

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

IN THE MATTER OF:

<b>DELAWARE PUBLIC EMPLOYEES, COUNCIL</b>	:	
<b>81, LOCAL 1385, AFSCME, AFL-CIO,</b>	:	
	:	
Petitioner,	:	
	:	<b>REPRESENTATION PETITION NO.</b>
AND	:	
	:	<b><u>22-07-1310 (Clarification)</u></b>
<b>STATE OF DELAWARE, DEPARTMENT OF</b>	:	
<b>FINANCE,</b>	:	
	:	
Respondent.	:	

RE: Non-supervisory Employees of Dept. of Finance,  
Office of Unclaimed Property

Appearances

*Lance Geren, Esq., O’Donoghue & O’Donoghue, for AFSCME LU 1385*  
*Khrishna Hawkins, Labor Relations Manager, DHR/DLREP, for Dept. of Finance*

The Delaware Department of Finance (“DOF”) is an agency of the State of Delaware and is a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 Del. C. Chapter 13 (1994). Both the Division of Revenue and the Office of the Secretary are divisions of DOF.

Delaware Public Employees, Council 81, American Federation of State, County and Municipal Employees (“AFSCME”) is an employee organization within the meaning of 19 Del. C. §1302(h). By and through its affiliated Local 1385, it is the exclusive bargaining representative

of a unit of the Department of Finance, as defined in DOL Case 7.

On July 5, 2022, AFSCME Local 1385 filed a representation petition with the Delaware Public Employment Relations Board seeking to clarify the bargaining unit of “non-supervisory employees of the Department of Finance, Division of Revenue” as defined in DOL Case 7 to include “all non-supervisory employees of the Department of Finance, Office of Unclaimed Property and Office of the Secretary.” In the cover letter for the petition, AFSCME specifically requested to clarify the following positions within the Office of Unclaimed Property in the DOF Office of the Secretary are part of the existing bargaining unit: Tax Auditor I, II, and III; and Unclaimed Property Claims Examiners I and II.

By letter dated July 18, 2022, the State opposed AFSCME’s requested clarification of the existing bargaining unit because the unit certification was limited to Division of Revenue positions. In a responsive letter dated July 29, 2022, AFSCME stated:

... [T]he Union was originally certified as the exclusive bargaining representative on October 8, 1965, in DOL Case No. 7. Since that time, the State has created and established other divisions, including the Office of Unclaimed Property and the Office of the Secretary. Employees working in these newly created divisions are employed in the same job classifications and perform work similar in nature to bargaining unit employees. Further, some employees, such as Virginia Ingram, have been transferred between divisions. As such, it is proper at this time to update the scope of the bargaining unit in a fashion sought by the petition.

In order to resolve the issues raised, a hearing was scheduled and conducted on November 15, 2022, at which the parties were provided the opportunity to submit documents and elicit testimony through direct and cross examination of witnesses. The record was closed with the submission of written argument by the parties. This decision results from the record thus created by the parties.

## ISSUE

WHETHER THE BARGAINING UNIT DEFINED IN DOL CASE 7 INCLUDES POSITIONS WITH IDENTICAL JOB CLASSIFICATIONS AND/OR PERFORMING SIMILAR WORK IN DEPARTMENT OF FINANCE DIVISIONS CREATED AFTER THE ORIGINAL CERTIFICATION IN 1965?

## FACTS

### Bargaining Unit History:

On November 16, 1965, AFSCME was certified, following a secret ballot election conducted by the Department of Labor, as the exclusive bargaining representative of a unit of “State Tax Offices located in New Castle, Kent, and Sussex Counties”. The bargaining unit included Office Auditors, Typists, Telephone Operators, Clerks, Field Auditors, Cashiers, Multilith Operators, IBM Machine Operators, Elevator Operators, Custodians, Bookkeeping Machine Operators, Mail Clerks, Files Clerks, Field Inspectors, Receptionists, Secretaries and Collection Officers. Specifically excluded from the unit were the Tax Commissioner, Assistant Tax Commissioner, Director of Taxation and Statistics, and the Office Manager.<sup>1</sup>

In June, 1970, two petitions were filed by AFSCME Local 1385. The first (DOL Case 7(a)) sought to determine the bargaining unit status of the newly created positions of Manager of Field Operations, Manager of Office Operations, Administrative Services Manager, Chief Compliance Officer, Personnel Officer, Administrative Assistant to the Tax Commissioner, and State Revenue Agent. Only Compliance Officers were modified into the bargaining unit. The second petition was more limited and sought to modify only State Revenue Agents and Tax Compliance Officers in the bargaining unit. Consistent with its decision on the prior petition, only

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<sup>1</sup> Joint Exhibit 3, DOL Case 7.

Compliance officers were modified into the bargaining unit. (DOL Case 7(b)).

The bargaining unit was amended by agreement of the Department of Finance/Division of Revenue and AFSCME Local 1385 on December 9, 1977 to include State Revenue Agent (non-supervisory), Fiscal Administration Officer (non-supervisory), and Tax Reviewer positions, noting that the FAO's and Tax Reviewers were formerly Auditors. The modified unit excluded the supervisory positions of State Revenue Agent, Compliance Officer, Administration Assistant, Accountant, Assistant Accountant, Senior Clerk, Systems Analyst, Fiscal Administrative Officer, and Tax Data Reviewer. It also excluded the Administrative Services Officer, Input/Output Control Manager, System and Programming Manager, Personnel Assistant positions and the Secretary to the Department Director.<sup>2</sup>

On October 28, 1983, the bargaining unit was clarified by the Governor's Council on Labor at the request of the Director of Revenue to conform the bargaining unit records to reflect changes in position titles. The clarified unit included Division of Revenue non-supervisory Accountant, Administrative Assistants, Assistant Accountants, Compliance Officers, Computer Operators, and Senior Clerk positions. Also included were Accountant Clerks, Clerks (including mail-file clerks), Clerk-Stenos, Clerk-Typists, Revenue Processing Unit Technicians, Input Operators, Program Analyst Trainee, Record Clerks, Secretaries I, Store Keeper, and Tax Reviewer/Examiners. Excluded from the Division of Revenue bargaining unit were the DOR Director, Assistant Director of the R&E group, EDP Technician, Programmer Analyst Section Manager, Programmer Analyst, Senior Legislative Fiscal Mgt., Management Analyst, Statistician, State Revenue Agents, Chief Compliance Officer, Revenue Compliance Officer (special investigator), Assistant Director of the Bureau of Tax Processing, Manager – Manual Operations,

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<sup>2</sup> The Governor's Council on Labor excluded the non-supervisory State Revenue Agent, although the parties had agreed to include this position. Joint Exhibit 3, DOL Case 7(c).

Manager – Machine Operations, Data Processing Branch Manager, Personnel Assistants, Secretary to the DOR Director, Associate Director – Economics/Statistics Bureau, Attorneys, Secretary to Associate Directors, Secretary to Assistant Directors, and Secretary to the Tax Appeal Board. Supervisory employees within the following classifications were also excluded from the bargaining unit: Administrative Assistant, Accountant, Assistant Accountant, Senior Clerk, Tax Data Review, Revenue Compliance Officers, and Fiscal Administrative Officer.<sup>3</sup> There was no determination of appropriateness made. The notes from this proceeding state:

A petition was not filed in Case No. 7(d). A letter was submitted by the Director of Revenue to the Department of Labor requesting clarification of the bargaining unit. It is the desire of both parties to have the Department of Labor's records accurately reflect the bargaining unit as it exists in the current contract agreement. Positions and Titles have changed over the past 10 years and contracts reflected changes but the Department of Labor's records did not. Rules and regulations have since been promulgated by the Department of Labor which requires that a petition be filed, reviewed, and recommendations made by the Governor's Council on Labor, approved by the Secretary of Labor, and certified by Administrative Officer of the Labor Law Enforcement Section. The Governor's Council on Labor accepted from both parties that the last contract agreement between both parties accurately reflected the positions that currently constitutes the bargaining unit and that neither party can come back before the Governor's Council on Labor and dispute it.

The Division of Revenue again petitioned the Governor's Council on Labor to "update the list of positions which have been mutually agreed to be in the union and a list of positions which are mutually agreed to be excluded from the union."<sup>4</sup> The certification was formally amended on May 13, 1985. The notes of the proceedings state:

The Secretary of Labor also approved the recommendation by the Governor's Council on Labor to exclude future positions of Secretary I from the bargaining unit, with the understanding that a single "grandfather" provision is included and applicable to Louise Juhlin who will be permitted to remain in the bargaining unit.

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<sup>3</sup> Joint Exhibit 3, DOL Case 7(d).

<sup>4</sup> Join Exhibit 3, DOL Case 7(f).

... The union agreed to the exclusion of the classification of Secretary I, which was previously a bargaining unit position, from the bargaining unit, with the understanding that incumbents in the classification at the time of the signing of the contract agreement on June 14, 1984, would remain in the bargaining unit as long as they remained so employed. Any future positions of Secretary I's would be excluded from the bargaining unit.<sup>5</sup>

When the Public Employment Relations Act was passed in 1994, responsibility for representation functions involving State employees (other than those employed as police officers, firefighters, and by public schools) and the bargaining unit records of State employees were transferred from the Department of Labor to the Public Employment Relations Board. The PERA addressed the transfer of the responsibilities:

An employee organization that has been certified as the exclusive representative of a bargaining unit deemed to be appropriate prior to September 23, 1994, shall so continue without the requirements of an election and certification, until such time as a question concerning representation is appropriately raised under this chapter in accordance with 1311(b) of this title, or until the Board find the unit not to be appropriate in accordance with §1310(f) of this title.<sup>6</sup>

The bargaining unit was not modified again until July 29, 2021, when AFSCME Local 1385 petitioned PERB to modify the existing bargaining unit to include DOR Paralegals I, II and III. Following a secret ballot election conducted by the PERB, the certification was modified.<sup>7</sup>

The parties entered into a collective bargaining agreement with a term of December 23, 2002 through December 23, 2005.<sup>8</sup> Article 2 defined the bargaining unit composition as the parties understood it at that time:

2.2 The term “employee” as used herein shall include the non-supervisory employees of the Division of Revenue in the job

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<sup>5</sup> Joint Exhibit 3, DOL Case 7(f).

<sup>6</sup> 19 Del. C. §1318.

<sup>7</sup> Joint Exhibit 3, DOL Case 7(h).

<sup>8</sup> Joint Exhibit 1. Article 24 provided the Agreement would be automatically “renewed from year to year” after December 23, 2005, “... unless either party gives the other party written notice of its desire to reopen” the Agreement.

classification listed below. All others are excluded.

- Accountant II (non-supervisory)
- Accounting Technician
- Accounting Specialist (non-supervisory)
- Administrative Specialist I – formerly Mini-Micro Computer Operator I and Typist
- Administrative Specialist III (non-supervisory)
  - Excludes Administrative Specialist III reporting to the Deputy Director of Revenue and Administrative Specialist III reporting to the Deputy Attorney General formerly Administrative Assistant II (non-supervisory)
- Assistant Production Supervisor
- Data Entry Technician
- Inventory Control Clerk
- Operations Support Specialist – formerly Unit Operations Clerk
- Production Control Clerk
- Records Management Specialist
- Revenue Processing Unit Assistant Production Supervisor
- Senior Data Entry Technician
- Tax Examiner <sup>9</sup>

At no point in the historical records of this bargaining unit was the classification of Tax Auditor included in the unit.

There were no successors to the 2002-2005 collective bargaining agreement, until a Memorandum of Agreement (“MOA”) was negotiated and signed on April 6, 2021.<sup>10</sup> The MOA sets forth a limited number of changes to the 2002-2005 Agreement. Although the MOA does not include a durational clause, it appears that the negotiated wage rates are for the period of July 1, 2021 through June 30, 2024. The MOA does not expressly modify the Union Recognition clause of the 2002-2005 Agreement, but it does include a paragraph (numbered as ¶6), which states:

Composition of the Bargaining Unit:

The parties will meet and discuss within ninety (90) days after the execution of this agreement to consider updates to the classifications and positions making up the bargaining unit. Following such meetings, the Union will, either individually or in conjunction with the Department of Finance, take appropriate action with the Public

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<sup>9</sup> Joint Exhibit 1, p. 4 – 5.

<sup>10</sup> Joint Exhibit 2.

Employment Relations Board clarifying the composition of the bargaining unit.<sup>11</sup>

Office of Unclaimed Property:

Prior to 2007, the responsibility for identifying and processing unclaimed property was organizationally located within the Division of Revenue. The DOR unclaimed property unit consisted of two small functional working groups: the Enforcement or Audit Unit (which interacted with holders of unclaimed property); and the Compliance Unit (which was responsible for connecting the unclaimed property reported and remitted to the State with its rightful owners). The Audit Unit was staffed with two Tax Auditors<sup>12</sup>, an administrative employee and an Audit Manager.<sup>13</sup> The Compliance Unit was staffed with two Tax Auditors, an Accounting Specialist, and an Acting Manager.<sup>14</sup>

In 2007, state and federal investigations were conducted into the embezzlement of funds by a Tax Auditor in the DOR unclaimed property Compliance Unit. Rebecca Goldsmith (currently the Department of Finance Deputy Secretary) was assigned to lead the state investigation of the theft and to identify policy and control weakness in the unclaimed property process in order to improve them. She was also assigned at that time to manage the Compliance Unit.<sup>15</sup>

In June 2005, Clara Gibbs was hired as an Accounting Specialist in the Public Service unit of the Division of Revenue. In that position, Ms. Gibbs was responsible for collecting tax

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<sup>11</sup> Joint Exhibit 2, p. 2.

<sup>12</sup> Agency witness Rebecca Goldsmith testified that Tax Auditors were not represented by AFSCME Local 1385 in 2007. It is noted that Tax Auditor is not among the positions listed in the Union Recognition clause of the 2002-2005 collective bargaining agreement.

<sup>13</sup> TR p. 21.

<sup>14</sup> TR p. 19-20.

<sup>15</sup> TR p. 19.



payments, paying out lottery claims, and issuing cigarette excise tax stamps.<sup>16</sup> The Accounting Specialist was included in the Union Recognition clause of the 2002-2005 collective bargaining agreement.<sup>17</sup>

In September 2007, Goldsmith reached out to Clara Gibbs to join the DOR unclaimed property unit. Prior to being hired as an Accounting Specialist, Ms. Gibbs had worked for a brief period as a contractual employee in the DOR unclaimed property group. When Ms. Gibbs transferred to the unclaimed property unit, she remained an Accounting Specialist, but her duties now included:

Identifying, receiving inquiries, be they from mail, email communications from companies letting us know that people that needed to be connected with their property ... connecting the person with their property through identifying name, social security number, account number... basically matching up the property with the owner to make sure that we had the right owner receiving the correct property.<sup>18</sup>

In September 2008, Ms. Gibbs was promoted to a Tax Auditor position in the DOR unclaimed property unit. She testified she continued to perform the same functions she did as an Accounting Specialist and she continued to report to the Compliance Unit Supervisor. DOF continued to treat Ms. Gibbs as if she held a represented bargaining unit position.

In Fiscal Year 2011<sup>19</sup> responsibility for processing unclaimed property was moved out of the Division of Revenue and a new Office of Unclaimed Property (“OUP”) was created under the Office of the Secretary of Finance. In order to staff this new office, the existing DOR staff handling unclaimed property work was moved into the OUP. Additional positions were added to OUP over time by reassigning vacant positions from throughout the Department of Finance, as well as from

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<sup>16</sup> TR. p. 9

<sup>17</sup> Joint Exhibit 1, Article 2, §2.2, p. 4.

<sup>18</sup> TR. p. 10

<sup>19</sup> July 1, 2010 – June 30, 2011

other agencies. As of November, 2022, there were thirty-three positions in the OUP, of which nearly half (16) were vacant.<sup>20</sup> Of the total complement of OUP positions, sixteen originated in DOR.<sup>21</sup> The positions in the OUP include one Administrative Specialist III, six Accounting Specialists, four State Accountants (I - IV), one Tax Auditor 1 (Ms. Gibbs), three Tax Auditors III, seven Unclaimed Property Claims Examiners I, two Unclaimed Property Claims Examiners II, two Unclaimed Property Claims Supervisors, one Assistant Production Supervisor, one Public Service Manager, two Assistant Directors of the Office of Business Taxes, the Director and an Deputy/Principal Assistant.<sup>22</sup> There is no common supervisory or managerial staff shared by DOR and OUP.

When the OUP was created in the Office of the Secretary, it permitted employees who had held union represented positions in DOR to retain their union membership as long as they remained in the same classification in OUP. At the time the employee left their “grandfathered” position (e.g., upon promotion, accepting a new position or leaving State employment), the position would be a non-union position. Ms. Gibbs is the only remaining former DOR employee who continues to be grandfathered and who pays dues to Local 1385.<sup>23</sup>

### **POSITIONS OF THE PARTIES**

#### **AFSCME:**

AFSCME argues that the facts of this case are analogous to those in *NLRB v. Gitano Distribution Center*.<sup>24</sup> It asserts the Department of Finance simply created another facility or

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<sup>20</sup> State Exhibit 1.

<sup>21</sup> Positions which originated in DOR are identified by an organizational code beginning with 2506 in Column L, Previous Division.

<sup>22</sup> State Exhibit 1.

<sup>23</sup> State Exhibit 4.

<sup>24</sup> 208 NLRB 1172 (1992).

location under the existing bargaining unit definition when it established the OUP and staffed it by transferring DOR positions. AFSCME relies on the testimony of Ms. Gibbs to establish that her terms and conditions of employment have not changed and to support its positions that the OUP positions share a community of interest with the existing DOR bargaining unit.

AFSCME argues that it is not seeking to expand the existing bargaining unit with this petition. It is, "... simply seeking to retain its representative status for employees who were employed in the bargaining unit, remain in job classifications that are included in the bargaining unit, or work in positions that are similar to those included in the bargaining unit."<sup>25</sup>

AFSCME argues that accretion does not interfere with employee free choice and that the State in this case has unilaterally decided that OUP employees should no longer be in the bargaining unit.

State:

To grant AFSCME's clarification petition to include the OUP positions within the bargaining unit of DOR positions would violate the PERA. Bargaining unit status is determined by application of the certified unit definition to the position(s) in question. Under the PERA, the only manner in which OUP employees may secure representation for purposes of collective bargaining is through a modification process, including a secret ballot election.

The State also asserts that AFSCME has failed to demonstrate that the OUP positions share a community of interest with the existing bargaining unit. OUP was established in the Office of the Secretary to create separation from DOR and to ensure that OUP had fiduciary integrity and was protected against internal theft. OUP and DOR do not perform similar work; simply asserting that positions in different agencies work under the same classifications does not, *ipso facto*,

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<sup>25</sup> AFSCME Post-hearing Brief, p. 11

establish the positions share a community of interest.

The fact that some of the positions moved into OUP were formerly DOR positions represented by AFSCME does not mean the functions of the two divisions are indistinguishable. Only five DOR positions were “grandfathered” when positions were moved into OUP. All grandfathered incumbents have vacated their positions (which are now unrepresented positions) except for Ms. Gibbs. The State notes:

There is no indication that AFSCME represented other employees within OUP for grievances, wage negotiation, or other terms and conditions of employment. Additionally, AFSCME has never raised any concerns regarding dues deductions from this unit and/or the DOF omitting OUP classifications from seniority or employment list.<sup>26</sup>

### **DISCUSSION**

The purpose of a clarification petition is to determine whether the questioned positions are included or excluded from a currently certified bargaining unit. A Unit Clarification does not amend or modify the existing bargaining unit definition; it simply clarifies whether the existing unit definition covers the position(s) or classification(s) in question.<sup>27</sup> PERB’s express authority to determine appropriate bargaining units carries with it the implied authority to police certifications and to clarify them as a means to effectuate the policies of the PERA. A Unit Clarification petition cannot seek enforcement, application or interpretation of the recognition clause of the parties’ collective bargaining agreement.<sup>28</sup>

There is no dispute that the non-supervisory employees of the Division of Revenue are and have been represented by AFSCME Local 1385 for many, many years. The question raised by this petition is whether, when the Department of Finance reorganized in Fiscal Year 2011 to move

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<sup>26</sup> State’s Post-Hearing Brief, p 15-16.

<sup>27</sup> *COAD & State DOC*, Rep. Pet. 08-01-613, VI PERB 4033, 4040 (2008)

<sup>28</sup> *Appoquinimink Education Association, DSEA & Appoquinimink School District*, Rep. Pet. 13-05-906, VIII PERB 5869, 5879 (2013).

unclaimed property responsibilities out of the Division of Revenue, the positions which were now in OUP are bargaining unit positions.

This Board has long held that bargaining units are defined by positions, not by the individuals who hold those positions. If an employee leaves a bargaining unit position and takes a position of a similar type and classification in another State agency, their union-status is not transferable. A new hire would then fill the bargaining unit position vacated when the first employee moved to a new position. Reorganizations and changes to the distribution of work within agencies is reserved to the State as a matter of inherent managerial policy.<sup>29</sup>

The State concedes that the Department of Finance “grandfathered” the few individuals whose represented positions were moved out of DOR when the OUP was reorganized under the Office of the Secretary. Those incumbent employees were permitted by DOF to retain their bargaining unit status while working in the OUP until they left those positions, at which time the positions would be unrepresented. Whether this “grandfathering” was unilaterally implemented or agreed to by AFSCME is irrelevant.<sup>30</sup> This action did not alter or amend the bargaining unit definition beyond the Division of Revenue, nor did it properly extend the rights of representation to the employees in the OUP.

AFSCME’s assertion that the OUP positions are included within the existing bargaining unit of DOR employees based on a shared community of interest is misplaced. A clarification

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<sup>29</sup> 19 Del. C. §1305 A public employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as ... the organizational structure and staffing levels and the selection and direction of personnel.

<sup>30</sup> It is noted that the practice of “grandfathering” is fraught with conflicts which lead to situations like those presented in this case. It creates disparities within agencies, where the employer is affording employees in identical positions sitting side-by-side in the workplace with disparate rights. It creates a difficult duty of representation for the exclusive bargaining representative, who is charged with representing a sub-group of positions in a workplace. It deprives employees of their fundamental right to choose to be represented for purposes of collective bargaining within an appropriate bargaining unit. Grandfathering also creates the opportunity for mistakes such as failing to “turn off” the grandfather provision, especially where, as here, there appears to be no documentation of the terms of the grandfathering.

petition does raise a question of appropriateness or invoke application of §1310(d)<sup>31</sup> of the PERA.

The Delaware PERB looks to federal decisions under the National Labor Relations Act for guidance, to the extent that the federal and Delaware law are similar. Delaware law under the PERA and the NLRA are, however, significantly different in the area of representation.

AFSCME is seeking, through this clarification petition, to accrete into the bargaining unit of Division of Revenue non-supervisory employees OUP Tax Auditor and Unclaimed Property Claims Examiner positions under the Office of the Secretary. Unlike the federal law, the PERA does not permit recognition of an exclusive bargaining representative by a public employer (nor does it permit the employer to refuse to bargain with an exclusive bargaining representative if it believes that representative no longer has the support of a majority of the employees in a unit). Section 1302(j) defines an exclusive bargaining representative to mean:

... the employee organization which as a result of certification by the Board, has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit. (*emphasis added*).

Certification of an exclusive bargaining representative requires "... official recognition by the Board, following a secret ballot election, that an employee organization is the exclusive representative for all employees in an appropriate bargaining unit." 19 Del. C. §1302(d).

The rights under the Delaware Public Employment Relations Act accrue to the employees to select their exclusive bargaining representative, to negotiate and grieve through that representative, to be represented by their exclusive bargaining representative without discrimination, and to engage in protected concerted legal activity for purposes of collective

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<sup>31</sup> "In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of the employee organization; the recommendations of the parties; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate..."

bargaining or other mutual aid or protection. Public employees also have the right to organize, form, join or assist any employee organization, except as limited by the statute. 19 Del. C. §1303.

The rights of an employee organization commence once that organization is certified as the exclusive bargaining representative of an appropriate bargaining unit. 19 Del. C. §1302(j).

The PERA does provide a mechanism for OUP employees to secure representation, should they so desire. Either a certification petition (seeking to create a new and separate bargaining unit) or a modification petition (seeking to be include the OUP positions within the existing bargaining unit of DOR positions) can be filed, with the support of at least 30% of the unrepresented employees seeking representation for purposes of collective bargaining. The PERA requires that a secret ballot election be conducted to determine the desires of the affected employees before a labor organization can be certified as the exclusive bargaining representative.

All of the federal cases cited by AFSCME were reviewed and considered. AFSCME argues that this Board should adopt the NLRB's accretion guidelines to evaluate its request for clarification. Accretion was defined by the 9<sup>th</sup> Circuit Court of Appeals in *Machinists District Lodge 190, Local Lodge 1414*:<sup>32</sup>

“An accretion is the addition of ... employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit's choice of representative.” *Consolidated Papers*, 670 F.2d AT 756-77. The most common example of accretion is the addition of employees to an existing bargaining unit through normal employee turnover. *Sheraton-Kauai Corp. v. NLRB*, 429 F. 2d 1352, 1354, n. 2 (9<sup>th</sup> Cir., 1970).

Numerous factors may enter into an NLRB determination of a question of accretion of a group of employees into an existing bargaining unit. These include: functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, degree of employee interchange between groups and geographical distance, *Sunset House* 415 F.2d @

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<sup>32</sup> 759 F.2d 1477 (9<sup>th</sup> Cir., 1985)

548, similarity of job classifications, skills, functions and products. *Lammert Industries*, 578 F. 2d @ 1225, and centralization of supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations. *Peter Kiewit Sons' Co.* 231 NLRB 76 (1977).

... The [NLRB] is charged with the responsibility to balance the competing policy considerations which inhere in an accretion determination: stability of labor relations and employees' freedom to choose their own bargaining agents. *See, e.g., Food Employers Council*, 3699 F. 2d @ 594. Employee freedom, moreover, "must be paramount," *Pacific Southwest Airlines v. NLRB*, 587 F. 2d 1032, 1037 (9<sup>th</sup> Cir., 1978), and so "the accretion doctrine should be applied restrictively as it offends this basic employee right... A determination of accretion "forecloses a vote and restricts the employees in the exercise of their basic right to select their bargaining representative,... [which] is the predominant consideration under Section 7 of the Act and is to be restricted only under 'compelling conditions'" (quoting *Pix Manufacturing Co.*, 180 NLRB 88,90 (1970).

There are no 'compelling conditions' established by this record which militate for accreting, through a unit clarification petition, the OUP Tax Auditor and Unclaimed Property Claims Examiners positions into the existing bargaining unit of non-supervisory DOR employees. Ms. Gibbs is the only remaining employee initially transferred from DOR to OUP. There is not a critical mass of former DOR employees in OUP positions. AFSCME has not provided convincing evidence that the OUP positions have no separate identity from DOR positions in the same classifications. In fact, the testimony and documentation of record establish that the functions of the OUP are distinct and organizationally separate from the DOR. There was no evidence of regular interchange between the two divisions and that the day-to-day supervision of DOR and OUP are also separate and distinct. There is no functional integration between DOR and OUP.

Finally, in 2010, Ms. Gibbs held the position of Tax Auditor I. As previously mentioned, neither the bargaining unit records (DOL Case 7) nor the most recent negotiated union recognition



clause (2002) include the Tax Auditor as a bargaining unit position.<sup>33</sup> While noting that the Department of Finance is withholding dues from Tax Auditors in the DOR,<sup>34</sup> it would be in the parties interest to clean up the official representation records with PERB.

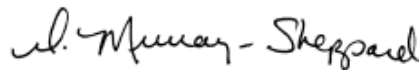
### **DECISIONS**

Based on the record created by the parties, review and consideration of the arguments presented by the parties, and application of the PERA, the bargaining unit represented by AFSCME Local 1385 is confined, by the express terms of its certification as set forth in DOL Case 7, to non-supervisory employees of the Department of Finance, Division of Revenue. The positions in the Office of Unclaimed Property under the Office of the Secretary do not fall within the bargaining unit definition.

WHEREFORE, the petition is denied.

**IT IS SO ORDERED.**

DATE: June 28, 2023



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

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<sup>33</sup> The State asserts as fact in its closing argument, “In or around 2004, the Tax Examiner classification was abolished and incumbents were absorbed into the Auditor I position which was not part of the bargaining unit certification from 1985.” There is nothing in the record to support this assertion as fact.

<sup>34</sup> State Exhibit 4, p. 2.