Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
International Federation of Professional and Technical Engineers,	
Petitioner,	
and	PERB Case No. 12-RC-03
District of Columbia Office of Administrative Hearings,	Opinion No. 1469
Agency.	

DECISION AND ORDER

I. Statement of the Case

Seeking to represent a unit composed of administrative law judges ("ALJs") in the Office of Administrative Hearings ("OAH"), the International Federation of Professional and Technical Engineers ("Petitioner" or "Union") filed a recognition petition with the Board on July 27, 2012. The petition was accompanied by a showing of interest of employees in representation by the Petitioner.

On August 17, 2012, the Board issued a notice to all employees, labor organizations, and agencies associated with OAH, informing them of the petition filed by the Union. No comments or intervention petitions were filed. On September 10, 2012, OAH submitted an alphabetical list of ALJs in OAH. The Executive Director compared that alphabetical list with the showing of interest submitted by the Petitioner and determined pursuant to Rule 502.4 that the Petition was properly accompanied by a thirty percent (30%) showing of interest as required by D.C. Official Code Section 1-618.10(b)(2) and Rule 502.2.

The Petitioner subsequently filed an amended petition adding a roster of the Petitioner's officers and representatives, as required by Rule 502.1(d), and a second amended petition correcting the caption. The Petitioner seeks to represent, for purposes of collective bargaining:

> All administrative law judges in the District of Columbia Office of Administrative Hearings ("OAH" or "Agency") appointed pursuant to D.C. Code §§ 2-1831.06 and 2-1831.08, excluding all

> management officials, supervisors, confidential employees, employees engaged in personnel work other than in 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.

(Second Amended Recognition Petition at p. 1). The Petitioner alleges that "[n]o current collective bargaining agreement ('CBA') is in effect covering the proposed unit of employees or any part of it." (*Id.* at 2).

On October 24, 2012, OAH filed comments regarding the recognition petition and filed a demand for an evidentiary hearing, adding that in OAH's view any election must be by ballot at the workplace. In its comments, OAH asserted that D.C. Official Code § 1-617.09(b)(1) precludes the establishment of a unit containing management officials or supervisors and that the ALJs are by law managers and supervisors pursuant to section 2-1831.09(a)(5) and (6) of the D.C. Official Code. OAH also argued that a collective bargaining agreement for ALJs could not cover job tenure or pay because those matters are governed by statute. The Union filed a response to OAH's comments in which it argued that the ALJs give only recommendations regarding management and supervision to the chief administrative law judge, who exercises managerial and supervisory authority. The Union further argued that the chief administrative judge has some discretion over discipline and pay.

An effort to resolve the case through mediation was unsuccessful. Following an informal conference conducted pursuant to Rule 502.10(c), the case was referred to Hearing Examiner Sean Rogers "to develop a full and factual record upon which the Board may make a decision." Rule 502.11. A hearing was held on June 18, 21, 24, and 25, 2013. On the first day of the hearing, the Hearing Examiner denied motions to stay and for summary judgment. The Hearing Examiner granted a motion filed by Mayor Vincent C. Gray for leave to file a brief as amicus curiæ in support of the petition.

The hearing examiner issued a Report and Recommendation November 12, 2013, recommending that the Union be certified and that a representation election be held. On December 13, 2013, OAH filed exceptions, which it later withdrew. On March 18, 2014, the parties filed a Joint Motion for Voluntary Recognition of Bargaining Unit without an Election. The Report and Recommendation and the joint motion are before the Board for disposition.

II. Hearing Examiner's Report and Recommendation

A. Issues

The Hearing Examiner noted that D.C. Official Code § 1-617.09(b)(1) provides, "[a] unit shall not be established if it includes . . . any management official or supervisor" and further noted that OAH contended that the ALJs were management officials and supervisors. (Report and Recommendation 24.) The Hearing Examiner found that OAH raised the following issues concerning the status of ALJs as management officials and supervisors:

> OAH has challenged IFPTE's Recognition Petition contending that: ALJs cannot be included in the petitioned for bargaining unit because the *Establishment Act* precludes ALJ inclusion in a bargaining unit; ALJs are actively engaged in day-to-day OAH management and supervise OAH personnel which excludes them from a bargaining unit; and ALJ-association with and representation by IFPTE would violate OAH's Ethics Code and create a conflict of interest.

(*Id.* at 23.)

OAH also raised issues related to the ALJs' excepted service status:

> OAH asserts [that] DC Code § 1-609.08(15) ALJs are deemed to be Excepted Service and the DC Council has linked ALJs to the Senior Executive Attorney Service (SEAS) in DC Code § 2-1831.05(11) applying an equivalent pay scale and retention allowances to the ALJ position. OAH argues ALJs' Excepted Service status and their SEAS pay exclude their participation in a bargaining unit.

(*Id.* at 12.)

B. Facts

OAH has a chief judge, a deputy chief judge, and thirty-two ALJs. (*Id.* at 8.) The Hearing Examiner found that the record established that

> OAH's Chief Judge is the principal policy-maker and supervises and manages all OAH employees. (Tr 70, 85-86; Px 1; Px 3). Specific to the OAH ALJs, the Chief Judge assigns cases, monitors and supervises the quality of administrative adjudication, develops and implements rules, procedures, performance standards, training programs, contracts on behalf of OAH, approves forms and documents, and exercises all other duties consistent with the *Establishment Act*. (Tr 85-86; Px 3 and 5; DC Code § 2-1831.05(a)(5)). However, only the Commission on Selection and Tenure (COST) has the authority to appoint, reappoint, discipline and remove OAH ALJs. (Tr 71-2 and DC Code § 2-1831.06).

(*Id.*)

OAH has four departments—trials and appeals, the office of general counsel, clerk of court, and agency administrative staff. The deputy chief judge heads the trials and appeals department. (*Id.* at 8; Tr. 525.) ALJs serve on ten management committees, namely, Case Management and Quality Control, Ethics, Events, Mediation, Performance Measures, Recruiting, Risk Assessment and Control, Rules, Training and Education, and Website. (Report and Recommendation 10.) All ALJs serve, or have served, on a committee, and some ALJs serve or have served on more than one committee. (*Id.*) The Hearing Examiner found that the committees make non-binding recommendations to the chief judge.

ALJs decide cases appealed to OAH from over forty D.C. administrative agencies, boards, and commissions. The cases are grouped by subject matter into twenty-three jurisdictions, which in turn are grouped into jurisdictional clusters. The jurisdictional clusters are overseen by six principal ALJs. The principal ALJs hear cases like the other ALJs but undertake some additional administrative duties concerning the jurisdictions and jurisdictional clusters that they oversee. They do not supervise the other ALJs. (*Id.* at 9.)

The chief judge adopted an Ethics Code for OAH in 2004. (*Id.* at 10.) The Ethics Code requires ALJs to avoid the appearance of impropriety and to recuse themselves in any proceeding in which their impartiality might reasonably be questioned. The Ethics Code advises that an ALJ should not serve as an officer, director, trustee, or advisor of an organization that will engage in proceedings that would ordinarily come before the ALJ or that will regularly engage in proceedings before OAH. The Ethics Code prohibits partisan political activity by ALJs. (*Id.* at 11.)

C. Conclusions and Recommendations

OAH argued, in effect, that ALJs are *de jure* and *de facto* management officials and supervisors. In view of the right of employees to organize and join labor organizations, D.C. Official Code § 1-617.06(a), the Hearing Examiner found that "in determining whether ALJs are management officials or supervisors under the CMPA, their actual duties and responsibilities control." (*Id.* at 25.) The Hearing Examiner found that the duties and responsibilities of ALJs did not make them supervisors or managers. (*Id.* at 25-28.)

In addition, the Hearing Examiner found OAH's objections related to the Ethics Code to be speculative and its argument that the ALJs are excepted service attorneys to be without basis in fact. (*Id.* at 33.) He also rejected OAH's argument related to the ALJs' senior executive attorney service pay on the ground that "[n]othing in the CMPA set[s] salary as the basis for denying an employee the right to form, join or assist a labor organization." (*Id.* at 33.)

The Hearing Examiner made the following recommendations:

1. The description of the bargaining unit which IFPTE seeks to be certified as the exclusive representative be defined as:

> All Administrative Law Judges and Principal Administrative Law Judges in the District of Columbia Office of Administrative Hearings appointed pursuant to DC Code §§ 2.1831.06 and 2.1831.08, excluding all management officials, supervisors, confidential employees, employees engaged in personnel work other than in 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.

2. The PERB order a representation election in accordance with its Rules.

III. Discussion

A. The Report and Recommendation

OAH has manifested its lack of opposition to the recognition petition and to the Report and Recommendation by withdrawing its exceptions to the Report and Recommendation and by joining in a motion for voluntary recognition without an election. In view of OAH's lack of opposition, the Board accepts the recommendations of the Hearing Examiner, finds the proposed unit to be appropriate, and orders a representation election.

B. The Joint Motion for Voluntary Recognition of Bargaining Unit Petition without an Election

As noted, the parties moved for voluntary recognition without an election. Rule 502.12 sets forth the elements for recognition of a unit without an election:

> If the choice available to employees in an appropriate unit is limited to the selection or rejection of a single labor organization, the Board may permit the employing agency to recognize the labor organization without an election on the basis of evidence that demonstrates majority status (more than 50%), such as documentary proof not more than one (1) year old, indicating that employees wish to be represented by the petitioning labor organization. In case of voluntary recognition by the employer, the Executive Director shall review the evidence of majority status and shall recommend to the Board whether certification should be granted without an election.

Two of the elements required to support a motion for recognition without an election are not present. First, the documentary proof of interest is more than one year old. Second, the Executive Director has reviewed the showing of interest, determined that the evidence does not demonstrate majority status, and accordingly recommended that the motion for certification without an election be denied. For those reasons, the motion is denied.

ORDER

IT IS HEREBY ORDERED THAT:

1. The following unit is an appropriate unit for collective bargaining over terms and conditions of employment:

   All administrative law judges and principal administrative law judges in the District of Columbia Office of Administrative Hearings appointed pursuant to D.C. Official Code §§ 2.1831.06 and 2.1831.08, excluding all other employees, management officials, supervisors, confidential employees, employees engaged in personnel work, and employees engaged in administering the provisions of Title 1, Chapter 6, subchapter XVII of the D.C. Official Code.

2. An on-site election shall be held by the Board in accordance with the provisions of D.C. Official Code § 1-617.10 and Board Rules 510, 511, 513, 514, and 515 in order to determine whether a majority of eligible employees in above-described unit desire to be represented for bargaining on terms and conditions of employment by either the International Federation of Professional and Technical Engineers or no union.

3. The Joint Motion for Voluntary Recognition of Bargaining Unit Petition without an Election is denied.

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

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy and Members Donald Wasserman and Ann Hoffman

Washington, D.C.

June 4, 2014

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 12-RC-03 was transmitted via File & ServeXpress to the following parties on this the 4th day of June 2014.

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