

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

DELAWARE SOLID WASTE AUTHORITY,	:	
	:	Representation Petition
and	:	
	:	<u>No. 07-02-554</u>
INTERNATIONAL UNION OF OPERATING	:	
ENGINEERS, AFL-CIO, LOCAL 542.	:	(CERTIFICATION)

APPEARANCES

Jeremy W. Homer, Esq., Parkowski, Guerke & Swayze, PA, for DSWA
Louis Agre, for IUOE Local 542

BACKGROUND

The State of Delaware is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Delaware Solid Waste Authority (“DSWA”) is a “public instrumentality of the State established and created for the performance of an essential public and governmental function.” 7 Del.C. §6403(a). DSWA is statutorily charged to perform enumerated functions, which include:

- (1) The planning, design, construction, financing, management, ownership, operation and maintenance of solid waste disposal, volume reduction and resources recovery facilities and all related solid waste reception, transfer, storage, transportation and wastehandling and general support facilities considered by the Authority to be necessary, desirable, convenient or appropriate in carrying out its statewide solid waste management plan and in establishing, managing and operating solid waste disposal and resources recovery systems and their component waste-processing facilities and equipment;

- (2) The provision of solid waste management services to municipalities, regions and persons within the State by receiving solid wastes at Authority facilities, pursuant to contracts between the Authority and such agencies, municipalities, persons, regions and business entities; the recovery of material and energy resources and resource values from such solid wastes; and the production from such services and resources recovery operations of revenues sufficient to provide for the support of the Authority and its operations on a self-sustaining basis, with due allowance for redistribution of any surplus revenues to reduce the costs of Authority services to the users thereof;
- (3) The utilization, through contractual arrangements, of private industry for implementation of some or all of the requirements of the state solid waste management plan and for such other activities as may be considered necessary, desirable or convenient by the Authority;
- (4) Assistance with the coordination of efforts directed toward source separation for recycling purposes;
- (5) Assistance in the development of industries and commercial enterprises within the State based upon resources recovery, recycling and reuse. These objectives shall be considered to be operating responsibilities of the Authority, in accordance with the state solid waste management plan, and are to be considered in all respects public purposes. It is the intention of this chapter that the Authority shall be granted all powers necessary to fulfill these purposes and to carry out its assigned responsibilities and that this chapter, itself, is to be construed liberally in furtherance of this intention; and
- (6) The development, implementation and supervision of a program requiring all persons who haul, convey or transport any solid waste in any container to obtain a license from the Authority. The Authority may enter into an administrative agreement with any county, municipality or other political subdivision under which agreement the licensing program referenced herein may be conducted by the county, municipality or other political subdivision pursuant to such rules and regulations adopted by the Authority which are applicable to the licensing program. 7 Del.C. §6404.

DSWA employees are covered by the State Merit System and are classified employees thereunder. 7 Del.C. §6405(c). DSWA employees are public employees within the meaning of 19 Del.C. §1302(o).

The International Union of Operating Engineers, AFL-CIO (“IUOE”), through its Local 542, is an employee organization within the meaning of 19 Del.C. §1302(i) and has as one of its purposes the representation of public employees in collective bargaining.

On or about February 8, 2007, the IUOE filed a Petition for Bargaining Unit Determination and Certification of Exclusive Representative with the Delaware Public Employment Relations Board (“PERB”), seeking to create and represent a bargaining unit comprised of:

Curbside collectors, Roll Off Drivers, Loader Operator, Recycle Tech, Electronic collectors, Oil Filter collectors and full time Sorters employed at the Employer’s New Castle Facility located at 1101 Lambsons Lane, New Castle DE. Exclude all other employees, including supervisors, clericals, guards as defined by the Act.

The petition was accompanied by a number of authorization cards in support of representation by the IUOE, signed by employees holding positions in the proposed bargaining unit.

On or about February 20, 2007, DSWA filed its response to the IUOE petition, objecting to the creation of a bargaining unit which was limited to employees at the single DSWA facility located at Lambsons Lane, which is commonly referred to as the Delaware Recycling Center (“DRC”). DSWA proposed that an appropriate bargaining unit would include all DSWA employees holding the following recycling positions statewide:

- Recycling Curbside Technician
- Recycling Technician I
- Recycling Technician II
- Recycling Coordinator
- Plant Operator Mechanic III
- Office Specialist
- Mercantile Sales Clerk
- Recycling Laborer
- Recycling Laborer/Sorter
- Recycling Skilled Labor I
- Recycling Skilled Labor II
- Truck Operator I
- Truck Operator II

Accompanying its position statement, DSWA provided the required list of employees in the proposed bargaining unit, and included employees working in the following work locations: Delaware Recycling Center; Cheswold; Intermediate Processing Facility; Mercantile Store and the DSWA Administrative Office in Dover.

The employee list provided by DSWA was used to verify that the IUOE petition was properly supported by at least thirty percent (30%) of the employees in the petitioned-for bargaining unit.

The IUOE responded to DSWA's position by letter dated February 23, 2007;

... The Union seeks to represent only those employees employed in direct trash¹ processing employed at the Delaware Recycling Center and the Intermediate Processing Facility. These employees are indicated by designation DRC or IPF on the list of employees provided by the State. The Union does not seek those employees working in the Mercantile Store, as they do not share a community of interest with the other employees.

A public hearing was convened on April 12, 2007 in order to allow the opportunity for the parties to create a factual record on which a determination can be made as to the appropriate bargaining unit of DSWA employees, as required by 19 Del.C. §1310(d).

Written closing argument was received from both the DSWA and the IUOE on May 11, 2007. This decision results from the record thus created by the parties.

ISSUE

IS THE BARGAINING UNIT OF DELAWARE SOLID WASTE AUTHORITY RECYCLING PROGRAM EMPLOYEES WORKING IN THE DRC AND IPF AT THE LAMBSONS LANE FACILITY LOCATED

¹ DSWA Recycling Division employees collect and process recyclable materials; "trash" is handled by other DSWA divisions. The IUOE clarified at hearing that it was petitioning for DSWA employees who were handling recyclable materials, rather than "trash".

IN NEW CASTLE, DELAWARE, AN APPROPRIATE BARGAINING UNIT WITHIN THE MEANING OF 19 DEL.C. §1310(d)?

PRINCIPAL POSITIONS OF THE PARTIES

IUOE Local 542:

The IUOE petitioned to represent a bargaining unit of DSWA operational recycling employees working at the Lambsons Lane facility in New Castle, Delaware. The requested unit does not include supervisors, clericals or guards. It asserts that under 19 Del.C. §1310(d) a single facility unit is appropriate.

The IUOE argues that both the facts and PERB precedent militate against the DSWA position that a statewide unit of all recycling employees, including additional facilities in Cheswold and Dover², is appropriate, asserting:

- The recycling facilities in New Castle and Cheswold are autonomous operations with separate full-time supervisors at each site.
- There is no interchange of employees between the facilities and no meaningful contact between the two facilities during the work day.
- The two facilities are geographically separate and distinct. There is no bargaining history or petition for a multi-facility bargaining unit.
- The two facilities serve separate and distinct clientele, with the Lambsons Lane facility servicing New Castle County and the Cheswold facility servicing Kent and Sussex Counties.

² The Dover site is the DSWA administrative headquarters located on Bradford Street which includes a self-service recycling drop-off center but is not a recycling processing facility.

The IUOE also argues that it does not seek to represent the Recycling Coordinators, who should be excluded as supervisory employees within the meaning of 19 Del.C. §1302(s) because they have responsibility to direct the subordinate workforce. It asserts Recycling Coordinators assign work to less skilled employees through the exercise of independent judgment.

Office clericals and Mercantile Store staff should also not be included in an appropriate bargaining unit because these positions do not share a community of interest with the Recycling Collection and Material Processing employees.

Delaware Solid Waste Authority:

DSWA opposes the limited bargaining unit the IUOE seeks to represent and proposed two alternative units as appropriate, namely:

- (1) All non-supervisory positions in the statewide Recycling Division, working at the Lambsons Lane (“DRC”) and Cheswold facilities, and its administrative office in Dover, including employees of the Mercantile Store³; or
- (2) Accept the IUOE’s unit but extend it to include identical positions recycling collection employees working at the Cheswold facility.

DSWA argues all of its employees act in furtherance of its statewide mission, report to a centralized administrative and managerial authority, and are governed by a single set of statewide policies, procedures and rules developed by the DSWA Board of Directors. It asserts that the IUOE unit would undermine its operations because DSWA

³ The Mercantile Store resells reusable materials to the public collected from the public and charities, including but not limited to household items, furniture, electronics, books and games. *Testimony of Von Stetton*, Transcript p. 18.

would be required to negotiate a separate system of rules to apply to DRC Curbside and Recycling Technicians from those that apply to Cheswold employees holding the same positions. It argues this would be contrary to the statutory purpose of fostering harmonious and cooperative relationships. It also argues that different rules at the two facilities could jeopardize the Authority's need to temporarily transfer employees between facilities.

The recycling employees working at the DRC and Cheswold facilities hold the same positions, perform the same duties, require the same skills, work under the same working conditions with the same schedules, and enjoy the same compensation and benefits. They pick up the same types of materials and use the same type of equipment, albeit on different routes and in different parts of the state. Recycling and Curbside Technicians, regardless of their work location, do essentially the same thing and spend much of their work days on the road either picking up curbside recycling or servicing recycling centers.

DSWA argues that while a single facility bargaining unit may be appropriate, PERB has previously held that the unit which leads to the creation of the fewest number of bargaining units is presumed to be appropriate. *FOP Lodge 7 v. University of Delaware*, Del. PERB, Rep. Pet. 00-10-292, III PERB 2137, 2141 (2001). It argues that a finding that the IUOE unit is appropriate could result in a deprivation of bargaining rights for Cheswold facility employees holding the same positions at a later date because the decision in this case would result in a finding that those employees are inappropriate for inclusion in the unit at this time.

Finally, in support of its proposed unit of all non-supervisory Recycling Division employees, DSWA argues that Recycling Coordinators are not supervisory employees within the meaning of 19 Del.C. §1302(s) because they exercise no consequential authority over subordinate employees.”⁴ It asserts these positions should be included in an appropriate bargaining unit because their duties are closely integrated with the other Recycling Division employees.

OPINION

The determination of bargaining unit appropriateness depends upon a factual analysis on a case-by-case basis, rather than a mechanical application of the rule of law. *AFSCME Council 81 and Del. Turnpike Administration*, Del.PERB, Rep. Pet. 95-06-140, II PERB 1189, 1193 (1995); *In RE: Rehoboth Beach Police Dept. and IBT Local 326*, Del.PERB, Rep. Pet. 96-10-198, III PERB 1531 (1997).¹ There is no bright line standard that clearly delineates appropriateness in all cases. *In RE: FOP Lodge 7 and University of Delaware, Div. of Public Safety*, Del. PERB, Rep. Pet. 00-10-292, III PERB 2137, 2140 (2001)

Consistent with the federal approach under the National Labor Relations Board (“NLRB”), the Delaware PERB has held a proposed bargaining unit need only be appropriate under the statutory criteria, and not necessarily the most appropriate unit in order to be certified. *Lake Forest Education Assn. v. Lake Forest Board of Education*, Del. PERB, Rep. Pet. 91-03-060, 1 PERB 651 (1991).

⁴ *In RE: Dept. of Health and Social Services, Stockley Center*, Del.PERB, Rep. Pet. 95-06-145, II PERB 1399, 1410 (1996); *In RE: Caesar Rodney Instructional Aides*, Del.PERB, Rep. Pet. 92-03-070 (1991), aff’d Del. PERB (1992).

PERB has held that it must first evaluate the appropriateness of the unit proposed by the union on behalf of the employees. *In RE: Caesar Rodney School District Instructional Aides*, Del.PERB, Rep. Pet. 92-03-070, II PERB 821, 829 (1992). It is logical that where the union's proposed unit is found not to meet the statutory criteria for appropriateness, the appropriateness of the employer's proposed alternative unit should then be considered. This is consistent with the federal practice under the NLRB:

Determination of an appropriate bargaining unit is guided by the objectives of ensuring employee self-organization, promoting freedom of choice in collective bargaining, and advancement of industrial peace and stability. These objectives are realized when the members of an appropriate unit share, *inter alia*, a community of interest in wages, hours and other terms and conditions of employment.

[NLRB] inquiry pursues not the most appropriate or comprehensive unit but simply an appropriate unit. Once this unit is determined, the requirements of the Act are satisfied. The inquiry first considers the petitioning union's proposals. If the union's proposed is inappropriate, the employer's proposals are then scrutinized... *PJ Dick Contracting and IUOE Local 66*, 290 NLRB 24, 129 LRRM 1144 (1988). (*citations omitted*)

FOP Lodge 7 and University of Delaware, Supra., p. 2141.

Comparing the petitioned-for unit with the DSWA Organizational Chart (DSWA Ex. 2) and the list of employees supplied by the DSWA in response to the petition (DSWA Ex. 3), it is clear that the IUOE is seeking to represent a bargaining unit of DSWA employees working at the Lambsons Lane facility, who report to the Materials Processing Supervisor⁵ and those reporting to the Materials Collection Supervisor⁶. The IUOE unit does not include Recycling Coordinators or anyone working in the Mercantile

⁵ Employees reporting to the Materials Processing Supervisor are designated on the Employer's list of employees as working at the "IPF", i.e., the Intermediate Processing Facility which is located at Lambsons Lane.

⁶ Employees reporting to the Materials Collection Supervisor are designated on the Employer's list of employees as working at the "DRC", i.e., the Delaware Recycling Center which is located at Lambsons Lane

Store, none of whom report to either the IPF Materials Processing Supervisor or the DRC Materials Collection Supervisor.

In this case, the bargaining unit of Materials Processing and Materials Collection employees at the Lambsons Lane facility constitutes an appropriate bargaining unit within the meaning of 19 Del.C. §1310(d) for the reasons set forth below. Consequently, it is not necessary to make a determination as to whether DSWA's proposed alternative unit is also appropriate. The question of whether Recycling Coordinators are statutory supervisors within the meaning of 19 Del.C. §1302(s) is not placed in issue nor does this decision constitute a determination that the Cheswold facility employees are inappropriate for inclusion in this unit. The rights of organization and representation accrue to employees. 19 Del.C. §1303. Should the Cheswold facility or Mercantile Store employees seek representation at some future date, they will not be precluded from seeking representation by operation of this decision, although it may impact the determination of the appropriate bargaining unit.

Similarities of Duties, Skills and Working Conditions:

The PERA does not require that all employees in an appropriate bargaining unit perform the same job functions, but rather that all bargaining unit positions share a community of interest based upon similarity of duty, skills and working conditions. *In RE: Battalion Chiefs of the Wilmington Fire Department*, Del. PERB, Rep. Pet. 95-06-142, II PERB 1253 (1995).

The positions the IUOE seeks to represent perform functions which relate to the collection and processing of recycled materials. These materials are either collected from

curbside customers in New Castle County or collected from the 140 drop-off Recycling Centers of which those located in New Castle County are monitored and maintained by employees of the Materials Collection unit at the DRC. Once recycled materials are collected and delivered to the DRC (whether by Curbside Recycling Technicians or by contracted services that empty and transport from the receptacles at the drop-off centers), the materials are then sorted, cleaned, prepared for shipping and sent to market by employees in the Materials Processing Unit at the DRC. *Testimony of Von Stetton*, Transcript p. 17.

All of the positions the IUOE seeks to represent report to direct supervisors at the DRC. Richard Von Stetton, DSWA Senior Manager of Statewide Recycling testified that Materials Collection employees report to the DRC daily and receive a route of either curbside pick-up customers or drop-off centers which they are required to service that day. At the end of the day, these employees return to the DRC, drop off any collected materials and report on their day's work to the on-site supervisor.

The employees in the Materials Processing unit hold "plant operations" positions. *DSWA Exhibit 3, Job Descriptions*. They are responsible for sorting, cleaning and bundling recycled materials for shipping, as well as to operate, maintain and repair the equipment used for these purposes. All of the Materials Processing employees work at the DRC, operating the Intermediate Processing facilities.

The DSWA does not contend that the positions the IUOE seeks to represent do not share a community of interests in duties, skills and working conditions, but rather the same community of interest is shared by all positions within the Recycling division. It argues that a single facility unit is less appropriate than a division-wide unit where there

is arguably a commonality of job functions, requisite skills and working conditions between all statewide Recycling positions.

The Delaware PERB has a long history and practice of examining each question of bargaining unit appropriateness on a case-by-case basis, consistent with the practice of its predecessor, the Governor's Council on Labor. This practice has resulted in findings that both agency-wide and facility specific units are appropriate, depending upon the circumstances presented by the petition. PERB has not adopted a presumption that either an agency-wide or a single facility unit is appropriate. *In RE: FOP 7 v. University of Delaware*, (Supra., 2143). It is also not necessary to create a presumption in this case.

The statute grants the rights of organization and representation to public employees as a means to promote harmonious and cooperative employment relationships that help to ensure the orderly and uninterrupted operation and function of public services. Accordingly, PERB has consistently evaluated the petitioned for unit first. In this case, it is undisputed that the unit of DRC employees in the Materials Collection and the Materials Processing units share a community of interest in their work and working conditions.

History and Extent of Organization:

There is no prior collective bargaining history between DSWA and any of its employees. The appropriateness of a proposed unit is, however, impacted by whether the petition seeks to create a new bargaining unit or seeks to modify an existing unit. In this case, the fact that there are no other existing DSWA bargaining units aids the IUOE petition.

Recommendation of the Parties:

The DSWA and the IUOE are opposed in their respective recommendations for an appropriate bargaining unit of employees. PERB has held that where the recommendations of the parties are in opposition, the appropriateness of the unit proposed by the petitioner will be evaluated first; the appropriateness of the opposing party's alternative will only be evaluated if the petitioned for unit is found not to meet the standards of appropriateness established by 19 Del.C. §1310(d). *Capital Paraprofessionals Association v. Capital School District*, Del.PERB, Rep. Pet. 01-04-314 III PERB 2249, 2256 (2001).

Overfragmentation:

As there are currently no organized employees, established bargaining units or history of negotiations at the DSWA, there is no issue of overfragmentation and this consideration has no bearing on the decision in this matter. Where the petition seeks to create a single bargaining unit of unrepresented employees who share a undisputed community of interests, overfragmentation does not impact a finding of appropriateness.

DECISION

Based upon the record created by the parties and the specific circumstances unique to this case, there is persuasive support to conclude that the unit of blue collar DSWA employees working at the Lambsons Lane facility in the Materials Collection and Materials Processing units is an appropriate unit within the meaning of 19 Del.C. §1310(d). The statute requires PERB identify an appropriate bargaining unit; there is no

requirement that the designated unit be the most appropriate. Consequently, unless evidence and/or argument are produced which support a finding that the petitioned for unit is not appropriate, consistent with PERB practice, the desires of the employees who seek representation was evaluated first.

Because the petitioned for unit is appropriate, there is no need to balance the relative appropriateness of the employer's proposed unit, to make a determination as to whether Recycling Coordinators are statutory supervisors, or whether office and Mercantile Store employees share a community of interest with the operational employees at the DRC.

There is no prohibition on modifying this bargaining unit in the future, should employees holding similar positions at other DSWA facilities or divisions seek to be represented for purposes of collective bargaining.

THEREFORE, based on the circumstances presented by this petition, the appropriate bargaining unit is determined to be:

ALL DELAWARE SOLID WASTE AUTHORITY EMPLOYEES WORKING AT THE LAMBSONS LANE RECYCLING FACILITY WITHIN THE MATERIALS PROCESSING AND THE MATERIALS COLLECTION UNITS.
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This unit currently includes employees in the following positions:

Recycling Technician I	Recycling Curbside Technician
Recycling Technician I – oil	Recycling Skilled Laborer/Sorter
Recycling Technician I - electronics	Recycling Laborer
Recycling Skilled Laborer I and II	Truck Operator I and II
Plant Operator/ Mechanic III ⁷	

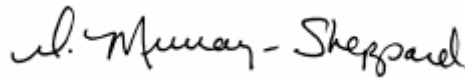
This decision is accompanied by a Notice of Bargaining Unit Determination which the DSWA is required to post in the workplace to advise employees of this

⁷ DSWA Exhibit 2, DSWA Organizational Chart, March 15, 2007.

determination and in order to allow any other union which seeks to be on the ballot the opportunity to file a showing of support of at least ten percent (10%) of the bargaining unit, in accordance with the requirements of 19 Del.C. §1311(c). An election will be scheduled within forty-five (45) days of the issuance of this decision to determine if and by whom the employees in the defined unit wish to be represented for purposes of collective bargaining.

IT IS SO ORDERED.

DATE: 18 June 2007



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