(k), respectively. As further evidence of the existence of a controversy, there is no definition of "police officer" or "police officers" in either the PERA or the POFERA. Furthermore to the best of our knowledge, there has been no decision by the PERB addressing this issue.

Moreover, as the Department of Justice has opposed the inclusion of supervisors in the proposed bargaining unit petitioned for by the DAGIA, and the ability of supervisors to organize and bargain collectively will be determined by whether the parties proceed under the PERA or the POFERA, the controversy is such that it merits resolution by the PERB. Therefore, the Department of Justice believes that the PERB should resolve this controversy prior to processing the representation petition in PERB Rep. Pet. 06-10-540. In other words, we believe that questions as to the appropriateness of the bargaining unit, e.g., the inclusion of certain positions within the unit should be deferred until after the issues raised in this petition are finally resolved.

The DAGIA opposed the preliminary issuance of a Declaratory Statement, asserting no controversy exists within the meaning of PERB Reg. 6.1(c). It argued its petition was filed under the POFERA because DOJ Investigators "share a commonality of interest with other bargaining

units created under that act, namely, Probation and Parole ³, New Castle County Police, Dover Police and State Police.” It asserts each of these agencies has investigatory responsibilities, arrest powers and assists the Attorney General in preparing cases for trial. It argues the DAGIA has the same general duties as the other police agencies who exercise their collective bargaining rights under the Police Officers’ and Firefighters’ Employment Relations Act.

PERB certified the issue raised by the petition for declaratory statement and the parties simultaneously filed opening and responsive argument, with the final submission received on January 11, 2007.

This decision results from the record thus created by the parties.

ISSUE

WHAT CONSTITUTES A “POLICE OFFICER” AS THAT TERM IS USED IN THE POLICE OFFICERS’ AND FIREFIGHTERS’ EMPLOYMENT RELATIONS ACT, 19 DEL.C. CH. 16?

OPINION

Prior to a consideration of the merits of this petition, it must first be established that this matter is properly postured for issuance of a declaratory statement. The Public Employment Relations Board is statutorily directed,

- (4) To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures 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. 14 Del.C. §4006(h)(4).⁴

³ The Hearing Officer notes that Probation and Parole officers are not covered by the POFERA, but rather by the PERA, because they hold State merit system positions which are exempted from the Police and Firefighters Act at 19 Del.C. 1602(k).

⁴ This provision of the Public School Employment Relations Act is specifically incorporated by reference into the Public Employment Relations Act, 19 Del.C. Chapter 13 at §1306.

Unlike unfair labor practice charges which assert the statute has been violated and request remediation of the asserted wrongs, a declaratory statement addresses questions concerning applicability of statutory provisions and/or PERB rulings. *Bourdon v. Del. Office of State Personnel & DHSS*, DS 03-08-400, V PERB 3039, 3044 (2004).

PERB Regulation 6, Petitions for Declaratory Statements, defines the procedural requirements for petitions for declaratory statements:

6.1 Filing of a Petition

- ... (b) A petition may be filed when there exists a controversy concerning:
- (1) A potential unfair labor practice;
 - (2) Whether a matter is within the scope of collective bargaining as defined by statute; or
 - (3) The application of any statutory provision or regulation or order of the Board.

The instant petition questions the scope and application of the term “police officer” for purposes of defining an appropriate bargaining unit under the POFERA. The petition therefore meets the requirements of subsection (b)(3) of PERB Rule 6.1.

PERB Regulation 6.1 further requires that a proper petition concern a “controversy” which must meet the following criteria:

- (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) The controversy is between parties whose interests are real and adverse; and
 - (4) The matter has matured and is in such a posture that the issuance of a declaratory statement by the Board will facilitate the resolution of the controversy.

This dispute concerns the obligations of the State, as the Petitioner, to potentially bargain with an exclusive representative of a unit, the composition of which may be significantly different depending upon which statute is applied to process the petition. The POFERA does not identify “supervisory employees” nor does it prohibit inclusion of such employees in bargaining units and applies exclusively to police officers and firefighters. The interests of the parties and of the effected employees are real and adverse. This issue is mature and ripe for resolution because the petition cannot be processed until the applicable statute is identified.

The issue raised by this petition for declaratory statement is what constitutes a “police officer” as used in §1602(k) of the POFERA and as excluded from coverage of the PERA by §1302(0). The Delaware PERB administers three laws covering public sector collective bargaining. The laws are essentially similar, but differ slightly in the areas of impasse resolution, fair share provisions, and appropriate bargaining unit determinations, particularly as it relates to the treatment of supervisory employees.

The PERA excludes both supervisory employees and police and firefighters from the definition of public employees covered by the PERA:

"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 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 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. 19 Del.C. §1302(o) (*emphasis added*)

Consequently, “police officers” covered by the POFERA are not eligible for organization and representation under the PERA.

A “public employee” eligible for representation under the POFERA is defined as:

"Public employee" or "employee" means any police officer or firefighter employed by a public employer except those determined by the Board to be inappropriate for inclusion in the bargaining unit; provided, however, that for the purposes of this chapter, this term shall not include any state employee covered under the State Merit System. 19 Del.C. §1602(k).

The term “police officer”, however, is not defined. It is undisputed that the Department of Justice investigators at issue in this case are not covered by the State Merit System.

In order to ascertain the intent of the General Assembly in passing a collective bargaining bill to specifically cover the distinct subset of public employees comprised of “police officers and firefighters”, the history of the POFERA must be examined. The DAGIA errs in its assertion that had the General Assembly wished to treat police officers in the same manner as other public employees, it could simply have modified the PERA. At the time the POFERA was passed, the PERA did not yet exist. In fact, certificated public school employees were the first to receive full collective bargaining rights as well as impasse resolution and unfair labor practice provisions when the PSERA was passed in 1982. The Police Officers and Firefighters Act was passed in 1986; the PSERA was modified to cover all public school employees in 1989; and the PERA was finally passed in 1994 (extending these rights to all other public employees).

The DAGIA argues “the term ‘police officer’ is a general term and the term special investigator, State detective, detective, corporal, etc., are all sub classes of that very general term.” It asserts police officers should include all public employees who provide public safety services, including but not limited to having the power to investigate and make arrests as a primary job function. It argues the DOJ Investigators are similar in all material respects to other police officers routinely covered by the POFERA and perform duties identical to a detective working for the State Police, New Castle County Police or City of Wilmington Police, except that DOJ investigators have responsibility for civil as well as criminal investigations.

The State points to other Delaware statutes which define the term “police officer”, specifically 11 Del.C. §1911, arguing that the General Assembly included the term “police officer” specifically to differentiate those covered by the POFERA from the more general classifications of law enforcement officers or public safety employees. It asserts that while other law enforcement officers (such as special detectives, criminal investigators, Probation & Parole officers, and correctional officers) may carry weapons and have authority to make arrests, police officers are a subset of law enforcement officers who are granted broad statutory authority to enforce criminal laws. It also argues that both federal law and the case law of other states have defined police officers to be law enforcement officers (1) with statutory authority to enforce a wide range of criminal laws, AND (2) responsibility to exercise that authority in the performance of the officer’s job duties.

Both the PERA and the POFERA cover “employees”, i.e., individuals are only eligible for representation based upon their employment and job responsibilities. In this case, the application of the definition of a “police officer” must be laid against the responsibilities and hiring criteria for a DOJ Investigator. It does not relate to credentials or experiences which are either not job related or, more importantly, not a prerequisite for hire as an Investigator. Although an Investigator may have previously been employed as a police officer for another agency, that officer does not remain a “police officer” under the POFERA when he or she accepts

subsequent employment by virtue of that prior employment unless the new position requires that individual be qualified as a police officer as a condition of employment. For example, a retired County police officer who accepts a position as disciplinary officer in a school system would not be eligible to be covered by the POFERA.

Title 1 of the Delaware Code provides guidance in interpreting statutes at §303:

Words and phrases should be read with their context and shall be construed according to the common and approved use of the English language. Technical words and phrases and such others as may have acquired a peculiar and appropriate meaning, shall be construed and understood according to that same peculiar and appropriate meaning.

Where guidance exists concerning the meaning of a technical term or phrase within the Delaware Code, it is unnecessary to reach further for an understanding of that term. Title 11, Crimes and Criminal Procedure, at Chapter 19, Subchapter I, Arrest and Commitment, differentiates between the responsibilities and authority of a “peace officer” as distinct from the broad statewide responsibilities of a “police officer”.

Specifically, in §1911, a “police officer” is defined to have statewide authority, hold current certification by the Council on Police Training, and be an officer or agent of one of the nine (9) identified categories of police agencies which include:

- (1) A member of the Delaware State Police;
- (2) A member of the New Castle County Police;
- (3) A member of the police department, bureau or force of any incorporated city or town;
- (4) A member of the Delaware River and Bay Authority Police;
- (5) A member of the Capitol Police;
- (6) A member of the University of Delaware Police;
- (7) A law enforcement officer of the Department of Natural Resources and Environmental Control;
- (8) An agent of the State Division of Alcohol and Tobacco Enforcement; or
- (9) An officer or agent of the State Office of Narcotics and Dangerous Drugs.

Investigators employed by the Department of Justice are not listed therein.

“Police Officer” is also defined at 11 Del.C. Chapter 84, Delaware Police Training Program, to mean a “sworn member of a police force or other law enforcement agency of this State or any county or municipality who is responsible for the prevention and detection of crime and the enforcement of laws of this State or governmental unit within the State.” 11 Del.C. §8401(5). Subsection (a) goes on to define the term for purposes of eligibility for training by the Council to include:

- a. For purposes of this chapter this term shall include permanent full-time law enforcement officers of the Department of Natural Resources and Environmental Control, state fire marshals, municipal fire marshals that are graduates of a Delaware Police Academy which is accredited/authorized by the Council on Police Training, sworn members of the City of Wilmington Fire Department who have graduated from a Delaware Police Academy which is authorized/accredited by the Council on Police Training, environmental protection officers, enforcement agents of the Department of Natural Resources and Environmental Control, agents of the State Division of Alcohol and Tobacco Enforcement, officers or agents of the State Office of Narcotics and Dangerous Drugs and officers of the University of Delaware Police Division, Delaware State University Police Department.

This subsection on its face adds to the covered “police officers” who are eligible for training by the Council on Police Training by including other specifically identified law enforcement officers.

A prerequisite for being a “police officer” under 11 Del.C. §1911 is that the employee be trained and certified by the Council. Not all employees who are so trained and certified, however, are “police officers”. Police officers must also be a member, agent or officer of one of the enumerated departments, bureau or forces listed in §1911(a).

Consequently, based upon consideration of the defined scope of “police officer” in the Delaware Code at this time, Investigators do not constitute “police officers” under the POFERA. PERB takes administrative notice of the fact that a bill is currently pending before the General Assembly that would modify 11 Del.C. §1911 to include DOJ Investigators. When and if that bill

is signed into law, this decision will be rendered moot and the POFERA will be applicable to the DOJ Investigators. Further, at that point in time, any employees who are not “police officers” would not be eligible for inclusion in an appropriate unit created under the POFERA.

Finally, although the State urges PERB to consider defining “police officer” in more broad or generic terms that circumscribe authority and responsibility, this agency has long recognized “... the wisdom of refraining from attempting to fashion broad and general rules that would serve as a panacea. The obviously wiser course is to resolve disputes on a case-by-case basis until there is developed, through experience, a sound basis for developing general principles. *Seaford Ed. Assn. v. Bd. of Education*, ULP 2-2-84S, I PERB 1, 5(1984). There is no need in this case to go beyond the definition of the term “police officer” as found in the Code.

DECISION

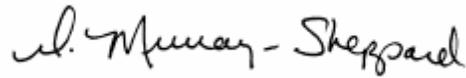
“Police Officers” as that term is used in the Police Officer and Firefighter Employment Relations Act is a technical term, understanding of which is found in the Delaware Code at 19 Del.C. §1911.

Specifically, a “police officer” means “any police officer holding current certification by the Council on Police Training as provided by Chapter 19 of this title [11] and who is:

- (1) A member of the Delaware State Police;
- (2) A member of the New Castle County Police;
- (3) A member of the police department, bureau or force of any incorporated city or town;
- (4) A member of the Delaware River and Bay Authority Police;
- (5) A member of the Capitol Police;
- (6) A member of the University of Delaware Police;
- (7) A law enforcement officer of the Department of Natural Resources and Environmental Control;

- (8) An agent of the State Division of Alcohol and Tobacco Enforcement; or
- (9) An officer or agent of the State Office of Narcotics and Dangerous Drugs.

Because the Department of Justice is not included in this list, the pending petition will be processed under the Public Employment Relations Act as DOJ Investigators are not “police officers” within the meaning of 19 Del.C. §1602(k)



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer, Delaware PERB

DATED: 23 APRIL 2007