Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 1403,	
Complainant,	
And	PERB Case Nos. 05-U-32 and 05-UC-01
	Opinion No. 873
District of Columbia Office of the Attorney General,	
Respondent.	

DECISION AND ORDER

I. Statement of the Case

This case involves the Hearing Examiner's consolidation of an unfair labor practice complaint ("Complaint") and unit clarification petition ("Petition). The Complaint was filed by the American Federation of Government Employees, Local 1403 ("Local 1403" "Union"or "Complainant") against the District of Columbia Office of the Attorney General ("OAG" or "Respondent"), alleging the Agency removed Assistant Attorney General Pollie Goff ("Goff"), Legal Counsel Division, Office of the Attorney General, from the bargaining unit represented by Local 1403, in violation of D.C. Code § 1-617.04(a)(1), (3), and (5).[1] Specifically, the Union alleges OAG violated the Comprehensive Merit Personnel Act ("CMPA") by: (1) unilaterally

[1] The Union initially sought relief for the Agency's action in removing a total of 11 attorneys from the bargaining unit. The parties stated in their post-hearing briefs they had reached a settlement of all claims regarding the other 10 attorneys, and, therefore, asked the Hearing Examiner to dismiss the charges relating to the other 10 attorneys. The Hearing Examiner granted that request, and the charges relating to those 10 attorneys were, accordingly, recommended for dismissal without further comment.

removing Goff from the unit after initially agreeing to her inclusion; (2) because Goff was a known Union supporter, and her removal from the unit was discriminatory and motivated by anti-union animus; and (3) Goff's removal from the unit is a breach of the parties' collective bargaining agreement.

In OAG's Answer to the Complaint, it denied all of the Union's allegations as legal conclusions and moved the Complaint be denied in its entirety. (See Answer at p. 4). In response to OAG's Petition, the Union moved to dismiss the Petition as untimely and as without merit. (See Hearing Examiner's Report and Recommendation ("R&R") at p. 9). As to the timeliness issue, the Union argued it was a fatal procedural error to bring such a petition mid-term, where there was no change in job duties. (See R&R at p. 9). As for the merits of the Agency's determination that Goff legally is excluded from the unit, the Union contends the Agency misconstrues the law. (See R&R at p. 10). The Union relied on FLRA precedent and argued that Goff does not perform excluded personnel work, as she is not involved in personnel work directly relating to her own Agency such as would create a conflict of interest.[2] (See R&R at p. 10). The Hearing Examiner, Andrew M. Strongin, denied both parties' motions to dismiss on the grounds that factual and legal questions were raised in the pleadings, and, therefore set the matter for hearing. (See R&R at p. 3). As a result, two days of hearings were held.

The Petition filed by OAG contends it properly removed a number of employees from the bargaining unit once it determined they performed certain personnel work statutorily excluded from bargaining unit employees, as mandated by D.C. Code § 1-617.09(b)(3), and those exclusions are not based on any inappropriate or unlawful consideration. (See R&R at p. 2).

The Hearing Examiner issued a R&R. Local 1403 filed exceptions and OAG filed an Opposition to the exceptions. The Hearing Examiner's R&R, the Petitioner's Exceptions and the Respondent's Opposition are before the Board for disposition.

II. Background

On November 2, 2001, in Certification Number 121, PERB Case No. 01-RC-03 (2001), PERB certified the following unit:

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[2] The Union also argued Goff does not perform excluded "managerial" or "confidential" duties. As already noted, the Agency abandoned those claims and the Hearing Examiner, accordingly, dismissed them.

> All attorneys employed by the Office of the Corporation Counsel, 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 Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.[3]

(See R&R at p. 4).

"The parties subsequently negotiated a collective bargaining agreement, effective October 1, 2001, through September 30, 2007, which contains a Recognition Clause incorporating PERB Certification No. 121." (R&R at p. 4). Goff was considered by both parties to be part of the bargaining unit. Later, the Agency conducted an audit of Goff's position functions, and concluded that Goff is legally excluded from the unit by virtue of § 1-617.09(b) of the CMPA. (See R&R at p. 4).[4]

On April 11, 2005, the Agency notified Goff in writing that her position was being removed from the bargaining unit on the ground her "position falls within the statutory exclusions regarding employees who (1) function as management officials, (2) are 'engaged in personnel matters in other than a purely clerical capacity', and/or (3) are confidential. *See,* OAG Office Order No. 2005-14 (March 29, 2005)." (R&R at pgs 4-5). Goff's removal from the unit was made effective the same date, unilaterally, without bargaining or negotiation, and without prior Board approval. (See R&R at p. 5).

As a result of OAG's Actions, Local 1403 filed the above described Unfair Labor Practice Complaint. OAG filed an Answer, after which it also filed a Petition for Unit Clarification. Subsequently, the matter was referred to a Hearing Examiner.

III. The Hearing Examiner's Report and Recommendations and Local 1403's Exceptions and OAG's Opposition.

Based on the pleadings, the record developed at the hearings, and the post-hearing briefs, the Hearing Examiner identified three issues for resolution. These issues, his findings and recommendations, and the parties' exceptions and oppositions, are as follows:

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[3] The record shows the Office of the Corporation Counsel was reorganized by mayoral order in May 2004 and renamed the Office of Attorney General at that time. There have been some changes to the make-up of the unit over time, due at least in part to the reorganization of the office, but those changes are not relevant to the question whether the Agency properly removed Goff from the unit on April 11, 2005. Stated otherwise, the parties agree that Goff is eligible for membership in the Union except as she may be excluded from such membership by virtue of her performance of excluded work under § 1-617.09(b).

[4] "Notwithstanding that audit, it is undisputed that Goff's job functions did not change from the time of the Board's initial certification or thereafter." (R&R at p. 4).

1. *Is OAG's unilateral and mid-term removal of Goff from the bargaining unit an unfair labor practice?*

The Union argued OAG violated its obligation to bargain in good faith, interfered with Goff's bargaining rights, and was motivated by anti- animus when it unilaterally removed Goff from the bargaining unit, mid-term and despite the fact Goff's job description had not changed from the time the Agency had agreed she was eligible for inclusion in the unit. (See R&R at p. 9). In support of this contention, the Union maintains the "contract bar" rule precluded OAG from removing Goff when it did. (See R&R at p. 9). In addition, the Union cited *Bennett and International Association of Firefighters, Local 36 and District of Columbia Fire and Emergency Services Department*, 47 DCR 10092, Slip Op. 445, PERB Case No. 95-RD-01 (2000), for the proposition that the Board's "contract bar" rule is derived from the NLRB.

OAG argued the Union failed to show the removal of Goff was motivated by anti-union animus or a retaliatory motive. (See R&R at p. 11).

The Hearing Examiner concluded the contract bar rule did not preclude Goff's removal from the bargaining unit and no Board precedent prohibited Goff's mid-term removal. (See R&R at p. 12). In addition, the Hearing Examiner found the *Bennett* case "does not involve any substantive contract bar question, let alone one that is comparable to the instant case." (R&R at p. 12). Instead, the Hearing Examiner stated "[b]etter guidance on the Board's actual 'contract bar' doctrine is found in *American Federation of Government Employees, Local 2725, AFL-CIO and District of Columbia, Department of Housing and Community Development*, 45 DCR 2049, Slip Op. No. 532, PERB Case No. 97-UC-01 (1998), in which the Board upheld the unilateral, mid-term exclusion of one of the positions, on the ground the position is 'managerial,' and therefore statutorily excluded. (See R&R at p. 12). In addition the Hearing Examiner pointed to *NAGE, Local R3-06*, Slip Op. 635 at 10-11, PERB Case No. 99-U-04 (2000), in which the Board stated:

> We note that changes in the bargaining unit status of individual employees may change from time to time even if the overall responsibilities of the office in which they work do not, and the employing agency may reclassify their bargaining unit status, consistent with the provisions of D.C. Code [§ 1-617.09(b)]. However, such actions are subject to challenge by the union through a unit clarification petition. (See Board Rule 506.1.)

The Union excepts to this finding, arguing the Board should adopt the NLRB's contract bar rule and dismiss OAG's Petition for Unit Clarification as untimely.

The Board finds this exception is merely a disagreement with the Hearing Examiner's findings and interpretation of Board precedent and NLRB case law. The Board finds the Hearing Examiner's analysis is reasonable, supported by the record, and consistent with Board precedent.

Based on the following, the Board adopts the Hearing Examiner's recommendation that OAG could unilaterally remove Attorney Goff mid-term, but such removal is at risk of being found an unfair labor practice if such removal was not subject to the statutory exclusions mandated by D.C. Code § 617.09(b).

2. *Was Attorney Goff Statutorily Excluded from the bargaining Unit?*

Having concluded Goff's bargaining unit status is subject to challenge, the Hearing Examiner turned to whether as an employee engaged in personnel work in other than a purely clerical capacity, Goff is statutorily excluded from the bargaining unit under the authority of § 1-617.09(b)(3)." (R&R at p. 14).

The Hearing Examiner observed both parties had looked to FLRA precedent under § 7112(b)(3) of the Federal Service Labor-Management Relations Statute ("Statute"), which is essentially identical to § 1-617.09(b)(3). The Statute provides: "[a] unit shall not be determined to be appropriate ... if it includes - (3) an employee engaged in personnel work in other than a purely clerical capacity." (R&R at p. 14). The Hearing Examiner also considered FLRA precedent, which defines the subject "personnel" work as follows:

> [A] unit will not be found to be appropriate if it includes an employee engaged in personnel work in other than a purely clerical capacity. For a position to be excluded under section 7112(b)(3), it must be determined that the character and extent of involvement of the incumbent is more than clerical in nature and that the duties of the position in question are not performed in a routine manner. Further, the incumbent or incumbents must exercise independent judgment and discretion in carrying out the duties.

Dep't of the Treasury, Internal Revenue Service, 36 FLRA 138, Slip Op. at 5 (1990). (See R&R at pgs 14-15).

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. *OPM*, 5 FLRA 238, Slip Op. at 8 (1981); *See also, Dep't of the Army*, 59 FLRA 296, 302 (2003) ("[T]he proper focus ... is whether the personnel work performed by employees in other than a purely clerical capacity relates to their own employing agency. If it does, then Congress has mandated that such employees are excluded by § 7112(b)(3)."). (See R&R at p. 15).

Based on all of the testimony of record, but particularly on that offered by Goff, the Hearing Examiner concluded Goff performs excluded personnel work, and therefore must be

removed from the unit. (See R&R at p. 15). Specifically, the Hearing Examiner found because Goff's work had District-wide implications, it affects her own Agency and unit. The Hearing Examiner added "Goff is not merely reviewing the products of negotiated changes to which her Union already is privy, but rather of proposed changes to law to which her Union is not yet privy." (R&R at p. 16). In addition, the Hearing Examiner found Goff's work to present the conflict of interest between Goff's work and her Union-related interests that the statutory exclusion is designed to prevent. (See R&R at p. 16). The Hearing Examiner concluded Goff's work includes personnel work in other than purely clerical capacity, and relates to her own employing agency and, therefore, is statutorily excluded under D.C. Code § 1-617.09(b)(3). (See R&R at p. 16).

The Union's exceptions to this finding argue that the evidence presented should have been found to support its contention Goff's work was of a clerical capacity and, therefore, not statutorily excluded.

The Board finds the Hearing Examiner's factual findings are supported by the record. The Board has held challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings. *Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees, Local 2741 v. D.C. Department of Recreation Parks*, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). Therefore, the Board finds the Hearing Examiner's findings to be reasonable and supported by the record and his analysis to be consistent with Board precedent. Accordingly, the Board adopts the Hearing Examiner's recommendation that Goff is statutorily excluded from the bargaining unit pursuant to § 1-617.09(b)(3).

3. *Did OAG commit an unfair labor practice by virtue of the way it handled Goff's removal from the bargaining unit?*

Notwithstanding his finding that Goff was statutorily excluded from the bargaining unit, the Hearing Examiner turned to the question of whether OAG committed an unfair labor practice and whether Goff's removal: (1) was a result of bad faith bargaining; (2) was motivated by anti-union animus; and (3) wrongfully interfered with Goff's bargaining rights. (See R&R at p. 17). The basis for the question stems from the initial inclusion of Goff in the bargaining unit under the 2001agreement and the Agency's unilateral exclusion of Goff from the unit in 2005. (See R&R at p. 17). The Union argued this action amounted to a unilateral change to a mandatory subject of bargaining because Goff was included in the unit by agreement of the parties in 2001, and then, without any intervening change in circumstances, unilaterally was removed from the unit in 2005 without bargaining with the Union or prior approval from the Board. (See R&R at p. 18).

The Hearing Examiner found OAG's initial agreement to include Goff in the bargaining unit, "though, certainly curious, [was] not relevant to any timely claim of bad-faith bargaining." (R&R at p. 19). As stated above, the Hearing Examiner determined Goff was statutorily excluded from the bargaining unit and the CMPA or related case law did not preclude OAG from proceeding as it did. (See R&R at p. 20). Specifically, the Hearing Examiner stated:

> Nothing in the CMPA seems to require the Agency to seek advance approval for the removal from the unit of an employee who is performing statutorily excluded work, and *NAGE, Local R3-06* seems to authorize the opposite: an employee can be removed mid-term if the Agency correctly concludes that the employee is performing statutorily excluded work, subject to Union challenge and at its own peril.

(R&R at p. 20).

Consequently, having concluded Goff was performing statutorily excluded work, the Hearing Examiner concluded the Agency did not commit an unfair labor practice by removing Goff from the bargaining unit when, and as, it did. (See R&R at p. 20.). In addition, the Hearing Examiner found the record showed there was a valid basis for Goff's removal and there was insufficient evidence OAG's actions were motivated by anti-union animus, or Goff's protected and concerted rights were violated. (See R&R at p. 20).

The Union excepts to this finding by arguing the Hearing Examiner should have found OAG bargained in bad faith in 2001. In addition, the Union asserts the Hearing Examiner improperly concluded the Union's claim of OAG's bad faith bargaining concerning the 2001 Agreement was untimely. The Union argues the 120-day statutory limit imposed by Board Rule 520.14 should not stem from 2001, but from when it became aware of the violation (i.e when Goff was removed from the bargaining unit). (See Exceptions at p. 3).[5]

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[5] The Board has held the deadline date for filing a complaint is "120 days after the date Petitioner admits he actually became aware of the event giving rise to [the] complaint allegations." *Haggard v. District of Columbia Public Schools*, 43 DCR 1297, Slip Op. No. 352 at p. 3, PERB Case No. 93-U-10 (1996). See also, *American Federation of Government Employees, Local 2725, AFL-CIO v. District of Columbia Housing Authority*, 46 DCR 119, Slip Op. No. 509, PERB Case No. 97-U-07 (1997). Also, the Board has found "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).

The Board notes there was no finding by the Hearing Examiner that the Complaint was untimely. Instead, the Hearing Examiner determined a claim of bad faith bargaining in 2001, if it had occurred, would be untimely and irrelevant to whether OAG's actions in 2005 constituted a violation of the duty to bargain in good faith. Nevertheless, the Hearing Examiner found no evidence of bad faith bargaining in either 2001 or 2005. The Board finds the Union's argument merely represents a disagreement with the Hearing Examiner findings that OAG did not bargain in bad faith.

The Board has held that challenges to evidentiary findings do not give rise to a proper exception where, as here, the record contains evidence supporting the Hearing Examiner's findings. *Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (2000). The Board has also rejected challenges to the Hearing Examiner's findings based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees, Local 2741 v. D.C. Department of Recreation Parks*, 46 DCR 6502, Slip Op. No. 588, PERB Case No. 98-U-16 (1999). In view of the above, the Board finds the Hearing Examiner's finding that OAG did not violate the CMPA by committing an unfair labor practice to be reasonable, supported by the record, and consistent with Board precedent. Therefore, the Board adopts the Hearing Examiner's findings and conclusions that OAG did not violate the CMPA by unilaterally removing Attorney Goff mid-term from the bargaining unit.

Pursuant to D.C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. Thus, the Board adopts the Hearing Examiner's findings and conclusions that: (1) the Union's Unfair Labor Practice Complaint, PERB Case No. 05-U-32, be dismissed; and (2) the Agency's Petition for Unit Clarification, PERB Case No. 05-UC-01, be granted to the limited extent that Pollie Goff is excluded from the bargaining unit due to her performance of work that is excluded under § 1-617.09(b)(3).

ORDER

IT IS HEREBY ORDERED THAT:

(1) The Complainant's Unfair Labor Practice Complaint is dismissed with prejudice because it was not timely filed.

(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.

October 11, 2011

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 05-U-32 and 05-UC-01 was transmitted via Fax and U.S. Mail to the following parties on this the 11th day of October 2011.

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