GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Professional Employees Association, D.F.R. - D.C.,	
Petitioner,	
and	
Department of Finance and Revenue,	PERB Case No. 92-R-02
	Opinion No. 309
Agency,	
and	
American Federation of State, County and Municipal Employees, District Council 20, Local 2776, AFL-CIO,	
Intervenor.	

DECISION AND ORDER

On November 20, 1991, the Professional Employees Association-DFR-D.C. (PEA) filed a petition seeking exclusive recognition as the bargaining agent on behalf of the following proposed unit of employees:

> "All professional employees of the Department of Finance and Revenue excluding management executives, confidential employees, temporary employees, seasonal employees, supervisors or any employee engaged in personnel work in other than a purely clerical capacity."

PEA acknowledges in the Petition that the employees in the proposed unit above are currently a part of an existing unit covering all employees at the Department of Finance and Revenue (DFR), and are represented by the American Federation of State, County and Municipal Employees, District Council 20, Local 2776 (AFSCME) [1]/ PEA further notes that the professional employees of

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[1]/ See, National Association of Government Employees and American Federation of State, County and Municipal Employees, D.C.
(continued...)

DFR were permitted to vote on the question of whether they favored inclusion in a unit with non-professionals, at the same time that AFSCME was selected by these employees as the exclusive bargaining agent. Although the professional employees favored inclusion at that time, PEA asserts that they no longer do and requests that the Public Employee Relations Board (Board) find the proposed unit appropriate and certify PEA as their exclusive bargaining agent, or in the alternative, consider the Petition as a request to modify the existing unit pursuant to Section 504 of the Board's Rules. [2]/

In accordance with Board Rules 502.1(d) and 502.2, PEA submitted its Constitution and Roster of Officers, as well as a showing of employee interest in support of the Petition. [3]/

Notices concerning the Petition were posted for the prescribed period on January 17, 1992. On January 27, 1992, AFSCME timely requested intervention pursuant to Board Rules 502.7 and 502.8(b). We hereby grant AFSCME's request to intervene in this proceeding, based on its accorded right as the recognized bargaining agent for employees in the proposed unit. AFSCME also filed a Motion to Dismiss the Petition asserting,

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[1](...continued)
Council 20 and District of Columbia Department of Finance and Revenue, Certification No. 3, PERB Case No. 80-R-05 (1980). The unit set forth in the certification covers all employees at DFR with the exception of the same exclusions noted in the proposed unit above at p.1.

[2]/ A petition for the modification of a unit, in accordance with Section 504.1, may be sought for the following purposes: "(a) [t]o reflect a change in the identity or statutory authority of the employing agency; (b) to add to an existing unit unrepresented classifications or employee positions created since the recognition... of the exclusive representative; (c) to delete classifications [that] no longer exist or...are no longer appropriate to the established unit; or (d) [t]o consolidate two (2) or more bargaining units within an agency that are represented by the same labor organization."

We find that none of the above purposes are applicable to the Petitioner's expressed aim of severing from the existing unit, a proposed unit of professionals.

[3]/ Initially, PEA did not submit its Constitution and the showing of interest was unclear as to the designation of a bargaining agent. PEA, upon notice by the Board, cured these deficiencies.

inter alia, that D.C. Code Section 1-618.11 precluded the severance of the proposed unit from the existing unit.

On January 25, 1992, DFR filed "Agency's Response to Recognition Petition" also requesting that the Petition be dismissed. Among its arguments for dismissal, DFR states that employees in the proposed unit are covered by a collective bargaining agreement that expired on September 30, 1991, which by its terms remains in effect until a new contract is negotiated. Therefore, DFR contends, the contract bars the Petition in accordance with Board Rule 502.9(b). [4]/

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[4]/ In view of the basis for our disposition of this Petition, we have no occasion to rule on the parties' remaining arguments including, inter alia, the applicability of Board Rule 502.9(b) to DFR's and AFSCME's collective bargaining agreement, as a bar to PEA's Recognition Petition. However, in the interest of clarifying a misapprehension that appears to exist among the parties concerning Board Rule 502.9(b) we note the following:

Board Rule 502.9(b) provides:

> 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 that three years; provided, however, that a petition may be filed after the contract has been in effect for 975 days. (emphasis added.)

Use of the term "duration" in 502.9(b)(i) and (ii) refers to the period of time during which the collective bargaining agreement is actually in effect, as may be prescribed by the agreement's

(continued...)

On February 6, 1992, PEA filed its Response to both AFSCME's and DFR's requests that the Petition be dismissed. PEA countered that neither a contract bar nor the provisions of D.C. Code 1-618.11(b) prevented the granting of its Petition. Furthermore, in response to the Respondents' claims that the Petition is deficient because the scope of the proposed unit is unclear, PEA amended the unit description to limit its coverage to DFR's audit division. PEA's amended description proposes the following unit:

> "All professional employees in the audit division of the Department of Finance and Revenue excluding management executives, confidential employees, temporary employees, seasonal employees, supervisors or any employee engaged in personnel work in other than a purely clerical capacity." [5]/

Having considered the parties' respective arguments, the pertinent statutory provisions and relevant case law, we conclude, for the following reasons, that the Petition must be dismissed.

The threshold issue in this proceeding is whether the Board can find appropriate a proposed unit of professional employees in the audit division at DFR, if these employees are covered by a unit that was established prior to the effective date of the CMPA. The relevant provisions of the CMPA, which we find controlling and dispositive of this issue are the following:

Sec. 1-618.11. Rights accompanying exclusive recognition.

* * *

(b) Bargaining units established at the time this chapter becomes effective shall continue to be recognized as appropriate units subject to Sec. 1-618.9(c), and labor organizations which have exclusive recognition in bargaining units existing at the time this chapter becomes effective

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[4](...continued)
terms or by further agreement of the parties. Board Rule 502.9(b)(ii) places a cap, i.e., 975 days, on how long an agreement's effective period will act as a bar to a recognition petition, notwithstanding prescribed or agreed upon durations for longer periods.

[5]/ This modification in the unit description from that described in the Petition does not alter the Board's finding that the Petitioner has met the requisite showing of interest in accordance with Board Rule 502.2.

shall continue to enjoy exclusive recognition in these units subject to Sec. 1-618.10(b)(2). (1973 Ed., Sec. 1-247.11; Mar. 3, 1979, D.C. Law 2-139, Sec. 1711, 25 DCR 5740.)

Sec. 1-618.10. Selection of exclusive representatives; elections.

* * *

[b](2) The Board shall issue rules and regulations which provide procedures for decertification of exclusive representatives upon the request of 30 percent of the employees or the District and the holding of an election. Such rules and regulations issued by the Board shall prescribe the criteria under which the District may request decertification such as lack of any unit activity over a period of time.

Sec. 1-618.9. Unit determination.

* * *

(c) Two or more units for which the labor organization holds exclusive recognition within an agency may be consolidated into a single larger unit if the Board determines the larger unit to be appropriate. The Board shall certify the labor organization as the exclusive representative in the new unit when the unit is found appropriate.

We find that each of the above-quoted provisions is clear and unambiguous. D.C. Code Sec. 1-618.11(b) preserves the continuity of pre-CMPA bargaining units and their designated bargaining agents subject only to a union's decertification (Sec. 1-618.10(b)(2)) or the consolidation of bargaining units (Sec. 1-618.9(c)). Neither of these circumstances are present with regard to the existing unit of DFR Employees. The parties do not dispute that (1) AFSCME was selected through an election proceeding, by both professional and non-professional employees at DFR as their exclusive bargaining agent; (2) professional employees were separately balloted and voted for inclusion in a unit with non-professionals; (3) AFSCME was certified by the PERB on August 18, 1980, as the bargaining representative for all DFR employees, with the exception of certain noted classifications; and (4) AFSCME continues to remain the certified representative for these employees.

In its Motion to Dismiss, AFSCME argues that since the existing bargaining unit was established prior to the effective date of Chapter 17 of the CMPA, D.C. Code Sec. 1-618.11(b) is

applicable to this case and thus precludes a finding that the unit proposed by the Petitioner is appropriate, or that the existing unit can be modified. AFSCME's arguments are premised upon factual assertions not directly disputed by the Petitioner. For example, AFSCME directs attention to the historical genesis of the CMPA. Specifically, the directives of Commissioner's Order 70-229, which implemented Chapter 25A of the District of Columbia Regulations, sets forth in Section 9 the standards for recognition and provides that the parties to a representation proceeding could stipulate to the scope of an appropriate unit. Moreover, Chapter 25A also provided that the District of Columbia Personnel Officer was authorized to find a proposed or stipulated unit appropriate.

This is contrary to the present directives in the CMPA, in which exclusive authority resides with the PERB to determine the scope of units. [6]/

Although the events surrounding the establishment of the DFR unit very closely paralleled the effective date of Chapter 17 of the CMPA, we are compelled to find that the unit, as AFSCME suggests, was established prior to the effective dates of Chapter 17 and thus the provisions of Sec. 1-618.11(b) are controlling. [7]/

Since neither exception to this provision is applicable under the circumstances, i.e., the decertification of AFSCME or the consolidation of two or more bargaining units upon request by a labor organization, we find no reason to disturb what the legislators sought to preserve upon the enactment of these provisions-- the continuity of recognized, established units of

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[6]/ See, D.C. Code Sec. 1-605.2(1) and 1-618.9(a).

[7]/ AFSCME appended to its Motion to Dismiss a copy of a Memorandum of Agreement dated May 22, 1980, which AFSCME asserts is evidence that the parties in PERB Case No. 80-R-05 had agreed upon the established unit of employees to be polled in an election proceeding. Therefore, AFSCME claims, the unit had been established prior to the effective date of the Chapter XVIII containing the provisions codified as D.C. Code Sec. 1-618.11(b). AFSCME calculates that the effective date is June 2, 1980, since D.C. Code Sec. 1-637.1(1) provides that the Chapter would become effective 60 days after the PERB rules are issued. As AFSCME notes, PERB promulgated its Interim Rules on April 4, 1980.

employees. [8]/

Accordingly, we grant AFSCME's Motion and DFR's request that the Petition be dismissed.

ORDER

IT IS ORDERED THAT:

The Petition for Recognition, or in the alternative, Modification, is dismissed.

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

September 29, 1992

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[8]/ We find the Petitioner's arguments without merit that such a result was not intended by these provisions. We reject PEA's assertions that employees are "forever restrain[ed]" from changing their minds about their statutorily protected right to select a representative. As the Petitioner acknowledged in its arguments set forth in the Response to Motion to Dismiss, an open period in an existing contract is at least one manner in which an incumbent labor union may be challenged as an exclusive representative. Employees may also seek to decertify an incumbent labor organization, as prescribed by the Board's rules.