

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

In the Matter of:)	
)	
)	
)	
The Government of the)	PERB Case No. 97-UM-02
District of Columbia, et al.)	Opinion No. 540
)	
Petitioner,)	
)	FOR PUBLICATION
and)	
)	
All Unions Representing Bargaining)	
Units in Compensation Units 1, 2, 13)	
and 19 Employed by the D.C.)	
Department of Human Services,)	
Commission on Public Health; the D.C.))	
Water and Sewer Authority; the D.C.))	
Housing Authority; and the Office of))	
Financial Management,)	
)	
Respondents.)	
)	
)	

DECISION AND ORDER ON UNIT MODIFICATION

On October 25, November 1 and December 13, 1996, respectively, the D.C. Office of Labor Relations and Collective Bargaining (OLRCB), pursuant to Board rule 504, filed a Petition, First Amended Petition and Second Amended Petition for Unit Modification (together referred to as the Petition) on behalf of the D.C. Office of Financial Management; D.C. Department of Public Works, Water and Sewer Utility Administration (now the D.C. Water and Sewer Authority); D.C. Department of Human Services, Commission on Public Health (now, in part, reorganized into the Health and Hospital Public Benefit Corporation); and the D.C. Housing Authority (formerly the D.C. Department of Public and Assisted Housing).

The Petitioner sought the removal of certain bargaining units from their PERB-designated Compensation Units in view of their removal from the personnel authority of the Mayor through

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recently enacted legislation. The Petitioner contended that the legislation rendered the continued inclusion of the bargaining unit in their current Compensation Units inappropriate. Specifically, the legislation that gave rise to the Petition are, respectively, as follows: the "Financial Responsibility and Management Assistance Act" (FRMAA) and the "Omnibus Consolidated Rescissions and Appropriations Act of 1996 and 1997" (OCRAA); D.C. Act 11-111, "Water and Sewer Authority Establishment Act and Department of Public Works Reorganization Act of 1996" (Act); D.C. Act 11-388, "Health and Hospitals Public Benefit Corporation Emergency Act of 1996" and the "D.C. Housing Authority Act of 1994", D.C. Law 10-243.

By Order dated July 24, 1997, we referred the Petition to a Hearing Examiner and provided notice to the parties directing a hearing date of September 11, 1997. The Hearing was convened as scheduled; however, at the outset of the hearing, the Petitioner moved to withdraw the Petition. No reason for the Motion was provided by the Petitioner. All the Respondent Unions present at the hearing objected to the Petitioner's attempt to withdraw the Petition and countered with a Motion for Costs and Attorney Fees. The hearing remained open pending the receipt of briefs on the Motions filed by the parties, whereupon the record was closed.

The facts and issues as they unfolded in this case are set out by the Hearing Examiner in her detailed Report and Recommendation.^{1/} Based upon the evidence and arguments presented by the parties in their respective Motions, briefs and related pleadings, and upon consideration of applicable law and rules, the Hearing Examiner issued her recommended disposition of the issues set forth in the Petition and the ensuing Motions.

In view of the Board's previous disposition of the same issue in PERB Case Nos. 96-UM-07, 97-UM-01, 97-UM-03 and 97-CU-01^{2/}, the Hearing Examiner recommended that OLRCB's Motion to Withdraw its Petition be granted insofar as it pertains to the D.C. Water and Sewer Authority (WASA). The Hearing Examiner further recommended that the issues pertaining to the D.C.

^{1/} The Hearing Examiner's Report and Recommendation is attached as an appendix to this Opinion.

^{2/} In PERB Case Nos. 96-UM-07, 97-UM-01, 97-UM-03 and 97-CU-01, Slip Op. No. 510, the Board, among other things, created Compensation Unit 31 consisting of employees under the independent personnel authority of WASA established under D.C. Act 11-111, "Water and Sewer Authority Establishment Act and Department of Public Works Reorganization Act of 1996".

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Department of Human Services, Commission on Public Health (CPU) engendered by the creation of the Health and Hospitals Public Benefit Corporation (PBC) be deferred for resolution and consolidated with the impending PERB Case Nos. 97-UM-05 and 97-CU-02. In all other respects the Hearing Examiner recommended that the Motion to Withdraw be denied.

Pursuant to representations made at the hearing, DCHA was directed to submit for the Board's consideration an agreement and/or stipulation between it and the unions representing DCHA employees that resolves all issues presented by the Petition as it pertains to DCHA. As to the Office of Financial Management (OFM), the Hearing Examiner recommended that the Board determine the appropriateness of removing OFM bargaining unit employees from their current Compensation Unit as a result of their placement under the independent personnel authority of the Chief Financial Officer and, if appropriate, determine their compensation unit placement.

Finally, with respect to the Motion for reasonable costs and attorney fees, the Hearing Examiner recommended that the Respondents' Motion be granted in part. Specifically, the Hearing Examiner recommended that the Respondents' request for reasonable costs be granted but that their request for attorney fees be denied.

On December 19, 1997, OLR CB filed a document styled "Petitioner's Response to Hearing Examiner's Report and Recommendation", excepting to the Hearing Examiner's recommended dispositions of the Motions. Furthermore, OLR CB requested that the Hearing Examiner be disqualified and sanctioned for asserted ex parte communications with the Respondents while this matter was pending before her. For the reasons that follow we find no merit to OLR CB's exceptions and, to the extent consistent with our discussion below, adopt the conclusions and recommendations contained in the Hearing Examiner's Report and Recommendation.^{3/}

OLR CB takes exception to the Hearing Examiner's: (1) partial

^{3/} The American Federation of State, County and Municipal Employees, D.C. Council 20, (AFSCME) was the only Respondent to file a Response to the Hearing Examiner's Report and Recommendation. AFSCME did not except or object to the recommendations made by the Hearing Examiner or any of the related material facts contained in the Report. Rather, AFSCME's response takes the form of comments and advise it wishes the Board to consider in its disposition of the remaining issues that were expressly deferred to the Board by the Hearing Examiner.

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granting of its Motion to Withdraw its Petition with prejudice; and (2) granting the Respondents' Motion for Costs. OLRCB's exceptions, however, merely reiterate the arguments it made to the Hearing Examiner. These arguments were specifically considered and rejected by the Hearing Examiner in her Report and Recommendation. OLRCB maintains that it had effectively withdrawn its Petition "consistent with normal procedure" the day before the hearing, September, 10, 1997, when it notified the Board's staff. According to OLRCB, this should have obviated any further processing or action on its Petition prior to the hearing and thereby any basis for awarding costs. (Resp. at 2.)

As the Hearing Examiner noted, OLRCB offered no cognizable explanation at the hearing or in its post-hearing pleading that established that its decision to withdraw its Petition could not have been made prior to the eve of the hearing. OLRCB presents nothing new on this point in its Exceptions. Moreover, assuming arguendo that the numerous Respondents in this matter could have been notified in time to avoid attending the hearing, the costs associated with preparing for the hearing were already incurred by the Respondents at the time of OLRCB's 11th-hour oral withdrawal to the Board's staff. The Respondents took no exception to the Hearing Examiner's denial of attorney fees and therefore attorney fees associated with the Respondents' attendance at the hearing are not before the Board. Moreover, as the Hearing Examiner noted, we have previously held that the Board lacks the authority to award attorney fees. Doctors' Council of the District of Columbia General Hospital v. D.C. General Hospital, Slip op. No. 482, PERB Case Nos. 95-U-05 and 95-U-10 (1996).

OLRCB's impromptu attempt to withdraw its Petition at the last minute is not consistent with the intent of the Board Rules for matters pending which have been scheduled for hearing. Once we order that a matter be scheduled for a hearing, as the Hearing Examiner observed, the 5-day notice to the Board and other parties required under Board Rule 550.5 and 550.6 are applicable when attempting to cancel a hearing.

The very purpose of Board Rule 550.5 and 550.6 is to provide reasonable advance notice when a hearing has been scheduled so that a party can avoid incurring the expense and time that goes into preparing for a hearing prior to the actual hearing, itself. This is the very situation we have here. There is no exception to the 5-day notice requirement provided in Board Rule 550.5 unless "the most extraordinary circumstances" are demonstrated. We concur with the Hearing Examiner's discussion in her Report

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that OLRCB has not met this standard.^{4/}

With respect to the award of costs, we find that equity under the circumstances discussed above warrants payment by the Petitioner of the reasonable costs incurred by the Respondents. We have heretofore based our award of costs on the interest of justice standard that we adopted in American Federation of State, County and Municipal Employees, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). The Hearing Examiner cites this case to support her recommendation to award costs. The interest-of-justice standard, however, is based on an assessment of the merits of the dispute when a party prevails. Our authority to award costs under D.C. Code Sec. 1-618.13(d) is not limited to this circumstances. As we state in the text, our award of costs in the instant case turns on the circumstance created by the Petitioner's failure to observe a Board Rule that in part is intended to avoid the inequities created by the Petitioner's tardy action.

Therefore, OLRCB contention that the interest-of-justice standard is vague and misleading and should be abandoned is misplaced. An award of costs is warranted here not because of the degree of merit we accord OLRCB's reasons to withdraw, rather because of OLRCB's lack of a justifiable basis for the timing of it. OLRCB's reasons --which are essentially legal and, in OLRCB's view, dispositive of the issues presented by the Petition-- existed long before September 10, 1997.

As we noted above, under Board Rule 550.6, the Board would have granted a request to cancel or postponed the hearing if it had been made 5 days before the hearing date. As such we shall limit the Respondents' costs for which the Petitioner is obligated to pay to the 5-day period prior to the date of the hearing. We further state that we award such costs pursuant to our general authority to do so under D.C. Code Sec. 1-618.13(d).

Finally, OLRCB requests that the Hearing Examiner be disqualified and sanctioned for engaging in *ex parte* communications with the Respondents. OLRCB provides no basis for this assertion. To the contrary, OLRCB's reference to certain

^{4/} OLRCB states that the Board has permitted it to make last minute filings in the past without consequence. OLRCB, however, does not provide the circumstances of those previous occasions. Moreover, we are not aware of any previous cases where the Board has been confronted with deciding the effect of a untimely request to withdraw a matter which has been scheduled for a hearing.

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pages in the transcript to support its claim that the communications made by the Hearing Examiner to the Respondents were improper, established that her disputed remarks were made at the hearing in the presence of all concerned parties. Any subsequent communication afforded the Respondents by the Hearing Examiner that occurred after the hearing closed were limited to merely procedural issues concerning post-hearing filings. Board Rule 500.17 prohibiting ex parte communication, must be read in context with Board Rule 500.18 which extends such prohibition to "ex parte communication which involve the merits of the case or those which violate other rules requiring submissions to be in writing... ." (Emphasis added.) Based upon our review of the record, any communication by the Hearing Examiner concerning the merits of this matter were made to both parties in accordance with Board Rules. We find no support in the record that OLRCB was not made privy to any communication or filing concerning the merits of this case.^{5/}

We turn now to the issues that remained unresolved by the Hearing Examiner in her Report and Recommendation. With respect to employees employed in the Office of Financial Management, the Hearing Examiner concluded, and we agree, that pursuant to the FRMAA and the OCRAA these employees are no longer under the personnel authority of the Mayor; but, rather are now under the personnel authority of the Office of the Chief Financial Officer (CFO), a party in interest. In view of the change in the personnel authority for these employees, the Hearing Examiner recommends that the Board determine whether these employees should be removed from their current compensation unit, i.e., Compensation Unit 1, and if warranted, to sua sponte initiate a proceeding to determine the new appropriate compensation unit placement.

Under the Comprehensive Merit Personnel Act (CMPA), as codified under D.C. Code Sec. 1-618.16(b) and implemented by

^{5/} OLRCB's assertion that the Hearing Examiner demonstrated bias toward the Respondents during the hearing is completely subjective. Nothing in the record establishes that the Hearing Examiner favored the Respondents or restricted OLRCB's access to her on similar procedural matters. Furthermore, while OLRCB correctly notes that the Hearing Examiner was a former Board Member, she was a public member, not, as OLRCB asserts, labor's designee on the Board. In a supplemental filing to its Exceptions, OLRCB retracted this contention, acknowledging the Hearing Examiner's public member status. Finally, under Board Rule 500.20 a "presiding official[']s]", e.g., hearing examiner's obligation when a prohibited communication has occurred is to describe the occurrence on the record and provide notice to the parties. We are satisfied that, where applicable, this requirement has been met.

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Board Rule 503.2, the Board may on its own motion initiate a proceeding to make compensation unit determinations. We believe an exercise of that authority is appropriate here. The CFO, however, while represented in this proceeding, has not intervened, taking the position instead that the Board lacks jurisdiction over it. While we have previously rejected the CFO's challenge to our jurisdiction, the CFO has maintained this position and has indicated its intention to seek judicial review of our determination. See, American Federation of State, County and Municipal Employees, D.C. Council 20, Local 1200 and D.C. Office of the Controller, Division of Financial Management, Slip Op. Nos. 503 and 508, PERB Case No. 96-UC-01 (1997).

In view of the above, we shall hold in abeyance the further processing and disposition of this Petition with respect to issues concerning compensation unit removal and placement of the Office of Financial Management employees under the personnel authority of the CFO pending judicial review of PERB Case 96-UC-01. In the interim, these employees shall remain in Compensation Unit 1 for purposes of negotiations over the issue of compensation. If the CFO elects to intervene in this proceeding or files its own Petition for Unit Modification concerning these employees, we shall proceed with the disposition of these issues at that time.

Pursuant to D.C. Code Sec. 1-605.2(1), 1-618.16(b) and Board Rule 550.21, the Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable and supported by the record and applicable law. We therefore adopt the Hearing Examiner's recommendations to the extent consistent with this Decision and Order below.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Office of Labor Relations and Collective Bargaining's (OLRCB) Motion to Withdraw the Petition for Unit Modification of Compensation Units 1, 2, 13 and 19 is granted insofar as it concerns: the removal of the D.C. Water and Sewer Authority in view of our disposition in Opinion No. 510, PERB Cases Nos. 96-UM-07, 97-UM-01, 97-UM -03 and 97-CU-01, Slip Op. No. 510; and the removal of the Health and Hospital Public Health Corporation in view of its pending disposition in PERB Case Nos. 97-UM-05 and 97-CU-02.
2. OLRCB and D.C. Housing Authority (DCHA) are directed to submit a stipulation and/or agreement in conjunction with the

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Respondent labor organizations representing employees under DCHA's personnel authority for consideration and disposition by the Board with respect to appropriate compensation unit placement. The stipulation or agreement shall be accompanied by supporting arguments, documentation and/or affidavits. Alternatively, if OLRCB, DCHA and affected Respondent labor organizations mutually agree: (1) OLRCB may withdraw its Petition with respect to DCHA and (2) DCHA may file its own Petition for Unit Modification addressing the issues of compensation unit removal and appropriate placement raised the instant Petition. The respective parties shall submit said stipulation or Petition within 14 days of issuance of our Decision and Order.

3. The Respondent Unions present at the September 11, 1997 hearing shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of actual costs incurred during the 5-day period prior to the September 11, 1997 hearing that is sought from OLRCB. The statement of costs shall be filed together with supporting documentation; OLRCB may file a response to the statement within fourteen (14) days from service of the statement upon it.

4. OLRCB shall pay to each Respondent referenced in paragraph 3, its reasonable costs. incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

5. The Petition, with respect to bargaining unit employees employed by the Office of Financial Management under the personnel authority of the Chief Financial Officer (CFO), is held in abeyance pending (1) the judicial disposition of PERB Case No. 96-UC-01 or, (2) the CFO elects to intervene in this proceeding or initiate its own Petition for Unit Modification for further processing and disposition of this issue.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

February 18, 1998

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case Nos. 97-UM-02 was mailed (U.S. mail) to the following parties on this the 18th day of February 1998.

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