

hearing was held and the parties supplied post-hearing briefs to the Hearing Examiner. A Report and Recommendation ("R&R") was issued recommending that the Board find that the Respondent committed an unfair labor practice and direct that Mr. Mayfield be reinstated to his position. The Respondent filed exceptions to the Hearing Examiner's R&R and the Complainant responded with an Opposition to the Exceptions. The Hearing Examiner's R&R, the Respondent's Exceptions and the Complainant's Opposition are before the Board for disposition.

II. Discussion

Hearing Examiner's Report and Recommendation

The issue presented to the Hearing Examiner was: "Did the Respondent violate the Comprehensive Merit Personnel Act, D.C. Code § 1-601.01, et seq., when it released Robert Mayfield from employment with the Department of Health? If so was what shall be the remedy?" (R&R at p. 8).

The Hearing Examiner made the following findings of fact:

1. Robert Mayfield became a Public Affairs Specialist, DS11 with the Department of Health Bureau of Chronic Disease in 2005; in a term appointment position, effective March 7, 2005; not to exceed April 6, 2006.
2. A standard form SF50 Notification of Personnel Action effective March 7, 2005, states, "A term employee does not acquire permanent status on the basis of a term appt. Continued employment upon this appt. is contingent upon the availability of funding. Employee is eligible for within grade increases, health and life insurance benefits. Term appt. nte 04/06/06."
3. Mayfield was awarded three consecutive terms. The first term spanned 13 months not to exceed (NTE) April 6, 2006; the second term for 14 months not to exceed May 6, 2007, and a third term for 13 months not to exceed June 6, 2008
4. Some of the Tobacco Control Program (TCP) employees' positions were funded by the Center for Disease Control (CDC).
5. By memorandum dated May 12, 2006, Agency Fiscal Officer, Tammie Robinson advised Management that the criteria used for determining whether a position is eligible

for conversion from term to permanent status, must include a determination of whether the position was funded by an entitlement program, whether the grant or revenue source has existed for more than five (5) years and is not scheduled to expire.

6. Mr. Mayfield's position was funded through two (2) funding sources.

7. Mayfield's position was initially funded from the core program. Subsequently, part of his salary came from the Quit Line.

8. The Agency sought funding for the program manager and program assistant under the 5 year response it submitted to the Centers for Disease Control; but did not submit Mayfield's position.

9. An unsigned SF 50; processed on October 26, 2007; converted Mayfield from term to career appointment, effective October 14, 2007.

10. An email purportedly to Raneka Young, dated April 4, 2008, was submitted in the record to show John Jones sought instruction as to how to correct the alleged erroneous conversion to career status, effective October 14, 2007. The Examiner will give this document no weight. Neither John Jones nor Reineke Young were called as witnesses. Moreover, the Agency did not provide a copy to opposing counsel prior to the hearing. It was shown to opposing counsel at approximately 3 p.m. on the day of the hearing.

11. Performance evaluation for the period April 1, 2005 through March 31, 2006 –Mayfield's overall performance rating was excellent.

12. Report of Performance Rating for the period April 1, 2006 through March 31, 2007 also gave the overall performance rating of excellent.

13. Report of performance for the period April 1, 2007 to March 31, 2008 was "satisfactory". He was cited with having committed acts on two occasions wherein "... his judgment and corresponding actions have been

questionable at best and inappropriate at worst"; when he included a raise for himself in a grant without conferring with his manager/supervisor. He also submitted the paperwork to implement his promotion after a successful desk audit.

14. As a result of an April 3, 2007 desk audit performed on the Mayfield's position; Public Affairs Specialist, CS-1035-11; his grade was changed from DS-11 to 12, effective October 14, 2007.

15. Mayfield received two official SF 50 Notifications of Personnel Actions that were effective October 14, 2007. One converting him to permanent status, and the other promoting him to grade 12, with a salary increase.

16. John Jones personally delivered the two SF-50s to Mayfield that were effective October, 2007.

17. By email dated September 6, 2007, Mayfield challenged Supervisor Grant's decision denying his request to attend a Union related matter.

18. On September 7, 2007, Supervisor Grant sent Mayfield an email denying him leave to attend a union meeting stating, "[u]nion activity does not take precedence over our staff meetings. Your presence is required..."

19. Grant's decision to deny Mayfield ability to attend the Local Union Official's meeting was overturned by her Manager Sandra Robinson.

20. On the same day Mayfield was elected as President of Local 2978, he received a letter dated April 25, 2008 from Carlos E. Cano, M.D. Senior Deputy Director Community Health Administration stating his position was "... erroneously converted from a term appointment to a career appointment." It further stated that since it had been determined that the CDC Tobacco Control Program is a grant that cannot support conversions to career status, his position, "... has been changed back to a term status."

21. By letter dated May 30, 2008, Mayfield was provided unofficial notice that his term employment would terminate effective Friday, June 6, 2008. The letter further stated

Mayfield would be placed on administrative leave for one week, commencing May 30, 2008 through Friday, June 6, 2008.

22. Mayfield did not receive official notice of his reconversion to term status. No SF50 Notification of Personnel Action was sent to him.

23. A form SF 50 effective June 6, 2008, was issued stating, “[J]ob terminated due to expiration of appointment.”

24. Agency Fiscal Officer Tammie L. Robinson issued a memorandum dated July 9, 2008, stating “pursuant to your request, (emphasis added), this memorandum is to confirm ineligibility for conversion to permanent fulltime status the following funding sources...71/81 PHCD (previously 61PHBR) Chronic Disease Prevention (BRFSS/Tobacco) Grant.” She stated this was consistent with the May 12, 2008 determination.

25. After receipt of the July 17 advanced notice of intent to implement a RIF, as AFGE Local 2978 President, Mayfield issued a letter to his Union members advising them that the Agency intended to implement a RIF; effective September 28, 2008 and that employees affected would be notified on or about August 22, 2008.

26. On July 28, 2008, Carlos Cano, MD Senior Deputy Director Community Health Administration issued a letter stating President Robert Mayfield's memo to Union members made “broad statements” which “had the effect of creating alarm among employees who understandably are concerned about their future employment with the Department...”

27. On August 11, 2008, Deputy Director of Operations Sandra Robinson issued a memorandum to all Community Health Administration staff, announcing a policy change. Effective immediately, the main entrance door to the third floor at 825 North Capitol Street would be locked at all times. All visitors and guests were asked to remain in the reception area, until a staff member could escort them to their destination.

28. The Union complained that this restriction interfered with union members' anonymity when they wanted to confer with union representatives.

29. A police report confirmed that a former contractor made threats on the safety and lives of staff at that location.

30. When Mayfield showed photos of mold and unhealthy conditions to D. Vigilance, Sandra Robinson appeared distressed and spoke sharply to Mayfield asking why he did not show the photos to her first.

(R&R at pgs. 4-8)(Citations and footnotes omitted).

At the hearing, the Union argued "that President Mayfield's termination was motivated by anti-Union animus and done in reprisal for his having engaged in protected Union activity." (R&R at p. 8). The Union also challenged the Agency's stated justifications for Mr. Mayfield's removal; "i.e., lack of funds and lack of work; as legitimate reasons for its failure to retain Mr. Mayfield in his position." (R&R at p. 8). In addition, the Union maintains that "no documentation was produced to substantiate the lack of funding claim such as past budgets and financial justifications." (R&R at p. 8).

The Agency argued that its "decision not to renew Mayfield's term was based on its exercise of Management's rights. As a term employee, Mayfield was not entitled to conversion to permanent status." (R&R at p. 12). In addition, the Agency asserted that the Complainant did not show that Mr. Mayfield's Union activity was a motivating factor in the Agency's decision not to extend his term. (See R&R at p. 12). The Respondent claimed that the Union failed to meet its legal burden to show that the Department's "failure to renew Mayfield's term was motivated by anti-union animus or an effort to prevent Complainant from engaging in protected activities in violation of D.C Code § 1-617.04 (a) (3)." (R&R at p. 13). The Agency also asserted that the Complainant failed to show that Mr. Mayfield's Union activity "was in fact the motivating factor in the Agency's decision not to renew his term employment. Thus [the Union] cannot sustain the initial burden in their unfair labor practices case." (R&R at p. 13).

The Hearing Examiner found that the record evidence did not support the Respondent's justifications for the removal of Mr. Mayfield. Specifically, the Hearing Examiner did not find the evidence convincing that there was no funding available for the Mr. Mayfield's position. (R&R at p. 21). In addition, she did not find credible that there was not enough work available to justify maintaining Mr. Mayfield's position. (R&R at p. 21). The Hearing Examiner also rejected the Respondent's claim that Mr. Mayfield's grade change was due to a procedural error. (R&R at p. 22). The timing of Mr. Mayfield's removal was also a factor in the Hearing Examiner's credibility determinations. (R&R at pgs. 22-23). Additionally, the Hearing Examiner found that there was no reason for Mr. Mayfield to question his position upgrade. (R&R at p. 23).

As part of the Hearing Examiner's analysis, she employed the standard set forth in *National Labor Relations Board v. Wright Line*, 251 NLRB1084,1087 (1980), enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). The Hearing Examiner explained that "under the shifting burden analysis, the Union carries the initial burden of setting forth a *prima facie* case. Once a *prima facie* showing is established, the burden will shift to the employer to demonstrate that the same action (the employee's termination) would have taken place even in the absence of the protected conduct or activity." (R&R p. 25). Thus, "if the Board (Examiner) believes the employer's stated lawful reasons are non-existent or pretextual, the defense fails. See *Transp. Mgmt. Corp.*, 462 U.S. at 398; *NLRB v. Transp. Mgmt Corp.*, 462 U.S. 393,403 (1983), overruled on other grounds by *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, (1994) (adopting the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981))." (R&R at p. 25).

The Hearing Examiner found that the Union established its *prima facie* case. Specifically, the Hearing Examiner found that:

- 1) [Mr. Mayfield] [e]ngaged In Protected Union Activities. He increased an effective Union presence in the workplace, successfully processing grievances to arbitration for the first time in years, successfully ran for office and won employee respect.
- 2) The Employer Knew About The Activities. Mayfield's campaign fliers were posted in public areas when he ran for President. He met with managers and supervisors on behalf of others as steward and vice president. He showed management photographs of unhealthy and unsafe conditions at D.C. General. Ms. Robinson was described on the record as visually dissatisfied.
- 3) There Was Anti-Union Or Retaliatory Animus on the Part of the Agency. The Examiner does not believe the letter dated April 25 was "coincidentally" placed on Mayfield's chair to welcome him back to his office on the evening of his successful election as President of Local 2978. The Examiner finds this was a calculated act to put fear in the hearts of Union members and officials. Mayfield had become effective, the union was no longer a "joke" and irrespective of the fact that the RFP that was issued in 2008 could have included a request to fund what had "morphed" into his position at that time, with adequate functions being performed to warrant his grade increase to GS12 and an accompanying salary increase; the Agency decided to

forego the opportunity to seek additional funding. Thus, the Examiner was not impressed with the allegations that the community partner had taken over his functions. The classifier who evaluated the position believed there was enough left of his functions to merit an upgrade.

...

4) the Agency Made a Decision to Terminate Him Based on Anti-Union or Retaliatory Animus. This prong of the analysis was satisfied. Acts done in this case were egregious. The challenged act of leaving the conversion notice in his chair, on election night, initiated the process of being able to rid the workplace of an effective Union advocate, without need of providing a reason. The Examiner had the opportunity to examine witnesses, observe their demeanor and listen to their explanations. Credible testimony was entered on the record that "taking out" the Local's President sent a chilling message throughout the workplace. Recruitment of stewards became difficult. People felt bare and unprotected. The Examiner believes the Agency "elected" not to fund Mayfield's position. The Examiner also finds and Management acknowledged that irrespective of the fact that a community partner assumed some of his duties, Mayfield did not sit idle.

(R&R at pgs. 26-27) (Citations and footnotes omitted).

Based upon the foregoing, the Hearing Examiner concluded that: (1) the timing of Mr. Mayfield's removal was evidence of the Respondent's anti-union *animus*; (2) there was a hostile attitude towards Mr. Mayfield's union activity; (3) the Respondent was clearly aware of Mr. Mayfield's union activity; and (4) that the Respondent's anti-union animus had a negative effect on the bargaining unit members. (R&R at pgs. 29-32). In addition, the Hearing Examiner found that the Department did not make a procedural error concerning Mr. Mayfield's changes in employment status. Instead, "[t]he act of reconverting President Mayfield to term employment was a calculated intentional invidious act aimed at ridding the workplace of an effective union advocate." (R&R at p. 34).

Thus, the Hearing Examiner recommended "that the [Board] find that an unfair labor practice has been committed. Mayfield must be reinstated to his permanent position and notices posted. He is entitled to a make whole remedy." (R&R at p. 34).

Respondent's Exceptions and the Board's Analysis

The Department raises as an exception to the R&R that “[a]s a matter of law, term appointments do not confer permanent status. The HE’s recommendation to “reinstate him [Robert Mayfield] to his permanent position” is contrary to law. D.C. Official Code § 1-608.01(a)(6).” (Exceptions at p. 3). In support of this exception, the Respondent argues that the Hearing Examiner failed to accept its contentions that the promotion of Mr. Mayfield was an administrative error. (See Exceptions at pgs. 3-4).

The Hearing Examiner’s well-articulated analysis, findings and recommendations clearly demonstrate careful and thorough consideration of all the evidence presented. The Board has held that “issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner.” *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451, at p. 4, PERB Case No. 95-U-02 (1995); *University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 DCR 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and *Charles Bagenstose, et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case No’s 88-U-33 and 88-U-34 (1991). This is precisely the function of the Hearing Examiner; to determine issues of credibility and to judge the sufficiency of the evidence.

In the present case, the Respondent simply disagrees with the Hearing Examiner’s interpretation of the evidence, arguing that its version of the record is incompatible with the Hearing Examiner’s findings. The argument, that Mr. Mayfield’s promotion was a procedural error, and therefore “illegal”, was considered and rejected by the Hearing Examiner. A review of the record reveals that the Hearing Examiner’s determinations that the Respondent has not demonstrated that Mr. Mayfield’s promotion was unlawful is reasonable and supported by the evidence. Therefore, this argument is not a proper exception to the Hearing Examiner’s R&R. See *Hina L. Rodriguez v. District of Columbia Metropolitan Police Department*, __ D.C.R. ___, Slip Op. No. 954, PERB Case No. 06-U-38 (2010).

The Respondent’s also contends that “[a]bsent a finding that the DOH’s Tobacco Control Program converted employees to permanent status in its program, the HE committed reversible error by converting Robert Mayfield’s position to a permanent career status. (Exceptions at 5). The basis for this exception is the Respondent’s assertion that the Hearing Examiner should have agreed with its contention that there was no funding available to support Mr. Mayfield’s continued employment.²

² The Respondent repeats its contention that no funding was available to support Mr. Mayfield’s continuing employment in its fourth exception; that the Hearing Examiner “committed reversible error by reinstating Robert Mayfield to a grant-funded position in the Tobacco Control Program.” (Exceptions at p. 10).

This exception also represents a mere disagreement with the Hearing Examiner's findings. As stated above, this Board has determined a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner where, as here, the findings are fully supported by the record. See *AFGE, Local 874 v. D.C. Dept. Of Public Works*, 38 D.C.R 6693, Slip Op. No. 266, PERB Case No. 89-U-15, 89-U-18 and 90-U-04 (1991).

The third exception to the Hearing Examiner's R&R contends that "[t]he HE's determination that the DOH did not make an error when it converted Robert Mayfield's position to permanent career status is contrary to law and is not supported by the record evidence." (Exceptions at 8). As with the prior exceptions, this exception is simply a disagreement with the Hearing Examiner's rejection of their factual position. The Board, therefore, finds this not a proper exception to the Report and Recommendation.

The Respondent also argues that the "timing of the conversion alone is not sufficient to establish anti-union *animus* or show that his election was a motivating factor in the conversion of Mr. Mayfield's position back to a term appointment status." (Exceptions at 8). The Board finds, however, that the Hearing Examiner's finding of anti-union *animus* was based on a number of factors, not just the timing of Mr. Mayfield's removal.

The Board has acknowledged that determining motivation is difficult. Therefore a careful analysis must be conducted to ascertain if the stated reason for Mr. Mayfield's removal is pretextual. The employment decision must be analyzed according to the 'totality of the circumstances'. Relevant factors include a history of anti-union *animus*, the timing of the action, and disparate treatment." *Doctors Council of the District of Columbia v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 3, PERB Case No. 99-U-06 (2000), citing *NLRB v. Nueva*, 761 F.2d 961, 965 (4th Cir. 1985)." In addition to the timing of Mr. Mayfield's removal, the Hearing Examiner noted the hostile relationship the Department had with Mr. Mayfield, its reactions to his union activities and the effect of Mr. Mayfield's removal on the bargaining unit. In view of the above, we adopt the Hearing Examiner's findings that the Complainant has shown that the Department's motivation was pretextual and not for a legitimate business reason. Moreover, the Board finds that the Hearing Examiner's analysis under *Wright Line* was rational, consistent with Board precedent and supported by the record.³

The fifth exception argued by the Respondent contends that the Hearing Examiner's "conclusion that the DOH did not have a legitimate business reason for its decision not to renew Robert Mayfield's term appointment is not supported by the record evidence." (Exceptions at p. 11). Whereas the Board has found that the Hearing

³ The Board has previously adopted the National Labor Relations Board's reasoning in *Wright Line*. See *Charles Bagenstose and Dr. Joseph Borowski v. D.C. Public Schools*, 38 D.C.R. 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991) and *Ware v. D.C. Department of Consumer and Regulatory Affairs*, 46 D.C.R. 3367, Slip Op. No. 571, PERB Case No. 96-U-21 (1998).

Examiner's findings in this regard are supported by the record and reasonable, this exception is also rejected.

Lastly, the Respondent argues that "[t]he remedy recommended by the HE is inappropriate. A personnel action, to be unjustified or unwarranted, must be determined by an appropriate authority to be improper or erroneous on the basis of substantive defects, and no employee shall be entitled to back pay or reinstatement solely on the basis of procedural error by the agency. DPM§ 1149.7." (Exceptions at p. 13). The Hearing Examiner, however, specifically found that she did not accept DOH's contention that the change in Mr. Mayfield's employment status was merely a procedural error. (See R&R at p. 34). Also, the Board has found that, "[b]y not returning an employee . . . to his previous position, the CMPA's purpose and policy of guaranteeing the rights of all employees is undermined. By placing [the aggrieved employee] in an employment situation other than where the violation occurred, the *status quo* would not be restored and employees most aware of [the employer's] violative conduct, and thereby affected by it, would not know that exercising their rights under the CMPA is indeed fully protected. It is the furtherance of this end, *i.e.*, the protection of employee rights, that the Board denies this exception." *Bagenstose v. DCPS*, 41 D.C.R. 1493, Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991).

Concerning the posting of a notice, we adopt the Hearing Examiner's remedy requiring that DOH post a notice acknowledging that they have violated the CMPA. The Board has previously noted that, "the overriding purpose and policy of relief afforded under the CMPA, for [conduct which] violates employee rights, is the protection of rights that inure to all employees". *Id* at p.3, PERB Case No. 88-U-33 (1991). Specifically, if DOH is not required to post a notice, the CMPA's policy and purpose of guaranteeing the rights of all employees is undermined. Moreover, those employees who are most aware of DOH's illegal conduct and thereby affected by it, would not know that exercising their rights under the CMPA is indeed fully protected. Also, a notice posting requirement, serves as a strong warning against future violations.

For the reasons discussed above, we adopt the Hearing Examiner's recommendation finding DOH in violation of the CMPA, direct DOH to reinstate Mr. Mayfield to his permanent position and that notices be posted.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complainant, American Federation of Government Employees, AFL-CIO, Local 2978's Complaint is granted.
2. The District of Columbia Department of Health (DOH), its agents and representatives, shall cease and desist from violating D.C. Code § 1-617.04 (a)(1), (3) and (5), by the acts and conduct set forth in this Opinion.

3. DOH, its agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act (CMPA) in any like or related matter.
4. DOH shall cease and desist from interfering with the American Federation of Government Employees, Local 2978's rights as exclusive bargaining agents.
5. DOH shall reinstate Mr. Mayfield to his position after October of 2007 and prior to his removal.
6. DOH shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice, where notices to employees are normally posted.
7. Within fourteen (14) days from the date of this Decision and Order, DOH shall notify the Public Employee Relations Board (PERB), in writing, that the attached Notice has been posted accordingly, and as to the steps it has taken to comply with paragraphs 5 and 6 of this Order.
8. The Complainant will submit a verified statement as to the appropriate amount for a make whole remedy, *i.e.* back-pay. DOH shall provide a response to Complainant's verified statement within ten (10) days. The Board will issue a supplemental order ruling on the appropriate remedy in a subsequent order.
9. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 27, 2012

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH ("DOH"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1256, PERB CASE NO. 08-U-47 (March 27, 2012)

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered DOH to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1), (3) and (5) by the actions and conduct set forth in Slip Opinion No. 1256.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL cease and desist from interfering with the American Federation of Government Employees, Local 2978's rights as exclusive bargaining agents.

WE WILL reinstate Mr. Mayfield to his position after October of 2007 and prior to his removal.

District of Columbia Department of Health

Date: _____ By: _____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

April 13, 2012

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 08-U-47, Slip Opinion No. 1256 is being transmitted electronically and *via* U.S. Mail to the following parties on this the 13th day of April, 2012.

Natasha Campbell, Esq.
Director
Office of Labor Relations
and Collective Bargaining
441 4th Street, NW, Suite 820 North
Washington. DC 20005

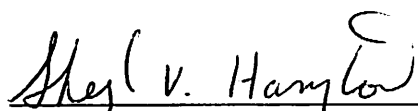
EMAIL & U.S. MAIL

Cisse, Louise-Ann (EOM) <Louise.Cisse@dc.gov>

Andres M. Grajales, Esq.
Assistant General Counsel
American Federation of Government Employees
General Counsel's Office
11th Floor
80 F Street, N.W.
Washington, D.C. 20001

EMAIL & U.S. MAIL

grajaa@afge.org



Sheryl V. Harrington
Secretary