

## **PUBLIC EMPLOYMENT RELATIONS BOARD**

## **STATE OF DELAWARE**

<b>AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNION 879,</b>	:	
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	:	
<b>Charging Party,</b>	:	<b><u>ULP No. 09-07-697</u></b>
	:	
	:	
<b>v.</b>	:	<b>Decision on the Merits</b>
	:	
	:	
<b>STATE OF DELAWARE, DEPARTMENT OF TRANSPORTATION,</b>	:	
	:	
	:	
<b>Respondent.</b>	:	
	:	
	:	

### Appearances

*Perry F. Goldlust, Esq., for AFSCME Council 81  
Aaron Shapiro, SLREP/HRM/OMB, for DOT*

## **BACKGROUND**

The State of Delaware (“State”) is a public employer within the meaning of §1302(p) 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 within the meaning of §1302(i) and its affiliated Local 879 is the exclusive bargaining representative within the meaning of 19 Del.C. §1302(j) of the bargaining unit of DOT employees defined by DOL Case 12.

On or about August 3, 2009, AFSME filed an unfair labor practice charge alleging that the State violated 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and §1319, which provide, in relevant part:

§1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

- 1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- 2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- 3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and condition of employment.
- 5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.
- 6) Refuse to reduce an agreement, reached as the result of collective bargaining, to writing and sign the resulting contract.

§1319. Fair Share fees.

- 4) Where the provisions of a collective bargaining agreement so provide, a public employer shall deduct a fair share fee from each nonmember's salary or wages and promptly transmit this amount to the exclusive representative.

On August 12, 2009, the State filed its Answer to the AFSCME's Charge in which it denied the material allegations set forth therein.

On August 24, 2009, AFCME filed its Reply to New Matter in which it denied the material allegations set forth in the State's New Matter.

A Probable Cause Determination was issued on December 9, 2009, in which it was determined the pleadings established probable cause to believe that a violation of 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and §1319, may have occurred.

A hearing was convened by the Executive Director on January 11, 2010, at which time the parties were afforded the opportunity to create a full and complete evidentiary record. The record closed with the receipt of written argument from both parties.

This decision results from consideration of the record thus created by the parties, relevant provisions of the Public Employment Relations Act and decisions issued pursuant thereto, applicable provisions of the parties' collective bargaining agreement, and the positions of the parties.

## **FACTS**

The facts concerning the evolution of the bargaining unit of Department of Transportation employees defined in DOL Case 12, specifically as it relates to maintenance employees who were formerly assigned to the Turnpike Division, have been previously litigated before PERB. In the Executive Director's Unit Clarification Decision (dated August 27, 2008), those facts were set forth and are adopted herein, as follows:

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." 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. In April 1987, AFSCME was decertified as the exclusive representative of this bargaining unit and no successor union was certified.

The Chapman Road Facility ("CRF") 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.

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, which also includes Kiamensi and Talley Road Maintenance Yards. The North District is responsible for all roads "north and west of I-95."

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. 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

*Delaware DOT v. AFSCME Council 81, LU 879, Rep. Pet 07-12-609, VI PERB 4053, 4055, Decision of the Executive Director (Del.PERB, 2008) (citations omitted).*

By decision dated August 27, 2008, PERB's Executive Director "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."

*Delaware DOT v. AFSCME (Supra, p. 4065).* That decision was affirmed by the full PERB on November 7, 2008. *Delaware DOT v. AFSCME Council 81, LU 879, Rep. Pet 07-12-609, VI PERB 4111, Board Decision on Review (Del.PERB, 2008).*

AFSCME and the State are parties to a current collective bargaining agreement which has a term of December 14, 2006 through December 13, 2010. Relevant portions of that Agreement provide:

**ARTICLE 3 – UNION RECOGNITION, UNION SECURITY AND DEDUCTION  
OF UNION DUES AND SERVICE FEES**

**Section 2. Union Security**

- (a) Upon completion of the probationary period, all employees who are not, who do not become or who do not remain members of the Union, shall during any such period of membership [*sic*], as a condition of continued employment, pay to the Union a service fee no greater than the dues uniformly required of its members, in accordance with the Constitution and Bylaws of the Union.
- (b) Any employee hired after April 1, 1964, who has chosen not to become a member of the Union shall continue to remain outside the bargaining unit, unless they otherwise indicate at some future time.

**Section 3. Deduction of Union Dues or Service Fees**

- (a) The State agrees to deduct the monthly Union membership dues or service fees from the earned wages of each employee selecting such option who is covered by this agreement. The Union hereby certifies that its present amount of membership dues or service fees has been fixed pursuant to the Constitution and Bylaws of the Union. In the event the amount of its dues or service fees is hereafter changed, such change shall be provided in writing to the State 30 days prior to any change in dues deduction. The Delaware Public Employees Council 81, AFSCME, and the Local Union jointly and separately agree to hold the State harmless against any and all claims, demands, suits, and other forms of liability that may arise out of or by reason of action taken by the State in connection with the deduction of dues or service fees. The term “dues” or “service fees” shall not be deemed to include any fine assessment, contribution or other form of payment required from AFSCME members.

On or about July 20, 2009, AFSCME sent the following letter to the State's Director of Labor Relations and Employment Practices:

On November 12, 2008, the Public Employment Relations Board issued its decision confirming the Executive Director's determination that “all Division of Highway Maintenance and Operations positions, including those assigned to the Chapman Road Facility are included within the bargaining unit defined by DOL Case 12, as currently represented by

AFSCME Local 897."

We are now refreshing our requests of more than a year ago (see letter of November 3, 2007) to enforce the provisions of the Collective Bargaining Agreement. We have contended from the beginning that the State had the obligation to make the deductions and has intentionally chosen not to comply. Despite the State's lack of authority to protect individual employees, the State has chosen to represent the interests of employees to the detriment of the Union. As the State has the power and the right to make the deductions, the Union will hold the State responsible for the unpaid dues. Once the PERB decision was made as to the bargaining unit, we had anticipated that a message "that the war was over" would be communicated to the Department and the employees of the Department. The State, however, has chosen to support the non-Union effort.

We regret that the State and the Department have pushed the Union to the wall on this matter. However, we cannot continue to let these people get special treatment. It is bad for the Union, and it is bad for the State if not the Department. Unless we hear otherwise, the Union will file its unfair labor practice in the next 5 days. *Union Exhibit 6.*

It is undisputed that there are eight individual CRF employees to whom the MOA continues to be applied. It is also undisputed that AFSCME has not requested each of these individuals either join the union or pay a service fee and that they each make a selection as to the method by which his or her financial obligation will be met, as required by the collective bargaining agreement.

### **ISSUE**

WHETHER THE EMPLOYER, DOT, VIOLATED 19 DEL.C. §1307(A)(1), (2), (3), (5), (6) AND §1319, BY FAILING OR REFUSING TO DEDUCT FAIR SHARE FEES FROM CERTAIN DOT EMPLOYEES AT ITS CHAPMAN ROAD FACILITY, AS ALLEGED.

### **APPLICABLE STATUTORY PROVISIONS**

#### **§ 1301. Statement of policy.**

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their

employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations;

### **§ 1302. Definitions.**

- (k) "Fair share fee" means a fee that a nonmember shall be required to pay to the nonmember's exclusive representative to offset the nonmember's pro rata share of the exclusive representative's expenditures. Such fee shall be equal in amount to regular membership dues that a member of the exclusive representative's affiliated organizations, provided that the exclusive representative establishes and maintains a procedure by which any nonmember fee payer may obtain a rebate.

### **§ 1303. Public employee rights.**

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.

### **§ 1304. Employee organization as exclusive representative.**

- (c) Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative and shall deliver the same to the treasurer of the exclusive bargaining representative. Such authorization is revocable at the employee's written request. Such deduction shall commence upon the exclusive representative's written request to the employer. Such right to deduction shall be in force for so long as the employee organization remains the exclusive bargaining representative for the employees in the unit. The public employer is expressly prohibited from any involvement on the collection of fines, penalties or special assessments levied on members by the exclusive representative. (19 Del. C. 1953, § 1303; 55 Del. Laws, c. 126; 69 Del. Laws, c. 466, § 1.)

### **§ 1319. Fair share fees.**

- (a) Where the provisions of a collective bargaining agreement so provide, a public employer shall deduct a fair share fee from each nonmember's salary or wages and promptly transmit this amount to the exclusive

representative.

(b) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a procedure that:

- (1) Provides nonmembers with an adequate explanation of the basis for the fee and any rebate;
- (2) Provides nonmembers with a reasonably prompt opportunity to challenge the amount of the fee and any rebate before an impartial decision maker; and
- (3) Provides an escrow for the amounts reasonably in dispute while such challenges are pending.

A public employer shall not refuse to carry out its obligations under subsection (a) of this section on the grounds that the exclusive representative has not satisfied its responsibilities under this subsection.

(c) In order to avoid undue delays in the receipt of and determination of the validity of fair share fees or rebates, any suit challenging a fair share fee or rebate must be filed within 6 months after receipt of the notice described in subsection (b) of this section or within 6 months after the nonmember exhausts the procedure described in subsection (b) of this section, whichever is later. (73 Del. Laws, c. 353, § 4.)

## **POSITIONS OF THE PARTIES**

### **AFSCME LU 879:**

AFSCME argues the 2003 MOA is voidable and unenforceable because it was improperly negotiated by the State to protect the interests of a particular group of bargaining unit employees, under the PERA. It argues the State's action dominated, interfered with, assisted or discouraged membership in the union by encouraging or discouraging membership through discrimination in tenure and/or terms and conditions of employment. It asserts that the State's goal in negotiating the 2003 MOA was "to save the CRF employees money by not requiring them to pay the fair-share fee that every other non-member person in the collective bargaining unit pays to the Union." AFSCME argues the State lacks standing to negotiate over the internal policies of the Union.

The PERA was amended in 2002 to address the obligation of non-members<sup>1</sup> to pay fair share fees. The General Assembly protected public employees' constitutional rights to freedom of association (i.e., employees cannot be forced to join the union) but balanced that right with the requirement that those bargaining unit employees who chose not join the union could be required to pay a fee "to offset the nonmember's pro rata share of the exclusive representative's expenditures."<sup>2</sup> *19 Del.C. §1302(k)*. AFSCME argues the statute requires that so long as the union is able to negotiate a provision in the collective bargaining agreement which requires an employee to either join the union or pay a fair share fee as a condition of employment, the State has no choice but to deduct service fees from the wages of bargaining unit employees.

Despite the 2002 changes in the law, AFSCME did enter into the MOA with the State. That agreement, however, is now either void or voidable because AFSCME has greater responsibilities for representation of bargaining unit employees because the scope of bargaining for State merit employees was expanded in 2007 to include compensation. AFSCME placed the State on notice in November, 2008, that it was terminating the MOA in response to its expanded representational obligations, and demanded the State begin deducting fair share fees from the former CRF employees. The State refused to initiate the deductions. By so doing, AFSCME asserts the State has violated the statute.

AFSCME argues the State has expended considerable time and expense "to protect the CRF employees from the rule of the majority and to continue to keep them eligible for the benefits of the collective bargaining agreement," at no cost to these

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<sup>1</sup> "Nonmember means an employee who is not a member of the exclusive representative but whom the exclusive representative is required to represent pursuant to this chapter." *19 Del.C. §1302(n)*.

<sup>2</sup> The statute further states, "Such fee shall be equal in amount to regular membership dues that a member of the exclusive representative's affiliated organizations, provided that the exclusive representative establishes and maintains a procedure by which any nonmember fee payer may obtain a rebate." *19 Del.C. §1302(k)*

“special” employees. Because the State chose to act to protect the interests of these employees in violation of 19 Del.C. §1307(a)(1), (2), (3), (5) and (6), and its statutory fair share obligations, AFSCME asserts the State should bear the consequences of its failure or refusal to follow the law. AFSCME requests the State be required to pay to the union “the prevailing fair share in a lump sum plus interest calculated at the Federal Discount Rate from the date the funds were due for the period of January 1, 2008 until current and to maintain such payments current until such time as the employee’s employment has terminated or if the employee moves into a non-union position with the State.” *AFSCME Closing Argument*, p. 7.

STATE:

The State argues it has fully and faithfully complied with the terms of the 2003 Memorandum of Agreement, a mutually binding agreement between these parties, and that there is no basis in fact or in law to support AFSCME’s unfair labor practice charge. Even if the MOA is determined to be inapplicable or unenforceable, the collective bargaining agreement does not mandate the employer withhold dues or service fees without the employee’s authorization. There has been no representation by AFSCME to the employer that the affected employees have failed or refused to meet their financial obligations to the union.

There is no support for AFSCME’s charge that the employer has interfered with union’s rights under the PERA, and has acted to “protect” the employees. The evidence of record supports the State’s position that it has simply complied in good faith with the terms of the negotiated MOA.

AFSCME has failed to establish that it has a legal right to unilaterally abandon or rescind the 2003 MOA. It has failed to articulate any legal standard, principle or

precedent which supports its claim that increasing the scope of bargaining for bargaining unit employees in some way negates the parties' existing agreement concerning the application of a union security provision to bargaining unit employees.

The State requests the Charge be dismissed in its entirety.

## **DISCUSSION**

The full PERB clearly and unequivocally defined the status of the CRF employees at issue here in its decision on review of the Executive Director's bargaining unit clarification decision:

[The State] errs, however, in its assertion that the ten positions in question are "unrepresented" and are therefore guaranteed the right to vote in a secret ballot election under the PERA. Bargaining units are defined by positions; the employees at the CRF hold positions in DOT, New Castle County Division of Highway Maintenance and Operations and fall within the DOL Case 12 bargaining unit. AFSCME Local Union 879 is the certified exclusive bargaining representative of all positions in that bargaining unit. *Delaware DOT v. AFSCME Council 81, LU 879, Rep. Pet 07-12-609, VI PERB 411, 4113, Board Decision on Review (Del.PERB, 2008)*.

The Board affirmed the Executive Director's determination that the CRF positions in question "fall within the existing bargaining unit defined by DOL Case 12", finding,

... the former Turnpike Division maintenance positions were absorbed into DOT maintenance staff and were no longer organizationally distinct from other maintenance divisions 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. *Delaware DOT v. AFSCME Council 81, LU 879, Rep. Pet 07-12-609, VI PERB 4053, 4063, Decision of the Executive Director (Del.PERB, 2008)*.

As of its November 7, 2008 decision, the PERB determined the remaining ten CRF employees to whom the MOA then applied, in fact, held bargaining unit positions. Consequently, the provisions of that MOA defining the "bargaining unit status" of former

CRF employees were mooted by the Board's decision. Once the positions were clarified on November 7, 2008, to be bargaining unit positions, the union security provisions of the collective bargaining agreement were applicable to those employees.

There is no question that the PERA permits public employers and exclusive bargaining representatives of their employees to enter into agreements which require the payment of a service fee as a condition of employment and further that the parties may also negotiate concerning applicability of the union security provisions as well as the process for collecting those fees. 19 Del.C. §1303; §1304; §1319; *Family Court and UFCW Local 27*, D.S. 09-06-684, VI PERB 4363, 4368 (Del.PERB, 2009). As clearly stated in Article 3, §2 of the collective bargaining agreement, all bargaining unit employees are required to pay either dues (should they choose to become members of the union) or a service fee (for any period of their permanent employment in which they decline to be a member) "as a condition of continued employment".

The parties have also negotiated in Article 3, §3(a), that the employer will deduct monthly dues or service fees from the earned wages of "each employee selecting such option" who is covered by the collective bargaining agreement. Failure or refusal to select payment of the dues or fee through payroll deduction does not relieve employees of their obligations to pay union membership dues or non-member service fees "as a condition of employment." Full payment of the moneys owed to the exclusive bargaining representative (union) pursuant to the terms of the statute and the service fee provision of the contract is a condition an employee must meet in order to maintain eligibility for employment. *Family Court*, p. 4369. As stated by the Chancery Court in *Alvini, et al., v. Colonial School District et al*<sup>3</sup>., "the Act does not implicitly guarantee to public ... employees a right to work free of the obligation to pay their fair share of the costs

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<sup>3</sup> *Alvini, et al., v. Colonial School District et al.*, CA 13019, II PERB 909, 920, (Chan. Allen, 1993)

associated with the collective bargaining process.”

It is undisputed that AFSCME has not demanded that the former CRF employees meet their statutory obligation to provide financial support for representation either through payroll deduction or direct payment since the unit clarification was finalized in November, 2008. Article 3, §3(a) of the negotiated agreement specifically provides bargaining unit employees with the right to select the method by which he or she will meet the financial obligation. Meeting the obligation, however, is not an option; it is a condition of continued employment.

There is no question that meeting the financial obligation through payroll deduction is a convenient method for both the union and the employee, and the PERA permits a public employer to withhold those fees from the wages of bargaining unit employees, where the collective bargaining agreement so provides. 19 Del.C. §1319(a). Employees can also meet their obligations by making regular direct payments to the union, so long as such payments are received in a timely manner.

It is the employee’s responsibility to ensure that he or she remains eligible for continued employment by meeting the financial obligation for the representation the union is obligated to provide. The employer is not a party to the financial relationship between the Union and the bargaining unit employee. At the point an employee who chooses not to become a member of the union declines, refuses or becomes delinquent in meeting his service fee obligation, he is no longer meeting a requisite condition for continued employment. Upon notice by the union to the employer, the employee must be terminated as he or she is no longer eligible to remain employed under the terms of the collective bargaining agreement and the Public Employment Relations Act.

The Charge does not raise a timely allegation that the State violated its obligations under the PERA when the MOA was negotiated. There is no question that the MOA

resulted from negotiation between the parties and that AFSCME was a signatory to the agreement. There was no charge at the time of its execution that the agreement was coerced or unilaterally imposed. It is also relevant that the MOA was reached and executed after the statutory modifications concerning fair share fees and that the applicable collective bargaining agreement which provides that employees must select payroll deduction has a term which began December 14, 2006, well after the 2002 statutory modifications.

Finally, the dissolution of the MOA does not result from the 2007 statutory modifications to the PERA which expanded the scope of bargaining for State merit employee units to include compensation under 19 Del.C. §1311A. While the statutory changes may have provided the impetus for AFSCME to re-examine or reconsider its financial base, those changes did not alter the fundamental structure and process for determining bargaining unit composition and representation status.

The record does not support the charge that the State has failed or refused to meet its statutory obligations or has otherwise interfered with the rights of the union or of bargaining unit employees. There is no evidence or applicable legal standard to support AFSCME's charge that the State was obligated to unilaterally institute payroll deductions of fair share fees from the former CRF employees and/or that it "intentionally chose not to comply", as asserted in this Charge and in AFSCME's letter of July 20, 2009. The State's "power and right to make the deductions" is limited by the terms of the negotiated collective bargaining agreement, which provides all bargaining unit employees with the "option to select" payroll deduction as the method by which they meet their financial obligations for representation.

AFSCME has self-help available to it in the terms of the agreement. It has the right under the statute to negotiate payment of dues or fair share fees as a condition of

employment and, with the agreement of the State, the applicable collective bargaining agreement does include a union security provision. At the point that any individual employee chooses not to meet the obligation to provide appropriate financial support for representation, the union's recourse is to advise the employer that the employee has failed to meet a condition of employment. The employer, at that time, is obligated to terminate the employment relationship.

Having found no conduct by the State in violation of the statute, the charge is dismissed and the requested remedy is denied.

### **CONCLUSIONS OF LAW**

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

2. The American Federation of State, County and Municipal Employees, Council 81, ("AFSCME") is an employee organization within the meaning of §1302(i) and its affiliated Local 879 is the exclusive bargaining representative within the meaning of 19 Del.C. §1302(j) of the bargaining unit of DOT employees defined by DOL Case 12.

3. AFSCME and DOT are parties to a current collective bargaining agreement which has a term of December 14, 2006 through December 13, 2010, which includes a Union Security provision which requires non-probationary employees who choose not to join the union to pay a fair share fee as a condition of continued employment. Article 3 of the parties' agreement also requires the State to "deduct monthly Union membership dues or service fees from the earned wages of each bargaining unit employee selecting such option".

4. By decision dated November 7, 2008, the Public Employment Relations

Board affirmed the Executive Director's determination 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.

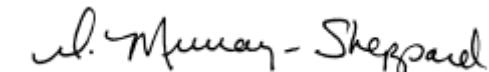
5. As November 7, 2008, the 2002 Memorandum of Agreement between AFSCME Local 879 and DOT (which defined the "bargaining unit status" of former CRF employees) was mooted by the Board's decision. Once the positions were clarified to be bargaining unit positions, the union security provisions of the collective bargaining agreement were applicable to those employees.

6. The record does not support AFSCME's Charge that the State has violated 19 Del.C. §1307(a)(1), (2), (3), (5), (6) and/or §1319, by failing or refusing to unilaterally withhold service fees from the former CRF employees.

**WHEREFORE**, the Charge is hereby dismissed.

**IT IS SO ORDERED.**

DATE: June 7, 2010



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.