GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Service Employees International Union, Local 722, AFL-CIO, Petitioner,	
and	PERB Case Nos. 93-R-01 and 93-U-09 Opinion No. 358
Department of Human Services, Home Care Services Bureau, Agency.	

DECISION ON UNIT DETERMINATION AND DIRECTION OF ELECTION

In a Decision and Order issued February 23, 1993, (Opinion No. 344) in the above-referenced proceedings, the Public Employee Relations Board (Board) consolidated and referred to a designated Hearing Examiner the Recognition Petition and Unfair labor Practice Complaint filed by the Service Employees International Union, Local 722, AFL-CIO (SEIU). SEIU seeks in its Petition to represent a unit of "[A]ll regular full and part-time Personal Care Aides 'employed' by the Home Care Services Bureau of the Department of Human Services." (Pet. at 2.)[1]/ The Complaint filed by SEIU alleges violations of D.C. Code Sec. 1-618.4 (a)(1),(2) and (3) by the Department of Human Services (DHS), Home Care Service Bureau (HCSB) by actions that "substantially interfered with the formation

[1]/ Personal Care Aide is the employee classification assigned to individuals who provide in-home care to patients entitled to such benefits under a Medicaid Assistance Program. The program, entitled Personal Care Aide Services Program, is sponsored by the U.S. Department of Health and Human Services through the Health Care Finance Administration which, in turn, has delegated local administration of the program for residents of the District of Columbia to the D.C. Department of Human Services. (Tr. at 507.)

and existence of a labor organization... ." (Compl. at 4.)[2]/

Both cases were referred to a Board-designated Hearing Examiner and scheduled for hearing on March 9 and 29, 1993. In a Report and Recommendation (R&R) dated June 2, 1993, a copy of which is appended to this Opinion, the Hearing Examiner considered the record evidence, the arguments and contentions of the parties and the applicable provisions under the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.9, concerning the determination of an appropriate bargaining unit. After completing his assessment of the record evidence, the Hearing Examiner recommended that the Board adopt his findings that (1) PCAs are not independent contractors, as alleged by DHS, but rather employees of DHS/HCSB; (2) there is continuity in the employment tenure of PCAs; and, therefore, (3) a unit of all regular full and part-time PCAs employed by DHS/HCSB is appropriate for collective bargaining.[3]/

The Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DHS, filed Exceptions to the Hearing Examiner's Report and Recommendation arguing, in the main, (1) that the Hearing Examiner erred by concluding that certain evidence supports a finding that the PCAs are employees of DHS and (2) that D.C. Code Sec. 1-618.9(a) requires an express finding that a proposed unit is one "that promotes effective labor relations and efficiency of government operations," and that the Hearing Examiner erred in finding the proposed unit appropriate without making the predicate finding. OLRCB requests that the Petition be dismissed or, in the alternative, that the case be remanded to the Hearing Examiner to address the unit issue. No exceptions were filed by SEIU. On June 29, 1993, SEIU filed a response requesting that the

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[2]/ A Motion for Injunctive Relief accompanied SEIU's Complaint and was also denied in Opinion No. 344 in light of "factual and legal questions regarding the standing of SEIU to file a Complaint on behalf of the personal care aides, as well as the nature of the employment relationship between the PCAs and DHS/HCSB... ." Slip Op. No. 344 at 3 and 4. SEIU ultimately withdrew its Complaint, as more fully explained at note 3.

[3]/ The Hearing Examiner also recommended that the Complaint be dismissed because "there is no evidence in the record which would support an unfair labor practice." (R&R at n. 1.) In view of SEIU's request in its post-hearing brief to withdraw its Complaint, as acknowledged by the Hearing Examiner, we shall accept SEIU's withdrawal, thereby precluding a disposition on the merits of the Complaint. PERB Case No. 93-U-09 is hereby closed.

Board deny DHS's Exceptions.

As we stated in Opinion No. 344, the threshold issue in this case is whether or not the PCAs are employees of the District government, i.e., DHS, and thus entitled to collective bargaining rights under the CMPA. The Board has stated that critical to the employer-employee relationship under the CMPA is the employer's maintenance of "sufficient control over essential terms and conditions of employment... to engage in meaningful collective bargaining." Washington Teachers' Union, Local 6 and District of Columbia Public Schools, 38 DCR 109, 114, Slip Op. No. 250 at 5, PERB Case No. 88-R-11 (1990).[4]/ A less critical consideration is the employer's authority over the content of mission-related tasks, e.g., type of patient care. Id.

The Hearing Examiner correctly stated that "in determining an independent contractor issue, [i.e., whether or not an employer-employee relationship exists,] all aspects of the relationship must be evaluated and no single factor should be determinative." (R&R at 2.) He found that HCSB (1) screens the applications filed by prospective PCAs; (2) determines the scope of the duties performed by PCAs and for whom they are to be performed; (3) provides the requisite training of PCAs; (4) establishes the rate of pay; (5) determines the designated hours to be worked; and (6) establishes the policy regarding the causes for not assigning, suspending or terminating the services of PCAs. OLRCB has not excepted to these findings. They have clear support in the record, and in themselves are sufficient to sustain the Hearing Examiner's conclusion that DHS/HCSB exercises "sufficient control over essential terms and conditions of employment... to engage in meaningful collective bargaining."

OLRCB's objections --discussed in the margin below-- do not overcome the weight of the evidence. [5]/ We therefore deny the

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[4]/ This approach is the same as that used by the National Labor Relations Board in Res-Care, Inc., 280 NLRB No. 78 (1986) and consistently adhered to by that Board. See, e.g., Community Transit Services, 290 NLRB No. 154 (1988); Koba Associates, 289 NLRB 330 (1988); Columbus Mental Health Center, 286 NLRB 1340 (1987); and Dickinson-Iron, 283 NLRB 1029 (1987).

[5]/ Specifically, OLRCB asserts that on-site control and direction over the in-home patient care that PCAs provide comes from visiting nurses whom the Hearing Examiner found were not employees of HCSB. The record reveals that the Home Care

(continued...)

exception to the Hearing Examiner's finding that PCAs are employees within the meaning of the CMPA.

In its final exception, OLRCB contends that under the standards for unit determinations set out in D.C. Code 1-618.9(a), the Hearing Examiner could not find the proposed unit to be

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[5](...continued)
Service Bureau is responsible for providing qualified PCAs to approximately 10 home health agencies certified by Medicaid and Medicare in the District of Columbia. (Tr. at 513, 517 and 519.) The testimony is somewhat unclear, but apparently each home health agency provides supervision for assigned PCAs. (Tr. at 333 and 334.) Some of these agencies, such as Long Term Care Administration, are under DHS while others are private, e.g., Visiting Nurses Association. In any event, the record reveals that the "direction" PCAs receive from visiting nurses and the patients to whom they are assigned concerns the kind of care provided to patients and not the terms and conditions of employment under which PCAs provide their service.

In addition, the Hearing Examiner found that the oversight nurse's visits were usually monthly and that despite the fact that HCSB does not make on-site visits to a patient's home, HCSB does conduct regular review of the daily care provided by PCAs. (R&R at 3.)

OLRCB also excepted to the Hearing Examiner's finding that PCAs can be suspended, terminated or refused patient assignments by HCSB. Although the record supports OLRCB's contention that the terms "suspension" and "termination" were not used in a disciplinary context, the record does support a finding that PCAs can be placed on a "no-hire list" due to "problems", not referred to patients and thereby effectively refused patient assignments or terminated by HCSB. (Tr. at 415-416.)

In its final exception to the finding that PCAs are employees, OLRCB asserts that the finding cannot stand since no positions have been allocated for PCAs in the District's budget. However, the record contains unrebutted testimony that PCAs are paid for their services by "both appropriated funds from the District government and matching funds from the federal government." (Tr. at 521.) Cf., Fire Fighters, 292 NLRB No. 114 (1989)(Federal funding of compensation for the employees in question was not controlling in determining employer-employee relationship where private sector employer maintained sufficient authority over compensation and other conditions of employment).

appropriate without first finding that it would "promote[] effective labor relations and efficiency of agency operation." [6]/

The Hearing Examiner found that "the PCAs perform a unique service which is unlike the services performed by other employees." (R&R at 4.) He further concluded that "PCAs have a community of interest which is separate and apart from that of other employees and...that they constitute an appropriate unit for collective bargaining under the applicable provisions of the CMPA." OLRCB points to no evidence that the proposed unit is inconsistent with effective labor relations and efficiency of agency operations, and indeed, offers no argument to that effect. We find nothing in the statutory language that requires an express finding in the terms of the proviso, and conclude that the record provides sufficient evidence that the statutory objective has been met. We consider the findings of the Hearing Examiner entirely adequate, and find no basis for remanding this case for further findings. See, American Federation of State, County and Municipal Employees, D.C. Council 20, AFL-CIO and Department of Human Services, Commission on Mental Health Services, 38 DCR 5039, Slip Op. No. 278, PERB Case No. 90-R-01 (1991).

After reviewing the record and the Hearing Examiner's assessment of the evidence, the Board finds the Hearing Examiner's findings and conclusions to be rational and persuasive, and the record evidence sufficient to support the conclusions and recommendations contained in his Report. Accordingly, the Board adopts the Hearing Examiner's findings and recommendations and concludes that PCAs are employees of DHS/HCSB and that the proposed unit is appropriate for bargaining over terms and conditions of employment.

The Board finds the following unit appropriate for bargaining over terms and conditions of employment:

> All regular full-time and part-time Personal Care Aides employed by the Home Care Services Bureau of the Department of Human Services, but excluding all management officials, confidential employees, supervisors, employees engaged in personnel work in other than a

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[6]/ D.C. Code Sec. 1-618.9(a) provides, in relevant part: "The essential ingredient of every unit is community of interest: Provided, however, that an appropriate unit must also be one that promotes effective labor relations and efficiency of agency operations."

> purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.[7]/

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 DHS/HCSB.

ORDER

IT IS HEREBY ORDERED THAT:

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

> All regular full-time and part-time Personal Care Aides employed by the Home Care Services Bureau of the Department of Human Services, but excluding all management officials, confidential employees, supervisors, 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, D.C. Law 2-139.

2. Furthermore, an election shall be held in accordance with the provisions of D.C. Code Sec. 1-618.10 and Sections 510-515 of the Rules of the Board to determine whether or not all eligible employees desire to be represented for purposes of collective bargaining on compensation and terms and conditions of employment by the Service Employees International Union, Local 722, AFL-CIO.

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[7]/ The unit description appears as amended by the Board to reflect statutory exclusions under the CMPA.

3. The Complaint filed in PERB Case No. 93-U-09, having been withdrawn, with prejudice, in accordance with Board Rule 520, is closed from further investigation or review.

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

August 4, 1993

APPENDIX

GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Service Employees International Union, Local 722, AFL-CIO,	
Petitioner/Complainant	
and	PERB Case Nos. 93-R-01 and 93-U-09
Department of Human Resources, Home Care Services Bureau,	
Agency/Respondent	

HEARING EXAMINER'S REPORT AND RECOMMENDATION

Upon a representation petition duly filed on September 30, 1992 with the District of Columbia Public Employee Relations Board (PERB), Service Employees International Union, Local 722, AFL-CIO (Union) is seeking a unit of all regular full-time and part-time Personal Care Aides "employed" by the Department of Human Services, Home Care Services Bureau (HCSB). On January 26, 1993, the Union filed unfair labor practice charges, alleging that HCSB was engaging in conduct which was violative of Section 1-618.4 of the District of Columbia Comprehensive Merit Personnel (CMPA) and the D.C. Code. On February 23, 1993, PERB consolidated the representation and unfair labor practice proceedings and directed a hearing. Thereafter, a hearing was held on March 9, and March 29, 1993 before Robert J. Perry, Esq., the undersigned Hearing Examiner. The Union was represented by Mose Lewis III, Esq. and HCSB was represented by Karen R. Calmeise, Esq. and William Schucker, Labor Relations Officers. The parties were given a full opportunity to examine and cross-examine witnesses and to adduce relevant evidence. The parties waived oral argument and, in lieu thereof, filed post-hearing briefs.

Background

Department of Human Services is an agency responsible for the public health of the residents of the District of Columbia. HCSB as a branch of that Agency provides long term personal care services under the Federal Medicaid Program for eligible individuals. Personal Care Aides are assigned to patients who are convalescing at home and need regular care. There are some

700 PCAs providing such care under the direction of HCSB. It is the Union's contention that the PCAs are employees of HCSB, an agency of the District of Columbia government. HCSB contends that the PCAs are independent contractors who provide services under contract. The principal focus of this proceeding is on the employment status of the PCAs.[1]

Issues

1. Are the PCAs independent contractors or employees of HCSB?

2. If they are employees is their employment transient in nature?

3. If the PCAs are regular employees of HCSB do they constitute an appropriate unit for purposes of collective bargaining under the provisions of the CMPA?

Discussion

It is well established that in determining an independent contractor issue, all aspects of the relationship must be evaluated and no single factor should be determinative. However, in applying such a test, the ultimate conclusion to be reached is whether or not the employer has the right to control and direct the servant in the performance of his work and the manner in which the work is to be done.[2]

In evaluating the relationship here between the PCAs and HCSB, it should be noted at the outset that HCSB has considered such individuals to be independent contractors and has so notified applicants upon their admission into the Federal Medicaid sponsored program. PCAs are paid a salary of seven dollars per hour and receive no benefits. The PCAs are solely responsible for payments to Social Security and for Federal and local taxes. On the other hand, HCSB actively recruits

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[1] The Union, in its brief, requested the withdrawal of the unfair labor practice complaint on the ground that representation proceeding will resolve the issues between the parties. I would note that there is no evidence in the record which would support an unfair labor practice finding. Accordingly, I will recommend that PERB dismiss the unfair labor practice complaint.

[2] LeGrand v. Insurance Company of North America, (C.A.D.C.) (1968), 241 A. 2d 734, 735.

individuals for the program and the applicant is not required to demonstrate any particular skills or training.

The duties required are described in a letter to prospective applicants and interested individuals are required to file an application which is reviewed by a HCSB screener and, if accepted, the applicant receives initial training for 75 hours and 12 hours of periodic training which is provided on an annual basis. The training is provided by HCSB under funding from the Federal Medicaid program. When the initial training has been completed and the applicant is ready for assignment,[3] an "agreement to provide personal care" is entered into by the PCA, HCSB and the patient. This agreement provides for the rate of pay ($7.00 per hour), the number of days per week the PCA will provide services and the hours those services will be performed. PCAs must agree to work a minimum of 90 days. Once, a PCA is assigned to a patient, she performs the designated duties and no other. The work of the PCA is overseen by the visiting nurse who will make periodic visits, usually on a monthly basis. The visiting nurses are not employees of, nor connected with, HCSB. The PCA prepares a record of daily care and a record of the hours she has worked and these documents are sent to HCSB on a regular basis. HCSB does not make on-site visits to the patient's home, but it maintains telephone contact with the patient and it will act on a patient's complaints. PCAs can be suspended, terminated or refused assignment for a wide variety of reasons, which are broad enough to cover every conceivable situation. The record is unclear as to whether disciplinary action can be appealed. Inez Atwell, branch chief for HCSB, testified to an existing appeals process, where the decision of a HCSB screener could be appealed to Atwell. The PCAs who testified, however, were generally unaware of any appeals' process and Chief Atwell could not recall any specific instances where she was called upon to act on a PCA's complaint. Even in rather common situations, where a PCA turns down an assignment from a screener and is not offered another available assignment, there is no showing that complaints were ever referred to Chief Atwell for resolution.

In my opinion, the evidence overwhelmingly supports a conclusion that the PCAs are not independent contractors, but rather that they are employees of HCSB. The PCAs are not in any position to exact terms favorable to them from HCSB and they have absolutely no control over the manner and means by which the assignment will be carried out. They are unskilled workers who are totally dependent upon HCSB for training and employment opportunities. Even after training and years of work experience, they must rely upon HCSB for employment opportunities. When a

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[3] The applicant is also required to get police and medical clearance.

PCA finishes a work assignment, she remains unemployed until HCSB chooses to make another assignment available. It is not simply a matter of selling one's services elsewhere. The rate of compensation is established by HCSB and allows for no variables for such things as the difficulty of the assignment or the transportation costs incurred by the PCA. Even in the one area where the PCA could generate additional income by providing additional services for the patient, they are expressly prohibited from doing so by HCSB under penalty of termination. The PCA must work the designated hours and any variation or adjustment must be approved by HCSB. The PCA is not permitted to seek a replacement to provide the services. And, on the issue of termination of the agreement, there are some 22 grounds listed as a basis for termination by HCSB. Many of the grounds listed are rather general in nature and could be said to serve as support for any conduct HCSB considered objectionable. In short, in examining the relationship, I am unable to find evidence of any concession favorable to the PCAs. The terms are dictated by HCSB who controls every aspect of it. Accordingly, I find that the PCAs are not independent contractors, but rather are employees of HCSB.

The remaining two issues may be readily disposed of. HCSB has claimed that the work of the PCAs is transient in nature. Although that claim had not been renewed in HCSB's post-hearing brief, I must consider the issue still before me. All of the record testimony about the PCAs involved individuals who had a long term commitment to HCSB. One aide, Mary Weston, testified that she had worked for HCSB for 13 years. The general gist of the testimony is that PCAs have a continuing employment relationship with HCSB. When a PCA's assignment is completed, she is available for and expects to be offered a new case. There is no evidence of PCAs leaving HCSB's employ voluntarily or of the Agency branch experiencing turnover problems with this group of individuals. Accordingly, I find that the PCAs are regular full-time and part-time employees of HCSB and that their employment is not transient in nature.

As to the remaining issue, the evidence clearly shows that all regular full-time and part-time PCAs employed by HCSB is an appropriate grouping for purposes of collective bargaining. The PCAs perform a unique service which is unlike the services performed by other employees. The PCAs have a community of interest which is separate and apart from that of other employees and I find that they constitute an appropriate unit for collective bargaining under the applicable provisions of the CMPA.

Conclusions of Law

1. The PCAs are not independent contractors, but rather are employees of HCSB.

2. The PCAs are regular employees of HCSB and their employment is not transient in nature.

3. A unit of all regular full-time and part-time PCAs employed by HCSB is appropriate for purposes of collective bargaining under the CMPA.

Recommendation

1. A finding that the PCAs are not independent contractors and that they are employees of HCSB.

2. A finding that the PCAs are regular employees of HCSB and that their employment is not transient in nature.

3. The Board find that a unit of all regular full-time and part-time PCAs employed by HCSB is appropriate for purposes of collective bargaining under the CMPA and direct an immediate election.

4. The Board dismiss the complaint in PERB Case No. 93-U-09.

June 2, 1993
Dated

Robert J. Perry
Hearing Examiner