

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)

Washington Teachers' Union,)
Local 6,)

Petitioner,)

and)

District of Columbia)
Public Schools,)

Agency.)

PERB Case No. 88-R-11
Opinion No. 250

DECISION ON UNIT DETERMINATION
AND DIRECTION OF ELECTION

On August 8, 1988, the Washington Teachers' Union, Local 6 (Petitioner), filed a Petition for Exclusive Recognition with the District of Columbia Public Employee Relations Board (Board). The Petitioner seeks to represent, for purposes of collective bargaining, a unit of Junior Reserve Officers' Training Corps (JROTC) Instructors and Assistant Instructors employed by the District of Columbia Public Schools (DCPS). The Petition was accompanied by a showing of interest meeting the requirements of Board Rule 101.2.

Notices concerning the Petition were posted on August 22, 1988. There were no requests to intervene. DCPS filed an Opposition to the Petition with the Board on October 17, 1988, contending that the proposed unit is not appropriate for purposes of collective bargaining because, (1) it lacks the necessary community of interest; (2) separate supervision by the military service of employees in the proposed unit negates the control necessary to enable DCPS to bargain effectively with a labor organization; (3) employees in the proposed unit do not possess the requisite substantial and continuous employment relationship; and (4) a sufficient employer/employee relationship does not exist between DCPS and employees in the proposed unit to permit effective collective bargaining. DCPS also argues, generally, that certification of JROTC Instructors and Assistant Instructors as an appropriate unit would not promote effective labor relations or the efficiency of agency operations.

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This matter was heard by a Board-designated Hearing Examiner on May 11, June 28, and August 2, 1989. In a Report and Recommendation (R&R) dated March 21, 1990, the Hearing Examiner ^{1/} recommended that the proposed unit be found appropriate and that an election be conducted among employees in the unit to determine whether or not they desire representation by the Petitioner.

Applying the criteria set forth in the Comprehensive Merit Personnel Act (CMPA), D.C. Code Section 1-618.9(a), the Hearing Examiner recommended that the Board direct an election in accordance with D.C. Code Section 1-618.10 and Section 102 ^{2/} of the Rules and Regulations among a unit described as:

"All Junior ROTC Instructors employed by the D.C. Board of Education"

to determine whether or not they wish to be represented for the purpose of collective bargaining for compensation and for terms and conditions of employment by Washington Teachers' Union. (R&R p. 14).

The Hearing Examiner found that DCPS's Director of Military Science has full authority to hire and retain JROTC Instructors and Assistant Instructors. Furthermore, the Director's authority not to renew an employment contract is more than a mere recommendation to terminate, as DCPS contended, but constitutes the full authority to do so. The Hearing Examiner further reasoned that the military service's certification of instructors as qualified is not evidence of military control over individuals in the proposed unit as JROTC instructors but rather evinces its control over the JROTC program content and operation. (R&R, p. 11).

The Hearing Examiner also found that the JROTC instruction staff share a clear and distinct community of interest. The Hearing Examiner also concluded that such a unit will promote effective labor relations and would not undermine DCPS's ability to maintain the efficiency of its operation. In support of this conclusion, the Hearing Examiner found that all JROTC Instructors

^{1/} Due to visual impairment, the designated hearing examiner was unable to complete the Report and Recommendation. The Board reassigned the case to another hearing examiner for completion of the report, a copy of which is appended hereto.

^{2/} A typographical error in the Hearing Examiner's Report and Recommendation reflects this citation to our Interim Rules and Recommendations as Section "192".

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are subject to similar military qualifications established under the JROTC program, have similar working conditions, are subject to the supervision of DCPS's Director of Military Service, are paid under a uniform policy, enjoy the same benefits, work the same work week and work year, perform similar duties, have similar skills and are employed on an annual contractual basis. (R&R, p.13).

The Hearing Examiner found no evidence to support DCPS's contention that "Senior Instructors" supervise "Junior Instructors," thereby making the proposed unit inappropriate under D.C. Code Section 1-618.9(b)(1). To the contrary, the Hearing Examiner found that the duties and responsibilities of all of these employees are the same and that any personnel action with respect to them is taken by the Director of Military Science or the principal of each school that employs JROTC Instructors. (R&R, p.13).

Finally, the Hearing Examiner found that the employees in the proposed unit are not temporary in that they have an expectation of continued employment, a conclusion consistent with our decision in Washington Teachers' Union, Local 6 and D.C. Public Schools, 36 DCR 6497, Slip Op. No. 233, PERB Case No. 88-R-09, (1989). (R&R, p. 14).

DCPS timely filed Exceptions to the Hearing Examiner's Report and Recommendation. ³/

DCPS asserts that it does not retain sufficient control over essential terms and conditions of employment to be the employer of JROTC Instructors. In this regard, DCPS argues it is without the authority to determine primary terms and conditions of employment and thus lacks the ability to engage in the necessary "give and take" required for meaningful good faith collective bargaining. We disagree. The record is replete with evidence that establishes that, like other DCPS Instructional personnel, JROTC Instructors work in the same school setting, are covered by the same rules, have the same vision and dental benefits and are hired and discharged by DCPS.

DCPS further argues that a "specific pay computation formula" established by federal law sets the salary of JROTC instructors and thus preempts DCPS's authority to establish salaries. Thus, DCPS contends, control by DCPS over this essential term and condition of employment is precluded, so that

³/ The Petitioner filed a Reply Memorandum To Respondent's Exceptions which was also considered by the Board.

it lacks the requisite control over these employees to engage in meaningful collective bargaining. As noted by the Union in its Reply Memorandum to DCPS's Exceptions, the United States Court of Appeals for the Fifth Circuit, in a discussion of the pay computation formula under 10 U.S.C. Section 2031(d)(1), in Cavazos v. United States, 776 F.2d 1263, (1264 n.1 (1985)), stated the following:

The minimum salary paid a JROTC instructor under 10 U.S.C. Section 203[1][sic](d)(1) is the difference between his retirement and active duty pay, exclusive of hazardous duty pay. The military branch involved reimburses the school district one-half this amount. The school authorities may opt to pay the instructors more but the reimbursement does not exceed one-half the minimum salary (emphasis added).

Under this pay arrangement, it appears that it is the military that has relinquished control over the determination of JROTC Instructors' salary. DCPS's discretion to vary upward its contribution in contrast to the military's fixed (one-half) contribution toward a minimum salary clearly provides school authorities with the "final say" over determining these employees' salary. ^{4/} Army and Navy Regulations introduced at the hearing further support this interpretation (see DCPS Exhibits 4 & 11 and Union Exhibit 4). DCPS has provided no basis for adopting a contrary interpretation. We therefore conclude that DCPS retains sufficient control over the compensation paid these employees to allow for meaningful collective bargaining over this essential term of employment.

In sum, we find that an employer/employee relationship exists between DCPS and employees in the proposed unit. All significant control maintained by the military concerns instructional content and not primary terms and conditions of employment. The military's retained authority to set minimum

^{4/} DCPS's control over these employees meets the standard set forth in Res-Care, Inc., 283 NLRB No. 78 (1986), cited by DCPS. In Res-Care, the National Labor Relations Board clarified what constitutes a valid employer/employee relationship for purposes of meaningful collective bargaining. In its view, the ability of an employer to have the final, practical say regarding wages and a union's practical ability to affect the employer's decision is fundamental. The evidence clearly establishes that ultimate control over these employees' total salary rests with DCPS.

qualifications of JROTC Instructors does not overcome the evidence of control over employment conditions maintained by DCPS as noted above nor DCPS's authority to decide who, among qualified JROTC Instructors, to employ. The record evidence clearly establishes that DCPS maintains sufficient control over essential terms and conditions of employment of all JROTC Instructors to engage in meaningful collective bargaining.

DCPS also urges that the Junior or Assistant JROTC Instructors do not have a community of interest with Senior Instructors in that the two positions, inter alia, have "radically different educational requirements." In support of this contention, DCPS asserts that all Senior JROTC Instructors must be commissioned officers and possess a baccalaureate or higher degree.^{5/} By contrast, according to DCPS, non-Senior JROTC Instructor positions require only a high school diploma with a minimum of 20 years active duty. However, what DCPS fails to state is that these qualifications are only minimum educational requirements for JROTC Instructors. In the case of Air Force JROTC Aerospace Science Instructors, the record establishes that an officer with a baccalaureate degree may be the Assistant Aerospace Science Instructor if he or she has less seniority at the school than another instructor with the same qualifications (DCPS Exhibit 11, p.5). This appears to be the case with Navy and Army JROTC Instructors as well. (Union Exhibit 4, p.3, DCPS Exhibit 4, p.2) Thus, some Assistant Instructors may possess the same educational qualifications as Senior Instructors. Moreover, we find the distinction between a high school diploma and a college degree not of significance in view of the 20 years of active military service (and thereby experience) that all JROTC Instructors must have in their respective branch of the armed services.

^{5/} We note that commissioned officers who do not possess a baccalaureate or higher degree also do not meet the educational requirements for Senior Instructor positions. See, DCPS Exhibits 4 and 11 and Union Exhibit 4. We further note that there is conflicting evidence whether Senior JROTC Instructors are required to be commissioned officers. DCPS Exhibit 4 indicates that Senior and Non-Senior Instructor positions alike require "20 years of active military service" and "[r]etirement as a commissioned, Warrant, or noncommissioned officer" (emphasis added), whereas Union Exhibit 4 (a Naval JROTC Informational Booklet) suggests at least in the case of Naval Science Instructors, that the Senior Instructor be the "senior commissioned officer employed by the institution (emphasis added)."

Contrary to DCPS's assertions, the record fully supports the Hearing Examiner's finding above that these JROTC Instructors share a clear and distinct community of interest. The uncontroverted evidence reveals that, unlike other instructional personnel of DCPS, JROTC Instructors work 8-hour days and a 12-month work year; have their employment contracts and other personnel matters reviewed by DCPS's Director of Military Science, and provide military instruction on programs established by the Department of Defense Military Service.

Finally, we address DCPS's claim that Senior Instructors are the supervisors of Assistant or Junior Instructors. In support of this contention, DCPS cites various Army, Navy, and Air Force regulations in addition to interpretive memoranda introduced during the hearing. In the main, those documents state that Senior Instructors are responsible for evaluating, assigning and, in one instance (Air Force regulation), supervising the work of Assistant Instructors. Notwithstanding words to this effect, the indicia of supervisory status or authority cannot be established by statements of such duties alone. DCPS refers to nothing in the record to show that Senior Instructors actually exercise such supervisory responsibilities. Furthermore, we note that DCPS stipulated that all personnel actions with respect to all JROTC Instructional staff are taken by the Director of Military Science. Thus, we find no basis for disturbing the Hearing Examiner's conclusion that the record contains no evidence that Senior Instructors hire, fire, suspend, demote, direct, or evaluate Junior or Assistant Instructors.

For the foregoing reasons, the Board adopts the Hearing Examiner's findings and conclusions as noted and discussed above, and finds the following unit appropriate for bargaining over the terms and conditions of employment:

All Junior ROTC Instructors who are hired to teach Junior ROTC in the District of Columbia Public Schools excluding supervisors, management officials, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

To resolve the question concerning representation, the Board orders that an election be held to determine the will of the employees eligible to vote in the unit described above regarding representation in collective bargaining with DCPS.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following unit is an appropriate unit for collective bargaining over terms and conditions of employment:

All Junior ROTC Instructors who are hired to teach Junior ROTC in the District of Columbia Public Schools excluding supervisors, management officials, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

2. An election be held in accordance with the provisions of D.C. Code Section 1-618.10 and Section 102 of the Interim Rules of the Board to determine whether or not the employees in the above-described unit wish to be represented by Washington Teachers' Union, Local 6 for purposes of collective bargaining for compensation and for terms and conditions of employment.

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

July 23, 1990