COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

IN THE MATTER OF THE EMPLOYES OF	:	
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	:	Case No. PERA-R-99-182-E
	:	(PERA-R-777-E)
COMMONWEALTH OF PENNSYLVANIA	:	(PERA-U-81-352-E)
OFFICE OF ATTORNEY GENERAL	:	
	:	

FINAL ORDER

On November 15, 1999, the Commonwealth of Pennsylvania, Office of Attorney General (Employer) filed timely[1] exceptions to a Nisi Order of Certification issued October 25, 1999, by the Pennsylvania Labor Relations Board (Board) certifying the Attorney General Investigators Association (Association) as the exclusive bargaining representative of all full-time and regular part-time non-supervisory, nonprofessional inspection, investigation and safety related employes including but not limited to narcotics agents I and II. On November 29, 1999, the Association filed its response to the Employer's exceptions along with a supporting brief. On December 7, 1999, Council 13, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) filed its response and supporting brief to the Employer's exceptions.

This case involves a representation petition filed by the Association seeking to represent a bargaining unit of nonprofessional, inspection, investigation and safety-related employes of the Employer currently represented by AFSCME. The petition was filed in the sixty to ninety day window period prior to the expiration of the collective bargaining agreement between the Employer and AFSCME provided for in Section 605(7)(ii) of the Public Employe Relations Act (Act). AFSCME was originally certified to represent the petitioned-for employes pursuant to a Nisi Order of Certification issued on January 4, 1972, at Case No. PERA-R-777-C, in a unit that included all nonprofessional, inspection, investigation and safety-related employes who came under the Governor's jurisdiction. At that same case number, AFSCME was also certified to represent a unit of <u>professional</u>, inspection, investigation and safety-related employes that came under the Governor's jurisdiction. On October 15, 1980, the Pennsylvania Legislature passed the Commonwealth Attorneys Act, the Act of October 15, 1980, P.L. 950, No. 164, as amended, 71 P.S. §§ 732-101 to 732-504, which established the independently elected Office of Attorney General to perform many of the duties previously performed by the former Department of Justice, which came under the jurisdiction of the Governor. Thereafter, the Employer and AFSCME filed a joint petition for amendment of certification requesting that the Board amend its previous certification to reflect that certain of the employes included in the professional and nonprofessional bargaining units certified at Case No. PERA-R-777-C were now employed by the Attorney General. On

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[1] November 14, 1999 would have been the last day for the timely filing of exceptions. However, November 14, 1999 was a Sunday and pursuant to Section 95.100 of the Board's rules and regulations, when the last day of any time period falls on a Saturday, Sunday or legal holiday, that day is excluded from the computation of time. 34 Pa. Code § 95.100. Accordingly, the exceptions were timely filed on November 15, 1999.

August 21, 1981, the Board issued a Nisi Order of Amended Certification, Office of Attorney General, 12 PPER ¶ 12291 (Nisi Order of Amended Certification, 1981), in which, pursuant to the joint request of the Employer and AFSCME, the Board certified two separate units of Attorney General office employes--one consisting of professional, inspection, investigation and safety-related employes and the other consisting of nonprofessional, inspection, investigation and safety-related employes. The two most recent collective bargaining agreements negotiated between AFSCME and the Employer reflect the two separate units of inspection, investigation and safety-related employes, with narcotics agents I and II specifically listed in the nonprofessional bargaining unit. Throughout the proceeding the Employer has attempted to litigate the appropriateness of the nonprofessional bargaining unit, contending that the professional and nonprofessional bargaining units should comprise a single unit. In the Order and Notice of Election, the Board Representative implemented the Board's policy to conduct rival representation elections in the unit as currently certified, Midwestern Intermediate Unit IV, 15 PPER ¶ 15178 (Final Order, 1984), aff'd, 16 PPER ¶ 16109 (Court of Common Pleas of Butler County, 1985); Baldwin-Whitehall School District, 26 PPER ¶ 26150 (Order Directing Submission of Eligibility List, 1995), and rejected the Employer's attempt to include the employes currently included in the professional unit.

In its exceptions the Employer alleges that the Board Representative erred in 1) not redetermining the bargaining unit to conclude that the professional, inspection, investigation and safety employes belong in the unit with the nonprofessional employes; 2) ignoring the Board's broad based bargaining unit policy in refusing to redetermine the bargaining unit; 3) ignoring changes since the unit was originally certified in 1972; and 4) relying upon the collective bargaining agreements between AFSCME and the Employer that reflect two separate units and refusing to admit the Employer's proffered "side agreement" with AFSCME executed in 1981 that reflects a single bargaining unit of both the professional and nonprofessional employes.

The Employer's exceptions are without merit. The Board Representative appropriately relied upon the Board's well-established case law in directing an election in the unit as presently certified. When an employe organization files a rival representation petition to gain the representation rights of a bargaining unit already represented by an incumbent representative, the Board's seeks to resolve the question of representation in the most expeditious fashion possible so that collective bargaining and/or contract administration concerning the employes in the bargaining unit can be accomplished with a minimum amount of delay and disruption. The Board must balance the competing concerns of the continued appropriateness of the existing certified unit with the delay in the exercise of the employes' representational rights that would occur if the bargaining unit is relitigated, especially in light of the Supreme Court's mandate that the bargaining timetable in the Act is mandatory. City of Philadelphia v. PLRB, 531 Pa. 489, 614 A.2d 213 (1992).

The Employer seeks to delay the resolution of the question of representation among the nonprofessional employes by arguing that a group of professional employes, who are currently certified in a separate bargaining unit, should be included in the nonprofessional bargaining unit. However, the Employer stipulated to the appropriateness of the two separate bargaining units when it petitioned the Board jointly with AFSCME in 1981

to amend the Board's original certification to reflect the creation of the separately-elected Attorney General by the Commonwealth Attorneys Act. Accordingly, the relevant time period is between the 1981 amendment of the certification and the present. In its brief in support of its exceptions, the Employer alleges for the first time that the job duties of the professional and nonprofessional employes have changed "since 1981" to such an extent that all of the employes should be included in a single nonprofessional unit. However, the Employer has failed to allege when those changes occurred. The Employer has an obligation to timely raise changed circumstances which affect the composition of the bargaining unit and cannot simply fail to timely raise these changes when they occur, wait to raise these issues when a rival representation petition is filed and thereby frustrate and delay the employes' exercise of their collective bargaining rights. Even though the Employer alleges that changes have occurred in the job duties of the employes "at some time" during that period of time, the Employer has failed over the eighteen years since these units were separately certified to file a petition for unit clarification to combine the units. It was only upon the filing of the Association's petition that the Employer now argues that the nonprofessional bargaining unit as presently constituted is inappropriate. Not only has the Employer failed to utilize available procedures to consolidate these two units, but the Employer, in fact, filed a unit clarification in 1984 at Case No. PERA-U-84-300-E to include additional employes in the professional bargaining unit, employes that the Employer now contends should be included in the nonprofessional unit. That petition was granted by the Board which issued a Nisi Order of Unit Clarification on June 28, 1984, including the requested positions in the professional bargaining unit. Additionally, the Employer has executed collective bargaining agreements with AFSCME (Findings of Fact Nos. 6 and 7), that clearly reflect the separate professional and nonprofessional bargaining units. The most recent agreement was executed by the current Attorney General <u>after</u> the filing of the Association's petition in this case. The Employer's proffered side agreement provides no evidence of changed circumstances because the side agreement was executed <u>prior</u> to the 1981 certification of the two separate bargaining units. In relying upon the 1981 certification and the present collective bargaining agreement for the determination of the appropriate unit in this case, the Board has complied with the obligation in Section 604 of the Act to make a determination regarding the appropriate unit.

The Employer contends that the Board erred in relying upon the collective bargaining agreements entered into between AFSCME and the Employer, while at the same time refusing to admit the Employer's 1981 side agreement with AFSCME that the Employer contends evidences the fact that these two bargaining units have always been treated as a single unit. The collective bargaining agreements relied upon by the Board Representative are the best evidence available to answer the relevant inquiry of which employes are currently included in the petitioned-for nonprofessional bargaining unit. Since the Board's certification of these two units in 1981, job titles have been changed and the parties have not filed unit clarifications with the Board to reflect those changes. However, the provisions of each of the collective bargaining agreements relied upon by the Board Representative specifically set forth the classifications included in the existing professional and nonprofessional units. Further, the side agreement is contradicted not only by the Board's subsequent certification in 1981, but also by the collective bargaining agreements entered into between AFSCME and the Employer since the side agreement was executed. Finally, as noted above, the side agreement was executed prior

to the 1981 Board certification of separate professional and nonprofessional bargaining units. Accordingly, reliance on the collective bargaining agreements between the Employer and AFSCME was appropriate and the Employer's proffered side agreement provided no basis for the Employer's argument for a single bargaining unit.

The Employer's further argument that the Board ignored the broad-based bargaining unit policy in conducting the representation election in the unit as currently certified is baseless. Initially it should be noted that the Employer stipulated to the appropriateness of the separate professional and nonprofessional bargaining units in 1981. Further, Section 604(2) of PERA specifically contemplates a separation between professional and nonprofessional employes. The Employer should have sought the consolidation of these two units between 1981 and the filing of the Association's petition through the Board's unit clarification procedures to the extent that the Employer believed that the employes included in the professional unit were no longer professional employes within the meaning of the Act. The Employer would not even have had to allege a change in the facts in a petition for unit clarification because in processing unit clarification petitions, the Board does not require a change in facts if the issue raised was stipulated in the prior proceeding. See Penncrest School District, 16 PPER ¶ 16113 (Final Order, 1985). As noted above, the 1981 certification was based upon the stipulation of the Employer and AFSCME. Such a petition would not have been dismissed by the Board as inappropriately raising a question of representation because AFSCME was the certified representative of both bargaining units. Having failed to utilize the Board's procedures in this regard, the Employer cannot now be heard to complain that the unit as presently certified is inappropriate in the face of a rival representation petition. To permit the litigation of the bargaining unit in this situation would unduly delay the resolution of the question of representation and frustrate the exercise of the employes' rights under the Act.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the Employer and make the Nisi Order of Certification absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Employer in the above-captioned matter be and the same are hereby dismissed and the Nisi Order of Certification issued by the Board Representative be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this eighteenth day of January, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.