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

In the Matter of:	)	
	)	
Washington Teachers Union, Local 6	)	
	)	
Petitioner,	)	
	)	
and	)	PERB Case No. 09-UC-02
	)	and 09-U-66
	)	
District of Columbia Public Schools,	)	Opinion No. 1124
	)	
Respondent;	)	
	)	
	)	
and	)	<b>Unit Clarification Petition</b>
	)	
Council of School Officers, Local 4,	)	
American Federation of School	)	
Administrators, AFL-CIO,	)	
	)	
	)	
Intervenor.	)	
	)	

**DECISION AND ORDER**

**I. Procedural History**

The Washington Teachers Union, Local 6, (“Petitioner” or “WTU”), filed a Unit Clarification Petition (“Petition”) in Case No. 09-UC-02 involving a bargaining unit of the District of Columbia Public Schools (“Respondent” or “DCPS”). The bargaining unit in question is currently represented by the Council of School Officers, Local 4 (“CSO” or “Intervenor”<sup>1</sup>). WTU’s Petition in PERB Case No. 09-UC-02, seeks to remove employees in certain salary grades from the CSO bargaining unit and place them in the WTU bargaining unit. (See Petition p. 2).

Specifically, in its unit clarification Petition in PERB Case No. 09-UC-02, WTU seeks the following:

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<sup>1</sup> The designation of “Intervenor” is explained below.

to include all [salary grade level] ET 10, 11 and other employees of the District of Columbia Public School System that are assigned by DCPS to the CSO bargaining unit, but are covered by a Certification and/or Authorization issued by the PERB to WTU, or otherwise have a community of interest with employees exclusively represented by WTU.

(Petition p. 2).

The Petitioner also filed an unfair labor practice complaint ("Complaint") against DCPS in PERB Case No. 09-U-66, alleging that DCPS committed an unfair labor practice in violation of D.C. Code § 1-617.04(a) (1), (2), (3) and (5). WTU asserts that "DCPS willfully assigned employees [to] the CSO bargaining unit." (Complaint p. 5). WTU alleges that these employees belonged in the WTU unit because they were covered by the bargaining unit certification issued to WTU in 1989. WTU demanded that DCPS return the employees to the WTU bargaining unit. DCPS refused to make the reassignment upon WTU's demand. (See Complaint p. 5).

As a remedy, WTU requests that the Board: (1) "remove certain employees from the CSO bargaining unit and place them in WTU's bargaining unit;" (2) "order DCPS to cease and desist classifying these employees in a way that will remove them from the WTU bargaining unit;" (3) "order DCPS to pay WTU the retroactive bi-weekly service fee required by the WTU-DCPS collective bargaining unit agreement;" and, (4) order DCPS to post a notice that it committed an unfair labor practice, on DCPS's website and "at each DCPS facility where WTU bargaining unit employees are assigned." (See Complaint p. 5).

On October 2, 2009, WTU filed an Answer to the Unfair Labor Practice Complaint denying any violation of the CMPA. DCPS denies classifying or reclassifying employees nor removing them from the WTU bargaining unit. DCPS also raised the issue of untimeliness, stating that the employees in question have been in the CSO bargaining unit for over five (5) years. DCPS requests that the Board dismiss the Complaint as untimely filed because it was not filed within the 120 day filing period and WTU never took steps to challenge their inclusion in the CSO bargaining unit. (See DCPS Answer pgs. 6-8). DCPS cites Board Rule 520.4 which provides that unfair labor practice complaints be filed no later than 120 days after the date on which the alleged violation occurred. (See DCPS Answer at p. 7).

DCPS alleges other affirmative defenses: (1) WTU is estopped from assigning related service providers ("RSPs") to the CSO bargaining unit and DCPS has "reasonably relied on WTU's failure to challenge this practice for a period of over five years;" (2) DCPS reasonably determined that the RSPs could correctly be assigned to the CSO bargaining unit since the recognition clause in the collective bargaining agreement (CBA) between CSO and DCPS includes "social workers, psychologists and other RSPs, consistent with Certification Nos. 51 and 19, issued by the Board in June 1988.... Certification 51 covers the ET officers bargaining unit for employees classified from Grades [ET] 6 through [ET] 12. Certification 19 covers EG officers bargaining unit for employees classified in Grades 11 and 12." (DCPS Answer p. 8).

"On September 30, 2009, the CSO filed a Motion to Intervene ("Motion") in PERB Case No. 09-U-66. WTU filed Complainant's Opposition to Motion to Intervene ("WTU Opposition") on November 4, 2009. Also, on November 4, 2009, DCPS filed a Response to

CSO's Motion to Intervene ("DCPS Response") stating, without taking any position regarding the merits of CSO's claim that DCPS did not object to CSO's Motion.<sup>2</sup> The Hearing Examiner granted CSO's Motion to Intervene. "The Board's Executive Director administratively joined the cases so that the CSO was a party in PERB Case No. 09-UC-02 and PERB Case No. 09-U-66." (See Hearing Examiner's Report and Recommendation ("R&R") pgs. 1-2).

On March 31, 2010, the CSO filed a Motion to Dismiss Petition for Unit Clarification ("Motion to Dismiss"). On March 23, 2010, CSO filed an Answer to the First Amended Unfair Labor Practice Complaint and a Motion to Intervene. ("CSO Answer"). On April 12, 2010, WTU filed an Opposition to the Motion to Dismiss. The CSO Motion to Dismiss is discussed below. (R&R p. 3).

On April 20, 2010, DCPS moved to have the litigation in PERB Case No. 09-U-66 held in abeyance pending the resolution of the Unit Clarification Petition in PERB Case No. 09-UC-02. In a pre-hearing telephone conference held on March 4, 2010, the parties agreed that the resolution of the unit clarification issues in PERB Case No. 09-UC-02 might eliminate the need for a hearing on the unfair labor practice issues in PERB Case No. 09-U-66, by rendering the Complaint moot. On March 10, 2010, the Hearing Examiner granted DCPS's motion to hold PERB Case No. 09-U-66 in abeyance. (See R&R p. 3, Tr. p. 4). On April 19, 2010, the CSO made a motion to hold PERB Case No. 09-U-66 in abeyance, consolidating DCPS's request.

On April 19 and May 24, 2010, a hearing was held concerning the unit clarification Petition in PERB Case No. 09-UC-02. The Hearing Examiner addressed the CSO's Motion and allowed the Parties to present oral arguments. The Hearing Examiner considered CSO's argument that the Board should defer to another process, in lieu of holding a hearing. (R&R p. 3). The CSO asserted that the National Labor Relations Board ("NLRB") defers to American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") procedures before conducting a hearing on representation issues.<sup>3</sup> In the absence of such a written policy by PERB, the CSO requested that the Board follow NLRB precedent, rather than conduct a hearing in this matter. The Hearing Examiner rejected this argument, denied CSO's Motion and conducted a hearing on the unit clarification Petition.<sup>4</sup> (See R&R p. 3).

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<sup>2</sup> (Petitioner and Respondents are referred to collectively as "the Parties").

<sup>3</sup> The CSO presented an excerpt from the NLRB R-Case Handling Manual regarding the processing of disputes within the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"). Article XX of the AFL-CIO Constitution is entitled, "No-raiding Procedures Among Labor Organizations." According to the CSO, these procedures apply when there are two AFL-CIO affiliates and when there is an established bargaining relationship in existence. (Tr. p. 10).

<sup>4</sup> The Hearing Examiner considered the following: (1) the NLRB assumes that there is no resistance to taking this issue to the AFL-CIO first, and that is not the case here, WTU filed an opposition to the motion to hold the UC petition in abeyance; (Tr. p.27); (2) "[the Hearing Examiner held a conference call with the parties] on March 4th, and CSO [did not file... its complaint with AFL-CIO [until one month later];" (Tr. p. 27); (3) "[t]he job of the PERB is to determine, based upon statutory principles, in a UC case what is the appropriate unit for the employees that are in dispute" (Tr. p. 27); (4) "the PERB applies a statutory standard and the jurisdictional resolution by the AFL-CIO is a private resolution [provided by the] constitution of an association of labor organizations... [Therefore,] I don't think it's appropriate to hold the matter in abeyance. And in that regard, I don't think it reaches what I'm doing." (Tr. p. 28, R&R p. 3).

At the conclusion of the hearing, WTU and CSO elected to submit written post-hearing briefs.<sup>5</sup> On July 16, 2010, the due date for post-hearing briefs, the CSO filed a brief. On July 18, 2010, WTU's counsel sent an e-mail to counsel for CSO and DCPS, stating:

Attached is WTU's brief that has been faxed to PERB. I don't know if PERB received it or received some of it as I do not have a confirmation. I'll try sending it again, but will deliver a hardcopy on Monday.

Beginning Tuesday, I am schedule[d] to travel over the next couple of weeks. Please send me your briefs by email.

(Attachment to CSO's July 22, 2010 letter to PERB Executive Director).

On July 22, 2010, at 9:56 a.m., WTU filed its brief with the PERB. On July 22, 2010, at 3:52 p.m., the CSO filed a letter with PERB raising PERB Rules 500.8, 501.11 and 599, objecting to the late filing and arguing as follows:

[I]f there is no proof that counsel for WTU filed its final brief with the PERB office before 4:45 p.m. on Friday, July 16, 2010, this filing should be deemed untimely and should not be considered by the Hearing Examiner. Accordingly, we request that you determine whether the WTU final brief was timely filed by July 16, 2010.

At the close of the hearing, the hearing examiner indicated that the parties could file reply briefs if they determined that such briefs were necessary. [emphasis added]. Therefore, if the WTU brief is determined to be timely filed, the CSO requests an opportunity to submit a reply brief within 10 days from such a determination.

(CSO's July 22, 2010 letter to PERB Executive Director, p. 2).

On July 23, 2010 at 5:18 p.m., WTU filed a Motion for Enlargement of Time ("Motion") admitting that its post-hearing brief was untimely filed. WTU asserted that the untimely filing was due to computer problems. Based on PERB Rules 555.2 and 501.2, the WTU requested an extension to file its post-hearing brief "up to and including, July 19, 2010, 9:00 a.m." (Motion p. 1).

On July 23, 2010 at 6:25 p.m., WTU filed an Amended Petitioner's Motion for Enlargement of Time ("Amended Motion"). WTU's Amended Motion provided an e-mail establishing that DCPS's counsel consented to WTU's Motion. On October 12, 2010, WTU filed Petitioner's Reply Brief. The CSO and DCPS did not file reply briefs.

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<sup>5</sup> DCPS did not submit a written post-hearing brief.

Based on WTU's Motion and Amended Motion for Enlargement of Time, and because there is no evidence that WTU was advantaged by its untimely filing, the Hearing Examiner accepted the WTU's untimely post-hearing brief. However, in the interest of fairness to all Parties and adjudicatory economy, and because CSO and DCPS did not file reply briefs, the Hearing Examiner did not accept WTU's reply brief as part of the record.<sup>6</sup>

## II. Statement of the Case

The Hearing Examiner found the following facts:

WTU's Petition asserts that it is the exclusive bargaining representative of DCPS employees for the following bargaining unit:

All Elementary and Secondary Teachers, Attendance Officers, Child Labor Inspectors, Counselors (elementary and secondary), Librarians (elementary and secondary), Pupil Personnel Workers, Audio-Visual Coordinators, Curriculum Development Specialists, Reading Specialists, School Social Work Therapists, Hearing Therapists, School Psychologists, Psychiatric Social Workers, Placement Counselors, and Job Coordinators employed by the D.C. Public School System in its regular and/or summer school program: excluding managerial or supervisory employees, confidential employees, and any employees engaged in personnel work in other than purely clerical capacities, and employees engaged in administering the subchapter XVI of the Comprehensive Merit Personnel Act of 1978. [*Washington Teachers' Union, Local 6 and District of Columbia Public Schools*, 36 DCR 6497, Slip Op. No. 233, PERB Case No. 88-R-09 (1989). **Certification No. 56**, September 21, 1989.] (R&R at pgs. 5-6).

WTU asserts that DCPS has [subsequently] classified several of these employees as ET-10 and 11. WTU asserts that DCPS has assigned several of these employees, including employees with the job titles School Psychologists, School Social Workers and Coordinators, to the CSO bargaining unit WTU says DCPS

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<sup>6</sup> On November 30, 2010, the Petitioner filed Exceptions to the Hearing Examiner's Report and Recommendation. The Exceptions were received by the Board on the due date, after the close of business. CSO filed a Motion to Strike as Untimely the Exceptions to the R&R of the Hearing Examiner ("Motion to Strike"). Pursuant to Board Rule 501.1, "When an act is required or allowed to be done within a specified time by these rules, the Board, Chair or the Executive Director shall have the discretion, upon timely request...to order the time period extended, or reduced to effectuate the purposes of the CMPA..." Under the particular circumstances of this case, and in order to effectuate the purposes of the CMPA, we hereby accept the Petitioner's Exceptions as timely filed on November 30, 2010.

justifies these assignments to the CSO bargaining unit because CSO is the exclusive bargaining representative for DCPS ET-2 through ET-12 employees. But, WTU argues there is no community of interest among these employees. For this reason, WTU petitions PERB to clarify the WTU and CSO bargaining units by including all ET-10 and 11 and other employees to the WTU bargaining unit based on a community of interest. (R&R p. 6).

However, WTU holds a second, earlier certification for its DCPS bargaining unit. This certification, PERB Case No. 80-R-09, **Certification No. 12**, is dated August 30, 1982 and describes WTU's DCPS bargaining units as follows:

All personnel employed by the District of Columbia Public Schools who are rendering educational services and received compensation pursuant to the "EG" Schedule, excluding supervisors, management personnel, confidential employees, employees engaged in personnel work other than in purely clerical capacities, employees in the ET bargaining unit, any other personnel currently represented by a labor organization and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act. [*Washington Teachers' Union, Local 6 and Public School of the District of Columbia*, 28 DCR 5104, Slip Op. No. 20, PERB Case No. 80-R-09 (1981), **Certification No. 12**, August 30, 1982.] (R&R at p. 6). (R&R pgs. 6-7).

CSO holds two certifications for a DCPS bargaining unit as well. CSO's first-in-time certification, **Certification 19**, describes CSO's DCPS bargaining unit as follows:

All personnel employed by the District of Columbia Public Schools who are rendering educational, technical and administrative support services in EG classifications 11 and 12 and excluding management executives, supervisors, confidential employees, any employees engaged in personnel work in other than purely clerical capacities and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978. [*Council of School Officer, Local 4 and the District of Columbia Public Schools*, 29 DCR 5855, Slip Op. No. 53, PERB Case No. 82-R-19 (1982),

**Certification No. 19**, May 4, 1983.] (R&R pgs. 7-8).

The second certification, [amended] Certification 19 [and Certification 51], describes [separate supervisory and non-supervisory] CSO bargaining units, or sub-units, as follows: [emphasis added]

1. ET Officers Bargaining Unit: All Employees employed by the Board in the ET-6 through ET-12 classifications; but excluding confidential employees, [and] employees engaged in personnel work in other than a purely clerical capacity, employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

2. EG Officers Bargaining Unit: All full-time personnel employed by the Board who are rendering educational, technical and administrative support services in EG classifications 11 and 12; but excluding management, supervisors, confidential employees, any employees engaged in personnel work other than in purely clerical capacities and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978. [*Council of School Officers, Local 4, American Federation of School Administrators, AFL-CIO and the District of Columbia Board of Education, 35 DCR 2975, Slip Op. No. 181, PERB Case No. 88-R-06 (1988), Certification No. 51, and Certification No. 19 as amended, June 13, 1988.*] (R&R p. 7).

In addition, in PERB Case No. 88-R-13, the PERB clarified CSO certification when, through unit clarification, CSO sought[:]

to add to the existing ET School Officers' bargaining unit ET-10, ET-11 and ET-12 School Officers in the classification of Counseling Psychologists, Case Workers, Speech Pathologists, Social Services Workers, Attendance Social Workers, Career Counselors, Instructional Specialists and Special Education Specialists in facilities and programs of the Board of Education. [*Council of School Officers, Local 4, American Federation of School Administrators. AFL-CIO and the District of Columbia Board of Education,*

36 DCR 2178, Slip Op. No. 211 at p. 1, PERB Case No. 88-R-13 (1989)]. (R&R p. 7).

The [Board] granted CSO's unit clarification [Petition] concluding that[:]

[s]ince the plain wording of the certification includes those ET-6 through ET-12 job classifications set forth in the Petition and the attached Addendum, irrespective of location and there being no objections or claims that another labor organization represents these employees, this Petition is considered a unit clarification petition and is granted.... (R&R pgs. 7-8).

These WTU and CSO certifications form the margins or boundaries of the Hearing Examiner analysis of the WTU Petition.

(R&R p. 8).

### III. Arguments of the Parties

WTU contends that the Board has plenary power to make unit determinations and place employees in appropriate units. WTU asserts that the Board's decisions in PERB Case Nos. 88-R-06 and 88-R-13, Certifications 51 and 19, respectively), placed employees in an inappropriate CSO bargaining unit. WTU asserts that, nonetheless, the Board has the authority to correct decisions when employees are not in appropriate units. (See R&R p. 8).

WTU asserts that the certification in PERB Case No. 88-R-06 is defective because:

[N]o hearing was conducted and many employees in the ET bargaining unit are principals, assistant principals, supervisors and managers, particularly ET-10, 11 and 12 employees. Further, the job titles of the ET-6 through ET-12 employees are not identified or discussed in the certification and a community of interest is not defined. (R&R p.8).

In contrast, WTU filed a petition in PERB Case No. 88-R-09, Certification No. 56, and the Board properly held a hearing at which the hearing examiner discussed "community of interest" as the basis for the proposed unit. The Board issued a certification within 13 months. (See R&R p. 8).

WTU maintains that the CSO certifications in PERB Case Nos. 88-R-06 and 88-R-13 were void at their inception. WTU charges that the preparation and issuance of the certification and clarification occurred through the collusive acts of the CSO, DCPS and the Board's Executive Director. (See R&R p. 8).

WTU further contends that "DCPS has created [identical] job titles of WTU unit positions in CSO's unit and transferred employees from WTU's unit to CSO's unit."<sup>7</sup> (R&R p. 8). WTU asserts that this is an intentional misrepresentation of a material fact "that the CSO unit is appropriate." (R&R p. 8). WTU asserts that the CSO unit is inappropriate, as there is no community of interest between non-supervisory and supervisory employees; and placing supervisory and non-supervisory employees in the same bargaining unit is in violation of D.C. Code § 1-617.09(b)(1).<sup>8</sup> (Citing *Stay Security and United Unions of Security Guards*, 311 NLRB 252 (1993)). (See R&R at pgs. 8-9).

WTU requested that the Hearing Examiner: (1) reassign these employees to another bargaining unit; (2) deny CSO's Motion to Dismiss; (3) reconvene the hearing to determine which employees belong in WTU's unit; (4) declare the CSO unit inappropriate for the contested employees; and (5) declare that the WTU unit is the appropriate unit for the contested employees. (R&R p.9).

### **Motion to Dismiss**

The CSO maintains that the WTU unit clarification Petition must be dismissed.<sup>9</sup> The CSO cites Board Rule 506.1, which provides that a petition for clarification of an existing unit may be filed by the labor organization which is a party to the certification. In this regard, the CSO makes the following arguments:

WTU is not a party to [any] certification covering the affected positions[.] For this reason, WTU does not have standing under PERB Rule 506.1<sup>[10]</sup> to petition for a unit clarification involving

<sup>7</sup> WTU alleged in Case No. 09-U-66 that these actions by DCPS constitute an unfair labor practice in violation of D.C. Code § 1-617.04(a) (1), (2), (3), and (5).

<sup>8</sup> D.C. Code § 1-617.09(b)(1) provides as follows:

A unit shall not be established if it includes the following:

- (1) Any management official or supervisor; Except, that with respect to firefighters, a unit that includes both supervisors and non-supervisors may be considered: Provided, further, that supervisors employed by the District of Columbia Board of Education may form a unit which does not include non-supervisors[.]

<sup>9</sup> CSO also contends that WTU mistakenly characterized the petition in this matter as a petition for unit clarification, as WTU has no standing to file any petition concerning the CSO bargaining unit.

<sup>10</sup> Board Rule 506.1 provides as follows:

506.1 - Clarification Petition - Contents

A petition filed for clarification of an existing unit may be filed by the agency or by the labor organization which is party to the certification and shall be in the same form and contain the same information (as appropriate) that is required by Section 502 or 503; plus:

- (a) A description of the existing unit; and

the affected positions. Moreover, PERB Case No. 80-R-09, Certification 12, states that "employees in the ET bargaining unit" are excluded from the WTU bargaining unit while PERB Case No. 88-R-06, Certifications 51 and 19, recognizes CSO as the exclusive bargaining representative of DCPS ET-6 through ET-12 employees. For this reason, CSO concludes that [the] WTU Petition must be dismissed.

(R&R p. 9).

Moreover, the CSO asserts that even if WTU had standing, WTU is seeking to add positions from a CSO bargaining unit that has been certified for over 20 years and enjoys a stable bargaining relationship with the Agency. These positions are neither newly created nor unrepresented as they are covered by a collective bargaining agreement between CSO and DCPS. The CSO asserts that the Board has no authority to set aside this bargaining relationship. (R&R p. 9). The CSO contends that, "WTU action should be considered an improper request for a midterm change to CSO's defined bargaining unit....WTU's unit clarification Petition must be dismissed because it seeks to disrupt a settled bargaining relationship by a stranger to the agreement."<sup>11</sup> (R&R p. 10).

The CSO argues that there is no PERB case law on the legitimacy of mixed bargaining units. The CSO states that "[w]hen this Board does not have precedent on an issue, it looks to the decisions of other labor relations authorities, such as the National Labor Relations Board (NLRB), for guidance." (*AFGE, Local 2714 v. DC Department of Parks and Recreation*, PERB Case No. 00-U-22, Slip Op. No. 697 at p. 8, (November 26, 2002)). Citing *Arizona Electric Power Cooperative, Inc.*, 250 NLRB 1132 (1980), ("*Arizona Electric*"), the CSO maintains that WTU's assertion that CSO's bargaining unit contains a mixture of supervisors and non-supervisors, is without merit. The CSO argues that "even [if it] represented a mixed unit, which it does not, WTU cannot lay claim to...the CSO bargaining unit" members because CSO and DCPS have bargained for more than two decades. [N]either side has disputed the makeup of the CSO bargaining unit, thereby ensuring the stability of the bargaining relationship." (R&R p. 10). CSO asserts that the Board has no authority to grant relief under these circumstances.

In sum, the CSO asserts that WTU's petition should be dismissed because WTU does not have standing; PERB does not have the authority to grant the relief requested; and CSO's bargaining unit is not subject to WTU's challenge.

#### IV. Hearing Examiner's Discussion

The Hearing Examiner reasoned as follows:

The plain language of Board Rule 506.1 states that a petition for clarification of an existing bargaining unit may be filed by the

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(b) A statement of why the proposed clarification is requested.

<sup>11</sup> In addition, CSO argues that WTU's Petition must be dismissed because WTU did not comply with its anti-raiding obligations under the AFL-CIO Constitution applicable to all affiliates. The Hearing Examiner dismissed this allegation.

agency or the labor organization which is party to the certification. (PERB Rule 506.1). [In addition,] [Board] Rule 502.9 establishes the conditions barring petitions for exclusive recognition in pertinent part, as follows: [R&R p. 10].

#### 502.9 - Conditions Barring Petitions for Exclusive Recognition

A petition for exclusive recognition shall be barred if:

\* \* \*

(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. [R&R at pgs. 10-11].

... CSO's certification Nos. 12<sup>12</sup> (sic) and 51 were joined by [the Board] in PERB Case No. 88-R-06, and were then amended and clarified in PERB Case 88-R-13 to include ET-6 through ET-12 job classifications [regardless] of location. [In addition,]... CSO's bargaining units are covered by current collective bargaining agreements. [R&R p. 11].

... WTU is not a party to CSO's certification and is barred, by the existence of a contract, from petitioning to represent the employees defined in CSO's certification.... WTU has no standing to petition for a unit clarification of employees within CSO's bargaining units or to petition for representation pursuant to [Board] Rules 502, *et seq.* for this reason, the Hearing Examiner grants CSO's March 31, 2010, Motion to Dismiss Petition for Unit Clarification because it is not a party to the certification. In addition, WTU may not petition for representation pursuant to PERB Rules 502, *et seq.*... For this reason, the Hearing Examiner grants CSO's March 31, 2010, Motion to Dismiss Petition for Unit Clarification. [R&R p. 11].

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<sup>12</sup> This is a typographical error and should be "Certification No. 19."

[The Hearing Examiner further concluded that] CSO's assertion that WTU's petition must be dismissed for failing to comply with its obligations under the AFL-CIO Constitution, Article XX, is without merit for the reasons described by the Hearing Examiner at hearing. [R&R p. 11].<sup>13</sup>

Regarding WTU's assertion that CSO's bargaining units improperly include non-supervisors and supervisors in violation of D.C. Code § 1-617.09(b)(1), CSO asserts that neither CSO nor DCPS has disputed the makeup of the CSO bargaining units and they have bargained for more than twenty years. CSO argues, based on the NLRB precedent of *Arizona Electric*. WTU must not be allowed to disturb this stable relationship.<sup>14</sup> [R&R pgs. 11-12].

In addition, PERB Case No. 80-R-09, Certification 12, specifically states that "employees in the ET bargaining unit" are excluded from WTU's bargaining unit. Certifications 51 and 19, specifically state that CSO is the exclusive bargaining representative of DCPS ET-6 through ET-12 employees. For these reasons, the Hearing Examiner finds that WTU has no standing to bring this unit clarification petition regarding employees in the ET bargaining [unit, as] these positions are expressly excepted from WTU's bargaining unit. This express exception in Certification 12 forms another separate ground for dismissing WTU's unit clarification petition. [R&R p. 12].

WTU asserted that CSO's certifications and unit clarification were prepared and issued through the collusive acts of the CSO, DCPS and [the Board's] Executive Director. WTU presented no evidence to support this assertion. The Hearing Examiner finds WTU's claim...completely lacks materiality and therefore constitutes meritless, groundless disagreement with the [Board's] CSO certifications. [R&R p. 12].

The Hearing Examiner recommended that the Board dismiss PERB Case No. 09-UC-02 with prejudice. He recommended that the claim that CSO's bargaining units violate D.C. Code § 1-617.09(b)(1) is without merit and should be dismissed with prejudice. Finally, the Hearing Examiner determined that, in view of the outcome of the Unit Clarification Petition in this matter, the unfair labor practice complaint in PERB Case No. 09-U-66 is moot and also should be dismissed with prejudice.

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<sup>13</sup> The AFL-CIO Constitution provides at Article XX, Sections 11017 – 11019. "No-Raiding Procedures Among Labor Organizations." Article XX, Sec. 11017 establishes that the disputes will be handled within the AFL-CIO.

<sup>14</sup> CSO asserts that PERB looks to NLRB precedent for guidance when PERB does not have precedent on an issue, as in this case. *AFGE, Local 2714 v. D.C. Dep't of Park and Recreation*, Slip Op. No. 697 at p. 8, PERB Case No. 00-U-22 (November 26, 2002).

## V. Exceptions<sup>15</sup>

The WTU raised several exceptions to the findings of the Hearing Examiner. The Petitioner disagrees with the Hearing Examiner's findings that: (1) WTU is prevented from filing a unit clarification petition because it is not the certified representative of the employees in the CSO bargaining unit, pursuant to Board Rule 506.1; (2) WTU is prevented from filing a representation petition because of the Contract Bar rule found in Board Rule 502.9; (3) the plain language of the CSO certification excludes ET-series employees from the WTU unit; (4) the Hearing Examiner relied on *Arizona Electric* to support his conclusion that the parties (CSO and DCPS) have a longstanding bargaining relationship not challenged by either party that should remain undisturbed; (5) the Hearing Examiner recommended that the petition be dismissed. The Board finds that these arguments have been raised and addressed by the Hearing Examiner. The Petitioner is merely disagreeing with the Hearing Examiner's findings and conclusions. This is not a basis for rejecting the Hearing Examiner's findings and recommendations.

Board Rule 506.1 provides that a petition for clarification of an existing bargaining unit may be filed by the agency or the labor organization which is party to the certification. The Board has certified the CSO as the exclusive representative of the employees whom WTU seeks to represent. The Board finds that, as WTU is not a party to the CSO certification, it has no standing to file a unit clarification petition for any employees in the CSO bargaining unit.

In addition, Board Rule 502.9 (a) and (b) provides in pertinent part that:

[a] petition for exclusive recognition shall be barred if during the previous twelve (12) months... a certification of representative has been issued [or if] [a] collective bargaining agreement is in effect covering all or some of the employees in the bargaining unit and [certain] conditions have been met. If the agreement is of three years or shorter duration... the petition may be filed between the 120<sup>th</sup> day and the 60<sup>th</sup> day prior to the scheduled expiration date or after the stated expiration of the contract.

Therefore, if the collective bargaining agreement has a duration of more than three years, the petition may be filed after the contract has been in effect for 975 days. (See Board Rule 502.9 (a) and (b)). The Board notes that there is no allegation or evidence that WTU has met these requirements. Aside from having no standing to file a unit clarification petition, WTU has no standing to file a representation petition to represent employees covered by the CSO-DCPS collective bargaining agreement.

Finally, WTU claims that supervisors and non-supervisors are in the same CSO bargaining unit. Relying on *Arizona Electric*,<sup>16</sup> the Hearing Examiner found that even if this were so, based on the Board's certification, CSO and DCPS have enjoyed a stable bargaining relationship for over twenty (20) years, without any challenge to the representational status of CSO and this relationship should not be disturbed, as in *Arizona Electric*. WTU attempts to

<sup>15</sup> See n. 1. The Petitioner subsequently filed Amended Exceptions.

<sup>16</sup> *Arizona Electric Power Cooperative, Inc.*, 250 NLRB 1132 (1980).

distinguish *Arizona Electric* from the present case, asserting that at its inception, the bargaining unit in that case was properly certified by the NLRB. Later, by mutual agreement, the parties added a supervisor to the bargaining unit. This action was belatedly challenged. The NLRB held that while it would not disturb the longstanding bargaining relationship of the parties, it initially granted certification for an appropriate bargaining unit, and would not have sanctioned such an arrangement when it granted the certification that created the unit. WTU claims that in the present case, the Board is a party to a violation of the law by placing supervisors in a unit with non-supervisors. The Board disagrees with the Petitioner's characterization of the facts in the present case. Here, the Board certifications place CSO supervisors and non-supervisors into distinct units, as required by statute.

The Board finds that the Hearing Examiner's findings and conclusions are reasonable, based on the record and consistent with Board and NLRB precedent. The Board hereby adopts the recommendation of the Hearing Examiner that this matter be dismissed.<sup>17</sup> This conclusion is not meant to discourage members of the AFL-CIO from invoking procedures within the provisions of the AFL-CIO Constitution in order to resolve any remaining disputes.

The Board finds no basis for setting aside the current bargaining unit certification for CSO. We, therefore, find that WTU's Petition must be dismissed.

#### **VI. Unfair Labor Practice Complaint**

WTU further alleges that because the Hearing Examiner did not take evidence on bargaining unit positions alleged to be common to the WTU and CSO bargaining units, and requests that the Board remove the Hearing Examiner and order a new hearing in the unfair labor practice complaint. The Board finds no merit to this claim.

There is no evidence that WTU filed an interlocutory appeal during the course of the hearing, in order to preserve its right to request recusal of the Hearing Examiner. Moreover, the Hearing Examiner developed a record concerning WTU's unit clarification petition. The parties agreed that the outcome of the unit clarification petition may render moot the allegations raised in the unfair labor practice complaint in PERB Case No. 09-U-66. In the Complaint, WTU

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<sup>17</sup> WTU further alleges that because the Hearing Examiner did not take evidence on bargaining unit positions alleged to be common to the WTU and CSO bargaining units, the Hearing Examiner should be removed and a new hearing should be scheduled and the unfair labor practice complaint ("Complaint") should be heard. The Board finds no merit to this claim.

The Hearing Examiner developed a record concerning WTU's unit clarification petition. The parties agreed that the outcome of the unit clarification petition may render moot the allegations raised in the unfair labor practice complaint in PERB Case No. 09-U-66. In the Complaint, WTU alleged that DCPS was improperly and illegally assigning certain employees to the CSO bargaining unit.

As a remedy, WTU requested that the Board order DCPS to assign the employees in question to the WTU bargaining unit, order DCPS to post a notice that it committed an unfair labor practice and order WTU to pay service fees for the past twenty years to WTU. In light of our finding that the employees sought by WTU belong in the CSO bargaining unit, WTU has raised no allegation or facts which would result in an unfair labor practice. Consequently, WTU's unfair labor practice Complaint must be dismissed. Finally, there is no evidence that WTU filed an interlocutory appeal during the course of the hearing, in order to preserve its right to request recusal of the Hearing Examiner.

alleged that DCPS was improperly and illegally assigning certain employees to the CSO bargaining unit. As a remedy, WTU requested, *inter alia*, that the Board order DCPS to assign the employees in question to the WTU bargaining unit and order WTU to pay retroactive service fees for these employees.

The Board has determined that the employees sought by the Petition in the present case are included in the CSO bargaining unit Certifications. In light of the Board's finding that these employees belong in the CSO bargaining unit, in its Complaint, WTU raises no allegations or facts which would result in an unfair labor practice. Consequently, WTU's unfair labor practice Complaint must be dismissed.

### ORDER

#### IT IS HEREBY ORDERED THAT:

1. The Unit Clarification Petition filed in PERB Case No. 09-UC-02, by the Washington Teachers' Union, Local 6, seeking to represent employees of the District of Columbia Public Schools who are currently represented by the Council of School Officers, Local 4, American Federation of School Officers, AFL-CIO, is **DISMISSED** with prejudice.
2. The allegation of the Washington Teachers' Union, Local 6, in PERB Case No. 09-UC-02, that the composition of the CSO's bargaining units violates D.C. Code Sec. 1-617.09(b)(1), is without merit and is **DISMISSED** with prejudice.
3. In light of the outcome of PERB Case No. 09-UC-02, the Board finds that the Unfair Labor Practice Complaint filed by the Washington Teachers' Union, Local 6, against the District of Columbia Public Schools in PERB Case No. 09-U-66, is moot, and is hereby **DISMISSED** with prejudice.
4. This Decision and Order is final upon issuance pursuant to Board Rule 559.1.

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

August 23, 2012

**CERTIFICATE OF SERVICE**

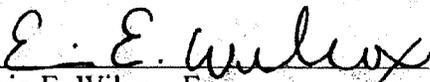
This is to certify that the attached Decision and Order in PERB Case No. 09-U-50 was transmitted via U.S. Mail and e-mail to the following parties on this the 24th day of August, 2012.

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