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

In the Matter of:)	
)	
National Association of)	
Government Employees)	PERB Case No. 19-RC-02
)	
Petitioner)	
)	Opinion No. 1761
and)	
)	
District of Columbia)	
National Guard)	
)	
Respondent)	

**DECISION ON UNIT DETERMINATION
AND DIRECTION OF ELECTION**

I. Statement of the Case

On August 21, 2019, the National Association of Government Employees (NAGE) filed a Petition for Recognition (Petition), seeking to represent the following proposed bargaining unit for the purpose of collective bargaining:

All employees of the Government of the District of Columbia D.C. National Guard, excluding managers, supervisors, confidential employees, or any employees engaged in personnel work in more 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.

As required by Board Rule 503.1(e), the Petition was accompanied by a roster of NAGE officers and a copy of the NAGE constitution and bylaws. In addition, NAGE submitted evidence of the employees' showing of interest in NAGE as their exclusive representative for collective bargaining.

On November 21, 2019, as required by Board Rule 503.3, the District of Columbia Office of Labor Relations and Collective Bargaining, on behalf of the District of Columbia National Guard (D.C. National Guard), filed a list of employees in the proposed unit. Pursuant to Board Rule 503.4, the Executive Director determined that NAGE met its showing of interest based on its Petition. On December 4, 2019, the Executive Director issued the D.C. National Guard a notice that the Petition had been filed. The Board received no comments or requests for intervention in response to the notice.

On February 28, 2020, a hearing was held to determine which employees belonged in the bargaining unit.

II. Hearing Examiner's Report and Recommendation

A. Issues Presented to the Hearing Examiner

At the hearing, the D.C. National Guard argued that the Board must deny the Petition in its entirety.¹ According to the D.C. National Guard, the bargaining unit employees proposed by NAGE did not share a community of interest.² D.C. National Guard argued that the unit description was overly broad and made no distinction between federal employees and D.C. government employees employed by the D.C. National Guard.³ D.C. National Guard also argued that the proposed bargaining unit employees did not share the same working conditions or organizational structure.⁴

D.C. National Guard further argued that the proposed bargaining unit includes supervisory and confidential employees. D.C. National Guard listed several positions that it believes are classified as supervisors based on abilities, including ability to hire, fire, promote, assign, grant or deny leave, adjust or resolve grievances, supervise the work of two or more employees, and/or exercise independent judgment.⁵ D.C. National Guard then asserted that several other positions must be excluded as confidential employees based on access to confidential information, security clearances and access to federal computers.⁶

Finally, D.C. National Guard argued that granting the Petition would not promote labor relations and would harm agency efficiency.⁷ D.C. National Guard asserted that it is an uncommon, unique and complex military organization, different from other District government agencies that have represented bargaining units.⁸ Furthermore, D.C. National Guard stated that funding for the agency comes, in part, from federal funds and grants not controlled by the District government.⁹

¹ Report at 12.

² Report at 12.

³ Post Hearing Brief at 6.

⁴ Post Hearing Brief at 6.

⁵ Post Hearing Brief at 7.

⁶ Post Hearing Brief at 8.

⁷ Report at 12-13.

⁸ Report at 14.

⁹ Post Hearing Brief at 12.

B. Recommendation

The Hearing Examiner found that D.C. National Guard's challenges were without a statutory basis and unsupported by the regulations or precedent.¹⁰ On the issue of community of interest, the Hearing Examiner rejected D.C. National Guard's arguments and found that there was a strong community of interest within the proposed bargaining unit.¹¹ The Hearing Examiner's Report stated that D.C. National Guard is divided into two functional organizations: the D.C. Operations Division and the Federal Operations Divisions.¹² Some D.C. National Guard employees are Federal employees and subject to Federal Civil Service laws, rules and regulations. However there are many D.C. National Guard employees who are D.C. employees subject to the Comprehensive Merit Personnel Act and other D.C. laws, rules and regulations.¹³ The Hearing Examiner found that NAGE sought to represent D.C. government employees in the D.C. Operations Divisions.¹⁴

The Hearing Examiner found that fifteen (15) employees should be excluded from the bargaining unit based on a statutory exemption.¹⁵ These employees include several, but not all, of the positions D.C. National Guard claims are supervisory and/or confidential. The Hearing Examiner rejected several of D.C. National Guard's arguments for excluding bargaining unit members, including security clearance requirements, access to federal computers with a computer access card, job title alone, and access to confidential data or other information not related to labor relations and in a purely clerical capacity.¹⁶

Finally, the Hearing Examiner found that, contrary to D.C. Official Code § 1-617.01(a) and (b), the D.C. National Guard erroneously argued that its working conditions are distinct from other District agencies and certifying a bargaining unit does not support effective labor relations.¹⁷ Regarding funding, the record established that a review of the District Fiscal Year 2020 Public Safety and Justice Budget shows that numerous District agencies are funded with federal grants including the Department of Forensic Sciences and the Metropolitan Police Department.¹⁸ The Hearing Examiner also found that funding of a position through federal funds is not a statutory or regulatory or precedential basis for exclusion from the proposed bargaining unit.¹⁹

The Hearing Examiner recommended that the Board certify the bargaining unit but exclude those employees who are statutorily exempted from inclusion in the bargaining unit.²⁰

¹⁰ Report at 18.

¹¹ Report at 21.

¹² Report at 3.

¹³ Report at 3.

¹⁴ Report at 3.

¹⁵ Report at 22.

¹⁶ Report at 18-19.

¹⁷ Report at 19.

¹⁸ Report at 6-7.

¹⁹ Report at 19.

²⁰ Report at 22.

Finally, the Hearing Examiner also recommended that the Board order a representation election in accordance with its Rules.²¹

III. Discussion

D.C. Official Code § 1-617.09(a) states that the determination of an appropriate unit will be made on a case-to-case basis and will be made on the basis of a properly supported request from a labor organization.

The essential ingredient in every unit is that a community of interest exists among employees for a unit to be found appropriate by the Board for collective bargaining over terms and conditions of employment. An appropriate unit must also promote effective labor relations and efficient agency operations.²² The Petition states that the employees are “subject to the same organizational structure, working conditions, pay schedule, and supervision.”²³ The Petition further states that a single unit would promote effective labor relations “as the unit will communicate with one Agency and chain[-]of[-]command in negotiating working conditions and resolving labor disputes.”²⁴ The Hearing Examiner found that all employees in the proposed bargaining unit are in the same chain-of-command reporting to the D.C. National Guard Director of Operations.²⁵ The Director testified that he is a D.C. government employee and supervises all D.C. National Guard employees under him.²⁶ Furthermore, the record established that all employees that NAGE seeks to represent are served by one human resources team, supervised by a D.C. National Guard Human Resources Manager, also a D.C. government employee.²⁷ Finally, the D.C. National Guard’s organization chart for fiscal year 2020 shows that all employees work in a component of the D.C. government entitled “District of Columbia National Guard DC Government Employees (Local).”

After reviewing the record and the Hearing Examiner’s Report and Recommendation, and the lack of exceptions from the parties, the Board accepts the Hearing Examiner’s recommendation and finds that the proposed bargaining unit constitutes an appropriate unit for collective bargaining.

IV. Conclusion

The Board orders an election to determine the will of eligible employees in the unit described above to be represented by the Petitioner or no representative. The Board finds that based on the changes to the District’s operating status as a result of COVID-19, a mail ballot election is most appropriate in this case.

²¹ Report at 23.

²² See D.C. Official Code § 1-617.09(a).

²³ Petition at 3.

²⁴ Petition at 3.

²⁵ Report at 21.

²⁶ Report at 21.

²⁷ Report at 21.

ORDER

IT IS HEREBY ORDERED THAT:

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

All employees of the D.C. National Guard, excluding managers, supervisors, confidential employees, or any employees engaged in personnel work in more 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. A mail ballot election shall be held in accordance with the provisions of D.C. Official Code § 1-617.10 and PERB Rules 510, 511, 514, 515 in order to determine whether a majority of eligible employees in the above-described unit desire to be represented for bargaining on terms and conditions of employment by the National Association of Government Employees or no union.
3. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of the Board Chairperson Douglas Warshof, Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

October 29, 2020

Washington, D.C.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 19-RC-02, Opinion No. 1761 was served to the following parties via File & ServeXpress on this the 30th day of October 2020:

Lateefah S. Williams
National Association of Government Employees
1020 N. Fairfax Street
Suite 200
Alexandria, VA 22314

William T. Jolley
D.C. Office of Labor Relations and
Collective Bargaining
441 4th Street NW
Suite 820 North
Washington, D.C. 20001

/s/ Merlin M. George
Merlin M. George
Attorney Advisor