

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

<b>AMERICAN FEDERATION OF STATE, COUNTY,</b>	)	
<b>AND MUNICIPAL EMPLOYEES, AFL-CIO,</b>	)	
<b>COUNCIL 81, LOCAL 837,</b>	)	
	)	
<b>Charging Party,</b>	)	
	)	<b><u>ULP No. 10-12-780</u></b>
<b>v.</b>	)	
	)	
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	)	
<b>TRANSPORTATION,</b>	)	
	)	
<b>Respondent.</b>	)	

**Appearances**

*Perry F. Goldlust, Esq., for AFSCME Local 837*

*Aaron Shapiro, SLREP/HRM/OMB for DOT*

**BACKGROUND**

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

The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, through its affiliated Local 837, is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of certain employees of DOT within the meaning of §1302(j), of the Act.

The above-captioned unfair labor practice charge was filed on or about December 15, 2010. The charge alleges conduct by the State in violation of §1307(a)(2) and (a)(3)

of the PERA.<sup>1</sup> A Probable Cause Determination issued on May 24, 2011, dismissed the charge in its entirety except as it pertained to a letter dated November 16, 2010, sent by four (4) DOT supervisors to Local 837 bargaining unit employees. The letter was addressed “Dear Fellow Union Member.” The letter encouraged recipients to stop paying membership dues and to decertify the Union. AFSCME alleges that upon information and belief, the letter was prepared and distributed by the supervisors while they were working on State paid time and with the permission and assistance of DOT management.

A hearing was held on September 12, 2011. But for a copy of the Governor’s Executive Order 10 pertaining to Union activity, neither party presented any testimony or documentary evidence during the hearing. Closing argument was provided in the form of post-hearing briefs. The record closed on December 6, 2011, following receipt of the Union’s reply brief. The following discussion and decision result from the record thus compiled.

### **SUMMARY POSITIONS OF THE PARTIES**

#### **AFSCME:**

1. The letter sent by the dissidents was, on its face, an effort to interfere in the exercise of a protected right by the Union in that it openly solicits the decertification of the Union. The dissidents addressed the November 16, 2010, letter to, “fellow union members” despite their personal knowledge that this statement was not true. The dissidents signed the letter using their official job title of “supervisor”.

2. All of the evidence supports the conclusion that the action taken by the

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<sup>1</sup> §1307, Unfair Labor Practices, (a). It is an unfair labor practice for a public employer or its designated representative to do any of the following: (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 conditions of employment.

dissidents was in furtherance of the Employer's goal to weaken if not decertify the Union. To support this allegation the Union cites an inquiry by DOT's Human Resources Department about the Union's dues and service fee structure and the November 16, 2010 letter from the dissidents and the attenuating circumstances, including that the letter was sent by DOT supervisors.

3. The Union has carried its burden of establishing that DOT sought to discourage membership in the Union and ultimately have the Union decertified in violation of the Governor's Executive Order and the PERA.

Citing several private sector decisions by the federal courts reviewing decisions by the National Labor Relations Board ("NLRB"), the Union argues that circumstantial evidence is sufficient to support a finding of union animus on the part of an employer. Once established, the burden shifts to the employer to establish that it played no part nor had any responsibility insofar as the occurrence of the underlying incident. AFSCME further argues that DOT's anti-union history is relevant to the present charge.

DOT refuses to acknowledge that it is responsible for the actions of its employees and agents acting under its direct or apparent authority. DOT did not present any evidence to establish a legitimate motive or to refute the conclusion that it violated the Governor's Executive Order or the PERA. To the contrary, the Employer introduced no evidence that would shift the burden back to the Union.

State:

The burden to establish by "clear, convincing and substantial evidence" the statutory violations alleged in an unfair labor practice charge rests upon the charging party. As set forth in the Probable Cause Determination, the Union's burden in this matter

applies to the, “creation, distribution and/or content” of the November 16, 2010 letter. AFSCME has provided no direct evidence of improper conduct by DOT.

When greater detail beyond the allegations that the letter existed and may have been distributed during State paid work time was requested AFSCME did not respond. DOT, however, initiated an investigation which failed to validate AFSCME’s claims. When DOT subsequently learned that a single employee may have been involved in distributing the letter in the workplace it counseled that employee that doing so was improper and should not occur again in work areas during scheduled working hours.

DOT further denies any inference that by using their work title of “supervisor” the letter’s signatories acted in concert with the Employer. Beyond the absence of any direct evidence supporting AFSCME’s allegations, the record is void of any circumstantial evidence to this effect.

### **DISCUSSION**

The Probable Cause Determination dismissed AFSCME’s allegations relating to other incidents and limited further consideration of the Charge to:

The remaining incident alleged in the Charge concerns allegations that DOT was involved, supported, and/or had knowledge of the distribution of the November 16, 2010, letter from the four (4) supervisors named in the Charge to all Local 837 members. The pleadings establish factual discrepancies concerning the distribution of the letter, specifically as to whether DOT “permitted the supervisors to use State mail to distribute anti-union material while being paid by the State”, whether DOT condoned the supervisors’ use of their supervisory titles in communicating with other bargaining unit members to advocate for decertification of the union, and/or whether DOT condoned or supported the supervisors who communicated as “fellow union members” when DOT knew they were not, in fact, members of Local Union 837.

... This probable cause relates exclusively to the allegations concerning DOT's involvement, if any, in the creation, distribution and/or content of the November 16, 2010 letter from the four bargaining unit supervisors to other Local 837 bargaining unit members.

A hearing will be convened forthwith to address the factual issues raised by the pleadings concerning this incident.

Other than AFSCME's submission of the Governor's Executive Order 10 during the brief unfair labor practice hearing, no direct evidence was entered into the record by either party. To support its position and satisfy its burden of proof the Union relies solely upon the pleadings and documents attached as exhibits to the Charge. No testimony was offered and no rationale for its failure to do so was put forth by AFSCME except to assert its belief that the pleadings are sufficient to prove its case.

The decision by the Union not to present evidence in support of its position ignores the finding of the Probable Cause Determination and is fatal to the Union's case. Persuasive rationale for the denial of the Union's claim and the dismissal of the Charge is set forth in the State's closing brief which provides, in relevant part:

The only relevant issues in this case, as established by the probable cause determination, are whether DOT was involved with the creation and distribution of the letter, and whether it condoned the use of supervisory titles and the representation of union membership status. With regard to these specific issues, the record is completely devoid of any evidence detailing when, where or how the letter was drafted, who knew of its creation other than the signatories, how, when or where it was reproduced or – most importantly – whether DOT management had any knowledge of the letter until AFSCME provided notice of its distribution. The letter itself is not printed on any type of letterhead, and contains no institutional or organizational references – other than to AFSCME - and no reference to DOT in general or any DOT management representatives.

Despite the clear delineation of the scope of the probable cause determination and the matters to be examined, AFSCME has failed to produce a single piece of direct or

circumstantial evidence that demonstrates – even inferentially that any DOT management representative knew or had any reason to know that the employees were preparing the letter, the contents of the letter, the manner and resources used to draft the letter, when it was drafted, or when and how it was reproduced. Nor has AFSCME offered a single piece of evidence to demonstrate that DOT knew about the intended or actual method of distribution *before* it was distributed and AFSCME lodged its complaint with DOT, or evidence that supports AFSCME’s allegations about how the letter may have been distributed.

. . . The State’s position in this matter is not about the *weight* of the evidence. Rather, it is quite simply that AFSCME has not and cannot provide a single item of direct or compelling circumstantial evidence to support its claims about DOT’s involvement with the letter. Even when provided the opportunity to create a full evidentiary record beyond the confines and limitations of the pleadings process, it affirmatively chose to waive the opportunity to expand the record, and declined to present any testimony or relevant documentary evidence to support its claims.

In addition to the foregoing comments, the failure to present any testimonial evidence deprives the opposing party of its right test the veracity and accuracy of evidence through cross examination. It further compromises the validation of documentary evidence and deprives the trier of fact of the opportunity to make credibility determinations or to question witnesses if he or she deems necessary.

At page thirteen (13) of its closing argument AFSCME asserts “DeIDOT refuses to believe that it is responsible for the actions of its employees and agents acting under its authority or acting under its implied authority.” AFSCME’s argument is overly broad and unpersuasive. 19 Del.C. §1307(a) provides, in relevant part, “ It is an unfair labor practice for a public employer *or its designated representative* to do any of the following:” (emphasis added) The Union has produced no evidence that DOT or its designated representative played any role in the drafting, reproducing or the distribution of the November 10, 2010 letter. Nor was evidence produced to support the conclusion or

inference that the signatories of the letter were acting as designated representatives of DOT.

Not every person has the statutory capacity to commit an unfair labor practice. AFSCME contends that the signatories to the letter acted as designated representatives of DOT simply because they are supervisors. The mere presence of supervisory status does not, in and of itself, impose derivative responsibility upon the employer. Supervisory status does not convey a general grant of authority so that supervisors become the designated representative of the employer for all purposes. Their authority is limited to their operational responsibilities. For this reason, the element of “apparent authority” is not established here as the letter in question does not constitute an operational responsibility within the scope of a supervisor’s expected job-related duties. Nor does the statute provide that the element of apparent authority is sufficient to transform employees into designated representatives of the employer concerning their every act.

AFSCME’s position fails to recognize that employees periodically engage in conduct at work without either the prior knowledge or authorization of the employer and without the power to bind the employer. *Lake Forest Ed. Assn. and Lynda Rae Gannon v. Sarah Williams*, ULP No. 86-02-007, Del. PERB, I PERB 175 (1986).

The record here provides no basis for determining that the actions attributed to the Respondent were other than those of individual employees and not of designated representatives of the employer. As a matter of law, supervisory status is not sufficient to automatically confer upon individuals the status of designated representative for every activity in which they choose to participate while at work. (Supra.)

The PERB has no authority to resolve issues concerning the application of a gubernatorial mandate; therefore, Executive Order No. 10 has no bearing upon the

resolution of this Charge.

**CONCLUSIONS OF LAW**

1. The State of Delaware is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13.

2. The Department of Transportation is an agency of the State.

3. The American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, through its affiliated Local 837 is an employee organization within the meaning of §1302(i), of the Act and the exclusive bargaining representative of certain employees of DOT within the meaning of §1302(j), of the Act.

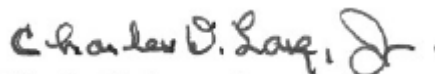
4. The signatories to the November 10, 2010 letter were not acting as designated representatives of DOT.

5. The record is insufficient to establish that DOT was involved with the creation and/or distribution of the November 16, 2010, letter or that it condoned the use of supervisory titles or the representation of union membership status by its authors.

6. The State did not violate 19 Del.C. §1907(a)(1) and (a)(2), as alleged.

**WHEREFORE, THE CHARGE IS DISMISSED IN ITS ENTIRETY.**

Date: January 13, 2012



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Charles D. Long, Jr.  
Hearing Officer  
Del. Public Employment Relations Board