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GOVERNMENT OF THE DISTRICT OF COLUMBIA

PUBLIC EMPLOYEE RELATIONS BOARD

In the matter of: District of Columbia Nurses Association, Petitioner, and District of Columbia Department of Mental Health, and Government of the District of Columbia, Respondents.	PERB Case Nos. 04-UM-03, 05-U-17, 06-RC-02, 08-CU-02 Slip Op. No. 1013 **Direction of Election** **Remand Order**

DIRECTION OF ELECTION AND REMAND ORDER

I. Statement of the Case:

The District of Columbia Nurses Association ("DCNA") filed a unit modification ("UM") petition, asking the Board to modify the description of the bargaining unit to reflect changes in the employing entities.[1] (PERB Case No. 04-UM-03). More specifically, DCNA asked that the unit

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[1]Currently, DCNA is the exclusive representative of the following group of employees:

> All registered nurses employed by the Commission on Mental Health Services, including registered nurses transferred from St. Elizabeth's Hospital, U.S. Department of Health and Human Services, pursuant to P.L. 98-621, excluding nurses working at the Rehabilitation Center for Alcoholics, management executives, confidential employees, supervisors, employees engaged in personnel work in other than in a purely clerical capacity and employees engaged in administering the provision of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

PERB Case No. 87-R-12, Certification No. 43.

which consists of "all Registered Nurses employed by the Department of Mental Health and the Government of the District of Columbia (District)[,] [be modified] to reflect a change in [the] name and statutory authority of the [Department of Mental Health] ..., and to reflect the transfer of DCNA represented registered nurses throughout several agencies of the Government of the District of Columbia." (UM Petition at p. 1).

The District of Columbia Department of Mental Health ("DMH") and the Government of the District of Columbia ("District Government" or "the District") filed responses and comments on October 4, 2004 and October 22, 2004, respectively.

DMH also filed an unfair labor practice complaint ("Complaint") on December 22, 2004. DMH alleged that DCNA violated D.C. Code § 1-617.04, contending that DCNA was representing "When Actually Employed" ("WAE") registered nurses despite the fact that the collective bargaining agreement ("Agreement") between the parties explicitly excludes WAEs from the bargaining unit.[2] (See PERB Case No. 05-U-17). In its Answer, DCNA denied any violation of the Comprehensive Merit Personnel Act ("CMPA"). DCNA moved to consolidate the two matters on June 3, 2005. Both the District Government and DMH filed an opposition to the consolidation request.[3]

On May 9, 2006, DCNA filed a Recognition Petition asking to be certified as the exclusive representative of WAE nurses. (See PERB Case No. 06-RC-02). The District Government was not named as a party. DMH submitted its comments and a list of employees on August 17, 2006.

The prehearing conference took place on August 29, 2008. At the proceeding, DMH and the District Government agreed to consolidate the UM petition and DMH's Complaint. The parties also agreed to consolidate the Recognition Petition with these two matters. DCNA stated that it intended to file a unit clarification ("UC") petition which, the parties agreed, would be also be consolidated with these matters. The parties stated they would consult on proposed language for the proposed unit. However, the parties did not reach agreement on the proposed language.[4]

DCNA also represents "all other Registered Nurses in Compensation Unit 13." See PERB Case Nos. 80-R-08, 90-R-03 and 90-R-07. DCNA asked that the unit which consists of "all Registered Nurses employed by the Department of Mental Health (DMH) and the Government of the District of Columbia" be modified to "reflect a change in name and statutory authority of the DMH and to reflect the transfer of DCNA represented registered nurses throughout several agencies of the Government of the District of Columbia." (UM Petition at p. 1).

[2]PERB Case No. 05-U-17 was scheduled to be heard on June 23, 2005, but the hearing was postponed the parties' request.

[3]The District Government filed an Amended Opposition on June 14, 2005.

[4]The Hearing Examiner issued an Order on September 23, 2008, memorializing the decisions reached during the prehearing conferences.

On September 19, 2008, DCNA filed an Amended Unit Modification petition seeking to establish a separate bargaining unit at the Department of Health, as well as a Unit Clarification petition, requesting that WAE nurses be included in the bargaining unit. (PERB Case No. 08-UC-02).[5]

The consolidated matters were heard on November 5, and November 18, 2008, and January 26, 2009 and January 27, 2009.

On September 28, 2009, the Hearing Examiner issued a Report and Recommendation ("R&R"). The Hearing Examiner found that the WAE nurses are not included in the current city-wide bargaining unit and recommended that: (1) the Board hold an election to determine whether the WAE nurses at the DMH wish to be represented by the Union; (2) the current unit of regular nurses at DMH should be excluded from the city-wide unit of regular nurses and should be in a separate bargaining unit from WAE nurses; and (3) the city-wide unit of regular nurses should be modified to include the Child and Family Services Agency but exclude DMH. Furthermore, the Hearing Examiner found that DMH did not establish that DCNA violated the Comprehensive Merit Personnel Act ("CMPA").

The Hearing Examiner's R&R is before the Board for disposition.

II. Hearing Examiner's Report Regarding the three (3) Petitions filed by DCNA and the Unfair Labor Practice ("ULP") Complaint filed by DMH

As per the Hearing Examiner, the issues presented were:

(1) Are WAEs currently part of the bargaining unit? (PERB Case No. 08-UC-02);

(2) If not, did DMH meet its burden of proving that DCNA committed an unfair labor practice when it notified DMH that it was representing WAEs? Was the ULP complaint filed in a timely manner? (PERB Case No. 05-U-17);

(3) Should the bargaining unit be modified? If so how? (PERB Case No. 04-UM-03); and

(4) Should DCNA be recognized as the exclusive bargaining representative for WAE nurses at the Department of Mental Health? If so, should the WAEs be placed in the same unit as permanently

[5]In accordance with Board Rules 503.4 and 504.3, Notices concerning the petitions were posted and, as stated above, the parties filed comments to the respective petitions. No objections, requests to intervene or other comments to the petitions were received by the Board during the posting period.

> employed nurses? Should WAE supervisory nurses be excluded from the bargaining unit? (PERB Case No. 06-RC-02).

(See R&R at p. 3).

The Hearing Examiner found that the following facts are undisputed:

> 1. In its Unit Modification Petition, DCNA represented that there were about 175 employees in the bargaining unit certified in PERB Case No. 87-R-12, Certification 43. It stated that it was also the exclusive representative of all other Registered Nurses ... employed by the Department of Health, which it estimated at 60 nurses. (See PERB Case Nos. 80-R-08, 90-R-03 and 90-R-07). [R&R at p. 7; see, UM Petition at pgs. 2-3].
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> 2. DMH is the governmental entity responsible for the District's mental health system. It provides District of Columbia residents with inpatient services at St. Elizabeth's Hospital and outpatient care. It employs both permanent and WAE ("When Actually Employed") nurses. The District Government also employs permanent and WAE nurses. (R&R at p. 7).
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> 3. The current bargaining unit ... represented by DCNA is described in PERB Case No. 87-R-12, Certification 43 as:
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>> All registered nurses employed by the Commission on Mental Health Services, including registered nurses transferred from St. Elizabeth's Hospital, U.S. Department of Health and Human Services, pursuant to P.L. 98-621, excluding nurses working at the Rehabilitation Center for Alcoholics, management executives, confidential employees, supervisors, employees engaged in a purely clerical capacity and employees engaged in personnel work in other than in a purely clerical capacity and employees administering the provisions of Title XVII of the District of Columbia Merit Personnel Act of 1978, D.C. Law 2-139.
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> 4. The parties entered into a collective bargaining agreement ... for fiscal years 2005-2007 on May 21, 2004. . . .
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> 5. . . . [T]he Recognition Clause of the Agreement ... states in pertinent part:

> The parties recognize that a unit modification petition is required to reflect organizational changes. Pending the final outcome of such a petition, the parties recognize that DCNA is the exclusive representative of all non-supervisory, non-managerial, non-WAE registered nurses of the Department of Mental Health.[6] [R&R at p. 8].

6. Pursuant to Title 6, Chapter 8, §6-824 of the Code of D.C. Municipal Regulations:

> A personnel authority may develop procedures to effect temporary time-limited appointments in the Career Service, including "When-Actually-Employed" (WAE) appointments, also known as "intermittent appointments, to meet an administrative need, such as to fill a temporary position or to fill a continuing position for a temporary period of time." See also, § 6-899. [R&R at p. 8].

7. Since the early 1990s, [the District Government] has hired registered nurses to offset the shortage of registered nurses needed to provide clinical services. Initially, they were hired as contract or per diem employees. Most are retired D.C. Government employees. In 1998, [the District Government] terminated the contracts, and notified the contract nurses that they would henceforth perform their services as WAEs. WAEs do not receive any benefits, such as health insurance or sick and annual leave, and are paid at a uniform hourly rate.[7] [R&R at p. 8].

8. There are currently nine [9] WAE nurses employed by DMH. Most are retirees who "are drawing pensions and obtaining fringe benefits as a result of their retiree status" with the [District] Government. They generally work 40-hour shifts every two weeks. They are paid at a Grade 9, Step 6 level. [R&R at p. 9].

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[6][All references made by the Hearing Examiner to exhibit numbers are deleted.]

[7]In the document implementing the WAE program for registered nurses, the words "contract" and "WAE" were used interchangeably. (See R&R at p. 8).

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> 9. In the UM petition, DCNA asked [the Board] to revise the description of the bargaining unit to reflect that all registered nurses employed by DMH and the District were now in the bargaining unit represented by DCNA. This change was necessary, according to DCNA, because the certification did not identify DMH, which had not existed when the unit was certified....[8] DCNA stated that the modification would "assist in fostering the goals and purposes of the D.C. Comprehensive Merit Personnel Act of 1978 ("CMPA") by enabling DCNA and the District to negotiate agreements. [It maintained that] 'all of the nurses share an identifiable community of interest.'" [DCNA] defined the proposed modified unit as:
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>> All registered nurses employed by the Department of Mental Health, excluding management executives, supervisors, employees engaged in a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Merit Personnel Act of 1978. (R&R at p. 9).
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> 10. Upon receiving notification that DCNA had filed the UM petition, Vivian Nunez, on behalf of DMH, sent an email to DCNA's representative, Edward Smith, on May 11, 2004, asking him to clarify DCNA's position regarding the inclusion of WAEs in the bargaining unit. [R&R at p. 9]. Mr. Smith responded [as follows]:
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>> Please be advised that DCNA's position is that WAE nurses are not included in the current bargaining unit, nor would they be included in the petitioned for unit. DCNA believes that the WAE nurses are unorganized. DCNA has repeatedly advised DMH of this fact. Accordingly, DCNA disputes your characterization of WAE exclusion from DCNA as a change. [R&R at p. 9].
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> After DMH further inquired as to the relationship of WAEs in the proposed modified unit, DCNA responded, in pertinent part:

[8] DCNA noted that it did not represent the two nurses employed by the Office of Early Childhood, Child and Family Services.

> DCNA filed the unit modification petition to address the name change of the organization. The petition has nothing to do with the status of WAE employees. I suggest that you review the filing. Please be advised that the Department of Mental Health has consistently contended that the WAE nurses are not covered by the collective bargaining agreement or the certification issued by the [Board]. After legal review, DCNA agreed with the DMH position. If, indeed, DMH has altered its position and believes that WAE nurses are currently covered by the collective bargaining agreement and are part of the certification, please advise accordingly. [R&R at pgs. 9-10].

11. In its response to the [Unit Modification], filed on or about May 13, 2004, DMH proposed that the modified bargaining unit explicitly exclude WAEs. DCNA filed no further responses. (R&R at p. 10).

12. On June 3, 2004, three [3] WAE nurses, i.e., Dorothy Fairweather, Maria George and Eliza Dixon, contacted DCNA by letter, and asked to meet with Mr. Smith "regarding union dues being withheld" from their salaries despite the fact that they were not represented by [DCNA].

13. By letter dated July 2, 2004, DCNA notified DMH that it "had changed its position and would be representing WAE nurses as part of the bargaining unit". DCNA noted that it had "recently" come to its attention, that the WAE nurses [perform] identical duties [as] bargaining unit nurses. It further stated that after reviewing "various certifications" issued by [the Board] it concluded that "WAE nurses were, in fact included as part of the description of represented employees" of DMH and its predecessors. On September 30, 2004, DCNA filed a Step 3 Group grievance seeking retroactive pay for WAE employees. In December 2004, DCNA invoked arbitration. [R&R at p. 10].

14. DMH filed an additional Comment regarding the Unit Modification Petition on October 4, 2004, pointing out that the Agreement, approved by City Council and in effect since July 13, 2004, explicitly excluded WAE nurses. DMH concluded that it had

> "no objection to the unit modification petition except to the extent that it may alter the agreement and understanding between DCNA and DMH regarding the payment of compensation to the WAE nurses . . . namely that[:] (1) WAE nurses are not entitled to any retro[active] compensation payments pursuant to the [collective bargaining agreement] for FY 2005-2007; and (2) WAE nurses are entitled from the date of approval of the contract by City Council (July 13, 2004) forward, to any wage increases provided for under the [Agreement] for FY 2005-2007". DCNA did not file any additional pleadings. [R&R at p. 10].
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> 15. DMH filed the [unfair labor practice complaint] ("ULP") on December 22, 2004 contending that DCNA violated D.C. Code §1-617.04 (b) (1) and (3) by representing WAE nurses after explicitly agreeing that WAEs were not part of the bargaining unit. (R&R at p. 10).
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> 16. The parties stipulated that the bargaining unit [sought] included "the Child and Family Services Agency and all agencies under the personnel authority of the Mayor of the District of Columbia." At this time, the unit includes the Department on Disability Services, Department of Healthcare Finance, Department of Youth Rehabilitation Services and Department of Health, and the Office of the Chief Medical Examiner, but, other agencies could be covered in the future if they were to hire nurses. The unit would not include the Department of Mental Health.[9] [R&R at p. 11].

The Hearing Examiner found that "DCNA stated that the modification petition filed in 2004 did not intend to address WAE nurses. DCNA [now] takes the position that WAE nurses were already part of the bargaining unit and therefore the petition did not need to be modified to include them." (R&R at p. 15).

Issue 1: <u>Are WAE nurses currently part of the bargaining unit</u>? (PERB Case No. 08-UC-02)

The Hearing Examiner first addressed DCNA's unit clarification petition. Specifically, the Hearing Examiner considered whether WAE nurses are currently part of the existing bargaining unit represented by DCNA.

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[9]The Department of Mental Health is not under the personnel authority of the Mayor of the District of Columbia. Neither is the Child and Family Services Agency.

The Hearing Examiner noted that "[the Board] has long recognized that being classified as a temporary, part-time or WAE employee, does not bar an employee from membership in a collective bargaining unit.[10] [She stated that] the current unit is described as 'all registered nurses' and [is] not limited to full-time or permanent, which arguably could include WAE [nurses]. (R&R at p. 16).

"However, the [Hearing Examiner opined that the] decision as to whether WAE employees can be in the same bargaining unit as regular full-time employees or in a separate unit must be made on a case-by-case basis. [She noted that] WAEs, by definition and statute, differ from full-time permanent employees. In accordance with §1-618.9 of the CMPA, [the Board] would first have to determine if WAEs have the same 'conditions of work and employment interests, including fringe benefits' as the regular full-time employees in the bargaining unit."[11] (R&R at p. 16).

The Hearing Examiner determined that "[a] review of the history of the bargaining unit and the relationship between the parties does not support the conclusion that WAEs are currently part of the existing bargaining unit. [First], [a]t the time the unit was certified, there were no WAE nurses. Therefore, no investigation was undertaken to determine if WAEs could properly be included in the unit. No assessment was made as to whether WAEs shared a community of interest with the regular full time nurses. Second, the evidence established that throughout the bargaining history, the parties consistently agreed that WAEs were not part of the bargaining unit." (R&R at p. 16).

The Hearing Examiner noted that "[t]he matter was revisited by the parties when DCNA filed the UM petition. DMH asked if the matter was going to involve WAEs, and DCNA responded that it had 'repeatedly advised' DMH that 'WAE nurses are not included in the current bargaining unit'. [She stated that] [t]he fact that dues are deducted by DMH and accepted by DCNA does not alter the conclusion that WAEs did not exist when the unit was created and therefore no decision was reached as to whether they share a community of interest with permanent full-time nurses. The purpose of a petition to clarify an existing certification is to determine whether a particular position is part of the bargaining unit. Based on the evidence presented and the analysis herein, the Hearing Examiner conclude[d] that WAE nurses are not part of the current bargaining unit." (R&R at p. 17). No exceptions were filed concerning the Hearing Examiner's findings.

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[10]The Hearing Examiner relied on *District Council 20, American Federation of State County and Municipal Employees, AFL-CIO and D.C. Office of Management*, PERB Case No. 80-R-02, Certification No. 4 (Certification of Representative, 1981).

[11]Citing *American Federation of State County and Municipal Employees, Local 2093 and District of Columbia Public Schools*, PERB Case No. 80-R-03, Slip Op. No. 61 (1983).

Discussion

The Board has previously held that a proposed unit of WAEs is "an appropriate unit for collective bargaining concerning the compensation and working conditions of these employees". See *AFSCME, Council 20 and District of Columbia Public Schools*, 31 DCR 2287, Slip Op. No. 70 at p. 3, PERB Case No. 83-R-08 (1984), where employees in the Transportation and Warehouse Service Section of the District of Columbia Public Schools sought representation. However, in *AFSCME, Local 2093 and District of Columbia Public Schools*, 30 DCR 3014, Slip Op. No. 61 at p. 2, PERB Case No. 83-RC-03 (1983), the Board found that the bargaining history of the parties did not support that "workers hired under the WAE classification have ever been included in the bargaining unit", and that the union failed to cite "any compelling circumstances which might justify an expansion of the existing unit to include WAEs".[12] Therefore, in PERB Case No. 83-RC-03 the Board found no basis for including WAEs in the existing unit.

Also, in the present case, the Board notes that the bargaining history of the parties does not support that nurses hired in the WAE classification have ever been included in the bargaining unit. Nor has DCNA presented any compelling circumstances which might justify an expansion of the existing unit to include WAEs. Here, WAEs were first known as "contract employees" who provided a "resource pool of experienced" nurses who were all retired St. Elizabeth's nurses. Later, non-St. Elizabeth retirees were hired as WAEs. Furthermore, although WAEs perform the same duties as the regular full-time nurses[13] on the wards and in the clinics, the record does not support that they share a community of interest with the regular nurses. For example: (1) the regular nurses are assigned shifts by supervisors, but WAEs are always given the opportunity to sign up for the shifts they want; (2) regular nurses have a time-schedule, while WAEs work from a calendar; (3) regular nurses work 40-hour shifts and receive shift differentials, Sunday premiums, holiday pay and overtime; however, WAEs are required to work 32 hours each week, and after 2001 stopped receiving shift differentials (although they receive overtime pay if they work in excess of the 32 hours a week). (See R&R at p. 11). Thus, the WAE nurses do not share a community of interest with the regular full-time nurses, nor have they ever been included in the same bargaining unit. We adopt the Hearing Examiner's recommendation that WAE nurses are not part of the existing bargaining unit. The Board hereby denies DCNA's Unit Clarification petition requesting that WAE nurses be included in the existing bargaining unit.

[12]The Board also based its decision on the fact that there was "no evidence to suggest that a majority of WAE employees desire[d] representation by any labor organization". (*Id* at p. 2).

[13]The Board refers to "regular" nurses, "full-time" and "permanent" nurses interchangeably. These nurses are the nurses in the current bargaining unit which does not include WAE nurses.

Issue 2: Was the unfair labor practice complaint filed in a timely manner? Did DMH meet its burden of proving that DCNA committed an unfair labor practice when it notified DMH that it was representing WAEs? (PERB Case No. 05-U-17)

In the present case, DMH filed an unfair labor practice complaint on December 22, 2004, alleging that DCNA violated D.C. Code § 1-617.04 when it changed its position and began representing WAE nurses. Specifically, DMH claims that DCNA previously agreed to a collective bargaining provision stating that WAE nurses were excluded from the bargaining unit. On July 4, 2004, DCNA notified DMH that that it changed its position and believed that WAE nurses were part of the bargaining unit. On September 30, 2004, DCNA filed a grievance seeking retroactive pay for WAE nurses. (See R&R at p. 10).

DCNA counters as follows: (1) the complaint was untimely filed, and (2) DMH deliberately misrepresented the status of WAE nurses and it was not until it undertook its own investigation sometime in June or July 2004 that it determined that WAEs were in the bargaining unit. (See R&R at p. 17).

Board Rule 520.4 provides as follows: "Unfair labor practice complaints shall be filed not later than **120 days after the date on which the alleged violations occurred.**" (emphasis added). The Board has held that the deadline date for filing a complaint is "120 days after the date the [Complainant] admits he actually became aware of the event giving rise to [the] complaint allegations." *Glendale Hoggard v. D.C. Public Schools, AFSCME Council 20, Local 1959*, 43 DCR 1297, Slip Op. No. 352 at p. 2, PERB Case No. 93-U-10 (1993). See also, *American Federation of Government Employees, Local 2725 and District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has noted that "the time for filing a complaint with the Board concerning [] alleged violations [which may provide for] . . . statutory causes of action, commence when the basis of those violations occurred.... However, proof of the occurrence of an alleged statutory violation is not necessary to commence the time limit for initiation of a cause of action before the Board. The validation, i.e., proof, of the alleged statutory violation is what proceedings before the Board are intended to determine." *Jackson and Brown v. American Federation of Government Employees, Local 2741, AFL-CIO,* 48 DCR 10959, Slip Op. No. 414 at p. 3, PERB Case No. 95-S-01 (1995).

Board Rules governing the initiation of actions before the Board are jurisdictional and mandatory. As such, they provide the Board with no discretion or exception for extending the deadline for initiating an action. See, *Glendale Hoggard v. District of Columbia Public Employee Relations Board*, 655 A.2d 320, 323 (D.C. 1995) and *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991).

With regard to the DCNA's assertion that DMH's complaint was untimely filed, DCNA claims that DMH's complaint had to be filed 120 days after July 2, 2004, the date on which the Union notified DMH of its decision to represent WAE nurses. The Hearing Examiner found that

giving notice to DMH that it would represent WAE nurses did not create an alleged violation, since the Union took no further action with regard to representing the WAE nurses. Therefore, she determined that July 2, 2004, was not the operative date for calculating the 120-day filing period. The Hearing Examiner determined that it was the filing of a Step 3 group grievance on behalf of WAE nurses on September 30, 2004, that constituted the alleged violation and found that the complaint was timely filed.

Based on the Hearing Examiner's findings, September 30, 2004, served as the operative date for calculating the 120-day filing period. DMH had to file the complaint on or before January 28, 2005. DMH filed the complaint on December 22, 2004, well within the 120-day statutory filing period. The Board finds that the Hearing Examiner's findings are reasonable and supported by the record and we adopt her finding that the complaint was timely filed.

In the complaint, DMH alleged that DCNA violated D.C. Code § 1-617.04. The Hearing Examiner noted that in its complaint, DMH did not specify which provision of D.C. Code §1-617.04 it contends was violated. She determined that the only provision that appears applicable is the obligation to bargain in good faith.[14] (See R&R at p. 17). "DMH contends that DCNA did not bargain in good faith when it explicitly agreed [in the parties' collective bargaining agreement] that WAEs were excluded from the bargaining unit . . . and then began representing WAEs shortly after the Agreement was ratified rather than filing a UM petition as the parties had agreed." (R&R at p. 19).

"DCNA [countered] that it did not act in bad faith because it had relied on misrepresentations from DMH when it negotiated the Agreement, and only reached its conclusion that WAEs were part of the bargaining unit after it undertook its own investigation. Having reached a decision that WAEs were part of the unit, DCNA argued that it acted properly in representing them." (R&R at p. 19).

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[14]D.C. Code § 1-617.04(b) provides as follows: "Employees, labor organizations, their agents, or representatives are prohibited from:

> (1) Interfering with, restraining, or coercing any employees or the District in the exercise of rights guaranteed by this subchapter; Causing or attempting to cause the district to discriminate against an employee in violation of §1617.06;
>
> (2) Causing or attempting to cause the District to discriminate against an employee in violation of § 1-617.06;
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> (3) *Refusing to bargain collectively in good faith* with the District . . . [emphasis added]
>
> (3)Engaging in a strike or any other form of unauthorized work stoppage or slowdown . . .
>
> (4) Engaging in a strike or refusal to handle goods."

The Hearing Examiner noted that "the Board has long distinguished between obligations imposed by the CMPA and those contained in a collective bargaining agreement. . . . The Board has determined that a violation of an agreement is not a per se violation of the CMPA.[15] [She stated that] a violation that is solely contractual, is not properly before [the Board]. Therefore, even though DCNA's actions in beginning to represent WAEs violated the Agreement, that alone will not establish an unfair labor practice." (R&R at p. 18).

The Hearing Examiner stated that "pursuant to Board Rule 520.11, DMH has the burden of proof on this issue. [She found that] while there is evidence to support DMH's contention [that the Union filed a [group grievance on behalf of WAE nurses], DMH did not meet its burden of pro[ving] that DCNA acted in bad faith either when it negotiated the Agreement or when it decided that WAE nurses were part of the bargaining unit."[16] (R&R at p. 19). Therefore, the Hearing Examiner recommended that DMH's unfair labor practice complaint be dismissed. No exceptions were filed.

Discussion

Pursuant to Board Rule 520.11, the Complainant has the burden of proving the allegations of the complaint by a preponderance of the evidence. It is well settled that the Hearing Examiner is authorized and in the best position to assess the probative value of the record evidence in reaching his findings and conclusion of fact. See, *Charles Bagenstose, et al. v. D.C. Public Schools*, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Here, the Hearing Examiner relied on Board precedent establishing that a violation of an agreement is not a *per se* violation of the CMPA and found that DMH had the burden of proving that DCNA acted in bad faith. Based on the totality of the evidence, she determined that DMH did not meet its burden of proving that DCNA acted in bad faith when it negotiated the Agreement, nor when it treated the WAE nurses as part of the bargaining unit by filing a grievance on their behalf.

The Board notes that although the parties agreed to exclude WAE nurses from the bargaining unit, DMH was deducting dues from the WAE nurses' wages, in conflict with this agreement. This led DCNA to file a grievance on behalf of WAE nurses seeking equal pay, also in conflict with the agreement. DMH argues that the dues deductions were made in error. The Board finds that although neither party has clean hands, neither party can be said to have acted in bad faith. In light of the evidence presented, the Board finds that the Hearing Examiner's findings are reasonable, based on the record and consistent with Board precedent. Therefore, we adopt her

[15]The Hearing Examiner cited *Georgia Mae Green v. District of Columbia Department of Corrections*, 37 DCR 8086, Slip Op. No. 257, PERB Case No. 89-U-10 (1990).

[16]The Hearing Examiner cited *Continental Ins. Co. V. NLRB*, 495 F.2d 44 (2nd Cir. 1974), for the proposition that "determining good faith or its absence requires 'an analysis of the totality of the circumstances on a case by case basis'." She also cited *NLRB v. Billion Motors, Inc.*, 700 F.2d 454 (8th Cir. 1983), in support of her finding that DMH did not meet it burden of proving that DCNA acted in bad faith.

findings that DMH failed to establish that DCNA acted in bad faith in violation of the CMPA and hereby dismiss the complaint.

Issue 3: Should the bargaining unit be modified? If so how? (PERB Case No. 04-UM-03)

The Hearing Examiner noted that "the parties agree that the personnel authorities have changed since the bargaining unit was originally certified, thus rendering the descriptions outdated. Furthermore, functions performed by the Department of Human Services have been transferred to other agencies, including the Department of Disability Services and the Department of Youth Rehabilitation Services. The Commission on Mental Health Services no longer exists and has been replaced by DMH.... The parties also agree that two certifications are needed [a city-wide unit and a unit at DMH,] since DMH is an independent personnel authority." (R&R at p. 19). Regarding the parties' request to make the Department of Mental Health a separate unit, the Hearing Examiner stated "[w]here an agency has independent personnel authority, the Board has excluded its bargaining unit employees from city-wide units."[17] (R&R at p. 19).

The District Government asserted before the Hearing Examiner that the city-wide unit description should specify that it covers "registered nurses employed as nurses", because registered nurses are employed in other positions, such as investigative analysts. (See R&R at p. 20). Also, the District proposed that the city-wide unit description should reference "agencies under the Mayor's authority" rather than to list each agency that currently exists. (See R&R at p. 20). The District maintains that "agencies may be created and disbanded, but so long as they come under the Mayor's personnel authority, they are properly within the unit." (See R&R at p. 20).

DCNA proposed that the unit description for the city-wide unit simply include the position of "all registered nurses" without the limiting language proposed by the District and that each of the District agencies who employ registered nurses be listed in the description. (See R&R at pgs. 20-21).

Finally, the parties jointly requested that the Child and Family Services Agency, an independent authority, be included in the District-wide unit "even though [the parties] recognize that there is generally resistance to bargaining units that span personnel authorities."[18] (R&R at p. 20).

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[17]The Hearing Examiner cited *Barry et al. v. Unions Representing Employees of D.C. Hospital Commission*, 28 DCR 1762, Slip Op. No. 5, PERB Case No. 241 (1981), where the Board certified fifteen (15) separate bargaining units.

[18]CFSA is an independent personnel authority.