

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CORRECTIONAL OFFICERS' ASSOCIATION OF	:	
DELAWARE,	:	
Petitioner,	:	
	:	Representation Petition
AND	:	
	:	<u>REP. PET. 08-01-613</u>
STATE OF DELAWARE, DEPT. OF CORRECTION,	:	
	:	(Clarification)
Respondents.	:	

RE: Correctional Officer / Electronics Technician

Appearances

Lance Geren, Esq., Freedman & Lorry, P.C., for COAD

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)¹ of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). The Department of Correction (“DOC”) is an agency of the State.

The Correctional Officers’ Association of Delaware (“COAD”) is an employee organization and has as a purpose the representation of public employees for purposes of collective bargaining, pursuant to 19 Del.C. §1302(i).² COAD is the certified exclusive

¹ “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.

² “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

bargaining representative (within the meaning of 19 Del.C. §1302(j)³) of “all uniformed correctional officers employed by the Delaware Department of Corrections, Division of Adult Corrections⁴ and as defined by DOL Case No.1”.⁵

On January 16, 2008, COAD filed with the Public Employment Relations Board (“PERB”) a Petition for Modification or Clarification of Existing Certified Bargaining Unit, seeking to clarify “the bargaining unit status to confirm the inclusion of the position of Correctional Officer/Electronics Technician in the bargaining unit, as it is included in the originally certified bargaining unit in PERB Rep. Petition No. 02-03-350.” *COAD Petition, Rep. Pet. 08-01-613, 1/16/08.*

By letter dated February 4, 2008, the State objected to the petition asserting the Correctional Officer/Electronics Technician (“CO/ET”) position “is not now, nor has it ever been, in the bargaining unit represented by COAD, or by any preceding exclusive bargaining representative for the Correctional Officers’ bargaining unit.” *State Response to Rep. Pet. 08-01-613, 2/4/08.* The State requested an evidentiary hearing be scheduled.

By letter dated February 16, 2008, COAD responded to the State’s objections by asserting “the public records reflect that the CO/ET has been included in the bargaining unit for which COAD is certified, and therefore there is no reason for a hearing.” *COAD Response to State Position, Rep. Pet. 08-01-613, 2/16/08.* COAD attached to its response the PERB Representation Summary for the decertification election in which COAD replaced the Delaware Correctional Officers Association (“DCOA”) as the exclusive

³ “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 agent of all employees in that bargaining unit.

⁴ At some point since June 12, 2002, the Division of Adult Corrections was renamed and/or reorganized to become the “Bureau of Prisons”.

⁵ PERB Representation Petition 02-03-350, COAD Exhibit 2.

representative of this bargaining unit, asserting the summary evidenced that the CO/ET was included in the bargaining unit at that time.

A hearing was convened on March 11, 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 1, 2008. This decision results from the record thus created by the parties.

FACTS

By e-mail dated March 10, 2008, the parties provided the following Stipulation of Fact:

The Correctional Officers Association of Delaware, herein the Petitioner, and the Department of Correction, herein the Employer, by their undersigned counsel, enter into the following factual stipulation:

1. On March 28, 2002, the Petitioner filed a petition in Rep. Pet. 02-03-350 with the Public Employment Relations Board, herein PERB, seeking to decertify Delaware Correctional Officers Association, herein DCOA, and to replace DCOA with representation by the Petitioner.

2. On March 28, 2008, the PERB issued a letter to the Employer requesting a list of all employees in the bargaining unit in order to verify the showing of interest. A copy of the letter is attached hereto as Exhibit A.

3. The Employer provided a list dated April 5, 2002, of all employees in the bargaining unit in response to the PERB's March 28, 2002 letter. A copy of this list is attached hereto as Exhibit B.

4. On April 8, 2002, the PERB issued a letter to the Employer notifying the Employer of its obligations to provide an Excelsior list by April 18, 2002. A copy of the letter is attached hereto as Exhibit C.

5. On June 3, 2002, after receiving the Excelsior list from the Employer, the PERB issued a final Excelsior list, to the parties to file any challenges to the list before June 7, 2002. A copy of the letter and list are attached hereto as Exhibit D.

6. No party filed any challenge to the Excelsior list.

7. On June 12, 2002, an election was conducted by the Public Employment Relations Board in Rep. Pet. 02-03-350, in which the Petition received a majority of the votes cast in the election, and the Petition was certified as the exclusive bargaining representative of all uniformed correctional officers.

Additionally, the following relevant facts are deduced from the testimony and documentary evidence presented:

a) The Correctional Officer/Electronics Technician classification was established on July 1, 1993, and summarized in the Job Description, “An incumbent in this class oversees the operation and maintenance of the computerized security alarm system at Delaware Correctional Center⁶.” *COAD Ex. 3*

b) Donald Catalon was the first CO/ET hired by DOC, and he was promoted into the CO/ET position in 1993. He testified the position was created “during the time we had the last escape from Delaware Correctional Center.” *TR. 30-31*. Mr. Catalon continued to be employed as a CO/ET through the processing of this petition.

c) A second CO/ET was hired in approximately 1998, Guy Reid. Mr. Reid retired from the CO/ET position in or around 2006. *TR p. 23*.

d) Raymond Coppadge was hired as a CO/ET in or about 2006, to fill the position vacated by Mr. Reid.

e) At the time the CO/ET position was created the bargaining unit defined by DOL Case 1 was represented by AFSCME Local 1726. DOC and AFSCME Local 1726 were parties to a collective bargaining agreement with the term of 1991-1993. *State Ex. 1*.

⁶ Delaware Correctional Center was recently renamed and is now the James T. Vaughn Correctional Center.

f) On or about February 17, 1994, AFSCME Local 1726 was decertified and the Delaware Correctional Officers Association (“DCOA”) was certified as the exclusive representative of the bargaining unit in an election conducted by the Department of Labor.

State Ex. 2.

g) DOC and DCOA were parties to an “Interim DCOA Agreement” dated September 15, 1994, which was scheduled to expire on February 15, 1995. *State Exhibit 3.*

h) DOC and DCOA were parties to a “Contractual Agreement” which had a term of October 11, 1996 – October 10, 1999. *State Exhibit 4.*

i) On or about June 12, 2002, DCOA was decertified and the Correctional Officers Association of Delaware (“COAD”) was certified as the exclusive representative of the bargaining unit in an election conducted by the PERB. *COAD Exhibit 2.* The Eligible Voter Sign-in Sheets for that election include both Donald J. Catalon (DCC, p. 5) and Guy V. Reid (DCC, p. 24) as eligible voters. Each are listed as holding the classification of Correctional Officer/Electronics Techn. *COAD Exhibit 4.*

j) On or about October 10, 2002, DOC and COAD entered into an “Interim COAD Agreement”, which was scheduled to expire on July 1, 2003. *State Exhibit 6.* This agreement has not been amended since it was entered into in 2002. *Testimony of Machtinger, TR. p. 19.*

k) On or about November 30, 2007, PERB issued a Unit Definition Determination for State Merit Employee Unit 10 (“SB 36 Unit 10”) which includes the CO Electronics Technician classification. The unit was determined not to be properly postured to initiate compensation bargaining because the representation status of CO Electronics Technician and Business Operations/Trade Instructor positions were not resolved. *State Exhibit 8.*

ISSUE

WHETHER THE BARGAINING UNIT OF DEPARTMENT OF CORRECTION EMPLOYEES, DEFINED IN DOL CASE 1 AND CURRENTLY REPRESENTED BY THE CORRECTIONAL OFFICERS ASSOCIATION OF DELAWARE, INCLUDES CORRECTIONAL OFFICER/ELECTRONICS TECHNICIAN POSITIONS?

POSITIONS OF THE PARTIES

STATE: The State argues that bargaining unit determinations and unit modifications are controlled by statutory proceedings under the PERA, and administered by PERB. The statute guarantees employees the right to be represented in a designated appropriate bargaining unit and to select an exclusive bargaining representative through an election process. It asserts that following creation of the new Correctional Officer/Electronics Technician position in 1993, a modification petition had to be filed and an election held in order to modify the existing bargaining unit to include these positions. There is no support for COAD's petition because there has not been a showing of interest by the CO/ET's that they wish to be represented, a petition filed to modify the unit, nor an agreement by the State to include this position in the bargaining unit.

The State also argues that CO/ET's have not been included in any of the negotiated Recognition Clauses of collective bargaining agreements between DOC and the representatives of DOL Unit 1 since the CO/ET position was created. It asserts that this fact, when viewed in conjunction with the argument that no modification petition has been filed or processed, provides "clear evidence that both the State and the exclusive representatives did not consider the job title to be part of the union."

The State also argues that COAD has conceded that it does not represent the CO/ET positions by admission in a separate but related proceeding in November, 2007,

concerning the representation status of classifications included in State Merit Unit 10. It asserts “an express disclaimer of representation by an exclusive representative is powerful evidence that it does not represent a particular job title.”

Finally, the State asserts that it should not be bound by mistakes which have been made in providing the list of eligible voters in the 2002 election which resulted in the certification of COAD, or in the off-and-on deduction of dues and/or fair share fees from the wages of CO-ET’s. It argues that mistakes should not be considered reasonable, meaningful substitutes for a demonstration of employee choice, which it asserts is required by the PERA.

COAD: The Union argues that in June, 2002, when it was certified as the exclusive bargaining representative of this bargaining unit, CO/ET’s were unequivocally and undisputedly included in the bargaining unit, as evidence by the inclusion of this classification on the bargaining unit list and the eligibility of the incumbents to vote in the election.

It argues the State is mistaken in its argument that the unit had to be modified to include the CO/ET’s as the positions clearly are included within the unit definition. In order to remove these positions, a modification petition would have to be filed to explicitly exclude them.

COAD rejects the State’s “mistake” argument as baseless and not credible. If PERB were to allow parties to claim ‘mistake’ or ‘inadvertence’ after agreeing to the composition of bargaining units, there would be no stability or permanence in bargaining units.

It is also not dispositive whether the CO/ET position was included in negotiated Recognition Clauses or whether dues were consistently withheld. The payment of dues

may establish membership in the Union, but it is not dispositive of placement in or exclusion from the bargaining unit.

Finally, COAD argues that State's reliance on positions taken by COAD at the conclusion of the Unit 10 proceedings is misplaced. At no point did COAD agree to any change in the scope of the DOL Case 1 unit definition. The current petition serves a separate and distinct purpose from the Unit 10 petition.

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. The Unit Clarification process is used to resolve disputes concerning the scope of the existing bargaining unit definition and is also used to determine eligibility questions relating to whether a position is either supervisory or confidential as defined in the PERA.⁷

A Unit Clarification petition does not raise a question of appropriateness, nor does it raise a question concerning representation.⁸ Rather, it seeks clarification as to whether a position or classification falls 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.

Bargaining unit definitions are inherently dynamic in nature. In any workplace there is a reasonable expectation that the manner or method by which work is

⁷ Bona fide "confidential" and "supervisory" employees as defined by 19 Del.C. §1302(f) and (s) are not eligible for representation for purposes of collective bargaining under the PERA. 19 Del.C. §1302(o).

⁸ 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).

accomplished may change in response to technology, staffing and other changes over time. Job functions, responsibilities, and duties may change as a result of these advancements, resulting in changes to job titles and the distribution of work. 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. Such is the case here.

The Delaware PERB is faced with a somewhat unique history, in that many of the bargaining units (for which PERB is now responsible) were originally certified by the Department of Labor (“DOL”) and the certifications were grandfathered to PERB when it assumed representation responsibilities. The DOL took the unusual approach in the late 1970’s and 1980’s of attempting to delineate bargaining units by listing every single position or classification included therein. The DOL approach (as opposed to defining a unit more descriptively by the type of jobs or work performed) has proved to be rigid, inflexible and not well suited to the dynamics of public sector organization. Since assuming representation responsibilities, PERB has endeavored to translate DOL unit definitions which list classifications into descriptive unit definitions, where it is possible to do so without altering the scope of the unit, as petitions have been filed involving DOL units. Many of the Unit Clarification petitions processed by PERB have involved tracking the evolution of positions through reorganization, redistribution of job functions and responsibilities, and re-titling to determine the representation status of the current position.

When a representation petition is presented for resolution, parties are required to submit a list of bargaining unit positions during the preliminary processing of the petition. Where the parties are not able to agree on the application of the unit definition, PERB will resolve disputes based on the history of the unit and evidence presented by the parties either during an investigation or through hearing. The decisions in these cases are highly fact-bound and specific to the record and bargaining unit in each case.

The State's argument that CO/ET's cannot be included in the bargaining unit because there has not been a modification proceeding wherein the CO/ET's have had the opportunity to chose to be represented is limited and not dispositive of the issue in this case. Any individual who accepts employment in a position which is included in a bargaining unit is represented by the exclusive bargaining representative for that unit, regardless of whether that individual voted in the certification or modification election, or otherwise indicated his or her support for representation. Bargaining unit status is determined by application of the certified unit definition to the position or classification in question; not by the desire of the incumbents in the positions. The State is mistaken in its assertion that a demonstration of employee choice is required in order to resolve the clarification question raised by this petition.

In the current case, the existing bargaining unit is defined descriptively to include:

ALL UNIFORMED CORRECTIONAL OFFICERS EMPLOYED BY THE
DEPARTMENT OF CORRECTION, DIVISION OF ADULT
CORRECTION, AS DEFINED BY DOL CASE 1.

This unit definition was included in all of the Notices concerning the June, 2002, election in which COAD was certified as the exclusive bargaining representative, including the Notice of Decertification Petition (3/28/02), the Notice of Decertification Election (5/10/02), and the Notice of Decertification Election Results (6/13/02). *Public Records in PERB Representation Petition 02-03-350.*

At the time the decertification petition was filed in March, 2002, the State provided PERB with a list of all bargaining unit positions, including therein the classification of CO/ET, which had two filled positions. That list of bargaining unit positions was reviewed at least three times during the processing of that petition to election, by the State; the then-certified exclusive bargaining representative, DCOA; and the challenging union, COAD. At no point was there any question raised concerning the CO/ET positions.

The State argues that a mistake was made in including the CO/ET classification on the bargaining unit list, but there is nothing in the record which supports this assertion. The fact that DCOA (which was in the best position to object as the currently certified representative) did not do so on three separate occasions, nor the COAD or the State, supports the opposite conclusion, i.e., that at the time of COAD's certification, CO/ET's were acknowledged to fall within the unit definition.

The State next argues that when dues were withheld from CO/ET employees, these were also "mistakes". The record indicates that Fair Share fees were withheld from the incumbent CO/ET's (Catalon and Reid) until February, 2003. *State Ex. 9*. The State's witness, DOC Director of Human Resources and Development Alan Machtinger, testified that all of the CO/ET's at some point paid "dues" to the exclusive bargaining representative.⁹

The record supports the conclusion that there was a continuing question and confusion concerning the bargaining unit status of the CO/ET positions. Mr. Machtinger testified that he directed his staff to delete Catalon and Reid from the Fair Share

⁹ Mr. Machtinger testified Mr. Catalon paid dues to COAD in "late 2002 and early 2003", *TR p. 26*. He testified Mr. Reid (who was held a CO/ET position from 1998-2006) paid dues to DCOA (*TR p.23, 27*) and that Mr. Coppadge also paid dues to COAD from the time he was hired into the position in 2006 until February, 2008. *TR p.35*.

deduction list in February, 2003¹⁰, when Mr. Catalon told Mr. Machtinger that “he was paying dues in error.” *TR.31*. Mr. Machtinger testified he looked at the recognition clause of the Interim Collective Bargaining Agreement between DOC and COAD (rather than the PERB Certification in DOL Case 1) in order to confirm Mr. Catalon’s assertion. He further testified that he did not know whether COAD actually received a copy of his e-mail or whether the fair share deductions actually ceased. *TR. p. 30 -31*

The history is further complicated by yet another “mistake” which occurred when COAD dues were withheld from the third and current incumbent, Mr. Coppadge, from the time of his promotion to the position in 2006 up until a month prior to the hearing in this case. Mr. Coppadge testified that he requested the State stop the deduction of full COAD dues from his paycheck after he spoke with Mr. Catalon. *TR. 35-37*.

The State has also argued that the Recognition Clauses of the few collective bargaining agreements which have been negotiated since the creation of the CO/ET classification in 1993¹¹ are dispositive of this issue. PERB has previously addressed the issue of the weight to be accorded negotiated provisions in resolving Unit Clarification issues :

The Public Employment Relations Act confers exclusive authority for creating and modifying bargaining units on the PERB. Where parties choose to negotiate recognition clauses into their collective bargaining agreement which differ from the established bargaining unit definitions, they act at their peril. PERB is not responsible for enforcing provisions of the parties’ collective bargaining agreement, but rather to administer, interpret and apply the provisions of the statute. A contractual provision is applicable only for the term of the agreement and is enforceable through the contractual grievance procedure, whereas PERB/DOL bargaining unit

¹⁰ State Exhibit 9.

¹¹ State Exhibit 1: Agreement between DOC and AFSCME Local 1726, 1991-1993; State Exhibit 3: “Interim DCOA Agreement”, dated September 15, 1994; State Exhibit 4: Contractual Agreement: October 11, 1996- October 10, 1999, between DCOA and DOC; State Exhibit 6: Interim COAD Agreement, effective through July 1, 2003.

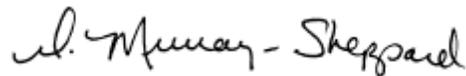
determinations are statutory in origin. *In RE: Delaware DSCYF/DYRS/Community Services & AFSCME LU 3384*, Rep. Pet. 99-07-262, III PERB 2025, 2031 (2000).

There is no dispute in this case that CO/ET positions are “uniformed Correctional Officers”.¹² Based on the record created by the parties, I find CO/ET positions fall within the existing bargaining unit certification, defined by DOL Case 1, notwithstanding mistakes which may have been made by the State in sometimes withholding and at other times not withholding dues and/or fair share fees.

DECISION

For the reasons set forth herein, it is determined Correctional Officer/Electronic Technician positions are included within the bargaining unit as defined in DOL Case 1. That bargaining unit is currently represented by the Correctional Officers Association of Delaware.

IT IS SO ORDERED.



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB

DATED: 15 August 2008

¹² Although not dispositive of the issue in this case, these parties have stipulated in a separate proceeding that this classification falls within the new State Merit Employee Unit 10 which includes, “Correctional officers and similar correctional occupations.”