Government of the District of Columbia
Public Employee Relations Board

In the Matter of	
American Federation of State, County, and Municipal Employees, District Council 20, AFL-CIO, Local 2743	
Petitioner	PERB Case No. 20-UC-01
v.	Opinion No. 1776
District of Columbia Department of Consumer and Regulatory Affairs	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On June 30, 2020, the American Federation of State, County, and Municipal Employees, District Council 20, AFL-CIO, Local 2743 (Union) filed a Unit Clarification Petition (Petition). The Petition seeks to return three promoted employees to the bargaining unit they were in prior to promotion. On July 15, 2020, the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) filed an Opposition to the Petition. The matter went before a Hearing Examiner on October 8, 2020. Both parties filed post hearing briefs ("Petitioner's Brief" and "Respondent's Brief") on December 22, 2020. On January 7, 2021, the Hearing Examiner issued his Report and Recommendation (Report), recommending that DCRA return the three employees in question to the bargaining unit. The parties did not file exceptions.

For the reasons stated herein, the Board adopts the Hearing Examiner's Report and Recommendation.

II. Background

On May 29, 1984, the Union was certified as the representative of all employees in the DCRA Office of Compliance (now the Consumer Protection Division), except for confidential employees and employees engaged in personnel work, other than in a purely clerical capacity.[1] Sometime around February of 2020, three DCRA employees were promoted to the position of

[1] Report at 2.

Grade 12 Program Analyst in what was then the Office of Compliance.[2] Before their promotion, these employees were in bargaining unit positions within the Agency.[3] However, after their promotion, DCRA claimed they were ineligible to be in the Union's bargaining unit under D.C. Official Code § 1-617.09(b)(2) and (3), as they were confidential employees or employees engaged in personnel work, other than in a purely clerical capacity.[4] The Union disagreed, contending the three employees in question should be included in the bargaining unit, as they were not confidential employees and were not engaged in personnel work, other than in a purely clerical capacity.[5] This disagreement is the subject of the case at hand.

III. Arguments of the Parties

The Union contends that the job duties of the employees in question fall squarely within the scope of its exclusive bargaining unit with DCRA.[6] At the hearing the Union presented witness testimony that the employees did not perform any work which could be deemed confidential and, "[e]ven assuming *arguendo* that the employees were performing some miniscule personnel duty, which they are not, those duties would be clerical in nature and not substantive."[7]

Citing the Supreme Court's ruling in *N.L.R.B. v. Hendricks County Rural Elec. Membership Corp.*,[8] the Union applied the NLRB's labor-nexus test defined in *Hendricks County Rural Electric*.[9] That test only excludes from the bargaining unit those employees with confidential and "managerial" functions and stands for the proposition that as few employees as possible should be excluded from statutory coverage.[10] The Union maintains that, because DCRA has failed to establish that the employees at issue have management responsibilities or access to confidential information about Union members, the Agency has no right to exclude them from the bargaining unit.[11] The Union demands (1) immediate return of the employees to the bargaining unit, (2) back payment of union dues and costs, (3) an order prohibiting future conduct, (4) posting of the Board's Decision for 30 days, and (5) sanctions.[12]

DCRA argues that the three employees in this matter are confidential and/or engaged in personnel work in other than a purely clerical capacity and, thus, have been rightfully excluded from the bargaining unit under D.C. Official Code § 1-617.09(b)(2) and (3).[13] The Agency claims the employees "currently function in roles sufficiently involved in labor relations and policy formation, and engage in internal personnel work in other than a purely clerical capacity that relates directly to the personnel operations of their agency."[14] DCRA notes that PERB has previously relied on FLRA case law which states that in order to be excluded from the bargaining unit,

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[2] Report at 1.
[3] Report at 1.
[4] Report at 2.
[5] Report at 2.
[6] Petitioner's Brief at 8.
[7] Petitioner's Brief at 8.
[8] 454 U.S. 170, 190 (1981).
[9] 236 NLRB 1616, 1619 (1978).
[10] Petitioner's Brief at 9.
[11] Petitioner's Brief at 9.
[12] Petition at 3.
[13] Respondent's Brief at 3.
[14] Respondent's Brief at 3.

employees must do personnel work for their "own employing agency."[15] The Agency concludes that:

> Based on all the testimony of the record, but particularly on that offered by the Employees themselves, the Employees[']work includes personnel work in other than a purely clerical capacity that meets the PERB and FLRA standard for the statutory exclusion for employees engaged in personnel work, in relation to fellow Agency employees, that is more than clerical in nature and not routine.[16]

IV. Hearing Examiner's Discussion

The Hearing Examiner noted that the Agency has the burden to establish that the employees' new position falls within the exception of D.C. Official Code § 1-617.09(b)(2) or (3).[17] After consideration of the facts, the Hearing Examiner was not persuaded by DCRA's arguments. He relied on Board precedent which states that employees are excluded from the bargaining unit pursuant to § 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." [18] The Hearing Examiner found that "the record fails to show that the three employees in the Grade 12 Program Analyst position…are currently involved in labor relations or labor relations policy formulation."[19] He noted that they do not negotiate with the union and there is no evidence that they have access to management's position on grievances or negotiations. Therefore, he concluded that they are not confidential employees within the meaning of § 1-617.09(b)(2).[20]

The Hearing Examiner then considered whether the three employees in the Grade 12 Program Analyst Position were engaged in personnel work in other than a purely clerical capacity within the meaning of § 1-617.09(b)(3).[21] The Board has previously held that it is appropriate to examine FLRA precedent in this kind of case.[22] Therefore, the Hearing Examiner considered an FLRA opinion which stands for the proposition that:

> The character and the nature of the involvement of the incumbents in personnel work must be more than clerical in nature, the personnel duties of the position in question are not performed in a routine manner, the incumbents must exercise independent judgment and discretion in carrying out their personnel duties and the personnel work must directly relate to the personnel operations of the employee's

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[15] Respondent's Brief at 8 (quoting *Office of Personnel Mgmt. v. AFGE*, 5 F.L.R.A. 238, 246 (1981)).
[16] Respondent's Brief at 9.
[17] Report at 3.
[18] Report at 7 (quoting *Local 12, AFGE and D.C. Department of Employment Services and AFSCME*, 28 D.C. Reg. 3943, Slip. Op. No. 14 at 3, PERB Case No. 0R006 (1981)).
[19] Report at 7.
[20] Report at 9.
[21] Report at 9.
[22] Report at 9. *AFGE, Local 1403, and D.C. Office of the Attorney General*, PERB Case Nos. 05-U-32 and 5-UC-01, Slip. Op. No. 873 (2011).

> own agency which would create a conflict of interest between the employee's job and Union representation if included in the unit.[23]

The Hearing Examiner reviewed the record and found that the employees at issue here have not assisted in making personnel determinations, evaluated employees, handled workplace complaints, or made independent determinations about employee job performance. Therefore, he concluded that they are not engaged in personnel work in other than a purely clerical capacity within the meaning of § 1-617.09(b)(3).

Having found that DCRA did not meet its burden of establishing that the three employees in question were either confidential employees or engaged in personnel work in other than a purely clerical capacity, the Hearing Examiner concluded that they should be included in the Union's bargaining unit.[24] However, he did not recommend the additional relief the Union sought (back Union dues and costs, order prohibiting future conduct, sanctions on the agency, and posting of a notice), as he believed those kinds of relief were not appropriately included in a unit clarification petition.[25]

Pursuant to PERB Rule 550.20, "[t]he Board must reach its decision upon a review of the entire record" and "may adopt the recommended decision of a hearing examiner to the extent that it is supported by the record, reasonable, and consistent with the Board's precedent." In this case, the Board has reviewed the entire record and finds that the Hearing Examiner's recommendation is supported by the record, reasonable, and consistent with the Board's precedent. Therefore, the Board adopts the Hearing Examiner's recommendation.

V. Conclusion

The Board adopts the Hearing Examiner's Report and Recommendation finding that the three employees who were promoted to Grade 12 Program Analyst positions were improperly excluded from the bargaining unit.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Department of Consumer and Regulatory Affairs must include the three employees promoted to Grade 12 Program Analyst in the bargaining unit of AFSCME District Council 20, Local 2743, AFL-CIO.

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[23] Report at 9. *AFGE, Local 1403, and D.C. Office of the Attorney General*, PERB Case Nos. 05-U-32 and 5-UC-01, Slip. Op. No. 873 (2011) (citing *United States Dep't of Transportation Fed. Aviation Admin.* (Agency/petitioner) & *Nat'l Air Traffic Controllers Ass'n, Afl-Cio* (Union), 71 F.L.R.A. 28, 36 (Feb. 12, 2019)).
[24] Report at 11.
[25] Report at 12-13.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

February 18, 2021
Washington, D.C.