

DCPS filed an Opposition To Recognition Petition with the Board on August 24, 1988, contending that the proposed unit is not appropriate for bargaining because, inter alia, summer school employees are not "employees" within the meaning of the Comprehensive Merit Personnel Act (CMPA), D.C. Code Section 1-603.1(7) ^{2/} since members of the proposed unit are employed on a temporary, intermittent and casual basis, with no reasonable expectation of future employment, and therefore do not possess the requisites of a continuing employment relationship. DCPS also contends that the proposed unit members have a de minimis employment relationship with DCPS because their entire work year consists of thirty-three (33) work days. According to DCPS, certification of summer school employees as an appropriate unit would not promote effective labor relations or the efficiency of agency operations.

This matter was heard by a Board-designated Hearing Examiner on December 6, 1988 and January 10, 1989. In a Report and Recommendation (R&R) dated May 3, 1989, the Hearing Examiner recommended that the proposed unit be found appropriate and that an election be conducted among employees in the unit to determine whether or not they desire representation by WTU.

Applying the criteria set forth in D.C. Code Section 1-618.9 (a) the Hearing Examiner concluded that the employees described in the Recognition Petition shared a community of interest with each other. The Hearing Examiner also found that the summer school employees had a reasonable expectation of continued employment. The Hearing Examiner reasoned that the six-week duration of summer school employment does not preclude a finding that the unit is appropriate in part because of the Board's rationale in AFSCME, Council 20. ^{3/} Furthermore, the Hearing Examiner noted that the employees in question, who have set work schedules just as do the regular teachers and WAE employees, do not conform to the commonly-accepted concepts of intermittent employees.

^{2/} Relevant statutory and regulatory provisions are set forth in the Appendix.

^{3/} American Federation of State, County and Municipal Employees, Council 20 and District of Columbia Public Schools, 31 D.C. Register 2287, Opinion No. 70, PERB Case No. 83-R-08 (1984). The Board found appropriate for bargaining a unit of WAE (wages-as-earned) employees of the Transportation and Warehouse sections of DCPS. The Board ruled that though classified as temporary or casual employees, in fact the employees in question had a strong expectation of reemployment with a resulting substantial interest in their working conditions.

The Hearing Examiner also found that DCPS had failed to show that the additional statutory criteria of D.C. Code Section 1-618.9(a)-that an appropriate unit is one that promotes effective labor relations and the efficiency of agency operations-would not be met if the unit sought by WTU was found appropriate. DCPS presented no evidence or testimony to support its contention that the proposed unit would have a negative impact on agency operations or labor relations.

According to the Hearing Examiner, from 1967 through 1985 WTU had "some effect" upon the working conditions of summer school employees. Specifically, she found that WTU had negotiated the method of pay check distribution for regular teachers in the summer school program and advance notification of summer school employment.

DCPS timely filed Exceptions to the Hearing Examiner's Report and Recommendations.

DCPS excepts to the Hearing Examiner's conclusion that a community of interest exists in the proposed unit, pointing to the differences in pay and job qualifications among summer school employees. We note, however, that the Hearing Examiner made several findings based on the record that while the salaries of the summer school employees differ, these employees are nonetheless within the same job classification (ET-18), they are recruited from the same vacancy listing, they are under the same overall supervision and their benefits are identical. While the qualifications for various jobs in the proposed unit require different skills, this is also true of the existing bargaining unit of ET-15 employees who are employed during the regular school calendar year. We therefore conclude that the differences in pay and job qualifications among members of the proposed unit are insufficient to overcome the Hearing Examiner's finding that there is a community of interest among employees in this unit, as established by the several other previously-mentioned factors.

DCPS also claims that the community of interest requirement is not met because the proposed unit contains the job title of Center Coordinators, who are supervisory personnel.^{4/} DCPS argues that because the Union did not amend the unit description, the Hearing Examiner exceeded her authority by recommending the exclusion of the Center Coordinators from the proposed unit. We

^{4/} Center Coordinators are not covered in the unit description in WTU's petition. However, the Hearing Examiner observed that the unit proposed by WTU includes, by definition "ET-18" personnel; this would encompass Center Coordinators.

do not find merit in this argument since the Hearing Examiner is only recommending the exclusion of employees who by virtue of D.C. Code Sec. 1-618.9(b)(1) must, in any event, be excluded because they are supervisors.

DCPS's central argument is that employees in the proposed unit are temporary, and temporary employees should not be accorded bargaining rights. DCPS excepts specifically to the Hearing Examiner's findings and conclusions that: (1) remedial courses have been offered on a continuous basis despite budgetary constraints; (2) the "undiscernible nature of budgeting constraints" which determined whether summer school is operational, does not substantiate the temporary status of summer school employees; summer school employees have a reasonable expectation of summer employment from year to year (similar to the WAE unit); (4) summer school employees do not conform to commonly accepted concepts of what constitutes an intermittent employee; and (5) summer school employees employed for a six (6) week period constitute an appropriate bargaining unit.

Contrary to DCPS's assertions, the record indicates that of the various types of summer school programs (enrichment, remedial, Chapter 1) there has been offered continuously one or more of these programs each summer. There is also testimony that ninety-five percent (95%) of all summer school personnel are employed by DCPS during the regular school year, and that sixty percent (60%) of the summer school personnel return each year and are employed by DCPS as summer school personnel. Thus, the majority of the unit (like the WAE employees) has a reasonable expectation of continued employment.

DCPS emphasizes that D.C. Code Section 31-102 grants DCPS the right to determine policy questions related to unit determinations. DCPS also refers to the District of Columbia Municipal Regulations, Title 5, Section 605, which were promulgated pursuant to D.C. Code Section 31-102 and which provides that no DCPS unit shall be established that includes temporary or casual employees. We note, however, that D.C. Code Sec. 1-633.5 states that any preexisting laws, policies or regulations that conflict with the CMPA are repealed or superseded. D.C. Code Sec. 31-102 predates the CMPA. And the CMPA, which governs here, does not preclude from an appropriate unit temporary employees. D.C. Code Section 1-603.1 defines the term "employee," as an individual who performs a function of the D.C. Government and is compensated for such services. Summer school personnel certainly meet this criteria. The CMPA in D.C. Code Section 1-618.1(b) grants each employee the right to form a labor organization and to participate in collective bargaining. Thus, the statutory and regulatory provisions on which DCPS relies have been superseded to the

extent that they restrict the ability of employees to be represented for purposes of collective bargaining.

Assuming that D.C. Code Sec. 1-618.8 reserves the authority of DCPS to decide whether summer school should be conducted and what courses are offered, our conclusion that the proposed unit is appropriate for collective bargaining does not diminish that authority.

Finally, DCPS excepts to the Hearing Examiner's finding that a process resembling the representation by WTU of the employees in the proposed unit had occurred with no adverse effect on labor relations and agency operations. We do not accept the Hearing Examiner's findings that WTU had represented the employees in question in prior negotiations. In WTU v. DCPS, 34 D.C. Register 3601, Slip Op. No. 151, PERB Case No. 85-U-18 (1987), the Board concluded that matters negotiated between WTU and DCPS that had some effect on summer employees were not sufficient to establish that WTU represented summer school employees. This decision precludes Board consideration of alleged representation by WTU of summer school employees' interests.

The Board, having considered this matter, adopts the Hearing Examiner's findings except as discussed immediately above, and finds the following unit appropriate for bargaining over the terms and conditions of employment:

Employees in the ET-18 classification program who are hired to teach in the summer school of the District of Columbia Public Schools in the following classifications: Elementary and Secondary Teachers, Attendance Officers, Child Labor Inspectors, Counselors (elementary and secondary), Librarians (elementary and secondary), Pupil Personnel Workers, Audio-Visual Coordinators, Curriculum Development Specialists, Reading Specialists, School Social Workers, Speech Therapists, Hearing Therapists, School Psychologists, Psychiatric Social Workers, Placement Counselors, and Job Coordinators; excluding management officials, supervisors, 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 Merit Personnel Act of 1978.

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To resolve the question concerning representation, the Board orders that an election be held to determine the will of the employees eligible to vote in the appropriate unit described above regarding representation in collective bargaining with DCPS.

ORDER

IT IS ORDERED THAT:

An election be held in accordance with the provisions of D.C. Code Section 1-618.10 and Section 102 of the Interim Rules of the Board to determine whether or not these employees wish to be represented by WTU for purposes of collective bargaining for compensation and for terms and conditions of employment.

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

August 2, 1989

APPENDIX

Relevant Statutory Provisions

DISTRICT OF COLUMBIA CODE

Section 1-603.1. Definitions.

For the purpose of this chapter unless otherwise required by the context:

* * *

(3) The term "Career Service" means positions in the District of Columbia government as provided for in subchapter VIII of this chapter and Section 1-602.4.

* * *

(6) The term "educational employee" means an employee of the Board of Governors of the School of Law, the District of Columbia Board of Education or of the Board of Trustees of the University of the District of Columbia, except person employed in any of the following types of positions:

(A) Clerical, stenographic or secretarial positions:

(B) Custodial, building maintenance, building engineer, general maintenance or general engineering positions;

(C) Bus drivers and other drivers involved in the transportation of persons, equipment, materials or inventory;

(D) Cooks, dieticians and other positions involved in direct planning, preparation, service of food;

(E) Technicians involved in the operation or maintenance of machinery, vehicles, equipment or the processing of materials and inventory; or

(F) Positions the major duties in which consist of the supervision of employees covered in subparagraphs (A) through (E) of this definition: Provided, however, that this subparagraph shall not be deemed to include heads of academic units at the School of Law, or the University of the District of Columbia.

(7) The Term "employee" means, except when specifically modified in this chapter, an individual who performs a function of the District government and who receives compensation for the performance of such services.

* * *

Section 1-618.1. Policy.

(a) The District of Columbia government finds and declares that an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.

(b) Each employee of the District government has the right, freely and without fear of penalty or reprisal:

(1) To form, join and assist a labor organization or to refrain from this activity;

(2) To engage in collective bargaining concerning terms and conditions of employment, as may be appropriate under this law and rules and regulations, through a duly designated majority representative....

* * *

Section 1-618.9. Unit determination.

(a) The determination of an appropriate unit will be made on the basis of a properly-supported request from a labor organization. No particular type of unit may be predetermined by management officials or can there be any arbitrary limit upon the number of appropriate units within an agency. The essential ingredient in every unit is community of interest: Provided, however, that an appropriate unit must also be one that promotes effective labor relations and efficiency of agency operations. A unit should include individuals who share certain interests such as skills, working conditions, common supervision, physical location, organization structure, distinctiveness of functions performed and the existence of integrated work processes. No unit shall be established solely on the basis of the extent to which employees in a proposed unit have organized; however, membership in a labor organization may be considered as 1 factor in evaluating the community of interest of employees in a proposed unit.

(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 non-supervisors may be considered: Provided, further, that supervisors employed by the District of Columbia board of Education may form a unit which does not include non-supervisors;
- (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;
- (5) Both professional and nonprofessional employees, unless a majority of the professional employees vote or petition for inclusion in the unit; or
- (6) Employees of the Council of the District of Columbia.

* * *

Section 1-633.5. Miscellaneous provisions.

(a) Commissioner's Order No. 70-229 (Organization Order No. 25), June 19, 1970; Interim Labor Management Relations policy of the University of the District of Columbia, May 4, 1978, 24 DCR 1004; Sections 600 through 619 of the Rules of the District of Columbia Board of Education, January 18, 1978, 24 DCR 6445-6475; the September 1975 Armory Board policy relating to labor relations; and any other labor-management relations policy inconsistent with this chapter are deemed to be superseded by this chapter: Provided, however, that nothing herein shall preclude the Mayor, the Board of Trustees of the University of the District of Columbia, the Board of Education or the Armory Board from adopting new labor relations policies that are not inconsistent with this chapter or with regulations issued by the Public Employee Relations Board pursuant to this chapter.

(b) Any law, rule and regulation, Commissioner's Order, Mayor's Order, Mayor's Memorandum or any administrative rule and regulation which is inconsistent with or contrary to the provisions of this chapter is repealed or superseded to the extent of such inconsistency on or after the effective date of this chapter.

(c) Any provision of the District Personnel Manual (DPM)

which, while not expressly repealed or inconsistent with any provision of this chapter, lacks a statutory basis under this chapter is repealed on the effective date of this chapter.

* * *

Section 31-102. General policies; expenditures; appointment of employees.

The Board [of Education] shall determine all questions of general policy relating to the schools, shall appoint the executive officers hereinafter provided for, define their duties, and direct expenditures. All expenditures of public funds for such school purposes shall be made and accounted for as now provided by law under the direction and control of the Mayor of the District of Columbia. The Board shall appoint all teachers in the manner hereinafter prescribed and all other employees provided for in this chapter. (June 20, 1906, 34 Stat. 317, ch. 3446).

Relevant Regulatory Provisions

D.C. PERSONNEL REGULATIONS

800 APPLICABILITY

800.1 This chapter applies to the Career Service of the District of Columbia, which consists of all

positions in the District government, except in the following cases:

* * *

(f) Positions in the Educational Service of the District of Columbia, pursuant to Section 1-609.1, D.C. Code (1981);

* * *

DPM Implementing Guidance and Procedures Subpart 6 -
Appointments in the Career Service

6.5 Temporary Limited Employment

A. General purpose of temporary limited employment. Temporary limited employment may be used to meet administrative needs such as filling temporary positions, or a continuing position for a temporary period. The

following types of positions are filled by temporary limited appointment (Section 824.1 of the D.C. personnel regulations):

1. Positions not expected to last more than one year;
2. Seasonal positions (e.g., positions involving periodically recurring employment other than career-type positions);
3. Part-time and intermittent positions that are not clearly of a continuing nature; and
4. Continuing positions, when temporarily vacated for periods of less than one year.

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DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS, TITLE 5

(DCPS) Section 607 Petitions: General Provisions

607.10 The Superintendent shall determine the appropriateness of a bargaining unit based upon the information contained in the relevant petition,

comments received on the petition, and on a consideration of other relevant factors, including the following:

- (a) The community of interest among the employees;
- (b) Whether the proposed unit would promote effective labor relations and efficient operation of the school system;
- (c) The history of collective bargaining with regard to the affected employees, among other employees of the Board, and in similar school systems; and
- (d) Any unique factors relevant to public sector employment.

607.11 No unit shall be established that includes any of the following:

- (d) Any employee whose duties or employment is of a temporary or casual nature.

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