Government of the District of Columbia
Public Employee Relations Board

In the matter of: Vartan Zenian, et al. Petitioners,[1] and American Federation of State, County and Municipal Employees, Local 2743, Labor Organization.	PERB Case No. 03-RD-02 Opinion No. 901
In the matter of: Vartan Zenian, Complainant, v. American Federation of State, County and Municipal Employees, Local 2743, Respondent, and Department of Insurance, Securities and Banking, Respondent.	PERB Case No. 04-U-30

[1]An individual who files a decertification petition is referred to as a "petitioner" while one filing an unfair labor practice complaint is identified as a "complainant". A union named in a decertification matter is referred to as a "labor organization." A party accused of committing an unfair labor practice or violating the standards of conduct for a labor organization is designated as a "respondent." Vartan Zenian is the sole Complainant in the unfair labor practice ("ULP") case. The Department of Insurance, Securities and Banking and the American Federation of State, County and Municipal Employees, Local 2743, are both named as respondents in the ULP case.

DECISION AND DIRECTION OF ELECTION

I. Introduction

On July 31, 2003, Vartan Zenian, Karen Moore and Yvette Alexander ("Petitioners"), filed a "Petition for Decertification," requesting that the Public Employee Relations Board ("Board") decertify the American Federation of State, County and Municipal Employees, Local 2743 ("Respondent," "Union," "AFSCME" or "Local 2743") as the exclusive bargaining unit representative for a group of employees employed by the District of Columbia Department of Insurance, Securities and Banking ("DISB" or "Agency") described as follows:

> Professional and non-professional employees at DISR,[2] excluding attorneys, members of the office of the controller, management executives, confidential employees, supervisors or any employee engaged in personnel work in other than a purely clerical capacity. (Petition at p. 2).

The Petitioners assert that Local 2743 and the DISB were parties to a collective bargaining agreement that expired on September 30, 2003. The Petitioners state that there are 62 employees in the bargaining unit at DISB. Also, the Petitioners submitted documentation to the Board in support of their assertion that over thirty percent (30%) of the employees in the current unit no longer wish to be represented by Local 2743.

The Petitioners contend that the employees of DISB have no community of interest with those employees who Local 2743 was certified to represent at the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). Specifically, the Petitioners claim that they have no community of interest with DCRA employees with regard to their location, the management personnel, working conditions and professional interests. The Petitioners assert that employees at DCRA make up the bulk of the membership of Local 2743.

A hearing was held in this matter. The Hearing Examiner bifurcated the decertification case and the unfair labor practice case. She issued a Report and Recommendation ("R&R") recommending that the Board direct an election in this matter. The Petition for Decertification is before the Board for disposition. (The unfair labor practice complaint is addressed in Slip Op. No. 890.)

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[2]The acronym "DISR" refers to the Department of Insurance and Securities Regulation. This will be explained in section "II. Procedural Background . . .", see, also n. 3.

II. Procedural Background and Positions of the Parties

AFSCME, Local 2743 was first certified in 1984 as the exclusive bargaining representative for a unit of employees in various divisions of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA"). The certified unit included employees in various divisions of DCRA, including the Insurance Administration.[3] The Petitioners assert that, as a result of several re-organizations, the Insurance Administration unit at DCRA no longer exits. Specifically, in 1997 the Department of Insurance and Securities Regulation ("DISR") was created as an independent agency and the Petitioners became part of DISR. In 2004, there was another re-organization and DISR became the Department of Insurance, Securities and Banking ("DISB"). The Petitioners contend that the employees currently at DISB have no community of interest with employees who are currently employed at DCRA.

The Petitioners contend that: (1) the unit certified in PERB Case No. 84-R-03 consisting of employees in the Insurance Bureau no longer exists; (2) members who work in the Securities Bureau were not included in the original certification; (3) DCRA is funded through an appropriated budget and is subject to the economic conditions of the D.C. government [while] DISR is funded through a trust and generates money for the D.C. government's general fund;[4] (4) the Petitioners' needs with respect to issues pertaining to budget cuts and hiring freezes are not in line with those of the employees at DCRA; (5) the Respondent no longer represents the needs of District of Columbia Department of Insurance and Securities Regulation's employees; (6) Local 2743 no longer represents the needs of DISR's employees; and (7) their concerns have continually gone unanswered by the

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[3] The Board certified AFSCME, Local 2743 as the exclusive bargaining representative of the following unit:

> All employees in the following organization components of the District of Columbia Department of Consumer and Regulatory Affairs [DCRA]: Occupational and Professional Licensure Administration; *Insurance Administration*; Business Regulation Administration; Office of Administration and Management; and Office of Compliance, excluding management official, supervisors, confidential employees, any employees engaged in personnel work in other than purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978." (emphasis added).

AFSCME, Council 20, Local 2743 and D.C. Department of Consumer and Regulatory Affairs, 31 DCR 5140, Slip Op. No. 89, PERB Case No. 84-R-03 (1984).

[4] The Petitioners reference DISR and DISB interchangeably in their arguments. See n. 1.

Union and their needs have continually been ignored, including but not limited to grievance cases taking two years to be heard. The Petitioners further assert that DISR employees filed charges against the Union's Executive Director George Johnson regarding the misuse of union funds and misrepresentation of their unit. According to the Petitioners, the Union's judicial panel found him not guilty, disregarding overwhelming evidence to the contrary. (See Petition at pgs. 1-2).

In its Response to the Petition for Decertification, the Union countered that the Petitioners did not present a thirty percent (30%) showing of interest and that there is a "contract bar" preventing the filing of the petition. Further, on December 30, 2003, the Petitioners filed a document styled: "PERB Order the Following: (1) DISR/DISB Work Place Was/Is Not Certified As Exclusive Represented (sic) By AFSCME Local 2743; (2) AFSCME Stop Collecting Membership Dues/Fees From DISB ; and (3) AFSCME Refund All Dues/Fees Collected From DISR/DISB Since May 1997." Subsequently, Vartan Zenian filed an unfair labor practice complaint ("Complaint") which raised allegations similar to those raised in the Petition for Decertification.

The Board's Executive Director issued a "Notice of Decertification of Unit and Unfair Labor Practice Hearing," scheduling a hearing for November 12, 2004. On October 19, 2004, the Union filed a "Motion to Dismiss and to Postpone Hearing Pending a Decision on this Motion" ("Motion"). The Petitioners filed their Opposition to the Motion on November 8, 2004. On November 9, 2004, the Hearing Examiner issued an Order denying the Motion and directed the parties to present arguments concerning the Petition for Decertification at the November 12, 2004 hearing.

The Petitioners had initially claimed that the bargaining unit which they seek to decertify was a certified unit. However, at the November 12, 2004 proceeding, they changed their position and asserted that the certified unit was abolished in 1996. They maintained that the prior certification could not have included DISR or DISB employees because the Insurance Administration at DCRA was abolished in 1996 and DISR was created as a separate and distinct entity. Therefore, the Petitioners took the position that the bargaining unit at DISR and DISB was never certified.

The Union countered that the Petitioners could not seek decertification if they claimed that the Union was not certified. In the alternative, the Union argued that if the Union was properly certified, a contract bar prevented the Petitioners from filing a petition. Consistent with this argument, the Union noted that DISB has continually recognized AFSCME, Local 2743 as the exclusive bargaining agent of the employees. The Union further argued that the Petitioners did not meet their burden of proof in this matter. In addition, the Union informed the Hearing Examiner that the Petitioners had filed an unfair labor practice complaint on July 9, 2004 which raised allegations similar to those in the decertification petition.

On February 1, 2005, the Hearing Examiner determined that an evidentiary hearing was needed in order to make a recommendation to the Board on the issue of decertification. She also directed the parties to show good cause why the decertification petition and the unfair labor practice

complaint should not be consolidated. The Union objected. The Petitioners and the Agency did not object to the consolidation. On March 7, 2005, the Hearing Examiner consolidated the two matters and scheduled an evidentiary hearing. The parties then entered into mediation for an extended period of time. When mediation did not prove successful, the matters were referred back to the Hearing Examiner. A hearing was held on February 2, 2006. The Mr. Zenian did not attend the February 2, 2006 hearing and the hearing was held in his absence.[5]

III. Hearing Examiner's Report and Recommendation

In her Report and Recommendation, the Hearing Examiner formulated the issues as follows:

A. Is the Petition for Decertification of AFSCME, Local 2743 as the exclusive bargaining representative of DISB employees a cognizable claim? If so, what relief, if any, should be granted?

B. Should a decision on the unfair labor practice charges be rendered at this time?

(See R&R at p. 4).

A. Decertification Petition:

The Hearing Examiner found that AFSCME was originally certified by the Board to represent a group of employees in the Insurance Department of the D.C. Department of Consumer and Regulatory Affairs ("DCRA") in 1984.[6] (R&R at p. 9). In 1997, the Insurance Department was removed from DCRA and placed in DISR. DISR was abolished in June 2004 and DISB was created.

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[5]Mr. Zenian did not appear at the hearing. The Hearing Examiner issued a report and recommendation in the decertification case; vacated the portion of her previous Order which consolidated the two matters; and issued an Order directing Mr. Zenian to show cause why he did not appear at the February 2, 2006 hearing. On September 29, 2006, the Union filed a "Request for Leave to File an Interlocutory Appeal". In Slip Op. No. 832 the Board denied the Union's Request for Leave to File an Interlocutory Appeal.

[6]Pursuant to Board Rule 502.1, a labor organization seeking recognition for a unit of employees must comply with the thirty percent (30%) requirement for a "showing of interest" as well as other requirements set forth in the Board's rules. Once the Board determines that the proposed unit is appropriate, the Board conducts an election. If a majority of the employees in the proposed unit elect to be represented, the Board certifies the labor organization as the exclusive bargaining representative of the employees. Here, the certified bargaining unit represented by Local 2743 at DCRA is described in *AFSCME, Council 20, Local 2743 and D.C. Department of Consumer and Regulatory Affairs*, 31 DCR 5140, Slip Op. No. 89, PERB Case No. 84-R-03 (1984). See n. 3, above.

However, neither the Agency nor AFSCME filed a petition for unit modification with the Board.[7] Therefore, AFSCME was "never formally certified" as the exclusive bargaining representative with regard to any of the three departments at DISB: Insurance, Banking and Securities. (See R&R at p. 9). The Hearing Examiner noted that "If AFSCME is not the certified representative, it may still maintain its relationship with [the] Agency and bargaining unit workers provided that it is recognized." (R&R at p. 10).

Board Rule 505.1 allows employees to file a decertification petition.[8] AFSCME claimed that it could not be decertified as the exclusive representative of the bargaining unit if it was never properly certified. The Hearing Examiner stated that "Board Rules 505.1 and 505.2 do not require that the exclusive representative be *certified* in order to be the subject of a decertification petition. Instead, the Board provides that a *recognized* representative may also go through the same decertification process as a certified representative."[9] (R&R at p. 9). Therefore, the Hearing Examiner determined that employees in a "*recognized*" bargaining unit may petition to decertify their *recognized* representative even if it was never properly certified.

Next, the Hearing Examiner considered whether AFSCME was the recognized representative of the Petitioners. The Hearing Examiner determined that: (1) the DISB collects dues and bargains with AFSCME; (2) the DISB has represented to employees that DISB is a "closed-shop" with AFSCME as the exclusive representative; (3) AFSCME accepts the dues and represents employees; (4) the Petitioners pay dues, participate in Union activities, and serve as Union officers; (5) the DISB and AFSCME have negotiated collective bargaining agreements; (6) AFSCME has continued to be the recognized exclusive bargaining representative for more than 20 years, despite the moves from DCRA and then DISR to DISB. Based on the above, the Hearing Examiner found that all the parties, i.e., bargaining unit members, Agency, and the Union, continued to treat AFSCME as the certified representative of bargaining unit employees. (See R&R at pgs. 10-11). Furthermore, the Hearing Examiner determined that the fact that the Union and the agencies did not take the necessary action to request that the Board modify the unit does not negate the fact that Union continued to be the

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[7]Board Rule 504.1(a) provides that a petition for unit modification may be filed with the Board "[t]o reflect a change in the identity or statutory authority of the employing agency" among other reasons.

[8]Board Rule 505.1 provides as follows: "The purpose of a decertification proceeding shall be to determine whether a majority of the employees in an appropriate bargaining unit maintain their desire to be represented by the existing exclusive bargaining representative."

[9]Board Rule 502.12 provides in pertinent part that "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 documentary proof not more than one (1) year old. . ."

recognized, exclusive representative of bargaining unit employees. (R&R at p. 11). Thus, the Hearing Examiner concluded that AFSCME is the recognized representative and a decertification petition may appropriately be filed in this matter.

The Hearing Examiner noted the Union's argument that the Petitioners are barred from filing a petition. The Union cited National Labor Relations Board ("NLRB") case law in *National Sugar Ref. Co.*, 10 NLRB 1410 (1939). In *National Sugar*, the NLRB established the "contract bar rule". The "contract bar" rule provides that where a contract has been negotiated by a certified representative, the union is insulated from challenge during specified periods of time. The Union argued that if AFSCME is the recognized exclusive representative of bargaining unit employees, the petition must be dismissed under the "contract bar rule."

The Hearing Examiner noted that the law in the District of Columbia also provides for a "contract bar." She indicated that the Board will *not* entertain a decertification petition if the following conditions apply:

(1) the Board has certified an election among bargaining unit workers in the preceding twelve months;

(2) the exclusive representative was voluntarily recognized within the preceding twelve months and the recognition was certified; or

(3) a collective bargaining agreement covering bargaining unit workers is in effect, a decertification petition can only be filed:

  (a) between the 120th and 60th day before expiration of an agreement with a duration of three years or less;

  (b) after the expiration of such an agreement; or

  (c) *at any time after an agreement of more than three years duration has been in effect for 975 days.* [emphasis added].

See Board Rule 505.8.

The Hearing Examiner noted that the Agreement between the parties has a duration of more than three years, from September 6, 2002 until September 30, 2005.[10] Therefore, she concluded that

[10]She noted that Article One of the Agreement entitled "Recognition" states in pertinent part as follows:

since the agreement has a duration of over three (3) years, a petition for decertification would be timely only if filed *after* the 975th day after the agreement went into effect - i.e., after April 18, 2005. Here, the Petitioners filed their Petition for Decertification prematurely, on July 21, 2003. The Hearing Examiner noted that the National Labor Relations Board has determined that the timeliness requirements for filing a petition are discretionary. They can be waived and an election may be ordered where a petition is prematurely filed - provided that the petition would be timely filed when the matter is decided.[11]

The Hearing Examiner noted that this Board has adhered to this principle when considering a decertification petition filed by a group of employees. In *Bennett, Kyle, Queen and Wright and IAFF and D.C. Fire and Emergency Services Department*, 49 DCR 1133, Slip Op. No. 436, PERB Case No. 95-RD-01 (1995), the Board ordered an election where the Petitioners prematurely filed a decertification petition, based on the conclusion that the petition would be timely if it had been filed at the time the Board's decision was rendered. However, two conditions must be met for the bar to be lifted:

(1) the petition for decertification must comply with the remaining Board filing requirements; and

(2) at the time of this decision, a timely petition for decertification could be filed.

Upon reviewing the Petition, the Hearing Examiner found substantial compliance with Board Rule 505.2 which imposes several notice and service filing requirements. The second condition

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Section 1 - Recognition: The District of Columbia Government hereby recognizes as the sole and exclusive representative for the purpose of collective bargaining, the American Federation of State, County and Municipal Employees, AFL-CIO, District of Columbia District Council 20, and its affiliated Local Unions, for each of the bargaining units under the personnel authority of the Mayor for which AFSCME is the certified collective bargaining representative.

Section 4 - Unit Clarification(s): The Union and the Employer shall file a Joint Petition with the Public Employee Relations Board to clarify and correct inaccuracies contained on the current unit certifications. Prior to filing of the joint petition, the Union and Employer shall confer on the revised unit descriptions.

[11] *See, Deluxe Metals Furniture Co.*, 121 NLRB No. 135 (1958). *See also, Foote Memorial Hosp.*, 230 NLRB No. 88; *Royal Crown Cola Co.*, 150 NLRB No. 159; *Silas Mason Co.*, 142 NLRB No. 83.

provides that a petition for decertification would be timely if filed at the time the Board's decision is issued. The Hearing Examiner determined that pursuant to Board Rule 505.8, a petition for decertification under this bargaining agreement would be valid at any time after April 18, 2005, - the 975th day after the agreement went into effect. (R&R at pgs. 12-13). The record in this matter closed on August 5, 2006, and no decision was yet issued by the Board. Thus, the Hearing Examiner concluded that the petition is timely and will continue to be timely when the Board renders its decision.

Additionally, the Hearing Examiner noted that under Board rules, "[a] petition for decertification filed by an employee shall be accompanied by a showing that at least thirty percent (30%) of the employees in the bargaining unit no longer desire to be represented by the exclusive representative." Board Rule 505.3. Before the Hearing Examiner, the Petitioners asserted that they met this prerequisite by submitting the required documentation with their Petition. (Petition for Decertification at p. 3).

In conclusion, the Hearing Examiner recommended that the Board permit the election sought by the petitioners in this matter to go forward. The Hearing Examiner further recommended that the Board submit a copy of the decertification petition to DISB and direct DISB to prepare an alphabetized list of all employees in the unit for the last pay period prior to the filing of the petition pursuant to Board Rule 505.9. The list and any comments regarding the petition should be filed with the Board within 20 days of the transmittal from the Board. Upon receipt of the list and comments, the Board, or its designee, shall make a determination regarding the "adequacy of the showing of interest" consistent with Board Rule 505.10.

B. Unfair Labor Practice Complaint in PERB Case No. 04-U-30

The Petitioners also filed an unfair labor practice complaint in this matter. That case was assigned PERB Case No. 04-U-30. The complaint was consolidated with the decertification petition and the cases were held in abeyance for approximately one year while the parties engaged in mediation. When mediation proved to be unsuccessful, the matters were returned to the Hearing Examiner. After several continuances, a hearing was scheduled. The Hearing Examiner: (a) denied AFSCME's Motion to dismiss; (b) consolidated the two matters; and (c) scheduled an evidentiary hearing for February 2, 2006. Vartan Zenian did not attend the February 2, 2006 hearing. Subsequently, the Hearing Examiner determined that he was the sole complainant in the unfair labor practice case. As a result, on September 13, 2006, the Hearing Examiner: (1) issued a Report and Recommendation in the decertification case; (2) vacated the portion of her previous Order which consolidated the two matters; and issued an Order directing Mr. Zenian to show cause why he did not appear at the February 2, 2006 hearing to prosecute his unfair labor practice complaint. The Hearing Examiner recommended that the unfair labor practice complaint be dismissed. The Board adopted the Hearing Examiner's recommendation and dismissed Mr. Zenian's complaint. See Slip Op. No. 890, PERB Case No. 04-U-30 (2007). The complaint will not be addressed here.

IV. Exceptions in PERB Case No. 03-RD-02

No exceptions were filed concerning the Hearing Examiner's findings concerning the contract bar issue. The Board finds that the Hearing Examiner's findings on this issue are reasonable, based on the record and consistent with Board precedent.[12] Thus, we adopt the Hearing Examiner's conclusion that the petition was timely filed.

On September 29, 2006, AFSCME filed timely exceptions to four (4) findings and conclusions by the Hearing Examiner concerning the decertification petition. The first two findings by the Hearing Examiner which are subject to the Union's exceptions are as follows:

1. "Board Rule 505.1 and 505.2 permit an exclusive or recognized bargaining unit representative to be decertified even without formal certification;"

2. "The fact that the Union and the agencies did not take the necessary action to modify the unit, does not negate the fact that [the] Union continued to be the recognized exclusive representative of bargaining unit workers."

AFSCME argues that under the Comprehensive Merit Personnel Act (CMPA), "exclusive recognition" is a legal status granted by the Board and there is no allowance in the statute for informal recognition by an employer, absent a showing of interest by the affected employees. (See footnote No. 9). On this basis, AFSCME asserts that only a union that has been certified by the Board is granted *exclusive recognition* status.

In their Opposition to AFSCME's exceptions, the Petitioners counter that AFSCME is their recognized representative. The Petitioners cite D.C. Code § 1-617.10(b)(1), which allows an agency to *recognize* a union.[13] The Petitioners also cite Board Rule 505.2(f) which requires the petitioner in a decertification petition to specify the date that the union was recognized and "the method of recognition, if known."

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[12]See Board Rule 505.8(c); see also, *Bennett, Kyle, Queen and Wright and IAFF and D.C. Fire and Emergency Services Department*, Slip Op. No. 436 at pgs.3-4, PERB Case No. 95-RD-01 (1995), where the Board stated, "like the National Labor Relations Board, we hold that an election may be directed even if a petition was prematurely filed if a timely petition could be filed at the time the case is decided."

[13]D.C. Code § 1-617.10(b)(1) provides as follows: "The employer may recognize, without an election, a labor organization as the exclusive representative for purpose of collective bargaining if an alternative method for determining majority status, such as a card check showing actual membership in the labor organization seeking recognition, has been approved by the Board."

AFSCME asserts that only a union that has been certified by the Board is granted *exclusive recognition* status. AFSCME's argument suggests that because the parties never followed the Board process to properly obtain *exclusive recognition* status or status as the *recognized* representative, AFSCME is not the recognized representative of the unit, and thus, is not subject to decertification. This argument is a repetition of the argument presented and rejected by the Hearing Examiner. Therefore, we find that AFSCME is merely disagreeing with the Hearing Examiner's findings and asking the Board to adopt its interpretation of the law. This we will not do. There is nothing in the Board rules that requires *exclusive recognition* status for a decertification petition.

Board Rule 505.2 provides that the petitioner in a decertification petition must inform the Board of the "method of recognition, if known" of the bargaining unit. This infers that there is more than one way to achieve the recognition of a bargaining unit. As AFSCME claimed, one method of establishing recognition status would be to present a showing of interest by the affected employees to the Board. However, this was not done in the present case with respect to the DISB employees. Here, all parties simply acted as though AFSCME was the *recognized* representative of the employees in the Department of Insurance, Securities and Banking. It is undisputed that the Union and DISB failed to avail themselves of the statutory right to seek certification, *recognition* or *exclusive representative* status, by utilizing the Board's processes.[14] Thus, the Hearing Examiner found that "the Union has continued to be the recognized exclusive bargaining representative for more than 20 years, despite the moves from DCRA and then DISR to DISB." (R&R at p. 11)

We agree with the Hearing Examiner's findings that AFSCME is the recognized representative of the Petitioners. Furthermore, we conclude that the Hearing Examiner properly found that "the fact that the Union and the Agency did not take necessary action to modify the unit, does not negate the fact that the Union continued to be the recognized exclusive representative of bargaining unit workers" - thus making it subject to a decertification petition. (R&R at p. 11). To conclude as AFSCME suggests, that because it did not properly seek certification by the Board, it is not subject to decertification - would be tantamount to allowing the parties to the collective bargaining agreement to benefit from their failure to seek exclusive recognition status under the Board's processes.

The Hearing Examiner's finding that AFSCME has been the recognized representative of the Petitioners are reasonable and based on the record. Therefore, we adopt her findings in this regard. As a result, we conclude that the Union is subject to the decertification provisions found in Board Rules 505.1 through 505.15.

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[14]Board Rule 504.1 provides as follows: "A petition for *unit modification* of either a compensation or non-compensation unit may be filed by a labor organization, by an employing agency or jointly." In addition, Board Rule 506.1 provides that: "A petition for *clarification of an existing unit* may be filed by the agency or by the labor organization which is party to the certification. . . ." (emphasis added).

AFSCME's two other exceptions pertain to the formulation of the appropriate bargaining unit for purpose of the election. Specifically, AFSCME's two other exceptions focus on the following recommendations by Hearing Examiner:

> 3. "The Hearing Examiner recommends that the Board permit the election sought by [the] petitioners in this matter to go forward. If AFSCME is not decertified, it may then file a petition consistent with Article I of the Master Agreement and PERB Rules to modify the unit."
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> 4. The Hearing Examiner recommends that the Board "[s]ubmit a copy of the decertification petition to DISB and direct DISB 'to prepare an alphabetic list of all employees in the unit for the last pay period prior to [the] filing of the petition.'"

AFSCME asserts that for the Board to order a decertification election, there must be a clearly defined bargaining unit. AFSCME claims that without a defined unit, there would be the question of how many employees are in the unit and what number of employees constitute a thirty percent (30%) showing of interest among employees. AFSCME contends that by directing DISB to prepare a list of the employees in the unit, the Board is allowing the Agency to define the unit. (See Exceptions at p. 5).

In their Opposition to AFSCME's exceptions, the Petitioners claim that the Hearing Examiner has clearly identified 62 employees of the Department of Insurance, Securities and Banking. (See Opposition at pgs. 2-3).

The Board is empowered by statute to make bargaining *unit determinations.*[15] D.C. Code § 1-617.09(a) (2001 ed.), requires that a community of interest exist among employees in order for a unit to be found appropriate by the Board for the purpose of collective bargaining over terms and conditions of employment. An appropriate unit must also promote effective labor relations and efficiency of agency operations. Furthermore, membership in a labor organization may be considered as *one* factor in evaluating the community of interest of employees in a proposed unit. Under the circumstances of this case, we find that a community of interest prevails among those employees at the Department of Insurance, Securities and Banking whose representative was *recognized* but not certified. Therefore, the Board concludes that the appropriate unit in this case consists of those employees at the Department of Insurance, Securities and Banking whose representative was recognized, but not certified.

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[15]See D.C. Code § 1-617.10.

Regarding the question of representation, we believe that the unit described in the petition is an appropriate unit for a decertification election. Therefore, an election shall be held for professional and non-professional employees, excluding attorneys, members of the office of the controller, management executives and other employee who are excluded by statute. Board Rule 502.4 provides that "[t]he adequacy of the showing of interest shall be determined administratively by the Board or its designee". Also, the Board has determined that the Petitioners have properly presented a thirty percent (30 %) showing of interest.

Whereas the Board has found that the Petition in this matter was accompanied by a thirty percent (30 %) showing of interest for decertification of the exclusively recognized representative, the Board hereby adopts the Hearing Examiner's recommendation to permit the election sought by the Petitioners in this matter to go forward. If AFSCME is not decertified, it may then file a petition consistent with Board Rules and Article I of the Master Agreement to modify the certified unit.

ORDER

IT IS HEREBY ORDERED THAT:

1. An election is directed pursuant to D.C. Code § 1-617.10(b)(2) of the Comprehensive Merit Personnel Act to determine whether employees in the bargaining unit described in paragraph 2 of this Order, wish to continue to be represented by the American Federation of State, County and Municipal Employees, Local 2743, or not, for purposes of collective bargaining over compensation and other terms and conditions of employment.

2. For purposes of this decertification election, the appropriate unit consists of employees at the Department of Insurance and Banking ("DISB") whose exclusive representative, American Federation of State, County and Municipal Employees, Local 2743 ("AFSCME, Local 2743"), was recognized but not certified:

> Professional and non-professional employees at the Department of Insurance, Securities and Banking (DISB); excluding attorneys, members of the office of the controller, 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. 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.

June 20, 2007

CERTIFICATE OF SERVICE

This is to certify that the attached corrected Decision and Order in PERB Case No. 03-RD-02 was transmitted via Fax and U.S. Mail to the following parties on this the 20th day of June 2007.

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