

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CITY OF DOVER, DELAWARE,	:	Representation Petition
	:	<u>No. 12-07-870</u>
and	:	
	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND	:	DECISION OF THE
MUNICIPAL EMPLOYEES, COUNCIL 81, AFL-	:	BOARD ON REVIEW
CIO.	:	

APPEARANCES

*Glenn C. Mandalas, Esq., and Michael J. Hoffman, Esq., Baird, Mandalas, LLC,
for the City of Dover*

Lance Geren, Esq., Freedman & Lorry, P.C., for AFSCME Council 81

BACKGROUND

The appellant, City of Dover, Delaware ("City"), is a public employer within the meaning of §1302(p) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13.

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

On or about July 27, 2012, AFSCME filed a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative with the Delaware Public Employment Relations Board ("PERB"), seeking to represent a bargaining unit comprised of unrepresented City employees.

On August 7, 2012, the City filed its response in opposition to the petition. The City asserted the proposed unit was inappropriate because the employees in the group did not share a community of interest, It also argued the proposed unit would have an adverse effect on the efficient administration of government. The City objected to the inclusion of 29 positions asserting they were ineligible for representation because: 1) they were either “confidential” or “supervisory” as those terms are defined in 19 Del.C. §1302; 2) five part-time positions did not fall within the proposed unit definition; and 3) the Tax Assessor position should be excluded because it is a Department Head.

A prehearing conference was convened by the PERB, followed by a public evidentiary hearing on October 19, 2012. The parties were afforded the opportunity to submit written post-hearing argument which was received on or about November 13, 2012. The Executive Director issued her decision December 21, 2012, finding:

Based on the record created by the parties and the specific circumstances unique to this case, there is persuasive support to conclude that an appropriate bargaining of “administrative, professional and managerial employees” exists...

I note that “administrative” as used in this definition includes positions which are differentiated from the positions in the DOE¹ unit who do similar work by the higher level of technical expertise required to perform their duties and their responsibilities for drafting and formatting of reports to be used by their superiors in developing policy and monitoring the operations of the City. “Managerial employees”, although that term is not defined in the statute, are differentiated from the positions in the DOE unit who do similar work by the higher level of responsibility these employees have for oversight of processes and other employees involved in direct services and coordination with other departments to ensure the effective and efficient delivery of services to the City’s residents. “Technical and professional employees” require higher level skills, specialized education and/or training in order to perform the functions of their positions.

On January 9, 2013, the City requested the full Public Employment Relations Board review the Executive Director’s decision, asserting the bargaining unit determination is

¹ Dover Organization of Employees (“DOE”) represents an existing bargaining unit of City employees

“unsupported by the record and is arbitrary, capricious, or otherwise contrary to law.” The Board received a written submission from AFSCME in support of the decision on or about January 14, 2013. A copy of the complete record in this matter was provided to and reviewed by each member of the Board.

The full Board convened in public session on January 16, 2013 to consider the City’s Request for Review of the Executive Director’s decision. Following consideration of the complete record below and the arguments of the parties on review, the Board unanimously reached the following decision.

DISCUSSION

Upon review of the record and consideration of the arguments presented on appeal, the Board finds the Executive Director’s bargaining unit determination is consistent with the law and PERB precedent, is supported by the evidence of record and is neither arbitrary nor capricious.

The City argues the Executive Director failed to identify a community of interest between the positions she determined to be appropriate, arguing the positions have varied duties and a wide range of responsibilities across City government. It asserts the decision ignores prior precedent and gave undue consideration to the fact that the positions are on a common pay scale. The City also contends the Executive Director misunderstood the agreement of the parties and concluded they had agreed the positions were appropriate for inclusion in the bargaining unit, whereas the parties had only agreed they were eligible for representation. It also argues these positions were not excluded from the existing bargaining unit of City employees currently represented by DOE, and that historically, when individuals have expressed an interest in joining the DOE, the City has “permitted them to petition for inclusion.” The City asserts the decision “deviates from well-established legal standards and PERB decisions interpreting the PERA” and

therefore results in “inevitable confusion and uncertainty among the City of Dover and its affected employees.”

The Executive Director noted she reviewed the job descriptions, organizational charts, salary scales and testimony offered during the hearing, as well as the stipulations and agreements of the parties in reaching her decision. She concluded the positions in this bargaining unit share a higher level of education and experience than the positions included in the bargaining unit currently represented by the Dover Organization of Employees. She further found these positions share common responsibilities for oversight and/or direction of work processes, programs, services and information; provide training to other employees; coordinate functions within and across divisions; have higher levels of skill and expertise which they are required to apply in order to perform their duties; and provide support in policy development through the collection, management and presentation of data and information. This constitutes an identifiable community of interest between the positions.

The City misreads the Executive Director’s application of the parties’ stipulation of agreement. Under the subsection, “Recommendations of the Parties” she noted, “... while the City opposed creation of the proposed bargaining unit, the parties did submit a stipulation which listed positions to which no questions of eligibility were raised.” *Decision at 5638*. The decision lists twenty-one (21) positions that the parties agreed were outside of the scope of the petition. It also listed twenty-eight (28) full-time positions which the parties agreed are not statutorily precluded from seeking representation. In determining and defining the appropriate bargaining unit, the Executive Director noted the parties’ stipulation on eligibility and then concluded that the unit she determined to be an appropriate unit is not a “catch all” or “residual” unit, but reflects an appropriate balance of the interests of the City and the employees, as required by statute. The decision neither states nor implies the Executive Director was simply adopting a

unit on which the parties had agreed was appropriate. Indeed, had the parties stipulated to the appropriateness of the proposed unit, there would have been no need for a decision.

The City's main objection appears to be that the City would prefer that the employees had petitioned to join the DOE unit, rather than seek to create a separate bargaining unit. While that was certainly an option for the employees, it was not the choice they made. The City does not seem to understand that under the PERA, the right to be represented accrues to the employees. The statute provides to public employees the right to negotiate collectively through representatives of their choosing. 19 Del.C. §1303(2).

The Executive Director's decision clearly sets forth the process and standards for evaluating a petition for bargaining unit determination, consistent with PERB precedent:

Procedurally, PERB examines the petitioned-for unit first. If that unit is determined to be an appropriate unit with an identifiable community of interest, the inquiry ends there, consistent with the right of self-determination granted to public employees. An employer who challenges the appropriateness of a proposed unit bears the burden of establishing the unit is clearly inappropriate under the statutory criteria; it is not enough to simply assert there may be an alternative or more appropriate unit. *Decision at p. 5633*

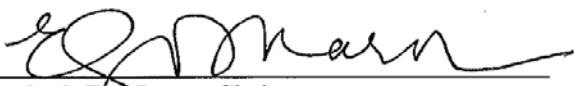
While the City may believe that there is a "better" unit from its perspective (i.e., the positions become part of the existing DOE unit), in order to prevail it bears the burden to establish the petitioned for unit is clearly inappropriate. The evidence presented in this case does not support that conclusion. The argument that adding a fourth city-wide bargaining unit of higher level positions (rather than creating multiple departmental units) constitutes overfragmentation is simply not credible. This bargaining unit is estimated to include between thirty-five and forty positions. Clearly including all of these positions in one unit does not constitute overfragmentation as the term is understood in labor law. As noted by the Executive Director, this unit in all probability will be the last unit created in Dover.

The Board does not find there is either insufficient evidence to support the Decision or a failure to properly apply the statutory criteria set forth in 19 Del.C. §1310(d). The City disagrees with the conclusion reached by the Executive Director and would have preferred that this group of employees were included in the DOE bargaining unit; however, the Board finds the Executive Director engaged in a thoughtful and careful review of the record absent any arbitrary or capricious reasoning and that the decision reached is supported by the evidence and applicable law.

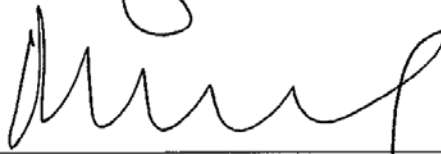
DECISION

For the reasons set forth above, following review of the complete record in this case and receipt and consideration of both the written and oral arguments of the parties, the Board unanimously affirms the bargaining unit determination made by the Executive Director. The Board further directs that an election be scheduled forthwith to determine whether City of Dover administrative, managerial, and professional employees wish to be represented for purposes of collective bargaining.

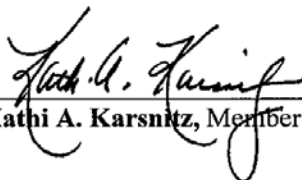
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: January 25, 2013