

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

AMERICAN FEDERATION OF STATE, COUNTY,	:	
AND MUNICIPAL EMPLOYEES, COUNCIL 81,	:	
LOCAL 879,	:	
Petitioner,	:	
	:	Representation Petition
AND	:	
	:	<b><u>REP. PET. 07-12-609</u></b>
STATE OF DELAWARE, DEPT. OF TRANSPORTATION,	:	
	:	(Clarification)
Respondent.	:	

<p>RE: DOT/ Division of Highway Maintenance and Operations Chapman Road Facility employees</p>
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Appearances

*Perry F. Goldlust, Esq., for AFSCME Council 81, Local 879*

*Aaron Shapiro, Office of State Labor Relations and Employment Practice, for the State*

**BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §1302(p)<sup>1</sup> of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). The Department of Transportation (“DOT”) is an agency of the State.

The American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”) is an employee organization and has as a purpose the representation of

<sup>1</sup> “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 had elected to come within the former Chapter 13 of this title, which hereinafter election to come within this Chapter, or which employs 100 or more full-time employees.

public employees for collective bargaining, pursuant to 19 Del.C. §1302(i).<sup>2</sup> AFSCME, through its affiliated Local 879, is the certified exclusive bargaining representative (within the meaning of 19 Del.C. §1302(j)<sup>3</sup>) of the bargaining unit defined by DOL Case 12.

On December 10, 2007, AFSCME filed a Petition for Modification or Clarification of Existing Certified Bargaining Unit, seeking to clarify the composition of the bargaining unit defined by DOL Case 12, specifically concerning DOT Maintenance employees at the Chapman Road Facility (“CRF”). Attached to the petition was a letter to the State in which AFSCME stated its intention to abrogate a Memorandum of Agreement (“MOA”) concerning the CRF employees, effective January 1, 2008?

By letter dated December 26, 2007, the State objected to the petition asserting AFSCME is not the certified bargaining representative for DOT employees at CRF. The State also objected to AFSCME’s abrogation of the MOA.

A pre-hearing conference was convened by PERB on February 11, 2008, for the purpose of identifying and defining the specific issue(s) in dispute.

A public hearing was held on March 14, 2008, at which time the parties were afforded a full opportunity to present evidence in support of their positions. Written closing arguments were received from both parties on May 19, 2008. This decision results from the record thus created by the parties.

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<sup>2</sup> “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.

<sup>3</sup> “Exclusive bargaining representative” or “exclusive representative” means the employee organization which as a result of certification of the Board has the right and responsibility to be the collective bargaining

## FACTS

The bargaining unit in issue (DOL Case 12) was originally certified on February 15, 1966, following an election conducted by the Department of Labor. It was defined to include “all Delaware State Highway Department employees in the New Castle County Maintenance Division.” *State Exhibit 3, p. 1.* AFSCME Local 879 was certified as the exclusive bargaining representative for this unit, and continues in that capacity at the time of the processing of this petition.

In December, 1971, AFSCME was certified as the exclusive bargaining representative of a separate and distinct bargaining unit (DOL Case 18) which included DOT, Delaware Turnpike Division Equipment Operators I, II, and III; Labor Foreman I and II; Automotive Mechanics I, and II; and Laborers I and II. *State Exhibit 1.* In April 1987, AFSCME was decertified as the exclusive representative of this bargaining unit and no successor union was certified. *State Exhibit 2.*

The Chapman Road Facility is a maintenance facility or yard, located in New Castle County, Delaware. CRF originally provided maintenance and operation services on Delaware’s portion of Interstate 95 and was organizationally part of the Turnpike Division. In 1996, DOT reorganized and the former Turnpike Division moved into the Division of Highways, and became part of the new Expressway Operations section. At that time, CRF provided maintenance and operational support to I-95, I-495, I-295 and portions of Route 1. *Testimony of Thatcher, TR p. 20 -21.*

A second DOT reorganization occurred in 2002, at which time the Expressway Operations section was abolished. CRF became part of DOT’s North Maintenance District,

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agent of all employees in that bargaining unit.

which also includes Kiamensi and Talley Road Maintenance Yards. The North District is responsible for all roads “north and west of I-95.” *TR. p. 22.*

CRF employs Equipment Operators, Mechanics and Trade Mechanics. Employees with these same classifications and performing the same types of work are also employed by DOT throughout the State, and specifically at the Talley and Kiamensi Yards. All of the employees in these positions at both Talley and Kiamensi yards are represented for purposes of collective bargaining by AFSCME Local 879. There is no difference in position or job function between an Equipment Operator at CRF and an Equipment Operator at Talley Road. Employees can be assigned to any North District yard by supervision on a short-term basis. Employees can request transfers between yards. *TR p. 23.* All Trade Mechanic positions in the North District are assigned to CRF, but their job responsibilities include work at the Talley and Kiamensi Yards.

Following the 2002 DOT reorganization, which placed the CRF in the North Maintenance District, the State and AFSCME entered into the following Memorandum of Agreement:

### **MEMORANDUM OF AGREEMENT**

Between

American Federation of State, County and Municipal Employees, Delaware Public Employees – Council 81, (“the Union”) and the State of Delaware, Department of Transportation (“the State”), collectively referred to herein as “the Parties”. The Parties hereby agree as follows, this 31<sup>st</sup> day of July, 2003.

1. This Memorandum of Agreement (MOA) is designed to resolve all issues relating to the bargaining unit status and union security obligations of employees affected by the reorganization of Maintenance and Operation Districts within the Division of Maintenance and Operations.
2. For purposes of this MOA, the terms set forth below shall be defined as follows:

- a. Chapman Road Facility (CRF): the maintenance facility formerly designated as Expressways District and presently part of the North District.
  - b. Bargaining Unit: a group of employees certified by the Public Employment Relations Board, or its predecessor, and represented by the Union in Local 837 or 879, which ever is appropriate.
  - c. CRF Employees: employees working at the Chapman Road facility as of the date of this MOA.
3. CRF employees who accept a voluntary transfer (as that term is defined in the collective bargaining agreement) into any bargaining unit position shall, as a consequence of that transfer, be covered by the union security provisions of the collective bargaining agreement for any permanent transfer.
  4. CRF employees who accept a voluntary transfer (as that term is defined in the collective bargaining agreement) into any bargaining unit position shall not, as a consequence of that transfer, be covered by the union security provisions of the collective bargaining agreement for any temporary transfer.
  5. CRF employees who are promoted into any bargaining unit position shall, as a consequence of that promotion, be covered by the union security provisions of the collective bargaining agreement.
  6. CRF employees who progress through a career ladder within CRF shall not, as a consequence of that career ladder progression, be covered by the union security provisions of the collective bargaining agreement.
  7. CRF employees who are permanently demoted within a career ladder shall not, as a consequence of that demotion, be covered by the union security provisions of the collective bargaining agreement.
  8. The State agrees that, prior to effecting an involuntary transfer (as that term is defined in the collective bargaining agreement) that may result in a CRF employee being covered by the union security provisions of the collective bargaining agreement, it shall first meet with the Union and discuss the proposed involuntary transfer.

For the Union:

/s/ Michael A. Begatto

For the State:

/s/ Thomas LoFaro

Dated: July 31, 2003

*State Exhibit 4.*

At the time this agreement was entered into, there were 66 “unrepresented positions” working at CRF. As of March 14, 2008, 56 of those positions had “transferred” into represented positions under the MOA. *Testimony of Thatcher, TR p. 19.*

By letter dated November 5, 2007, AFSCME advised the State it was “giving the State notice that effective January 1, 2008, the Union security provisions of the CBA<sup>4</sup> will apply to persons in the bargaining unit.”

### **ISSUE**

DOES THE BARGAINING UNIT OF DOT/DIVISION OF MAINTENANCE AND OPERATIONS/NORTH DISTRICT EMPLOYEES DEFINED BY DOL CASE 12 AND CURRENTLY REPRESENTED BY AFSCME LOCAL 879 INCLUDE POSITIONS ASSIGNED TO THE CHAPMAN ROAD FACILITY?<sup>5</sup>

### **POSITIONS OF THE PARTIES**

#### **STATE:**

The State argues that the CRF employees voted in 1987 to decertify AFSCME as their exclusive bargaining representative. Since that time, there has been no representation proceeding before either PERB or its predecessor which would “bring the employees into any defined bargaining unit.” *State’s closing argument, p. 2.* It asserts that the CRF employees are synonymous with the Turnpike Division bargaining unit defined in DOL Case 18. The State argues public employees are guaranteed the right to

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<sup>4</sup> Collective Bargaining Agreement (“CBA”).

<sup>5</sup> The specification classifications or identification of the positions in question here was not placed on the record in this case. The parties, however, appear to have a clear, shared understanding of which positions are in dispute. Should an issue arise later as to application of this decision to a specific position or

choose their bargaining representative under the PERA. The CRF employees exercised their statutory right to choose not to be represented in 1987 and have not chosen to change that status. The State also argues that AFSCME has not provided any evidence that the unrepresented CRF employees enjoy the same collectively bargained rights and privileges as those enjoyed by members of Local 879. It asserts that the only reason represented employees and unrepresented employees work side-by-side at the CRF performing identical job functions is because of the operation of the 2003 Memorandum of Agreement.

The State also argues that when the Turnpike Division was merged into the Division of Highways in 1996, the responsibilities and duties assigned to CRF employees did not change. The CRF remained a separate and distinct maintenance facility. It argues that the unfair labor practice charge<sup>6</sup> brought by AFSCME in 1997 acknowledged that AFSCME recognized the CRF positions were unrepresented because it did not file a representation petition. It argues that the Stipulation and Order of Dismissal recognized that the CRF employees were not part of any defined bargaining unit and were unrepresented regardless of their job titles, work location and similarity of duties with represented employees.

The State argues that it entered into the 2003 MOA “as an accommodation to AFSCME’s concern over the now very close working relationship between represented and unrepresented employees in identical job titles.” It argues this was the first “defined representation act between the State and AFSCME concerning CRF employees since the

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classification, either party has the option to file a new Clarification Petition.

<sup>6</sup> *AFSCME Local 879 v. DOT, Division of Highway Operations*, ULP 97-09-217.

1987 decertification.”<sup>7</sup> It asserts the MOA did not deprive or reverse any guaranteed rights of CRF employees to choose whether and by whom to be represented for purposes of collective bargaining. The MOA, it argues, is a clear and unambiguous acknowledgement by AFSCME that it did not represent the CRF employees.

It rejects AFSCME’s argument that the modification of the PERA to allow State merit employees to bargain concerning compensation once all positions within one of the twelve identified State Merit Employee units are represented, changes the circumstances under which the MOA was negotiated. It argues that AFSCME does not have legal authority to unilaterally rescind the MOA.

**AFSCME:**

AFSCME argues that when the Turnpike Division was merged into the Delaware State Highway Department in 1996, the CRF positions were no longer distinct from other maintenance positions in New Castle County. As a result of that reorganization, the CRF positions were covered by the DOL Case 12 unit definition. The Order of Dismissal issued in the unfair labor practice charge filed by AFSCME in 1997 made it clear that future questions concerning the representation status of CRF employees would be decided under the DOL Case 12 certification.

The 2003 MOA AFSCME entered into with the State relates to the “employees affected by the reorganization”, not to the positions held by those employees.<sup>8</sup> The MOA simply exempted certain employees from having to pay dues or fees to the Union, but did not alter the scope of the bargaining unit defined in DOL Case 12, which clearly included CRF positions.

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<sup>7</sup> State Closing Argument, p. 11

<sup>8</sup> AFSCME’s Closing Argument, p. 4.



AFSCME argues that passage of the modifications of the PERA to allow State merit employees to bargain concerning compensation changes the circumstances under which the MOA was negotiated, such that “whatever benefits inured to the employees of the CRF have come to an end with the creation of the bargaining unit created by SB36.”<sup>9</sup>

### **OPINION**

PERB’s express authority to determine appropriate bargaining units carries with it the implied authority to police certifications and to clarify them as a means to effectuate the policies of the PERA. A Unit Clarification petition does not raise a question of appropriateness, nor does it raise a question concerning representation.<sup>10</sup> Rather, it seeks clarification as to whether positions or classifications fall within or outside of an existing unit definition. A Unit Clarification does not amend or modify the existing bargaining unit definition; it simply clarifies its application to a position or classification in question. *COAD & State DOC*, Rep. Pet. 08-01-613, VI PERB 4003, 4040 (2008).

Changes in the organization and/or structure of the workplace and distribution of work are inevitable over time. Those changes do not, however, alter the bargaining unit certification or definition. In most cases, employers and bargaining representatives are able to resolve resulting scope of bargaining unit issues through discussion and mutual agreement. In the few instances where there is genuine disagreement, a Unit Clarification petition may be filed by either the Employer or the Bargaining Representative, seeking PERB resolution.

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<sup>9</sup> AFSCME Closing Argument, p. 5.

<sup>10</sup> The issue presented seeks clarification as to whether this position is within the existing bargaining unit definition. *In RE: Capital School District Benefits Specialist*, Rep. Pet., 94-09-103, II PERB 1175, 1178 (1995).

In this case, this petition results from the impact of two reorganizations affecting the highway maintenance and operations functions of the Department of Transportation in New Castle County. The decision in this case is based upon the specific facts as they relate to the organizational development of the CRF and to the bargaining unit certification.

The Department of Labor certified a bargaining unit in DOL Case 18 of Delaware Turnpike Division maintenance employees. There is no reference in the certification records to the Chapman Road Facility or to any specific work location of the bargaining unit positions. *State Exhibits 1 and 2.*<sup>11</sup> In 1987, AFSCME was decertified as the exclusive bargaining representative of this unit.

When the Turnpike Division “was merged into the Division of Highways”<sup>12</sup> in 1996, the bargaining unit defined by DOL Case 18 was no longer a presumptively appropriate unit as “Turnpike Division” positions no longer existed because the certification defined the unit in terms of the organizational division, not the work facility.

DOL Case 12 certified AFSCME Local 879 in 1966 as the representative of the bargaining unit of “all Delaware State Highway Department Employees in New Castle County Maintenance Division.”<sup>13</sup> There is ample evidence in this case that the highway maintenance and operations positions which are assigned to the CRF are identical to bargaining unit positions at the other two North Maintenance District yards.

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<sup>11</sup> The actual classifications which fall under the unit defined by DOL Case 18 are not relevant to the instant petition, which seeks clarification of the unit defined by DOL Case 12.

<sup>12</sup> State’s closing argument, p. 3.

<sup>13</sup> DOL Case 12 excluded from the unit “Delaware State Highway Department Employees in the New Castle County Construction Division, including inspectors, right-of-way personnel, for New Castle County, surveying personnel for New Castle County, area supervisors, shop supervisors, clerical personnel, and supervisors. Assistant area supervisors.” *State Exhibit 3.* There is no argument in this proceeding that any of the positions at CRF fall into any of the listed exclusions.

The Stipulation and Order of Dismissal in the unfair labor practice charge brought by AFSCME against DOT in 1997 is relevant to this petition. The transmittal letter accompanying the Order of Dismissal states,

The stipulation and dismissal of this charge does not alter the existing bargaining unit definition as set forth in DOL Case #12. Should future representation or other issues be brought before PERB involving this unit, the existing unit definition will apply.

Because the charge was voluntarily withdrawn, PERB was not required to apply the DOL Case 12 definition. PERB did, however, place the parties on notice that DOL Case 12 would be applied to any future cases concerning the representational status of the positions which were “transferred” from the Turnpike Division to the Division of Highway Operations.

The record supports the conclusion that the former Turnpike Division maintenance positions were absorbed into DOT maintenance staff and were no longer organizationally distinct from other maintenance division positions in New Castle County as a result of the 1996 DOT reorganization. The second DOT reorganization in 2002 did not alter this and in fact, further supports the conclusion that there is no distinction between the positions at any of the three maintenance facilities in the North District.

Based on this record and the organizational history of DOT Highway Maintenance and Operations in New Castle County, I find the CRF positions in question fall within the existing bargaining unit defined by DOL Case 12.

The July 31, 2008, Memorandum of Agreement (“MOA”) does not control or impact the decision in this case. The PERA provides only one method by which unrepresented positions may be certified for inclusion in a bargaining unit for purposes of collective bargaining, which is following a secret ballot election as a result of either a certification or modification petition. 19 Del.C. §1302(d). Under the PERA, the State and

AFSCME cannot enter into an Agreement which has the effect of depriving employees of their right to choose or decline representation. If CRF employees were not covered by the existing bargaining unit definition for DOL Case 12, AFSCME and the State were without statutory authority to enter into any agreement which required application of union security provisions.

The 2003 Memorandum between AFSCME and the State defined and described the agreed upon criteria for application of the union security provisions in the collective bargaining agreement. Union security provisions are negotiable between employers and certified bargaining representatives under the PERA. 19 Del.C. §1303(1); §1313. Parties may negotiate exclusion from the obligation to pay dues or fair share fees, but this does not modify or alter the scope of the bargaining unit certification. The 2003 MOA does not, and cannot, grant or deprive employees in bargaining unit positions from representation under the PERA. Bargaining unit status accrues to positions or classifications and is not determined by the identity or seniority of individuals who hold those positions.

Finally, a unit clarification petition is not a proper forum for resolving the question of whether AFSCME could unilaterally terminate the MOA. The PERB did, however, address a similar situation in a prior unfair labor practice proceeding. *DCOA v. DOC*, ULP 00-07-286, IV PERB 2355, 2358 (2001). If necessary, the parties may seek resolution of this question either through an unfair labor practice or declaratory statement proceeding. The impact, if any, of the passage of the modification of the PERA to allow State merit employees to bargain concerning compensation may be argued in that forum.<sup>14</sup>

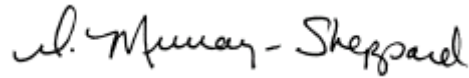
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<sup>14</sup> I take administrative note that there is currently a State Merit Employee Unit petition pending concerning Unit 1, which is defined to include “labor, maintenance, and trade and service workers.” At this time, the composition of Unit 1 has not been resolved, nor has any determination been made as to whether

**DECISION**

For the reasons set forth herein, it is determined that the Division of Highway Maintenance and Operations positions defined in DOL Case 12 and assigned to the North District, including those at the Chapman Road Maintenance Facility, are included within the bargaining unit represented by AFSCME Local 879.

**IT IS SO ORDERED.**



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DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB

DATED: 27 August 2008

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all of the covered positions are currently represented. Bargaining for this unit is not imminent and the status of that pending petition has no relevance to this Clarification Petition.