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**Government of the District of Columbia
Public Employee Relations Board**

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Fraternal Order of Police, D.C. Lodge 1,))	
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Petitioner,))	
))	
and))	PERB Case No. 05-RC-07
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International Brotherhood of Police Officers,))	Opinion No. 940
Local 445,))	
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Incumbent Intervenor,))	
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and))	
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District of Columbia Office of Property))	
Management,))	
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Agency.))	
_____)		

ORDER AND DIRECTION OF ELECTION

I. Background:

This proceeding involves a representation matter that was initiated by a Recognition Petition ("Petition") filed by the Fraternal Order of Police, D.C. Lodge 1 ("FOP"). FOP is seeking to represent, for purposes of collective bargaining, protective service officers who are employed at the District of Columbia Office of Property Management ("Agency"). These employees are currently represented by the International Brotherhood of Police Officers, Local 445 ("IBPO")¹.

¹ In 1982, the International Brotherhood of Police Officers, Local 445, Service Employees International Union was initially certified as the exclusive representative of "all protective service officers". (*International Brotherhood of Police Officers and District of Columbia Department of General Services and District Council 20, American Federation of State, Country and Municipal Employees, Local 2784, 29 DCR 2605, Slip Op. No. 48 at p.*

FOP's Petition was filed with the Board on September 2, 2005, and met the requirements of Board Rule 502.1. Notices were issued and posted. The Agency responded to FOP's Petition stating that it did not dispute the appropriateness of the bargaining unit sought to be represented by FOP. No other comments were received.

On May 26, 2006, in response to FOP's Petition and in accordance with Board Rules 504.4 and 502.8(b),² IBPO filed documents styled "Intervention Petition" and "Motion to Dismiss". In its Motion to Dismiss ("Motion"), IBPO alleged that FOP misrepresented the purpose of its representation signature cards and that the composition of the bargaining unit has changed since the filing of the petition. (See Motion to Dismiss at pgs. 2-4). FOP responded to IBPO's Motion, denying all the allegations.

The matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation ("R&R"). No Exceptions were filed. The Hearing Examiner's R&R is before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

At the hearing, IBPO claimed that FOP misrepresented the purpose of its representation signature cards and that the composition of the bargaining unit has changed since the filing of the

2, PERB Case No. 82-R-04, Certification No. 17 (November 30, 1982)). The Department of General Services subsequently became the Department of Administrative Services. On March 14, 1997, the International Brotherhood of Police Officers, Local 445 was certified as the exclusive bargaining representative for the following employees at the Department of Administrative Services:

All protective service officers employed by the Department of Administrative Services, excluding all management officials, supervisors, 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 District of Columbia Comprehensive Merit Personnel Act of 1978. (emphasis added).

45 DCR 8076, Slip Op. No. 504 at p. 2, PERB Case No. 96-RC-03, Certification No. 94, (March 14, 1997).

On October 1, 1998, D.C. Law 12-175 abolished the Department of Administrative Services, and the protective service officers in this bargaining unit were transferred to the newly-created Office of Property Management.

² Board Rule 504.4 provides as follows: "All comments or requests to intervene shall meet the requirements of Section 501 of these rules."

Board Rule 502.8(b) provides in pertinent part that: "[t]he incumbent labor organization shall be allowed to intervene as a matter of right without submitting any showing of interest." Consistent with Board Rule 502.8(b), IBPO was allowed to intervene in this case.

Petition. (See R&R at p. 5). IBPO argued that “[b]oth facts provide sufficient basis for the PERB to determine that the FOP lacks a showing of interest. . . .” (R&R at p. 5).

IBPO asserted that “PERB Rule 502.2 requires at least [a] 30% (percent) showing of interest . . . signed and dated by employees indicating their desire to be represented by the labor organization.³ [However,] misrepresentation cannot be used to obtain a showing of interest and it negates the authorization cards.” (R&R at p. 6).⁴ IBPO’s President and a National Representative testified at the hearing that James Guerra, a current protective service officer employed by the Agency, gathered signatures on behalf of FOP for an election. They further testified that Robert Webb, a protective service officer who was previously employed by the Agency, had protested at a union meeting that he did not know at the time that he was asked to sign a petition “that it was to bring the Fraternal Order of Police Officers in as a union. Webb thought it was to bring someone in and talk to them about the union.” (R&R at pgs. 3 and 6).

In addition, IBPO maintained that “since . . . FOP filed its petition for exclusive recognition, the bargaining unit has changed such that FOP no longer has a 30% showing of interest.” (R&R at p. 9). IBPO claimed that the testimony of the testimony presented shows that the composition of the bargaining unit changed. (See R&R at p. 7). Specifically, the National Representative testified that “a number of bargaining unit members retired, several passed away and four people were hired since September 2005 [eleven] 11 people have left the bargaining unit for these reasons and ‘we’ve picked up four’.” (R&R at pgs. 4 and 6-7; See

³Board Rule 502.2 provides, in part, as follows:

A petition for exclusive recognition shall be accompanied by proof, not more than one (1) year old, that at least thirty percent (30%) of the employees in the proposed unit desire representation by the Petitioner. Forms of evidence may include the following:

* * *

(d) Individual authorization cards or petitions signed and dated by employees indicating their desire to be represented by the labor organization; . . .

⁴ In its brief at p. 6, IBPO cited *Bauer v. NLRB*, 358 F.2d 766 (1966) in support of its argument that “NLRB precedent places more emphasis on the representations made to employees at the time the card was signed than on the card’s language.” (R&R at p. 6). We note that in *Bauer*, employees signed authorization cards that were accompanied by a cover letter in which the union stated that signing the card would call on the NLRB to conduct a representation election. Despite the union’s claim, the cards actually authorized the union as the exclusive bargaining agent for the employees, allowing recognition of the union without an election. The NLRB held that the employees reasonably expected that an election would be held and, therefore, there was a misrepresentation of the purpose for the cards. In the present case, FOP submitted authorization cards signed by the employees which stated that an election was the purpose for signing the cards. In addition, there has been no recognition of a union without an election. Therefore, *Bauer* does not support the allegation of misrepresentation in this case.

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also, IBPO's Brief at pgs. 5-6). IBPO asserted that this loss of support justifies finding that the FOP lacks a sufficient showing of interest. In view of the above, IBPO requested that "FOP's petition for representation should be rejected for lack of a sufficient showing of interest." (R&R at p. 7).⁵

FOP countered that its showing of interest was sufficient and proper. (See R&R at p. 7). Furthermore, it asserted that the Board's "administrative investigation of a showing of interest is conclusive and not subject [to] IBPO's challenge or litigation under [Board Rules] 502.2 and 502.4." (R&R at p. 7).⁶ Furthermore, FOP claimed that the contents of the card clearly state that by signing the card the employee requests that the Board conduct an election to certify the FOP, D.C. Lodge 1 as the exclusive representative. FOP maintained that there is no evidence that it engaged in any misrepresentation.

In addition, FOP addressed IBPO's argument that the bargaining unit has changed since FOP filed its Petition. FOP asserted that: "[1] there is no [Board] precedent on bargaining unit expansion or contraction during a question concerning representation; [2] the lapse of time and employee turnover does not affect a showing of interest; and [3] determination of a showing of interest must be made on a date certain." (R&R at pgs. 8 and 12).⁷

Finally, FOP asserted that "[t]here [was] no contract bar to FOP's petition because there is no collective bargaining agreement. IBPO admit[ted] that the last time a contract existed was 1990. PERB Rule 502.9(b) does not apply and does not bar an election." (R&R at p. 8; see also FOP's Brief at pgs. 12-13).

⁵ Citing *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1484 (1965), IBPO contended that "[c]hanges in the bargaining unit may affect a decision maker's assessment of employees' loyalty toward a union and the effect of the changes depends on the circumstances in each case." (R&R at p. 6; IBPO's Brief at p. 5). However, *Laystrom* concerned an employer's refusal to bargain because the employer believed that the union had lost its majority status (i.e., 16 employees had terminated their employment and 8 were newly hired since the last election). In *Laystrom*, the NLRB stated, *inter alia*, that "[e]mployee turnover standing alone does not provide a reasonable basis for believing that the Union had lost its majority. . . ." and found that the employer had committed an unfair labor practice by refusing to bargain. *Id.* at p. 1484. Therefore, *Laystrom* does not support the argument that, in the present case, the bargaining unit has changed such that FOP no longer has a 30% showing of interest because 11 employees left their employment and 4 employees were hired.

⁶ (Citing *Int'l Brotherhood of Police Officers and D.C. Housing Authority*, 47 DCR 10099, Slip Op. No. 638, PERB Case No. 00-RC-01 (2000), acknowledging the Board's authority to determine the showing of interest). (See FOP's Brief at pgs. 7-8).

⁷ See also, FOP's Brief at p. 10, citing *Avondale Shipyards*, 174 NLRB 73 (1969) in support of its argument that the NLRB looks to the showing of interest at the time the petition is filed.

The Hearing Examiner concluded that the evidence presented by IBPO concerning Mr. Webb was hearsay evidence. (See R&R at p. 11). Therefore, the Hearing Examiner excluded the statements made by Mr. Webb and found that "IBPO failed to present any evidence that Guerra misrepresented the purpose of FOP's authorization cards to the bargaining unit employees [whom] he solicited for authorization card signatures." (R&R at p 11).

Furthermore, citing Board Rule 502.3, the Hearing Examiner found that Board "Rule 502.3 establishes that the determination of a showing of interest and an ensuing representation election is based on a 'snapshot' of the bargaining unit as of the last full pay period prior to the filing of the petition for exclusive recognition." (R&R at p.12). Specifically, he noted that Board Rule 502.3 provides as follows: "Upon receiving a copy of the recognition petition, the employing agency shall prepare an alphabetical list of all employees in the proposed unit for the last full pay period prior to the filing of the petition. This list along with any comments concerning the petition shall be transmitted to the Board within twenty (20) days of the agency's receipt of the petition." (R&R at p. 12). The Hearing Examiner also noted that Board Rule 502.4 provides that "[t]he showing of interest determination shall not be subject to appeal." (R&R at p.12).

Therefore, Hearing Examiner recommended that: (1) IBPO's Motion to Dismiss FOP's Petition be dismissed, with prejudice; (2) the Board administratively determine the adequacy of FOP's Petition for exclusive recognition; and (3) if the Board administratively determines that at least 30 % (percent) of the bargaining unit employees desire to be represented by FOP, then the Board should order that a representation election be conducted to determine the exclusive representative, if any. (See R&R at p. 13). The Hearing Examiner also determined that "the Board's administrative determination of whether the FOP's authorization cards prove that at least 30 % (percent) of the bargaining unit employees desire representation by the FOP shall be based on a comparison of the FOP's authorization cards to an alphabetical list of all employees in the OPM Police Officer bargaining unit for the last full pay period prior to [the] September 2, 2005 [filing]." (R&R at p. 12).

No exceptions were filed to the Hearing Examiner's R&R. The Hearing Examiner's R&R is before the Board for disposition.

III. Discussion

FOP argued that there is no contract bar to the Petition. However, the Hearing Examiner did not address this issue. We believe that this may have been an oversight. Therefore, we shall address the contract bar issue. The contract bar rule is found at Board Rule 502.9, "Conditions Barring Petitions for Exclusive Recognition"⁸ In the present case, the record reveals that IBPO

⁸ Board Rule 502.9 states as follows:

A petition for exclusive recognition shall be barred if:

was certified as the exclusive bargaining representative of the protective service officer unit. IBPO and the Agency negotiated a collective bargaining agreement that expired in 1990. In its Intervention Petition, IBPO acknowledged that there is no contract currently in effect. (See Intervention Petition at p. 2). In light of the above, we find that Board Rule 502.9 is not applicable. Therefore, we conclude that there is no contract bar to FOP's Petition.

The Hearing Examiner excluded hearsay testimony and determined that IBPO did not establish that Mr. Guerra misrepresented the purpose of the authorization cards to bargaining unit members. 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. Fraternal Order of Police/Department of Corrections Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). In the present case, the Hearing Examiner properly weighed the probative value of evidence and made credibility determinations. The Board adopts the Hearing Examiner's findings that there is no evidence of misrepresentation.

The Board has reviewed the showing of interest based on a comparison of the FOP's authorization cards to an alphabetical list submitted by the Agency containing the names of all of protective service officers employed by the District of Columbia Office of Property Management for the last full pay period prior to the September 2, 2005 filing. We find that FOP has met the 30% (percent) requirement under Board Rules 502.2 and 502.4. As a result, we adopt the Hearing Examiner's recommendation that an election be held to determine the will of the eligible employees in the unit described above regarding their desire to be represented by either the Fraternal Order of Police, D.C. Lodge 1, or the International Brotherhood of Police Officers, Local 445, or no representative, for purposes of collective bargaining over compensation and terms and conditions of employment with the Office of Property Management. Finally, we

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- (a) During the previous twelve (12) months, a valid majority status determination has been made for substantially the same bargaining unit, or if during this same period a certification of representative has been issued, or the Board has determined the compensation unit placement, which ever is later.
 - (b) A collective bargaining agreement is in effect covering all or some of the employees in the bargaining unit and the following conditions are met:
 - (i) The agreement is of three years or shorter duration; provided, however, that a petition may be filed between the 120th day and the 60th day prior to the scheduled expiration date or after the stated expiration of the contract; or
 - (ii) The agreement has a duration of more than three years; provided, however, that a petition may be filed after the contract has been in effect for 975 days.

believe that a mail ballot election is appropriate in this case. Therefore, a mail ballot election shall be held in accordance with the provisions of D.C. Code §1-617.09(b) (2001 ed.) and Board Rules 502.13 and 510 through 515.

We have reviewed the Hearing Examiner's R&R and find that it is reasonable, consistent with Board precedent and supported by the record. Therefore, we adopt his R&R in its entirety.

ORDER

IT IS HEREBY ORDERED THAT:

1. The International Brotherhood of Police Officers, Local 445's Motion to Dismiss is hereby denied.
2. The International Brotherhood of Police Officers, Local 445's Intervention Petition is granted.
3. An election shall be held to determine whether the eligible protective service officers⁷ employed by the District of Columbia Office of Property Management, desire to be represented by either the Fraternal Order of Police, D.C. Lodge 1, or the International Brotherhood of Police Officers, Local 445, or no representative for purposes of collective bargaining over compensation and terms and conditions of employment with the District of Columbia Office of Property Management. A mail ballot election shall be held in accordance with the provisions of D.C. Code § 1-617.09(b) (2001 ed.) and Board Rules 510 through 515.
4. 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 26, 2008

⁷ Those employees eligible to vote are in the unit described below:

All protective service officers employed by the Office of Property Management, excluding all management officials, supervisors, 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 District of Columbia Comprehensive Merit Personnel Act of 1978.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-RC-07 was transmitted via Fax and U.S. Mail to the following parties on this the 26th day of March 2008.

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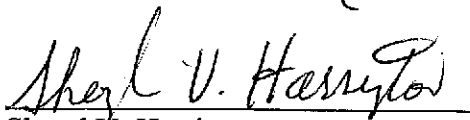
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