THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees, AFL-CIO, Local 631,	
Petitioner,	PERB Case Nos. 04-UM-01 and 04-UM-02
and	Opinion No. 1103
District of Columbia Office of Zoning,	
District of Columbia Office of Property Management,	**Motion to Disqualify**
District of Columbia Office of Planning,	
District of Columbia Department of Public Works, Public Works, Energy Office,	
Respondents.	

ORDER ON MOTION TO DISQUALIFY HEARING EXAMINER

I. Background

On February 5, 2004, the American Federation of Government Employees, Local 631 (Union or Local 631) filed a Petition for unit modification, to modify the Board certification of bargaining units in Certification No. 14, 1982, (D.C. Office of Planning and Development); Certification No. 15, 1982 (Department of Environment, Energy Division); and Certification No. 44, 1987 (Department of Administrative Services/Mail Room), for the purpose of non-compensation bargaining, "to reflect the change of the name of the local union and to reflect the changes in the identity of the employing agency; to add unrepresented positions created since the recognition or certification was granted; and to delete the classifications or employee positions that no longer exist." (Petition at pgs. 1-2). The

Petition was filed pursuant to Board Rule 504.1 (a) through (c), "Modification of Units".

On July 1, 2004, by "Amendment to Petition for Unit Modification" (Amended Petition), the Petitioner sought to amend Cert. No. 14, Cert. No. 15 and Certification No. 44, pursuant to Board Rule 516, in order to change the name of the Union from AFGE Local 3871 to AFGE Local 631.[1] Also, the Petitioner sought to amend the recognition issued in Case Nos. 5R003 and 5R007 and the certification issued to AFGE Local 1975 for the bargaining unit currently known as DPW/Fleet Management Administration, pursuant to PERB Rule 516, 'Petitions to Amend Certification' to reflect that AFGE Local 631 is the exclusive representative of all employees at the Department of Public Works, Fleet Management Administration." Specifically, Local 631 sought to:

> (1) reflect the change in the employing agency;
>
> (2) abolish the consolidated unit in Certification No. 24;
>
> (3) amend the listed certifications to reflect AFGE Local 631 as the exclusive representative of all employees in DPW/Fleet Management Administration;
>
> (4) reflect that AFGE Local 1975 is the exclusive representative of all employees within the District Department of Transportation and all other employees within the Department of Public Works which were previously assigned to AFGE Local 1975 on July 23, 1984, as state in Certification No. 24, excluding DPW/Fleet Management Administration;
>
> (5) consolidate two or more units within the same agency;
>
> (6) add unrepresented positions created since the recognition or certification was granted; and
>
> (7) delete classifications or employee positions that no longer exist.

(Petition at p. 2).

---

[1]In the initial Petition, Local 631 had asserted that "the certifications named in the is petition were issued to AFGE Local 3871. AFGE Local 3871 was merged into AFGE Local 631, effective July 13, 2001. By submission of this petition we seek to change the name of the Union listed on each certification in this petition from AFGE Local 3871 to AFGE Local 631." (Petition at p. 3). There are over 210 employees in the various units. (Petition at pgs. 3-5).

Local 631 filed a document styled "Union's Second Amendment to the Petition for Modification" (Second Amended Petition), seeking to "modify certifications that reflect a change in the agency names based upon a reorganization of the Department of Public Works; the creation of the Office of Property Management; the transfer of unit employees to the District Department of Transportation; and the name change of the Office of Property Management to the Department of Real Estate Services. Local 631 requests a name change and consolidation of Certification Nos. 77, 82, and 85 ... to reflect a reorganization of the Department of Public Works; creation of the Office of Property Management; the transfer of unit employees to the District Department of Transportation; and the name change of the Office of Property Management to the Department of Real Estate Services. AFGE 631 seeks to consolidate the March 31, 1965 Certification, Certification No. 77, Certification No. 82, and Certification No. 85 into one unit." (Second Petition at pgs. 1-2).

Consistent with Board Rules, the Agencies filed "Agencies Comments on Petition for Unit Modification" (Comments), opposing the Petition and Amended Petitions. The Agencies opposed Local 631's "modification of the certifications of any and all of the units previously represented by AFGE 3871 without proof that a valid merger took place including an election with the appropriate due process safeguards." (Comments at p. 4). The Agencies also alleged that "there has not been a substantial continuity of representation from Local 3871 to Local 631." (Comments at p. 5). In view of an alleged merger between Local 3871 and Local 631 in 2001, the Agencies "dispute[d] the majority status of either AFGE 3871 or AFGE 631 within the proposed bargaining units in these agencies. [The Agencies requested that the Board] order an election to determine whether a majority of employees in the proposed bargaining units desire representation by AFGE [Local] 631." (Comments at p. 6).

Hearing Examiner Shelley Hayes conducted a hearing in this matter. The Hearing Examiner issued an Order in which she stated "The petitioner is granted an enlargement of time to and including August 4, 2010, in which to file its reply brief in this case. Thereafter, the record will close and no further pleadings will be accepted." (Order at p. 1).

II. Position of the Parties

On September 10, 2010, the Respondents filed a "Motion To Disqualify Hearing Examiner" (Motion), requesting that the Hearing Examiner be disqualified from rendering a Report and Recommendation in this case. (Motion at p. 8). The Respondents maintain that under Board Rule 550.13, "Hearing Examiners shall have the duty to conduct fair and impartial hearings . . . [and assert that the Hearing Examiner showed bias and] did not conduct a fair and impartial hearing. [The Respondents allege] that the Hearing Examiner expressed her hostility to the Agencies' position several times [and that] [s]he also used her power to make evidentiary rulings against the Agencies by requiring strict adherence to the rules of evidence even though [Board] rule 550.16 states '[i]n hearing before Hearing Examiners, strict compliance with the rules of evidence applied by the courts *shall* not be required. The Hearing Officer shall admit and consider proffered evidence that possesses probative value'." (emphasis supplied in the original). (Motion at p. 3). The Respondents reference

the Executive Director's notice of hearing advising that the hearing would be investigatory in nature, and not an adversarial proceeding, to develop a factual record upon which the Board can make a decision.

The Respondents contend that the Hearing Examiner "did not allow the Agencies to contribute to the development of a full and factual record. [The Respondents assert that the hearing Examiner] . . . repeatedly demanded legal argument from the Agencies' counsel and expressed her belief that the Agencies' position had no merit. Her preconceived opinions poisoned the record." (Motion at p. 3). The Respondents referenced three (3) pages of transcript where the Hearing Examiner allegedly "interrogated and argued with Respondents' counsel . . . repeatedly demand[ing] that the Agencies justify their position rather than allowing them to do so in their post-hearing brief." (Motion at pgs. 3-4). The Respondents assert that the Hearing Examiner instructed the parties "'This is not a fact-finding mission, okay?' [Also, she expressed hostility towards the OLRCB Director for telling a witness to] Answer the question." (Motion at p. 6). In addition, the Respondents allege that the Hearing Examiner refused to accept a position description for Project Managers because the Respondents did not provide a separate position description for each Project Manager, even though all of the descriptions were identical.

Local 631 countered in its "Union Response in Opposition to the Respondent's Motion to Disqualify the Hearing Examiner" (Response), that the Motion was untimely filed. The record closed on August 4, 2010 and the Respondents filed their Motion on September 10, 2010 and "no extension of time was requested." Local 631 requests that the Board dismiss the Motion as untimely.

Local 631 asserts that pursuant to Board Rule 550.13, it is "the Hearing Examiner [who] may regulate the course of the proceeding." (Response at p. 1). Furthermore, Local 631 maintains that Board Rule 557 permits disqualification of a Hearing Examiner for a conflict of interest and here the Respondents "[have] cited no conflict of interest which would require the removal of the Hearing Examiner. The [Respondents'] motion, selectively, cites to excerpts from seven pages of transcript for proceedings which encompassed six days of hearings. [Local 631 states that[[a] review of the March 16, 2010 transcript shows the Hearing Examiner was attempting to ascertain the [Respondents'] position and narrow the area of inquiry to the specific job titles, the [Respondents] ... challenged in the petition for modification.... [Local 631 claims that the Respondents'] assertions of bias on the part of the Hearing Examiner are not supported by the record. ["Rather,] [t]he exchange relating to the matter not being a fact-finding mission is ... taken out of context. [According to Local 631,] [t]he Hearing Examiner, in response to the [Respondents'] assertions that numerous positions should be excluded from the bargaining unit, asked the [Respondents] when the Union had been notified about the exclusion of the positions.... The [Respondents] stated, 'There was no official notification to the Union.' ... The Hearing Examiner informed the [Respondents], *in that context*, [that] the proceeding was not a fact-finding mission. [emphasis added]. The Hearing Examiner was responding to the [Respondents'] position that it could raise new and additional grounds to the petition, at the hearing, without notice to the other party." (Opposition at p. 2).

Local 631 asserts that the Respondents' complaint "about the Hearing Examiner's instruction to Ms. Campbell is taken out of context as well. A review of the transcript shows, Al Venson, the witness, was attempting to speak, during an examination by the [Respondents'] counsel, Kathryn Naylor. Ms. Campbell interrupted and stated "Answer the question."... the Hearing Examiner properly instructed Ms. Campbell, [that] direction of a witness is the province of the Hearing Examiner and not counsel. Such a direction is within the province of ... [Board] Rule 550.13(c) [which allows the Hearing Examiner] to regulate the proceeding and the conduct of the parties." (Opposition at pgs. 2-3). Local 631 also contends that "[t]he District's assertions, concerning the affidavits and position descriptions for Project Managers, are not supported by the record. At the March 16, 2010 hearing, the Hearing Examiner instructed the District to file signed affidavits with a position description attached to each affidavit, to support the District's position, the Project Managers should be excluded from the bargaining unit....The District did not file the affidavits with ta position description attached. On May 25, 2010, the Hearing Examiner issued a Show Cause Order, requiring the affiants to appear and bring ... their current position description. The Show Cause Oder specifically informed the parties [that] the failure to produce the affiants and their position descriptions would result in the exclusion of the affidavits from the record.... The District was informed of the consequences of any failure to comply, and the Hearing Examiner's actions were in conformity with [Board] Rule 550.18(b). [Local 631 maintains that] [w]hen a party fails to comply with an order of the [H]earing [E]xaminer, the [H]earing [E]xaminer has full authority to exclude evidence, upon which a party is relying." (Opposition at p.3).

III. Discussion

Board Rule 550.20 provides as follows:

> The Hearing Examiner or Executive Director may refuse to consider any motion or other action which is not filed in a timely fashion in compliance with this section.

Board Rule 557.2 provides as follows:

> In any case in which a hearing examiner fails to withdraw from a proceeding as has been requested by a party, the examiner shall state the reason for ... her decision on the record. The Board shall consider the request at the time the entire case is transmitted and shall take appropriate action.[2]

The Hearing Examiner closed the record in this matter on August 4, 2010. The record shows that the Respondents did not request an extension of time to keep the record open to file their Motion. The Motion was filed on September 10, 2010, after the record in this matter had closed

[2]Here, the Hearing Examiner issued her Report and Recommendation on October 14, 2010.

pursuant to the Hearing Examiner's Order. There is no showing that the Respondents could not have filed their request while the record was open. No new evidence is relied upon by the Respondents, nor was there any new action by the Hearing Examiner that served as the basis of the Motion. Also, the late filing prevented the Hearing Examiner from considering the Motion while the record was open so that she could state the reasons for her position on the record, in order that the Board may review her position as part of the entire record. In view of the fact that the Motion was filed after the record in this matter was closed, the Board has determined that it was untimely filed. Therefore, the Motion must be dismissed for untimeliness.

Board Rule 557.1 provides as follows:

> A hearing examiner ... shall withdraw from proceedings whenever that person has a conflict of interest.

The Respondents requested that the Hearing Examiner be disqualified because she "did not conduct a fair and impartial hearing"; "expressed her hostility to the Agencies' position several times"; "used her power to make evidentiary ruling against the Agencies by requiring strict adherence to the rules of evidence"; "did not allow the Agencies to contribute to the development of a full and factual record"; "repeatedly demanded legal argument from the Agencies' counsel and expressed her belief that the Agencies' position had no merit"; and "her preconceived opinions poisoned the record." (Motion at p. 3). We find that even if the Motion been timely filed, none of the arguments raised by the Respondents are supported by Board Rule 557, which requires that a hearing examiner shall recuse himself or herself "whenever that person has a conflict of interest."

A conflict of interest is defined as "a conflict between private interests and the official responsibilities of a person in a position of trust".[3] Furthermore, the following discussion in How Arbitration Works, by Elkouri and Elkouri, Sixth Edition (2003), is instructive in the present case. Regarding the term "conflict of interest" as it applies to labor arbitrators, Elkouri and Elkouri state as follows:

> The *Code of Professional Responsibility* provides that an arbitrator's personal qualifications must include '"honest, integrity, impartiality and general competence in labor relations matters." To that end, an arbitrator must be willing to disclose any relationship "which might reasonably raise a question as to the arbitrator's impartiality." The Code of Professional Responsibility includes within such relationships any "current or past managerial, representational, or consultative relationship with any company or union involved. . . . [citations omitted].

---

[3]Merriam-Webster's Dictionary, 10th ed. (2000).

* * *

> [D]isclosure "is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality. Courts have similarly adopted this disclosure requirement."[4]
>
> Disclosure is to occur once the "circumstances become known to the arbitrator." Upon disclosure, the arbitrator may continue to serve "if both parties so desire." However, "[i]f the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desire of the parties." Still, a party's failure to object to an arbitrator upon disclosure of a disqualifying interest constitutes a waiver.
>
> Where the arbitrator is an attorney, he or she also is governed by the *Rules of Professional Conduct* under an amendment to the Model Rules adopted by the ABA. An Arbitrator/attorney is restricted from representing "anyone in connection with a matter in which the lawyer participated personally and substantially . . . as an arbitrator, mediator or other third-party neutral, unless all parties to the proceedings give informed consent, confirmed in writing."

(*Id.*, at pages 192 and 193).

Here, no allegation has been made that the Hearing Examiner had private interests that prevented her from performing her official responsibility as a hearing examiner, nor has it been alleged that she failed to disclose any professional relationships with the parties that would interfere with her impartiality in this matter. We find that the mere assertion that the Hearing Examiner in this matter expressed hostility, or that she indicated that there was insufficient proof to establish a certain outcome, is not sufficient to disqualify her as the Hearing Examiner.[5]

---

[4] [Citations omitted in the text.] See *William C. Vick Construction Co. v. North Carolina Farm Bureau Federation*, 123 N.C. App. 97, 100-101 (1996) (where numerous social, business, and professional relationships with the law firm representing the Farm Bureau impaired impartiality and failure to disclose warrants vacatur); see also, *Safeco Insurance Co. of America v. Stariha*, 346 N.W. 2d 663, 666 (Minn. Ct. App 1984) (arbitrator's unrelated and remote attorney-client relationship with firm representing claimant did not impair impartiality).

[5] Board Rule 550.21 provides as follows:

> If a hearing has been held, the Board may adopt the recommended decision of a Hearing Examiner to the extent that it is supported by the record. The Board shall issue its decision and order and serve it on all parties on the same day that the decision is issued.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Motion to Disqualify the Hearing Examiner filed by the District of Columbia Office of Zoning; District of Columbia Office of Property Management; District of Columbia Office of Planning; and District of Columbia Department of Public Works, Public Works Energy Office is **dismissed**. The Board will consider the issues raised before the Hearing Examiner under separate cover.

2. This Decision and Order is final upon issuance.

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

March 16, 2011

Thus, upon review of the entire record, the Board shall determine whether the Hearing Examiner's recommendation is supported by the record.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 04-UM-01 and 04-UM-02 were transmitted via Fax and U.S. Mail to the following parties on this the 16th day of March 15, 2011.

Barbara B. Hutchinson, Esq.
7907 Powhatan Street
New Carrollton, MD 20784

FAX & U.S. MAIL

Natasha Campbell, Director
Office of Labor Relations
and Collective Bargaining
414 4th Street, NW
820 North
Washington, D.C. 20001

FAX & U.S. MAIL

Courtesy Copy:

Shelley Hayes, Esq.
Hearing Officer
3020 Gentian Ct., NE
Washington, DC 20017

U.S. MAIL

Sheryl V. Harrington
Secretary