Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 1403, AFL-CIO	
Complainant	
v.	PERB Case No. 17-U-22
District of Columbia and the Department of Behavioral Health	Opinion No. 1685
Respondents	

DECISION AND ORDER

On February 22, 2017, complainant American Federation of Government Employees Local 1403 ("Union") filed an unfair labor practice complaint ("Complaint") naming as respondents the District of Columbia and the Department of Behavioral Health (collectively "the Respondents").[1] The Complaint alleges that the Respondents committed an unfair labor practice by removing two employees, Anndreeze Williams and Maureen Dimino (collectively "the Employees"), from the bargaining unit represented by the Union. The Respondents filed an answer with affirmative defenses ("Answer"). Having reviewed the record, the Board concurs with the Hearing Examiner's conclusion that the Respondents did not commit an unfair labor practice.

I. Statement of the Case

A. Pleadings

The facts established by the pleadings, having been alleged in the Complaint and admitted in the Answer, are as follows. The Union is a certified collective bargaining representative of approximately three hundred non-supervisory attorneys employed in the Office of the Attorney General and other agencies, including respondent Department of Behavioral

[1] The Complaint also named the Office of Legal Counsel as a respondent. In their answer the Respondents moved to dismiss the Office of Legal Counsel because the Complaint stated no allegations against it. At the hearing the Union acceded to the Respondents' motion. Tr. 37. Consequently, the Office of Legal Counsel has been removed from the caption.

Health ("Department"). At the time of the filing of the Complaint, the Union was a party to a collective bargaining agreement with the District and the Office of the Attorney General effective from October 1, 2013, to September 30, 2017, ("the 2013 CBA"). The 2013 CBA provided:

> The following employees are excluded from the bargaining unit covered by the Agreement: . . .
>
> 3. Employees who act in a confidential capacity with respect to an individual who formulates or effectuates management policies regarding attorney employees in the field of labor relations;
>
> 4. Employees engaged in personnel work regarding attorney employees in other than a purely clerical capacity. . . .

In a letter dated January 18, 2017, the Department's director of human resources told the Union's president that Andreeze Williams and Maureen Dimino "had been improperly coded as bargaining unit members" because the two perform significant personnel work and have access to confidential information. The letter served notice that the Department would, "consistent with District law, immediately code Anndreeze William and Maureen Dimino as outside any collective bargaining unit."[2]

The Union alleges that neither Williams nor Dimino "performs personnel work or has confidential information affecting AFGE Local 1403 bargaining unit members."[3] As a result, in the Union's view, the Department's position in its January 18, 2017 letter is contrary to the above-quoted provisions of the 2013 CBA as well as the Board's precedent.[4] The Union further alleges, "The unilateral removal of Williams and Dimino from the bargaining unit, made without notice to, or bargaining with, the Union/charging party, amounted to an unlawful refusal to bargain collectively with the Union in good faith in violation of D.C. Code §l-617.04(a)(1) and (5)."[5]

The Union requests the following remedies:

> a. Declare that Respondent violated D.C. Code § 1-617.04(a)(l) and (5) by virtue of the foregoing actions;
> b. Declare that the A[F]GE Local 1403 bargaining unit includes all non-supervisory attorneys employed by the District of Columbia in the District of Columbia Office of

[2] Complaint Ex. 1.
[3] Complaint ¶ 5.
[4] Complaint ¶¶ 26, 27.
[5] Complaint ¶ 28.

> Attorney General and the District's agencies, including the DCPS [*sic*] Office of General Counsel, who perform personnel work, so long as that personnel work does not directly or indirectly affect other attorneys who are members of the AFGE Local 1403 bargaining unit;[6]
>
> c. Order the District of Columbia, DCPS [*sic*] and their agents to desist from committing further unfair labor practices;
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> d. Reimburse the charging party for dues that would have been paid but for Respondent's unlawful actions;
>
> e. Order Respondents to conspicuously post an appropriate notice; and
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> f. Take such other and further action as the PERB deems necessary and appropriate to remedy the above unfair labor practices.[7]

In their Answer the Respondents raise several defenses. The first is that section 1-617.09(b) of the D.C. Official Code excludes certain categories of employees and that Williams and Dimino are in some of those categories. The Answer asserts that Williams falls into the exclusion for confidential employees[8] as well as the exclusion for employees "engaged in administering the provisions of this subchapter."[9] Dimino, the Answer asserts, falls into the exclusion for employees "engaged in personnel work in other than a purely clerical capacity."[10]

The Respondents' second defense is that the certification of representative that the Complaint alleges is applicable, PERB Certificate No. 133, also excludes the Employees from the bargaining unit because it too excludes "confidential employees, employees engaged in personnel work in 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, D.C. Law 2-139." The predecessor certification contains the same exclusions. The Answer maintains that the parties cannot enlarge or limit exclusions found in the law and the certifications.[11] Rather, the Answer states, only the Board has jurisdiction to expand the scope of a bargaining unit, adding, "The Complainant did not have such jurisdiction or authority when it negotiated terms in Article 1, Section 5 of the CBA that are inconsistent with the PERB's

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[6] The second paragraph of the Complaint's prayer for relief is, in effect, a request for a unit modification. It requests the Board to issue a bargaining unit description that modifies an existing unit by adding language to the unit description in the Certification of Representative. Joint Exhibit 3. The Complaint does not allege that any of the permissible grounds for unit modification set forth in Rule 504.1 are present and does not satisfy the requirements of Rule 504.2(b) and (d) for petitions for unit modification. Therefore, the Union's request for a unit modification is denied.

[7] Complaint at 7.

[8] D.C. Official Code § 1-617.09(b)(2).

[9] D.C. Official Code § 1-617.09(b)(4).

[10] D.C. Official Code § 1-617.09(b)(3).

[11] Answer at 9-10.

certifications (and D.C. Official Code § 1-617.09(b)).”[12] Finally, the Answer asserts that the 2013 CBA does not apply to the Employees.

The Executive Director referred the case to a Hearing Examiner.

B. Hearing

The Hearing Examiner conducted a hearing on February 12, 2018. At the hearing the parties agreed that the issue was whether “the employer committed unfair labor practice [*sic*] when it removed Williams and Dimino from the bargaining unit.”[13] At the hearing the parties presented arguments and evidence. Following the hearing, the parties submitted briefs.

On June 12, 2018, the Hearing Examiner submitted her Report and Recommendation (“Report”) to the Board. The Report states that the relevant code section is section 1-617.09(b)(1), (2), and (4) of the D.C. Official Code, which provides:

> A unit shall not be established if it includes the following: . . .
>
> (2) A confidential employee;
>
> (3) An employee engaged in personnel work in other than a purely clerical capacity;
>
> (4) An employee engaged in administering the provisions of this subchapter. . . .

The Hearing Examiner stated that the decisions of the Board and of the Federal Labor Relations Authority (“FLRA”) “do not support the Union’s position that Attorney Williams and Attorney Dimino should be included in a unit with other attorneys because they do not perform personnel work that affects other attorneys in [the Department].”[14] The Hearing Examiner found that both Williams and Dimino perform non-clerical personnel work that relates to their department.[15] She recommended that both employees should be excluded from the bargaining unit on that basis.[16] In addition, the Hearing Examiner found two other grounds for excluding Williams from the bargaining unit. First, the Hearing Examiner found that Williams was a confidential employee[17] and as such an employee, she should be excluded from the unit under section 1-617.09(b)(2).[18] Second, the Hearing Examiner found that Williams is “engaged in

[12] Answer at 11.
[13] Tr. 38:4-6.
[14] Report 15.
[15] Report 18-19.
[16] Report 23.
[17] Report 20, 23.
[18] Report 20.

administering Labor-Management relations" and "administers the Department's labor policy" under the Comprehensive Merit Personnel Act ("CMPA") and that as a result she should be excluded from the unit under section 1-617.09(b)(4).[19]

The Hearing Examiner rejected the Union's argument that the 2013 CBA takes precedence over the law, adding that "[t]he parties' prior CBA is unenforceable regarding the scope of the exclusions under D.C. Code § 1-617.09(b)(3) and (b)(4)."[20]

The Hearing Examiner recommended that the Board find that an unfair labor practice was not committed.[21] No exceptions were filed. The Report is before the Board for consideration in accordance with Rule 520.14.[22]

II. Analysis

The Union contends that the Respondents committed an unfair labor practice by refusing to bargain in good faith in violation of section 1-617.04(a)(1) and (5) of the D.C. Official Code.[23] The Union presents two grounds for this contention, asserting that the removal of Williams and Dimino from the bargaining unit (1) was done unilaterally without notice or bargaining and (2) was contrary to the terms of the 2013 CBA.

A. Unilateral Removal

The Union claims that the Respondents violated the CMPA when they "unilaterally removed Anndreeze Williams and Maureen Dimino from the bargaining unit, without notice to or bargaining with the Union."[24]

The Board has found the unilateral removal of an employee from a bargaining unit to be an unfair labor practice when the employee is not statutorily excluded from the unit, but conversely it has not found the unilateral removal of an employee who is statutorily excluded to be an unfair labor practice.[25]

The Respondents assert that three statutory exclusions found in section 1-617.09(b)(2)-(4) pertain to the Employees. That section excludes from bargaining units

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[19] Report 21.
[20] Report 22.
[21] Report 23.
[22] "The Board shall reach its decision upon a review of the entire record. The Board may adopt the recommended decision to the extent that it is supported by the record."
[23] Complaint ¶ 28.
[24] Union's Br. 1; *see also* Complaint ¶ 6.
[25] *See AFGE, Local 1403 and Office of the Att'y Gen.*, 59 D.C. Reg. 3511, Slip Op. No. 873 at 6-8, PERB Case Nos. 05-U-32 and 05-UC-01 (2011); *NAGE, Local R3-06 v. D.C. Water & Sewer Auth.*, 47 D.C. Reg. 7551, Slip Op. No. 635 at 8-12, PERB Case No. 99-U-04 (2000).

> (2) A confidential employee;
>
> (3) An employee engaged in personnel work in other than a purely clerical capacity; [and]
>
> (4) An employee engaged in administering the provisions of this subchapter[.]

The Board has consistently applied the test that employees are excluded pursuant to section 1-617.09(b)(2) if they "function in . . . confidential roles sufficiently involved in labor relations and policy formulation matters to justify their exclusion from the unit"[26] and "the employee's relationship to labor relations policy and collective bargaining matters would create, between management and the Union, a conflict of interest for the incumbent of the position at issue."[27]

The Report reflects that Williams functions in a confidential role that significantly involves her in labor-management relations in ways that include "conducting collective bargaining negotiations, handling and deciding grievances, as well as preparing for and defending arbitrations, and representing the Agency in multiple bargaining and impasse sessions."[28] The Hearing Examiner found Williams's involvement in these matters sufficient to justify her exclusion from the unit.[29] The Hearing Examiner's findings are not sufficient to establish that Williams is a confidential employee. Although the Hearing Examiner discussed the parties' arguments on whether conflict of interest is an element of the exclusion of employees engaged in personnel work, she did not make a finding on whether Williams's relationship to labor policy and collective bargaining would create for Williams a conflict of interest between the Department and the Union.

The Hearing Examiner's findings on the exclusion of employees engaged in personnel work, however, are sufficient to exclude Williams as well as Dimino from the bargaining unit. Section 1-617.09(b)(3) excludes "[a]n employee engaged in personnel work in other than a purely clerical capacity." The Union's position is that this provision should be read to exclude "employees who perform personnel work in other than a purely clerical capacity for other members of the unit of which they are a member."[30]

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[26] *Local 12, AFGE and D.C. Dep't of Emp't Servs. and AFSCME*, 28 D.C. Reg. 3943, Slip Op. No. 14 at 3, PERB Case No. 0R006 (1981). *Accord NAGE and D.C. Homeland Sec. & Emergency Mgmt. Agency*, 62 D.C. Reg. 14683, Slip Op. No. 1544 at 4, PERB Case No. 15-CU-01 (2015); *NAGE, Local R3-06*, Slip Op. No. 635 at 12, PERB Case No. 99-U-04.
[27] *AFGE, Local 2725 and D.C. Dep't of Hous. & Cmty. Dev.*, 45 D.C. Reg. 2049, Slip Op. No. 532 at 3, PERB Case No. 97-UC-01 (1998). *Accord NAGE, Local R3-06*, Slip Op. No. 635 at 12, PERB Case No. 99-U-04.
[28] Report 20 citing Tr. 80, 147, 182, 185.
[29] Report 20.
[30] Tr. 10:9-12.

In support of that argument, the Union quotes part of the following sentence from the Board's decision in *AFGE, Local 1403 v. Office of the Attorney General*[31] ("*Office of the Attorney General*"): "The Hearing Examiner stated the FLRA has made clear that such personnel work must relate directly to the personnel operations of the employee's own employing agency, which would create a conflict of interest between the employee's job and union representation if included in the unit."[32] The Union mischaracterizes this sentence as a holding of the Board even though in the sentence the Board merely restated what the hearing examiner said about the FLRA decision. The FLRA decision does not support the Union's position. The FLRA said that to be excluded employees must do personnel work for their "own employing agency."[33] It is undisputed that the Employees do that.[34]

The Union acknowledges that the quoted FLRA standard is broader than the one it advocates, but it claims that in *Office of the Attorney General* the Board excluded an employee named Polly Goff on the basis of a narrower exclusion: "While stating that it was applying this broader standard, PERB accepted the Hearing Examiner's finding that Polly Goff was excluded from the unit because her personnel work did affect other attorneys in her own bargaining unit, thus actually relying on and applying the narrower standard that we urge should be applied here."[35] None of that is true. Neither the hearing examiner nor the Board took the position that Goff should be excluded because her personnel work affected others in her own bargaining unit. All the opinion says about the effect of Goff's work on her unit is that "the Hearing Examiner found because Goff's work had District-wide implications, it affects her own Agency and unit."[36] The two words "and unit" at the end of that finding of fact cannot be stretched into a cause of the exclusion in that case or into an essential element of exclusion in future cases. The effect on Goff's unit was a fact of the case, not the beginning of a doctrine, as the FLRA explained with regard to similar statements in its decisions: "The statements in those decisions that performing personnel work 'affected the bargaining unit' resulted in exclusion may be explained as statements of fact, not findings that such facts were necessary for the exclusion to apply in the first place."[37]

After inviting briefs from all federal agencies and labor unions, the FLRA held in two companion cases that an effect on the employee's bargaining unit is *not necessary* for the personnel work exclusion to apply.[38] The Union acknowledges that the FLRA's position is adverse to its position but offers that the Board is not bound by the FLRA.[39] While the Board is not bound by the FLRA, it is bound by the CMPA, and what Chairman Cabaniss said in his

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[31] 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case Nos. 05-U-32 and 05-UC-01 (2011).
[32] *Id.* at 5.
[33] *Office of Personnel Mgmt. and AFGE*, 5 F.L.R.A. 238, 246 (1981).
[34] Tr. 21:7-19.
[35] Union's Br. 9.
[36] *Office of the Att'y Gen.*, Slip Op. No. 873 at 6, PERB Case Nos. 05-U-32 and 05-UC-01.
[37] *Dep't of the Army, N. Cent. Civilian Personnel Operation Ctr. and AFGE, Local 15*, 59 F.L.R.A. 296, 302 (2003).
[38] *Id.*; *Dep't of Justice Immigration & Naturalization Serv. and AFGE Local 511*, 59 F.L.R.A. 304 (2003), *overruled on other grounds by Dep't of Veterans Affairs Kan. City VA Med. Ctr. and AFGE*, 70 F.L.R.A. 465 (2018).
[39] Union's Br. 11.

concurrences to the two companion cases applies equally to the CMPA's section 1-617.09(b)(3): "I would also reach the same conclusion as the majority in this case by the additional rationale of reliance on the plain language provided by Congress at § 7112(b)(3) of our Statute. That language excludes from bargaining unit status, without exception, 'an employee engaged in personnel work in other than a purely clerical capacity[.]'"[40] The limitation on the exclusion that the Union seeks is not to be found in section 1-617.09(b)(3). Neither the Board's nor the FLRA's cases support a different conclusion.

In view of the plain language of the provision, the Hearing Examiner properly considered whether the Employees "engaged in personnel work in other than a purely clerical capacity" without imposing the extra-statutory limitation proposed by the Union. She summarized the testimony on the subject as follows:

> [T]he General Counsel who serves as attorney supervisor, Matthew Caspari testified on the record that Anndreeze Williams is the Chief Labor Counsel for DBH. (Tr. 181). He also testified that Ms. Williams represents DBH in bargaining and impasse hearings. Ms. Dimino testified that she serves as a chairperson of the Performance Review and Reconsideration Committee for non-attorney DBH employees. (Tr. 40). Ms. Dimino also testified that she has served as a hearing officer to determine whether a DBH employee met the residency requirements for the employment preference. (Tr. 65, 66). Attorney Dimino also admitted working closely with the EEO Officer, David Prince, to investigate EEOC claims. (Tr. 73). The undersigned Hearing Examiner credits the testimony of the witnesses during the hearing. *Both Ms. Williams and Ms. Dimino perform personnel work for DBH that is non-routine and not of a clerical nature.* They admitted on the record their involvement in matters requiring exercise of discretion and independent judgment in duties such as research, participating in hearings, developing agency defenses, defending against employee/union grievances, handling settlement negotiations, representing the agency in more than 50 arbitrations, administering agency policy, advising management in impact and effects bargaining, representing the agency on negotiations teams during collective bargaining, as well as employees' evaluations challenges. (Tr. 38, 40, 46, 51, 65, 66, 73, 76, 80).[41]

[40] *Dep't of the Army*, 59 F.L.R.A. at 303 (Chairman Cabaniss, concurring); *Dep't of Justice*, 59 F.L.R.A. at 306 (Chairman Cabaniss, concurring). *See also, e.g., Luck v. District of Columbia*, 617 A.2d 509, 512 (D.C. 1992) ("The proposition that plain statutory language generally trumps other considerations is hardly subject to challenge.")
[41] Report 18 (emphasis added).

On the basis of that testimony, the Hearing Examiner concluded that both Employees are statutorily excluded because both engage in personnel work in other than a purely clerical capacity.[42] That conclusion is reasonable, supported by the record, and consistent with Board precedent.

Finally, the Hearing Examiner also found that Williams should be excluded pursuant to section 1-617.09(b)(4) because she "engaged in administering Labor-Management relations" and "administers the Department's labor policy." Those findings do not answer the question posed by section 1-617.09(b)(4). Section 1-617.09(b)(4) excludes "[a]n employee engaged in administering the provisions of this subchapter," i.e., the Labor-Management Relations subchapter of the CMPA. William is involved with compliance with that subchapter, but there is no evidence in the record that, like the staff of this Board, Williams administers the Labor-Management Relations subchapter of the CMPA.

In conclusion, section 1-617.09(b)(3) requires the exclusion of the Employees from the bargaining unit. Therefore, the Respondents did not commit an unfair labor practice by excluding them from it unilaterally.

B. Alleged Contract Violation

The Union contends that the 2013 CBA expressly covers non-supervisory attorneys assigned to work for agencies including the Department.[43] Article 1, section 5 of the 2013 CBA provides:

> The following employees are excluded from the bargaining unit covered by the Agreement: . . .
>
> 3. Employees who act in a confidential capacity with respect to an individual who formulates or effectuates management policies regarding attorney employees in the field of labor relations;
>
> 4. Employees engaged in personnel work regarding attorney employees in other than a purely clerical capacity. . . .[44]

The Union alleges that the Employees "have never 'engaged in personnel work regarding attorney employees in other than a purely clerical capacity.'"[45] The Union asserts that the Respondent's position is contrary to article, 1 section 5.[46]

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[42] Report 23.
[43] Complaint ¶¶ 19, 20.
[44] Union's Ex.
[45] Complaint ¶ 24 (quoting art. 1, § 5(4)).
[46] Complaint ¶ 26.

The Respondents argue that the 2013 CBA cannot supersede section 1-617.09(b) or PERB's certifications, which track the language of the statute. In addition, the Respondents argue that the 2013 CBA did not apply to the Employees after the law transferred them from the Attorney General's Office to the Department on October 1, 2014.[47] In response, the Union asserts that the Department did not change the employees' status for two years after October 1, 2014, during which time it continued to remit dues to the Union. The Union argues that agencies are obliged to honor an expired contract until a successor contract is negotiated.[48]

On October 1, 2017, a new contract between the Union and the District and the Office of the Attorney General took effect. It does not retain the language from the prior contract that the Union relies upon to limit the exclusion of employees engaged in personnel work. Instead it references section 1-617.09(b).[49]

While the Department's classification of the Employees comports with the present contract, from January 17, 2017, to October 1, 2017, the classification of the Employees was arguably inconsistent with the contract then in effect. However, an alleged breach of a collective bargaining agreement does not state a claim of an unfair labor practice prohibited by the CMPA.[50] An employer's breach of a collective bargaining agreement is not an unfair labor practice unless the employer has entirely failed or refused to implement a collective bargaining agreement where no dispute exists over its terms.[51] Such conduct is a repudiation of the collective bargaining agreement and a violation of the duty to bargain. To establish a repudiation, a complainant must offer specifics indicating a repudiation of the contract rather than merely disputes over its terms.[52]

Here the Union neither alleged repudiation of the 2013 CBA nor put specifics of a repudiation into evidence. Instead what we have in this case is a dispute over the application of article 1, section 5 of the contract. The Respondents maintain that article 1, section 5 does not apply to the Employees and does not supersede certifications or the law. Disputes concerning the meaning or application of a contract or concerning alleged contract violations are matters for resolution through negotiated grievance procedures rather than through unfair labor practice proceedings.[53]

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[47] Answer ¶ 24; Respondents' Br. 11-12.
[48] Union's Br. 12.
[49] Joint Ex. 4 at 1, 4.
[50] *FOP/MPD Labor Comm. (on behalf of Culver) v. MPD*, 60 D.C. Reg. 2268, Slip Op. No. 1353 at 8, PERB Case No. 07-U-27 (2013).
[51] *Doctors' Council of D.C. and Dep't of Youth & Rehab. Servs.*, 64 D.C. Reg. 3705, Slip Op. No. 1613 at 6, PERB Case No. 11-U-22 (2016); *Teamsters Local 639 & 730 v. DCPS*, 43 D.C. Reg. 6633; Slip Op. No. 400 at 7, PERB Case No. 93-U-29 (1994).
[52] *Doctors' Council of D.C.*, Slip Op. No. 1613 at 6, PERB Case No. 11-U-22.
[53] *Allen v. Bd. of Trs. of the Univ. of D.C.*, 60 D.C. Reg. 13713, Slip Op. No. 1416 at 3, PERB Case No. 11-U-45 (2013); *Teamsters*, Slip Op No. 400 at 7, PERB Case No. 93-U-29.

III. Conclusion

Based on the forgoing, the Board finds that neither the unilateral removals nor the alleged contract violation constitutes an unfair labor practice. Accordingly, the Union's Complaint is dismissed with prejudice.

ORDER

IT IS HEREBY ORDERED THAT:

1. AFGE Local 1403's Complaint is dismissed with prejudice.

2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons

September 27, 2018

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order was served upon the following parties on this the 28th day of September 2018.

Robert Debardinis, president
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/s/ Sheryl V. Harrington
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