STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

STATE OF DELAWARE, DEPARTMENT OF HEALTH & SOCIAL SERVICES,	:	Representation Petition
	:	**08-05-622**
Petitioner,	:	
	:	(Clarification)
AND	:	
	:	**DECISION ON RESPONDENTS' MOTION TO DISMISS**
AFSCME COUNCIL 81 AND LIUNA LOCAL 1029,	:	
	:	
Respondents.	:	

RE: State Merit Employee Unit 2 (non-professional patient care workers)

Activity Therapists I – Stockley Center & Governor Bacon Health Center

APPEARANCES

Hannah Messner, Office of State Labor Relations and Employment Practice, for the State

Perry F. Goldlust, Esq., for AFSCME Council 81

Stephen C. Richman, Esq., Markowitz & Richman, for LIUNA Local 1029

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 Health and Social Services ("DHSS") is an agency of the State. The Stockley Center and the Governor Bacon Health Center are health care facilities operated by the DHSS, at which Activity Therapists I are employed.

[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.

The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81 ("AFSCME") is an employee organization and has as a purpose the representation of public employees for collective bargaining, pursuant to 19 Del.C. §1302(i).[2]

The Laborers International Union of North America, AFL-CIO ("LIUNA") is an employee organization and has as a purpose the representation of public employees for collective bargaining, by and through its affiliated Local 1029, pursuant to 19 Del.C. §1302(i).

On or about April 29, 2008, AFSCME Council 81 (through its affiliated Locals 516, 640, 936, 1109, 1525, 1832, 2030, 2031, 2072 and 2305), LIUNA Local 1029 and the Public Health Nurses Council, DSEA/NEA, were identified as a coalition[3] of bargaining representatives responsible for negotiating on behalf of all State Merit Employees in Unit 2.[4] Unit 2 was also determined on that date to be properly postured to initiate bargaining pursuant to 19 Del.C. §1311A.[5] Included in the defined bargaining unit

[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 or agent of said organization.

[3] "The exclusive bargaining representatives of all of the employees in each individual bargaining unit identified [in 19 Del.C. §1311A(b)] shall join together in a bargaining coalition to bargain collectively for that unit. Employee organizations that are part of the coalition shall exercise authority over decisions of the coalition proportional to the number of employees exclusive represented in the coalition by the employee organization..." 19 Del.C. §1311A(c)

[4] Unit 2 is defined as "Non-professional patient care workers which is composed of institutional care classes including licensed practical nurses, nursing assistants, active treatment assistants, technicians, therapy aides, and similar classes." 19 Del.C. §1311A(b).

[5] "Notwithstanding any other provision in this Code, exclusive representatives of State merit employees, who are in the classified service and not working in higher education, shall collectively bargain in the units provided pursuant to subsection (b) of this section. The scope of bargaining shall include:(1) Compensation which shall be defined as the payment of money in the form of hourly or annual salary, and any cash allowance or items in lieu of a cash allowance to a public employee by reason of said employee's employment by a public employer, as defined in this chapter, whether the amount is fixed or determined by time, task or other basis of calculations. Position classification, health care and other benefit programs established pursuant to Chapters 52 and 96 of Title 29, workers compensation, disability programs and pension programs shall not be deemed compensation for purposes of this section; and (2) any items negotiable for state merit employees pursuant to Section 5938 of Title 29. To the extent or where any of

was the State Merit classification of Activity Therapist I.

On or about May 6, 2008, the State filed a representation clarification petition asserting that the Activity Therapist I positions in the Department of Health and Social Services working at Emily P. Bissell Hospital, Governor Bacon Health Center and the Stockley Center are supervisory[6] and therefore ineligible for representation under Public Employment Relations Act ("PERA").

Both AFSCME and LIUNA objected to the State's petition. A hearing was convened on June 20, 2008, at which time the State presented its case in chief. At the conclusion of the State's evidence, AFSCME moved for dismissal of the petition. LIUNA joined AFSCME in its motion. The parties were afforded the opportunity to provide written argument in support of, and in opposition to, the preliminary motion to dismiss. The final argument was received from the State on July 30, 2008.

This decision is limited to consideration of the unions' motion to dismiss and is predicated on the arguments presented by the parties.

POSITIONS OF THE PARTIES

AFSCME:

AFSCME moves to dismiss the State's petition to exclude Activity Therapists I from a bargaining unit because they are supervisory employees because the State:

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these items are covered by existing collective bargaining agreements, the provisions negotiated pursuant to subsection (c) of this section shall supersede those agreements." 19 Del.C. §1311A(a).

[6] The PERA excludes from the definition of "public employee" eligible for representation for purposes of collective bargaining "supervisory employees" which are defined at 19 Del.C. §1302(s) to mean: " . . . any employee of a public employer who has the authority, in the interest of the public employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment." 19 Del.C. §1302(o).

> … has committed an unfair labor practice by requiring employees to perform supervisory duties that are assigned to a higher rated position without a promotion to the higher classification, depriving the employees of the right to freely organize and to dominate and interfere with the rights of the certified bargaining representative's ability to negotiate and represent employees in its bargaining unit, in violation of 19 Del.C. §1307(a)(1), (2), (3), and (5).

AFSCME asserts that the positions the State seeks to exclude from bargaining rights do not exist under the State's classified service system, i.e., there are no Activity Therapists I positions which have supervisory responsibilities. It argues that the Merit Job Descriptions clearly provide that the difference between an Activity Therapist I classification and an Activity Therapist II classification is supervisory responsibilities.

AFSCME relies upon PERB's decision in *Delaware DHSS, Del. Psychiatric Center & AFSCME LU 640* **(**Rep. Pet. No. 06-05-522, V PERB 3685 (2006), wherein Activity Therapists II were determined to be supervisory employees because they were responsible and accountable for overseeing the work of Activity Therapists I and Activity Aides.

LIUNA:

LIUNA adopts the arguments made by AFSCME and asserts the critical issue to be resolved is whether the State may unilaterally add supervisory duties to an existing classification of employees. It notes that the Activity Therapist I Merit classification description does not include any supervisory duties or responsibilities, whereas supervisory responsibilities are specifically included in the Merit classification description for Activity Therapist II.

LIUNA argues the State did not dispute that Activity Therapist I positions were appropriate for representation in *Delaware DHSS, Del. Psychiatric Center & AFSCME LU 640* (Supra.), and therefore should be estopped from taking an opposite position in

this case.

Further LIUNA argues that there is a well established precedent by the National Labor Relations Board (which PERB has acknowledged often provides guidance in interpreting its statutes which are based upon the federal National Labor Relations Act, National Labor Relations Act, 29 U.S.C. § 151 et seq.) that an employer is obligated to bargain when it promotes bargaining unit employees to supervisory positions with a consequent abolition of bargaining unit jobs. It also notes that the New Jersey Public Employment Relations Commission has also been vigilant in "protecting the institutional rights of unions from unilateral diminution of bargaining units by the addition of supervisory duties."

Although LIUNA acknowledges the instant petition does not directly involve a question of the State's bargaining obligation, it argues that to permit the State to assign supervisory duties to a position which clearly is not responsible for such duties under the State's classified system, leads to a perversion of the purpose of the PERA. It results in the denial of representation rights to those employees, based upon a unilateral action by the employer. In order to avoid that result, LIUNA argues the State's petition must be dismissed without resolution of the supervisory question.

STATE:

The State argues that the Motion to Dismiss is premature, as there has not yet been a determination that the Activity Therapists I in issue are supervisory employees within the meaning of 19 Del.C. §1302(s).

The State asserts its agreement that Activity Therapists I employed by DHSS at the Delaware Psychiatric Center are appropriate and eligible for representation in *Delaware DHSS, Del. Psychiatric Center & AFSCME LU 640* (Supra.) was based on a

separate set of facts concerning the job responsibilities of employees holding that position but working in a different facility. It asserts that PERB must review the duties of the positions in question, based on the evidence presented in this case, in order to determine whether those positions meet the statutory supervisory definition. If so, the positions are excluded from representation rights by operation of 19 Del.C. §1302(o).

The State asserts PERB has no statutory authority to make or review merit classification determinations, as that responsibility is charged to the Office of Management and Budget ("OMB"), with appeal and review responsibilities reserved to the Merit Employee Relations Board. 29 Del.C. §5915.

The State denies LIUNA's assertion that it should be required to bargain changes in duties, arguing classification is specifically removed from the scope of bargaining for State merit employees by 19 Del.C. §1311A(a)(1).

DISCUSSION

The PERB is not directly responsible for interpreting or applying the State merit rules. Decisions which have been made vis-à-vis the appropriate classification of positions may, however, be relevant and material to PERB's consideration of supervisory status. This is particularly true where the fundamental difference between two levels of a class series is supervisory responsibility. PERB respects the expertise of the OMB, Human Resource Management Classification division in making its determinations. If supervisory responsibilities of a given position have been deemed not to be sufficient to advance the position to the higher supervisory classification, PERB can and will take that determination into consideration and accord it appropriate weight in making its decision.

In a recent supervisory status decision, PERB required employees to have consequential authority and responsibility to act in the interest of the employer, to

exercise independent judgment and to be accountable for the work of subordinates in order to be found to be a *bona fide* supervisor, *CWA 13101 and Sussex County Emergency Operations Dispatchers*, Rep. Pet. No. 07-02-557, VI PERB 3949 (2/14/08). PERB has been consistently cautious over its history to narrowly construe the supervisory definition because the consequence of determining a position is supervisory is to deny employees rights which the State has statutorily declared should be protected. *In Re: Internal Affairs Officer of WFD*, Del. PERB, Rep. Pet. 95-06-142, II PERB 1387, 1397 (1996).

The Motion to Dismiss filed by AFSCME and joined by LIUNA is conditionally premised on the assumption that the State has presented sufficient evidence to prove the Activity Therapists I at Stockley Center and Governor Bacon Health Center are performing supervisory functions sufficient to meet the 19 Del.C.§1302(s) standard. Based on that assumption, the unions allege the State has committed an unfair labor practice because it has improperly classified these employees, improperly compensated them and by so doing, has deprived them of their right to organize and be represented for purposes of collective bargaining in violation of 19 Del.C. §1307(a)(1), (2), (3), and (5).

The Unit Clarification process is not, however, an alternative to either raising a classification challenge under the Merit law (29 Del.C. Ch. 59) or an unfair labor practice charge. The simple question before me at this time is whether the Activity Therapists I in question are responsible for the exercise of supervisory responsibilities sufficient to exclude them from coverage by the PERA under §1302(o). Without a determination that the Activity Therapists I at Stockley Center and Governor Bacon Health Center meet the supervisory definition, (either by stipulation or a determination based on the evidentiary

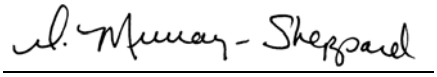
record), dismissing this petition will not result in resolution of their Unit 2 bargaining unit status, as the State has requested in its petition.

DECISION

WHEREFORE, consistent with the discussion above, the Motion to Dismiss is denied. The parties are ordered to resume completion of the record on the merits in this case. As the State has completed its case-in-chief, the hearing will be reconvened for the purpose of receiving evidence from the unions on the scope of the responsibilities of the Activity Therapists I at Stockley Center and Governor Bacon Health Center. Upon completion of the evidentiary record, the parties will be afforded the opportunity to present their arguments. A decision will be issued on the State's petition within thirty (30) days of the close of the record.

IT IS SO ORDERED.

Date: November 21, 2008



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB