

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

AFSCME COUNCIL 81, LOCAL UNION 1109,	:	
	:	
Petitioner,	:	
	:	Declaratory Statement
and	:	
	:	<b><u>D.S. No. 08-04-621</u></b>
STATE OF DELAWARE, DEPT. OF HEALTH AND SOCIAL SERVICES, DIVISION OF DEVELOPMENTAL DISABILITY SERVICES,	:	
	:	
and	:	
	:	
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 1029,	:	
	:	
Respondents.	:	

Appearances

*Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME*

*Hannah Messner, State Labor Relations and Employment Practice Specialist, for the State*

*Michael Barrett, Associate General Counsel, LIUNA*

The State of Delaware (“State”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). The Division of Developmental Disability Services, within the Delaware Department of Health and Social Services is an agency of the State.

AFSCME Council 81, Local 1109 (“AFSCME”) is an employee organization which admits public employees to membership, and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). AFSCME, by and through its Local Union 1109, is the certified exclusive bargaining representative

of Active Treatment Facilitators and Attendant Chauffeurs employed by the Division of Developmental Disability Services, within the Delaware Department of Health and Social Services. 19 Del.C. §1302(j).

Laborers International Union of North America (“LIUNA”) is an employee organization which admits public employees to membership, and has a purpose the representation of those employees for purposes of collective bargaining pursuant to 19 Del.C. §1302(i).

On or about April 25, 2008, AFSCME filed an “Emergency Petition to Cancel Pending Election Or, in the Alternative, To Stay Election Proceeding and Impound Ballots Pending a Hearing on AFSCME’s Objections to the Validity of the Petition and the Election.” The petition specifically requested to cancel “through a declaratory statement or otherwise, the April 25<sup>th</sup> [decertification election in Rep. Pet. 08-02-616] or, in the alternative to stay the election proceedings and impound the ballots pending a hearing on AFSCME’s objections to the validity of the petition and the election.” AFSCME also filed a Motion for Emergency Hearing on April 25, 2008.

PERB advised the parties that AFSCME’s petition and motion would be handled on an expedited basis.

By letter dated April 30, 2008, the State responded to AFSCME’s petition,

It is the State’s position that the provisions of the Public Employment Relations Act governing the decertification petition (19 Del.C. Section 1311) are clear and unambiguous and that this process is intended to follow the Public Employment Relations Board’s Rules and Regulations (Rules 3 and 4).

LIUNA responded by letter dated May 1, 2008,

I am writing to inform you that, while LIUNA and LIUNA Local 1029 do not agree with every statement therein, they do support the relief sought in AFSCME’s motion to cancel the

election in the above-referenced unit or to impound the ballots pending a full hearing on whether it is appropriate to hold an election among these employees after the petition has been withdrawn by LIUNA Local 1029.

When LIUNA representatives solicited “showing of interest” cards from the employees in the unit, the employees were told the purpose of the election would be to offer them the opportunity to be represented by LIUNA. The petition in the above referenced case [Rep. Pet. 08-02-616] was filed only because LIUNA was unaware that AFSCME represented these workers within the recently formed State Compensation Bargaining Unit 2 Coalition. Now that the issue has been resolved, there is no need for an election. It was never LIUNA’s intention that employees should be left without a collective bargaining representative. Therefore, when the petition was withdrawn, the election should have been cancelled.

Accordingly, LIUNA and LIUNA Local 1029, request that you cancel the election.

On May 15, 2008, PERB convened an Emergency Hearing as requested by AFSCME. The hearing was attended by AFSCME and the State; there was no LIUNA representative present to participate. The exhibits to the petition were entered into the record; no witnesses were called. AFSCME did not file written argument but informed the Board that its motion contained its argument. The record closed.

This expedited decision is based upon the record thus created by the parties.

## **BACKGROUND**

The following facts are compiled from the public records maintained by PERB concerning the creation of the bargaining unit at issue in this case (Representation Petition<sup>1</sup> 02-03-349), the modification petition filed by LIUNA seeking to represent DDDS Active Treatment Facilitators and Attendant Chauffeurs (Rep. Pet. 07-10-602),

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<sup>1</sup> Delaware PERB Representation Petitions are hereinafter referred to as “Rep. Pet.”

and the pending decertification petition affecting this bargaining unit (Rep. Pet. 08-02-616).

1. AFSCME was certified to represent Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/DDDS through a modification election conducted on or about May 30, 2002. The Active Treatment Facilitators and Attendant Chauffeurs were modified into the existing bargaining unit of DHSS/DDDS Senior Social Workers and Case Managers. Rep. Pet. 02-03-349.

2. On or about April 24, 2003, AFSCME notified all DHSS/DDDS Senior Social Workers/Case Managers it was disclaiming its interest in continuing to represent those employees for purposes of collective bargaining. PERB issued a Notice of Change in Representation Status advising all bargaining unit employees that Senior Social Workers/Case Managers were severed from the bargaining unit. Rep. Pet. 03-04-388. Consequently, only DHSS/DDDS Active Treatment Facilitators and Attendant Chauffeurs remained in the bargaining unit.

3. No collective bargaining agreement has been negotiated between AFSCME and the State since the 2002 modification election, nor has an Annual Employee Organization Report ever been filed for Local 1109 as required by 19 Del.C. §1313.

4. On or about November 20, 2007, LIUNA filed a modification petition seeking to modify its existing unit of DDDS employees working in DDDS at the Stockley Center and its satellite facilities to include “Active Treatment Facilitators and Attendant Chauffeurs employed by DDDS/Adult Daycare Centers.” Rep. Pet. 07-11-602. The petition was accompanied by cards in support of the petition signed by Active Treatment Facilitators and Attendant Chauffeurs.

5. In response to PERB's request, the State provided a list of employees LIUNA sought to represent to be used for verifying the showing of support. The petition was determined to be adequately supported by a showing of interest of at least 30% of those employees. The State objected to the proposed modification asserting there was no community of interest between the Active Treatment Facilitators and Attendant Chauffeurs positions and those represented by LIUNA 1029. It argued that the Active Treatment Facilitators and Attendant Chauffeurs shared a community of interest with other similar positions on a department-wide basis, rather than on a divisional basis.

6. On December 7, 2007, PERB issued a Notice of Proposed Bargaining Unit Modification notifying the Active Treatment Facilitators and Attendant Chauffeurs that a petition had been filed by LIUNA which sought to represent them within the existing bargaining unit of Stockley Center employees, and the basis for the State's objection. The Notice also advised that a hearing would be held to receive evidence on which a determination could be made on the question of unit appropriateness. At no time did either the State, PERB or individual employees recollect that these employees had chosen to be represented by AFSCME in 2002.

7. By e-mail dated December 13, 2007, the State withdrew its opposition to the proposed modification of the Stockley bargaining unit to include Active Treatment Facilitators and Attendant Chauffeurs working in Adult Day Care Centers. A Notice of Proposed Bargaining Unit Modification and Election Order was issued by PERB on December 28, 2007. The State was requested to replace the prior notice with this notice.

8. When the election was ordered, PERB suggested mail ballot election arrangements and requested the State provide an Excelsior List by January 7, 2008. The

Excelsior List of eligible voters was forwarded to LIUNA for objections on January 10, 2008.

9. At some time between January 10 and January 28, 2008, AFSCME Field Staff raised a concern with PERB that a petition was being processed to represent a group of employees for which it was currently certified as the exclusive representative.

10. LIUNA's modification petition was dismissed following PERB's investigation which revealed that AFSCME had been certified as the representative of the bargaining unit as described in paragraphs 1 – 3 above. The January 28, 2008 dismissal letter stated:

...because the group of employees LIUNA was seeking to represent are currently represented by AFSCME, the modification petition filed in this matter must be dismissed.

By copy of this letter, I am requesting Ms. Messner instruct DHSS/DDDS management to remove the currently posted Notices of Proposed Bargaining Unit Modification and Election Order.

The cards that were filed in support of the modification petition were returned to LIUNA with letter dismissing the petition.

11. On or about February 1, 2008, a Decertification petition was filed by Tracey Johnson, a bargaining unit employee who is and was employed as an Active Treatment Facilitator by DHSS/DDDS. The Petition was filed on a PERB form which states, "Employees in the bargaining unit (certified in D.O.L. Case No. 190) desire either to be represented by another bargaining representative or no longer wish to be represented by any bargaining representative." The petition also states the petition "must be accompanied by the uncoerced signatures of at least 30% of the employees within the bargaining unit and allege that the employee organization currently certified is no longer the choice of the majority of the employees in the unit." The cards filed in support of the

decertification petition indicated the employees desired to discontinue their current representative and be represented by LIUNA.

12. In response to PERB's request, the State provided a list of bargaining unit employees. The petition was determined to be adequately supported by a showing of interest of at least 30% of those employees.

13. On or about February 19, 2008, Notices of Decertification Petition were provided to the State for posting in the workplace which advised bargaining unit employees that a petition had been filed seeking to decertify AFSCME Local 1109 as the exclusive bargaining representative of "All Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/Division of Developmental Disability Services." The Notice also stated, in relevant part:

The petition seeks to replace AFSCME as the exclusive representative of the bargaining unit defined above (as certified in DOL Case 190) with representation by Laborers' International Union of North America ("LIUNA").

This petition has been verified by the Public Employment Relations Board and has been determined to be timely filed and properly supported by thirty percent (30%) or more of the members of the bargaining unit. This Notice of Decertification Petition will be followed by notification of the scheduling of an Election, in order that members of the bargaining unit may determine whether they desire to continue to be represented for purposes of collective bargaining.

Any organization other than LIUNA 1029 and AFSCME Council 81 which seeks to be included on the ballot must, within ten (10) days of this notice, submit a ten percent (10%) showing of interest.

Any objections to the validation of this petition should be addressed to the PERB at the number and address above and must be received within five (5) days of the posting of this Notice. All questions regarding this petition should also be addressed to the PERB. *Exhibit A*

14. PERB notified AFSCME Council 81's Executive Director on February 19, 2008, that a petition had been filed by bargaining unit employees seeking to decertify AFSCME Local 1109 as the representative of the bargaining unit of "All Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/Division of Developmental Disability Services," and to certify LIUNA Local 1029 as their exclusive representative. The letter stated the petition had been verified and validated as being properly supported by at least thirty percent (30%) of the bargaining unit employees as required by 19 Del.C. §1311(b). A copy of the verification list was provided to AFSCME as well as a copy of the Notice of Decertification Petition which was being posted in the workplace.

15. Later on February 19, PERB received a faxed letter from AFSCME's International President which stated, in relevant part,

We understand that a petition has been filed with your agency seeking to resolve a dispute between AFSCME and LIUNA over representation of a bargaining unit represented by AFSCME.

The purpose of this letter is to request that your agency defer taking any further action at this time on the petition so AFSCME and LIUNA may have the opportunity to resolve this matter under the terms of an inter-union agreement that covers disputes of this nature. Our inter-union agreement provides for a prompt resolution of these matters.

As you may be aware, the NLRB and most public sector labor boards regularly hold cases in abeyance to permit International Unions an opportunity to resolve inter-union disputes.<sup>2</sup> We would appreciate your agency following that practice in this case. *Exhibit B*

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<sup>2</sup> The Delaware PERB does not have a rule or policy which mirrors or is similar to the No-Raiding Procedures Among Labor Organizations described in the National Labor Relations Board Casehandling Manual at §§11017-11019.

16. In response to PERB's request for LIUNA's position with respect to AFSCME's request, LIUNA counsel responded on February 26, 2008, "Please be advised that LIUNA Local 1029 consents to a 30-day postponement of the proceedings in the above-captioned matter pending resolution of the issues raised by AFSCME International President Gerald W. McEntee in his correspondence of February 26, 2008.

17. PERB's Executive Director confirmed a thirty day postponement by letter dated March 3:

The Petition in the above-captioned matter was properly filed by employees in an appropriate unit in the Delaware Department of Health and Social Services, Division of Developmental Disability Services whose right by statute is to select a bargaining representative of their choosing. The Petition raises a question of representation routinely processed by this agency pursuant to established procedures. Essentially, the question is whether the employees in the certified unit prefer to be represented for the purpose of collective bargaining by AFSCME, LIUNA or not be represented. There is no collective bargaining agreement in effect at this time and, therefore, there is no contract bar to the filing of the decertification petition.

However, by letter dated February 26, 2008, LIUNA Local 1029 consented "to a 30-day postponement of the proceedings in the above-captioned matter pending resolution of the issues raised by AFSCME International President Gerald W. McEntee in his correspondence of February 19, 2008."

This will be a one-time extension in order not to interfere with the statutory rights of the employees. LIUNA and AFSCME must notify this office not later than the close of business on Thursday, March 27, 2008 as to any "resolutions" reached which impact the further processing of this petition.

18. On April 7, 2008, LIUNA advised PERB by faxed letter from Local 1029's counsel, "Pursuant to the no-raid complaint filed by AFSCME on February 19, 2008, Local 1029 hereby requests withdrawal of its petition in the above-captioned matter." *Exhibit C.*

19. PERB issued a letter to all parties (the Petitioner, AFSCME, the State and LIUNA) on April 9, 2008, which stated,

Please be advised that LIUNA has withdrawn from the above-captioned decertification petition (per the enclosed letter) and will not be included on the ballot in the election involving the bargaining unit of Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/Division of Developmental Disability Services.

The Public Employment Relations Act states “only a group of employees within the bargaining unit may file a petition with [PERB] for decertification.” 19 Del.C. §1311(b). Consistent with the statutory requirements, PERB Regulation 3.3 provides:

A petition for decertification may be filed by a public employee or a group of public employees. An employee organization or a public employer may not file a petition for decertification ...

Consequently, the decertification petition cannot be withdrawn by LIUNA, as it was not the petitioner.

The petition filed by Ms. Johnson on behalf of the bargaining unit employees was determined to be timely filed and adequately supported by the required showing of interest. As LIUNA has withdrawn from the ballot and no other union has petitioned to be included on the ballot, the election ballot “... will contain, as choices to be made by the voter, the name of the ... certified employee organization ... and a choice that the public employee does not desire to be represented by any of the named employee organization(s).” 19 Del.C. §1311(c). The ballot will include “AFSCME Local 1109” and “No Representative”. The election outcome will be determined by the majority of the votes cast.

Pursuant to its statutory responsibility, PERB will conduct a decertification election among employees within the bargaining unit currently represented by AFSCME Local 1109... *Exhibit H.*

The letter provided a copy of the Excelsior List of names and home addresses of all eligible voters to the Petitioner and AFSCME<sup>3</sup> and also proposed arrangements for a mail ballot election. The parties were notified that the Notices would be provided to the employer for posting by April 17, that ballots would be mailed on April 25, and that the election would occur with the counting of the ballots on May 15, 2008.

20. On or about April 17, 2008, copies of the Notice of Decertification Election (Ballots to be Cast through U.S. Mail) were provided to the parties and the employer was requested to post copies of the Notice in the Workplace. *Exhibit D*. The Notice advised bargaining unit employees of the purpose of the election:

AN ELECTION BY SECRET BALLOT WILL BE CONDUCTED, under the supervision of the Public Employment Relations Board, among Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/DDDS, to determine whether those employees desire to continue to be represented for purposes of collective bargaining by AFSCME Local 1109. *Exhibit G-1*.

The Notice also included a Sample Ballot:

SAMPLE	<b>OFFICIAL SECRET BALLOT</b>	SAMPLE
<p>The purpose of this election is to determine whether <b>Active Treatment Facilitators and Attendant Chauffeurs</b> employed by DHSS/Division of Developmental Disabilities wish to continue to be represented for purposes of collective bargaining.</p> <p><b>Do You Wish To Continue To Be Represented For Purposes of Collective Bargaining By AFSCME Local 1109?</b></p> <p style="text-align:center"><b>YES</b> <input type="checkbox"/></p> <p style="text-align:center"><b>NO</b> <input type="checkbox"/></p> <p style="text-align:center"><i>Mark only one X on your ballot, inside one square. Do not sign your name on this ballot.</i></p>		

<sup>3</sup> The parties were also advised in this letter that PERB Regulation 4.3(d) requires that any objections to the validity or completeness of the Eligible Voter List must be filed with PERB, in writing, and must set forth the basis for the challenge. Challenges to the validity or completeness of the Eligible Voter list were required to be filed on or before April 21, 2008.

Fold your ballot and seal it in the enclosed Secret Ballot envelope. Place the sealed envelope inside of the stamped, addressed return envelope.

Sign the back of the return envelope and mail it.

***This ballot must be received in the PERB offices by 12:00 noon  
on Thursday, May 15, 2008***

21. A Certificate of Posting was returned to PERB on April 23, 2008, indicating that the Notices of Election had been posted in all required workplaces on or before April 21, 2008.

22. Voting packets were mailed to the sixty-five (65) eligible voters at their homes on April 25, 2008. The election was scheduled for May 15, 2008 at which time the ballots would be counted.

23. Following receipt of the instant Request for Declaratory Statement and responses from the State and LIUNA, Notices of Expedited Hearing were placed in the workplace which advised bargaining unit employees:

On or about April 25, 2008, AFSCME filed an "Emergency Petition to Cancel Pending Election Or, in the Alternative, to Stay Election Proceedings and Impound Ballots Pending a Hearing on AFSCME's Objections to the Validity of the Petition and the Election," which seeks to stay the Decertification Election involving DHSS/DDDS employees.

Based upon the Petition and responses filed by the State and LIUNA, PERB is expediting its consideration of AFSCME's objections. AFSCME's Motion for Emergency Hearing is granted and will be conducted as noted below. An expedited decision will be issued within ten (10) days of the close of the record.

The ballots cast in the Decertification Election currently being conducted by mail Ballot involving Active Treatment Facilitators and Attendant Chauffeurs employed by DHSS/ Division of Developmental Disabilities (Representation Petition 08-02-616) will be impounded pending issuance of the decision in this matter.

## **ISSUES**

- 1) Did PERB exceed its authority by proceeding with an election in a bargaining unit in which LIUNA Local 1029 has disclaimed an interest and withdrawn its petition seeking to represent the employees?
- 2) Did PERB exceed its authority by allowing “interest cards” submitted by LIUNA Local 1029 in support of its now-withdrawn petition to subsequently be used as the “showing-of-interest” for a decertification election?
- 3) Did the PERB exceed its authority by scheduling the decertification election without first holding a hearing on AFSCME’s challenges to the validity of the underlying petition?
- 4) Did PERB exceed its authority by disregarding PERB Rule 3.5 and/or Rule 4.2 in posting a Notice of Election less than ten days in advance of the election?
- 5) Is this petition properly postured for issuance of a Declaratory Statement in accordance with PERB Regulation 6?

## **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).<sup>4</sup>

Unlike unfair labor practice charges which assert the statute has been violated and request remediation of the asserted wrongs, a declaratory statement addresses questions

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<sup>4</sup> 14 Del.C §4006 is specifically incorporated by reference into the Public Employment Relations Act at 19 Del.C. §1306.

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 the decertification provisions of the Public Employment Relations Act, 19 Del.C. §1311. 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 Public Employment Relations Board to process a decertification petition. This issue is a question of first impression and is mature and ripe for resolution because there can be no resolution of the underlying issue until this question is resolved.

I. AFSCME argues the Executive Director erred in ordering an election after receiving notice that LIUNA Local 1029 had withdrawn its petition, asserting LIUNA's April 7 letter disclaiming its interest in representing the bargaining unit in question invalidated the decertification petition.

The Delaware Public Employment Relations Act is not a mirror statute to the federal Labor Management Relations Act administered by the National Labor Relations Board. Decertification procedures are materially different under the PERA. Whereas federal law provides that a decertification petition may be filed by "an employee or group of employees or any individual or labor organization acting on their behalf"<sup>5</sup>, 19 Del.C. §1311(b) provides "only a group of employees within the bargaining unit may file a petition with the Board for decertification." PERB Regulation 3.3 governs the filing of a decertification petition and explicitly states:

A petition for decertification may be filed by a public employee or group of public employees. An employee organization or a public employer may not file a petition for decertification..."

The statute defines an "employee organization" to mean "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

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<sup>5</sup> §9 (c)(1)(A)(ii)

as an officer, representative or agent of said organization.” 19 Del.C. §1302(i). There is nothing on the record in this case or in the records of Representation Petitions 07-10-602 or 08-02-616 which indicate the petitioner, Tracey Johnson, is an officer, representative or agent of LIUNA.

By letter dated April 9, 2008, addressed to the State, AFSCME, and Petitioner Johnson<sup>6</sup>, all parties were notified that LIUNA had withdrawn from the petition and would not be included on the ballot. The letter stated:

The petition filed by Ms. Johnson on behalf of bargaining unit employees was determined to be timely filed and adequately supported by the required showing of interest. As LIUNA has withdrawn from the ballot and no other union has petitioned to be included on the ballot, the election ballot “... will contain, as choices to be made by the voter, the name of the ... certified employee organization ... and a choice that the public employee does not desire to be represented by any of the named employee organization(s);” 19 Del.C. §1311(c). The ballot will include “AFSCME Local 1109” and “No Representative”. The election outcome will be determined by the majority of the votes cast.

Consequently, there was no error committed by proceeding to election on a decertification petition which was filed by an employee within the bargaining unit as required by 19 Del.C. §1311(b). LIUNA was not the petitioner and could not be the petitioner by operation of 19 Del.C. §1311(b).

II. AFSCME argues the cards submitted by LIUNA in support of the decertification petition cannot be used as a “showing of interest” for the April 25<sup>th</sup> election because to do so would be contrary to the purpose of the statute and rules governing decertification proceedings. Specifically AFSCME asserts:

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<sup>6</sup> A copy was also provided to LIUNA Counsel, and Local 1029 President.

In January and February, 2008, LIUNA 1029 representatives solicited “interest cards” from unit employees promising that LIUNA would be a more effective bargaining representative than AFSCME. At no time during the solicitation were employees informed that the cards could be used to hold an election that could result in the loss of union representation.”

In support of this contention, AFSCME appended to its petition Exhibit E which included a petition and two letters “challenging the collection of signatures by LIUNA”, signed by seven bargaining unit employees.<sup>7</sup> AFSCME also argues the employees were coerced into signing the cards under the false pretense that their purpose was to support an election in which the choice would be “Do you wish to be represented by AFSCME or LIUNA?”

PERB has previously ruled that the review of a showing of support and determination as to whether a petition is adequately supported is a purely administrative expedient, “adopted to enable the Board to determine for itself whether or not further proceedings are warranted, and to avoid the needless dissipation of the government’s time, efforts and funds”. *Delaware Dept. of Correction and Del. Correctional Officers Association and Correctional Officers Association of Delaware*, Decision on DCOA’s Objections to Validation of the Petition, Del.PERB, Rep. Pet. 02-03-350, IV PERB 2603, 2605 (2002).

It is the representation election which will determine if the substantive issue of whether or not this bargaining unit will be represented for purposes of collective bargaining, and, if so, by whom. The statute grants to employees the right to be represented, to negotiate collectively, and to grieve through representatives of their choosing. 19 Del.C. §1301; §1303. The showing of support serves only to provide a basis for this

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<sup>7</sup> The signatories of the two letters also signed the petition. PERB takes administrative notice that even if the cards signed by the individuals who provided the information in Exhibit E were removed from consideration, the remaining cards filed in support of the decertification would constitute more than the required 30% showing of interest.

agency to assess whether there is a reasonable basis, administratively, for conducting an election.

Findings that a decertification petition is adequately supported is subject to neither direct nor collateral attack, nor are cards revealed to any party. *DOC & DCOA & COAD*, IV PERB 2603, 2606.

AFSCME's assertion that the purpose of the petition was to support an election in which only AFSCME and LIUNA would be on the ballot is contrary to the clear language of 19 Del.C. §1311(c), which requires "The election ballot shall contain, as choices to be made by the voter ... a choice that the public employee does not desire to be represented by any of the named employee organization(s)." All initial election ballots must contain a choice of "No Representative" under Delaware's public sector collective bargaining laws.

AFSCME was also notified that the decertification petition had been properly filed and validated on February 19, 2008, and was provided with a list of employees used to validate support for the petition. The Notice of Decertification Petition<sup>8</sup> (*Exhibit A*) specifically states, "Any objections to the validation of this petition should be addressed to the PERB at the number and address above and must be received within five (5) days of the posting of this Notice."

PERB Rule 3.4(2) has been in full force and effect since PERB first adopted rules in 1984, and provides,

Any objections to the validation process shall be filed with the Executive Director, in writing, within five (5) days of the date upon which the Notice of Petition Validation is received. Any objections filed will be resolved by the Executive Director within fourteen (14) days of their receipt. Any such decision issued by the Executive Director in response to objections to

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<sup>8</sup> A copy of this Notice was provided to AFSCME's Executive Director on February 19, 2008.

the validation process shall be interlocutory and shall be subject to appeal to the full Board once a final determination is made on the petition itself.

In addition to the other basis for rejecting AFSCME's challenge to the validation of support for the decertification petition, its April 25 objection is untimely.

III. AFSCME also argues the Executive Director acted in violation of PERB rules in ordering an election without holding a hearing. Until the filing of the instant Motion on April 25, there was no petition, motion or other action filed by AFSCME or any party to this proceeding which requested or necessitated a hearing. The Notice of Decertification Petition was provided to the parties on February 19, 2008, with copies placed in the workplace to advise bargaining unit employees that a secret ballot election would be conducted by PERB to determine whether bargaining unit employees "desire to continue to be represented for purposes of collective bargaining." Exhibit A. Parties were notified on April 9, 2008, that LIUNA had withdrawn from the ballot and that the matter would proceed to election. The Notice of Decertification Election to be Conducted by U.S. Mail was provided to the parties and to be posted in the workplace on April 17, 2008. At no time prior to April 25, 2008, was an objection or motion filed by AFSCME to the decertification election.

IV. AFSCME also argues the Notice of Election dated April 17, 2008, is defective because it was not provided to the employer in time for it to be posted at least 10 days prior to the election required by PERB Rule 4.2:

#### 4.2 Notice of Election

- (a) A Notice of Election shall be posted in a conspicuous place in each building where affected employees work

and in the office of the public employer. The Notice of Election shall be posted at least ten (10) days prior to the election.

- (b) The Executive Director shall supply the public employer with the Notice of Election at least seventeen (17) days prior to the election. It shall be the responsibility of the employer to post the Notice of Election.
- (c) The public employer shall complete and return the Certification of Posting form to the Executive Director.

The election in this matter is being conducted by mail ballot. Ballots were mailed to voters at their home addresses on April 25, but the election itself was scheduled for May 15, the date on which the ballots were to be counted. The Notice was provided thirty-one days prior to the election and advised bargaining unit employees that if they had not received ballots at their home by Friday, May 2, 2008, (10 days after the posting of the Notice), to contact PERB directly to request a duplicate ballot be provided. Individual Notices of Decertification Election were also provided in each ballot packet mailed to eligible voters' homes.

For these reasons, AFSCME's contention that the Notices of Election are defective because they were not posted in compliance with the time frames set forth in Regulation 4.2 is unsupported by the record.

Finally, LIUNA's assertion that the decertification petition "was filed only because LIUNA was unaware that AFSCME represented these workers within the recently formed State Compensation Bargaining Unit 2 Coalition", has no bearing on this matter. Putting aside the prior determination that LIUNA was not and could not have been the petitioner in this case, at the time the decertification petition was filed, there had been no determination of either the composition or representation status of SB36 Unit 2. Secondly, the provisions of 19 Del.C. §1311A(d), clearly establish that a sub-group

within a compensation unit may choose to decertify their bargaining representative. In such case, the only bar to a decertification election "shall be established by the noncompensation agreement covering employees in an appropriate unit." In this case, there was no collective bargaining agreement in effect to bar this decertification petition.

### **DECISION**

For the reasons set forth above, AFSCME's petition to stay the Decertification election involving DHSS/DDDS Active Treatment Facilitators and Attendant Chauffeurs is denied.

It is the statutory right of Delaware public employees to negotiate collectively through representatives of their choosing. Those exclusive bargaining representatives are selected through a secret ballot election process in which the employees have the opportunity to express their choice.

The decertification petition at issue in this case was properly filed by a bargaining unit employee, adequately supported by a showing of interest, and timely and properly noticed to bargaining unit employees (both through Notices in the workplace and Notices provided in the ballot packets mailed to their homes) as required by the Public Employment Relations Act and PERB Rules and Regulations.

**WHEREFORE**, the ballots which were impounded in this case will be opened and counted on Wednesday, June 18, 2008 at 2:00 p.m. in the PERB/DPA Conference Room.

DATED: 5 JUNE 2008

*D. Murray-Sheppard*  
DEBORAH L. MURRAY-SHEPPARD  
Executive Director, Delaware PERB