PUBLIC EMPLOYMENT RELATIONS BOARD

FOR THE STATE OF DELAWARE

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL UNIONS 320 AND 1102,	:	
	:	ULP 10-08-761
Petitioners,	:	ULP 10-10-767
	:	
v.	:	**DENIAL OF PERB RULE 7.6 APPLICATION FOR DEPOSITIONS**
	:	
CITY OF WILMINGTON, DELAWARE,	:	
	:	
Respondent.	:	

APPEARANCES

Perry F. Goldlust, Esq., for AFSCME

Martin C. Meltzer, Esq., Deputy City Solicitor, for Wilmington

On November 10, 2010, AFSCME Council 81, Locals 320 and 1102 made application to the Public Employment Relations Board for the right to depose seven City of Wilmington officials concerning information AFSCME sought in a May 28, 2010 letter (which is the subject of Unfair Labor Practice Charge No. 10-08-761) and information it sought in a September 7, 2010 letter (which is the subject of Unfair Labor Practice Charge No. 10-10-767).

On November 12, 2010, the City objected to AFSCME's application by submission received asserting the application was fatally flawed because,

- The application unilaterally consolidates the two unfair labor practice charges without the approval of the Public Employment Relations Board;
- The requested depositions are premature, overly burdensome and there is no reasonable showing that they are necessary at this point in the litigation;

- The issue in ULP 10-08-761 is a question of law. The requested deposition will have no influence on PERB's determination of the issue in that case;
- There is no reasonable foundation to depose any of the individuals listed in the application for ULP 10-10-767 as the issue there is who is responsible to pay the costs for a FOIA request;
- AFSCME's application of PERB Rule 7 is misplaced as that subsection pertains to formal hearings. There are no hearings scheduled at this time for either case.

DISCUSSION

PERB Rule 7, Formal Hearings, includes subsection 7.6, Depositions, which provides, in relevant part:

> (a) Witnesses at all hearing shall be examined orally under oath or affirmation, and a record of the proceedings shall be made and maintained by the Board. If any witness resides outside of the State or through illness or other cause is unable to testify before the Board, his or her testimony may, upon application, be taken by deposition.
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> (b) Application to take depositions under this section shall be in writing or may be made orally at a hearing. The application shall set forth the reasons why such deposition should be taken, the name and post office address with zip codes of the witness, and the time and place proposed for taking of the deposition. Such order shall be served on all parties. Such deposition may be taken before any court reporter authorized to administer oaths by laws of the State or of the United States or of the place where the examination is held. The cost of the deposition shall be borne by the party at whose request the deposition is ordered.

The rule permits deposition of a witness under a limited set of circumstances, namely that the witness "…resides outside of the State or through illness or other cause is

unable to testify before the Board." In conformity with that limitation, the rule requires the application to set forth the reason why such deposition should be taken.

It is well established under Delaware law that this State's statutes governing collective bargaining and labor relations in the public sector are patterned on the National Labor Relations Act. Similarly, the Rules and Regulations of the Delaware Public Employment Relations Board are informed by regulatory precedent established by the NLRB and similar agencies in other states. PERB Rule 7.6 is substantially similar in purpose to NLRB Rule 102.30.

The Federal Rules of Civil Procedure, which provide for compulsory pretrial discovery, do not apply to proceedings before the PERB. There is no provision in the PERB rules for prehearing depositions for discovery purposes. Rule 7.6 provides for the preservation of testimony or witnesses who are unable to attend a hearing, where good cause is shown to support the application.

The 2nd Circuit Court of Appeals reviewed and explained the purpose of the NLRB Rule 102.30, concerning depositions in *NLRB v. Interboro Contractors, Inc.,* [1]

> It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right. Starr v. Commissioner, 226 F.2d 721, 722 (7th Cir), cert.denied 350 US 993 (1955); Miner v. Atlass, 363 US 641 91960). In fact, until Rule 26 of the Federal Rules of Civil Procedure (FRCP) became effective in 1938, pre-trial discovery was not available in the federal courts. Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures. NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 752, 29 LRRM 2319 (9th Cir., 1951). Although section 6 of the Act does give the Board the necessary rule-making power to carry out the Act, the provision places the Board under no obligation to adopt particular pre-trial procedures. Indeed several cases arising under the Act have held that, although the Board may possess the necessary rule-making power, the circumstances under which discovery will be permitted is a matter

[1] 432 F.2nd 854, 75 LRRM 2459, 2461 Cir., 1970).

committed to the Board's discretion. See Electromee Design v. NLRB, 409 F.2d 631, 635, 70 LRRM 3255 (9th Cir., 1969); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407, 47 LRRM 2670 (7th Cir.), cert. denied 368 US 823, 48 LRRM 3111 (1961); North American Rockwell Corp. v. NLRB, 389 F.2d 866, 871-872, 67 LRRM 2603 (10th Cir., 1968).

The predecessor of the present Board Rule 102.30 was adopted and became effective in 1935, three years before Rule 26 of the FRCP entitled litigants in federal courts to take depositions "for the purpose of discovery." That Board Rule was patterned after former Equity Rule 47, which Rule 26 of the FRCP superseded, and which permitted the taking of depositions "upon good and exceptional cause" for the purpose of obtaining and preserving evidence for trial, not for the purpose of discovery.[2] The Board's Rule has not changed substantially; it did not then authorize, and has not since authorized the taking of depositions for discovery purposes. The Board has consistently upheld this interpretation and has construed the Rule as requiring more than a showing that the taking of depositions would aid counsel in the preparation of his case for trial. See Mastro Plastics Corp., 136 NLRB 1342, 1344, n.7, 50 LRRM 1006 (1962), enforced in relevant part, 354 F.2d 170, 60 LRRM 2578, cert. denied 384 US 972, 62 LRRM 2292 (1965); Van Raalte, Inc., 69 NLRB 1326, 1327, 18 LRRM 1312 (1946); Walsh-Lumpkin Wholesale Drug Co., 129 NLRB 294, 296, n.8, 46 LRRM 1535 (1960); Plumbers and Steamfitters Union Local 100, 128 NLRB 398, 400, n. 8, 46 LRRM 1316, enforced 291 F.2d 927, 48 LRRM 1316, enforced 291 F.2d 927, 48 LRRM 2544 (5th Cir., 1961); Del E. Webb Constr. Co., 95 NLRB 377, n. 2, 28 LRRM 1319. In short, Rule 102.30 does not on its face, or as interpreted by the Board, provide for the taking of depositions for the purpose of pre-trial discovery.

The Board's policy, moreover, is a logical one. Indeed other administrative agencies have the same policy. In FMC v. Anglo-American Shipping Co., 335 F.2d 255 (9th Cir., 1964), the Ninth Circuit held that the Merchant Marine Act does not warrant, much less require, the adoption of pre-trial discovery procedures by the Federal Maritime Commission. The same result has been reached in proceedings in which pre-trial discovery has been sought before the Tax Court of the United States. See Louisville Buildings Supply Co., 294 F.2d 333, 339-342 (6th Cir., 1961). The Administrative Procedure Act contains no provision for pre-trial discovery in the administrative

[2] FN in *Interboro* decision: "As the Historical Commentary to Rule 26, FRCP, indicates (at p. 291), 'Equity Rule 47 authorized… taking depositions of named witnesses for use at the trial for good and exceptional cause for departing from the general rule, the general rule being 'no depositions'. The purpose here was not discovery but obtaining proof.' (quoting from 45 W.Va L.Q. 5).

> process and our research discloses no federal agency which gives litigants the right to pre-hearing discovery in proceedings before it.

In the present matter, no formal hearing is pending concerning either unfair labor practice charge nor does AFSCME's application set forth reasons why the named individuals would be unable to attend a hearing to testify. When and if a hearing is scheduled for either or both of the charges, AFSCME will have the option to subpoena witnesses to testify.

For these reasons, the application is premature and does not comply with the requirements of PERB Rule 7.6 for the issuance of an Order to Depose.

DECISION

AFSCME's Application for Depositions is denied.

IT IS SO ORDERED.

DATE: November 17, 2010

D. Murray-Sheppard

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