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

_____)	
In the Matter of:)	
)	
National Association of Government)	
Employees)	
)	
Petitioner)	PERB Case No. 15-CU-01
)	
and)	Opinion No. 1544
)	
District of Columbia Homeland Security)	
and Emergency Management Agency)	
)	
Respondent)	
_____)	

Decision and Order on Compensation Unit Determination

I. Statement of the Case

On October 20, 2014, the National Association of Government Employees (“NAGE” or “Union”) filed a Petition for Compensation Unit Determination (“Petition”), seeking to place certain employees into Compensation Unit 1 for compensation bargaining. On November 13, 2014, the District of Columbia Homeland Security and Emergency Management Agency (“HSEMA” or “Agency”) filed comments to NAGE’s Petition, consenting to the placement of certain employees and objecting to the placement of other employees contained in NAGE’s Petition. Pursuant to Board Rule 503.4, HSEMA posted the required notice for fifteen (15) consecutive days. No comments to the Notice were received by the Board. The matter was referred to a Hearing Examiner, who issued a Report and Recommendation. No Exceptions were filed.

NAGE petitioned that the following unit of employees at HSEMA be included in Compensation Unit 1:

All employees of the Homeland Security Emergency Management Agency including Emergency Operation and Information Specialist, Emergency Operation and Information Specialist Bilingual, Emergency Operation VIP Technicians, all other clerical employees, excluding managers, supervisors, and confidential employees engaged in personnel work 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, (CMPA) D.C Law 2-139.¹

NAGE is the certified exclusive bargaining representative for this unit.² NAGE asserted in its petition that a number of positions were covered by this certification.³

In the Agency's comments, the Agency consented to the inclusion of several of the positions in the Union's bargaining unit under Compensation Unit 1, but disputed the appropriateness of several other positions.⁴ The Agency objected to certain positions in NAGE's Petition, because the Agency argued some of the positions were professional employees, who had not been afforded the opportunity to vote whether or not to be included in a unit with nonprofessional employees. The Agency also objected to the inclusion of several employees, who the Agency asserted were statutorily prohibited by the CMPA as managers or employees engaged in confidential work assignments.⁵

II. Hearing Examiner's Report and Recommendation

The Agency objected to several positions in the Petition, arguing that the Petition sought to cover nonprofessional and professional employees in the same bargaining unit without a vote by the professional employees to determine if they wished to bargain in the same unit as nonprofessional employees. At the hearing, the parties decided to settle issues regarding which positions were covered by NAGE's certification through the Board's unit clarification procedures.⁶ After NAGE and the Agency agreed on those issues, the parties only disputed whether two employees should be included in the unit: a District of Columbia Statewide Interoperability Communications Coordinator and a Telecommunication Specialist.⁷

The Hearing Examiner first considered whether the two employees were "aligned with management" and prohibited from inclusion in the unit by D.C. Official Code § 1-617.09(b)(1). The Hearing Examiner found that the record did not support that the two disputed employees

¹ Petition at 2.

² Certification No. 152 (2011).

³ Petition at 2-3.

⁴ Agency Comments at 3.

⁵ *Id.* at 5-9.

⁶ HERR at 4.

⁷ *Id.*

were “aligned with management,” because the two employees did not perform duties that required them to develop policies and recommendations for HSEMA.⁸

The Hearing Examiner then considered whether the two employees were “confidential” employees and prohibited from inclusion in the unit by D.C. Official Code § 1-617.09(b)(2). Based on the record, the Hearing Examiner found that the two employees were not confidential employees, and were not involved in labor relations policy or negotiations of a collective bargaining agreement.⁹

The Hearing Examiner recommended that the two disputed employees should be included in Compensation Unit 1.¹⁰

Applying the Board’s two-part test for a compensation unit determination, the Hearing Examiner found that the “the certified unit represented by the Petitioner for terms-and-conditions bargaining in PERB Case No. 10-RC-01, Certification 152 (2011) is also authorized as a unit for the purpose of negotiations concerning compensation and should be placed in Compensation Unit 1.”¹¹ The Hearing Examiner found that the unit met both prongs of the Board’s test: (1) the unit covered broad occupational groups that fell within Compensation Unit 1, and (2) placing the employees in Compensation Unit 1 would result in fewer pay systems.¹² The Hearing Examiner recommended that NAGE’s unit of employees be placed in Compensation Unit 1.¹³

III. Discussion

No Exceptions were filed. “Whether exceptions have been filed or not, the Board will adopt the hearing examiner's recommendation if it finds, upon full review of the record, that the hearing examiner's “analysis, reasoning and conclusions' are ‘rational and persuasive.’”¹⁴

A. Disputed employees were not managers or confidential employees

D.C. Official Code § 1-617.09(b) provides in relevant part:

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

(1) Any management official or supervisor: Except, that with respect to fire fighters, a unit that includes both supervisors and nonsupervisors may be considered: Provided, further, that supervisors employed by the District

⁸ *Id.* at 17.

⁹ HERR at 18.

¹⁰ *Id.* at 20.

¹¹ *Id.* at 19.

¹² *Id.* at 19 (citing *AFSCME, D.C. Council 20, Local 2401 v. D.C. Pub. Schs.*, 59 D.C. Reg. 4954, Slip Op. No. 962 at p. 3, PERB Case No. 08-CU-01 (2009)).

¹³ *Id.* at 20.

¹⁴ *Council of School Officers, Local 4, American Federation of School Administrators v. D.C. Public Schools*, 59 D.C. Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08 (2010) (quoting *D.C. Nurses Association and D.C. Department of Human Services*, 32 D.C. Reg. 3355, Slip Op. No. 112, PERB Case No. 84-U-08 (1985)).

of Columbia Public Schools may form a unit which does not include nonsupervisors;

(2) A confidential employee....

The Agency raised objections in its comments that two employees a District of Columbia Statewide Interoperability Communications Coordinator and a Telecommunication Specialist) were aligned with management.¹⁵

The Hearing Examiner in making her determination that two disputed employees were not “aligned with management” applied *NLRB v. Yeshiva University*, 444 U.S. 672 (1979), which was adopted by the Board.¹⁶ The *Yeshiva University* Court defined managerial employees as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.”¹⁷ The majority further stated, “Managerial employees must exercise discretion within or even independently of, established employer policy and must be aligned with management.”¹⁸ The Hearing Examiner applied *AFGE, Local 2725 v. D.C. Department of Housing and Community Development* where the Board stated, in finding a position managerial, that “the employee who encumbers this position is one who formulates and effectuates management policies.”¹⁹ The Hearing Examiner considered this case law in finding that the disputed employees did not exercise discretionary powers that created policies used by the Agency.²⁰ The Board has reviewed the Hearing Examiner’s analysis of the Board’s case law, and finds that it is consistent with the Board’s precedent.

Additionally, the Hearing Examiner determined that the disputed employees were not confidential employees. The Board notes that the Agency did not raise this objection in its Comments about the two disputed employees, and does not consider it a properly raised objection. Notwithstanding, the Board finds that the Hearing Examiner’s analysis of the Board’s case law is consistent with the Board’s precedent. The Hearing Examiner relied on the Board’s precedent that an employee “is properly excluded as confidential when his or her confidential role is ‘sufficiently involved in labor relations and policy formation matters.’”²¹ The Hearing Examiner found that the employees were not involved in labor relations or negotiated any labor relations issues and thus were not confidential employees consistent with the Board’s precedent.²²

¹⁵ Comments at 7.

¹⁶ The Board adopted the “aligned with management” test in *NAGE, Local R3-06 v. D.C. Water and Sewer Authority*, Slip Op. No. 635, PERB Case No. 99-U-04 (2000).

¹⁷ *Yeshiva University*, 444 U.S. at 695, citing *NLRB v. Bell Aerospace Co.*, 416 US 267 at 288 (1974).

¹⁸ *Id.* at 683.

¹⁹ HERR at 16 (quoting *FGE, Local 2725 v. D.C. Department of Housing and Community Development*, PERB Case No. 97-UC-01).

²⁰ *Id.*

²¹ *Id.* at 16 (citing *AFGE, Local 12 and D.C. Dep’t of Employment Servs. and AFSCME*, Slip Op. No. 22, PERB Case No. 0R006 (1981), and *AFGE, Local 1978 and Dep’t of Human Servs.*, Slip Op. No. 236, PERB Case No. 89-R-04 (1989)).

²² HERR at 18.

B. Two-prong test for Compensation Unit determination

The Board authorizes compensation units pursuant to D.C. Code § 1-617.16(b), which provides:

In determining an appropriate bargaining unit for negotiations concerning compensation, the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes. The Board may authorize bargaining by multiple employers or employee groups as may be appropriate.

From this statutory language, the Board recognizes a two-part to determine an appropriate compensation unit: (1) the employees of the proposed unit comprise broad occupational groups; and (2) the proposed unit minimizes the number of different pay systems or schemes.²³ The Hearing Examiner analyzed whether the proposed unit of employees was appropriate for placement in Compensation Unit 1 under the Board's test. The Hearing Examiner made factual findings that the employees in the proposed unit occupy broad occupational groups consistent with Compensation Unit 1, and that placing the unit of employees in Compensation Unit 1 would reduce the number of different pay systems and pay schemes.²⁴ The Board finds that the Hearing Examiner's analysis was consistent with the Board's precedent.

IV. Conclusion

The Board has reviewed the record and the case law that the Hearing Examiner analyzed in making her Report and Recommendation. The Board finds that the Hearing Examiner's factual findings and recommendations are based on the record, reasonable, and consistent with the Board's precedent. Therefore, the Board adopts the Hearing Examiner's Report and Recommendations.

²³ *AFSCME, D.C. Council 20, Local 2401 v. D.C. Pub. Schs.*, 59 D.C. Reg. 4954, Slip Op. No. 962 at p. 3, PERB Case No. 08-CU-01 (2009).

²⁴ HERR at 19.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Petitioner's Compensation Unit Determination petition is granted.
2. The following employees are placed in Compensation Unit 1: All employees of the Homeland Security Emergency Management Agency including Emergency Operation and Information Specialist, Emergency Operation and Information Specialist Bilingual, Emergency Operation VIP Technicians, all other clerical employees, excluding managers, supervisors, and confidential employees engaged in personnel work 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, (CMPA) D.C Law 2-139, under Certification No. 152.
3. The disputed employees (a District of Columbia Statewide Interoperability Communications Coordinator and a Telecommunication Specialist) are placed in Compensation Unit 1.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, and Member Keith Washington.

Washington, D.C.

September 22, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order PERB Case No. 15-CU-01 was served to the following parties via File & ServeXpress on this the 23rd day of September 2015:

Repunzelle Bullock, Esq.
Michael Levy, Esq.
Government of the District of Columbia
Office of Labor Relations & Collective Bargaining
441 4th Street, N.W., Suite 820 North
Washington, D.C. 20001

Robert J. Shore, Esq.
Lee A. Blackmon
NAGE/SEIU 5000
Federal Division/District of Columbia Headquarters
901 North Pitt Street, Suite 100
Alexandria, Virginia 22314

/s/ Sheryl V. Harrington

Sheryl V. Harrington
Administrative Assistant
Public Employee Relations Board
1100 4th Street, SW, Suite E630
Washington, D.C. 20024