

**Notice:** This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
Vartan Zenian,	)	
	)	
Complainant <sup>1</sup> ,	)	
	)	
v.	)	PERB Case No. 04-U-30
	)	
American Federation of State, County and Municipal Employees, Local 2743,	)	Opinion No. 832
	)	Motion for Interlocutory Appeal
and	)	
	)	
Department of Insurance, Securities and Banking,	)	
	)	
Respondents.	)	
Vartan Zenian, et al.,	)	
	)	
Petitioners,	)	
	)	
and	)	PERB Case No. 03-RD-02
	)	
American Federation of State, County and Municipal Employees, Local 2743,	)	
	)	
Labor Organization/Respondent.	)	

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<sup>1</sup>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 unfair labor practices or violating the standards of conduct for a labor organization is designated as "respondent". The Department of Insurance, Securities and Banking is not named as a party in the decertification petition; however, the Department of Insurance, Securities and Banking is a named respondent in the unfair labor practice complaint.

## DECISION AND ORDER

### **I. Statement of the Case:**

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 ("AFSCME" or "Union") as the exclusive bargaining representative for a group of employees employed by the District of Columbia Department of Insurance, Securities and Banking ("DISB" or "Agency"). The matter was referred to a Hearing Examiner. AFSCME filed a Motion to Dismiss. Subsequently, Vartan Zenian filed an unfair labor practice complaint which raised allegations similar to those in the decertification petition. The Hearing Examiner: (a) denied AFSCME's motion to dismiss; (b) consolidated the two matters; and (c) scheduled an evidentiary hearing. Vartan Zenian did not attend a February 2, 2006 scheduled hearing. 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 (3) issued an Order directing Mr. Zenian to show cause why he didn't appear at the February 2, 2006, hearing to prosecute his unfair labor practice complaint.

On September 29, 2006, AFSCME filed a "Request for Leave to File an Interlocutory Appeal," requesting that the Board grant AFSCME leave to file an interlocutory appeal concerning the Hearing Examiner's Show Cause Order directing that Mr. Zenian show cause why he failed to appear at the February 2, 2006 hearing.<sup>2</sup> In addition, AFSCME is asking the Board to remove the Hearing Examiner from presiding over PERB Case No. 04-U-30. On October 12, 2006, Mr. Zenian filed an opposition to AFSCME's request. AFSCME's submission and Mr. Zenian's opposition are before the Board for disposition.

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<sup>2</sup>"The Hearing Examiner concluded at least preliminarily, that there was good cause for Mr. Zenian's absence from the February 2, 2006 proceeding [and that] [u]pon consideration and reflection, she believes she should have delayed the [unfair labor practice] portion of the case and allowed Mr. Zenian to submit good cause why a continuance should be granted under the emergency circumstances [he alleged]. In order to meet his burden of proof, Mr. Zenian must establish that he is a victim of a standard of conduct and /or unfair labor practice. He was not given the opportunity to do so. Further, he did not authorize anyone to act on his behalf. Based on the unforeseen family emergency, Mr. Zenian preliminarily has satisfied the requirement under [Board] Rule 550.6 that a continuance will be granted during the five day period immediately preceding the date of the hearing only under 'the most extraordinary circumstances'." (September 13, 2006 Order issued by Hearing Examiner Hochhauser at p. 4).

**II. Discussion:**

AFSCME disagrees with the Hearing Examiner's ruling vacating the Order which consolidated the two cases and directing Mr. Zenian to show cause for his absence, and believes that it should be allowed to file an interlocutory appeal concerning the Hearing Examiner's ruling.

Board Rule 554.1 provides as follows:

Unless expressly authorized by the Board, interlocutory appeals to the Board of rulings by the Executive Director, Hearing Examiner or other Board agents shall not be permitted. Exceptions to such rulings shall be considered by the Board when it examines the full record of the proceedings.

Under Board Rule 554.1, the Board will: (1) not allow interlocutory appeals unless expressly authorized by the Board and (2) consider a party's exception to a ruling when it examines the full record of the proceeding. AFSCME asserts that in the present case, the Board should authorize the Union to file an interlocutory appeal because:

Together, these cases have dragged on for more than three years. The unfair labor practice has been before Hochhauser since March of 2005. That she failed to read the compliant until after the close of the hearing is an error entirely of her own making. . . . The Union must not be forced to suffer through a form of double jeopardy and additional litigation costs to repair Hochhauser's mistakes and to satisfy her attempts to bend over backwards to support this pro se litigant. . . . There is simply no reason that this case should not have been finally decided on the record presented.

Again, this is not an instance where the complainant has sought relief from a procedural error. Instead, this is an instance where the Hearing Examiner has, in a sense, granted an interlocutory appeal that the complainant never filed. . . .

This attempt to retry the case is beyond the authority of a hearing examiner and is wholly inappropriate and unfair. The sole expressed basis for the order is the Hearing Examiner's own admitted incompetence resulting from her failure to read the complaint. Under Hochhauser's direction, the Union is apparently subject to limitless liability. Whether Hochhauser's order is the result of her own

economic self-interest in prolonging this matter; sheer incompetence; or simply her unbridled hostility to the Union is unclear. In any event, to allow her jurisdiction to continue over this matter imposes an injustice on the union. The Union requests that the Board conduct its own *de novo* review of the existing record and rule on the unfair labor practice charge. (AFSCME's Motion at pgs. 6-7)

In view of the above, AFSCME is requesting that the Board: (1) grant its request for interlocutory appeal; (2) review the Hearing Examiner's ruling bifurcating the two cases and ordering Mr. Zenian to show cause why the unfair labor practice complaint should not be dismissed; (3) conduct its own *de novo* review of the record and rule on the unfair labor practice charge and (4) remove the Hearing Examiner from this case.

Mr. Zenian filed an opposition to AFSCME's motion. In his opposition, Mr. Zenian states the following:

Although AFSCME fills its motion with criticism and personal attacks on the Hearing Examiner, the record shows that AFSCME itself passed up an opportunity to correct the Hearing Officer's misunderstanding. As the Hearing Officer's September 13, 2006 [order] shows, the Hearing Officer was told by Yvette Alexander that she was co-complainant in this case, and the Hearing Officer proceeded on the basis that Alexander could present complainant's case. . . .AFSCME chose to be silent until the hearing closed, whereupon it filed a written closing argument arguing that Zenian was the sole complainant . . . .

The Hearing Officer's misunderstanding was not due to negligence, as AFSCME charges, but followed from the fact that three employees served as co-petitioners on the consolidated decertification petition, 02-RD-02, and that co-petitioner Alexander understood and stated that she was a co-complainant in this case as well. Rather than correcting this at the hearing, AFSCME held back to try to entrap the Hearing Examiner, the Complainant and the unfair labor practice process by only objecting to Zenian's February 2 absence after the close of the February 2 hearing.

The Hearing Officers' (*sic*) show cause order, to allow a ruling as to whether the unfair labor practice/standards of conduct hearing should be rescheduled, is reasonable and appropriate. There is no basis for

AFSCME's request to take this matter away from the Hearing Examiner prematurely. (Complainant's Opposition to AFSCME's Motion at pgs. 1-2)

After reviewing the pleadings, we find that at the November 12, 2004 hearing concerning the decertification petition, AFSCME's Counsel indicated that the Petitioners had also filed an unfair labor practice complaint which raised allegations against the Union and Agency that "incorporates by reference everything that was in the decert[ification] petition". (Tr I, 14) In response to AFSCME's statement, the Hearing Examiner discussed consolidation with the parties, and gave them an opportunity to brief the issue. Subsequently, "[o]n February 1, 2005, the Hearing Examiner issued an Order to Show Cause why the [unfair labor practice complaint] and the decertification cases should not be consolidated. [The Hearing Examiner] noted that [the] Complainants were raising similar allegations in both matters, that the evidence needed to support the claims were similar and that the relief was the same. AFSCME opposed consolidation based on its contention that the decertification petition should be dismissed. [The] Petitioners did not oppose consolidation. By Order dated March 7, 2005, the matters were consolidated and a hearing was scheduled." (September 13, 2006 Order issued by Hearing Examiner Hochhauser at p. 2).

We find that AFSCME's argument concerning the question of consolidation raises no new arguments and is a repetition of the argument considered and rejected by the Hearing Examiner. Disagreement with a Hearing Examiner ruling does not justify the Board taking the extraordinary step of allowing AFSCME's request for interlocutory appeal. Therefore, we deny AFSCME's request for interlocutory appeal. However, we point out that once the Hearing Examiner issues her Report and Recommendation in this matter (PERB Case No. 04-U-30), all of the parties will have an opportunity to file exceptions to the Hearing Examiner's findings and to challenge this and any other ruling at the end of the proceeding.

We now turn to AFSCME's request that the Hearing Examiner be removed from this case. Board Rule 557.1 provides that "[a] hearing examiner or Board member shall withdraw from proceedings whenever the person has a conflict of interest." In the present case, AFSCME has not presented any evidence that suggests that the Hearing Examiner has a conflict of interest. Instead, AFSCME argues that the Hearing Examiner should not allow Mr. Zenian to show cause for his absence at the February 2, 2006 hearing because "[t]here is simply no reason that this case should not have been finally decided on the record presented." (See AFSCME's Motion at p. 7) We find that AFSCME's reason for requesting that the Hearing Examiner be removed from this case is based on its disagreement with the Hearing Examiner's ruling. A disagreement with the Hearing Examiner's ruling does not satisfy the requirement of Board Rule 557.1. Therefore, we deny AFSCME's request that the Hearing Examiner be removed.

The Board is deeply offended by the language used by counsel for AFSCME in its motion. We believe that personal attacks made against employees of the Board or the Board's hearing examiners do not serve any parties' interest and will not be tolerated. We expect parties to focus on presenting facts and arguments and to refrain from such personal attacks.

For the reasons discussed, we deny AFSCME's requests: (a) for interlocutory appeal;<sup>3</sup> (b) that the Board conduct its own de novo review of the existing record and rule on the unfair labor practice; and (c) that the Hearing Examiner be removed from this case.

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The American Federation of State, County and Municipal Employees, Local 2743's ("AFSCME") "Request for Leave to File an Interlocutory Appeal," is denied.
2. AFSCME's request that the Hearing Examiner be removed from this case, is denied.
3. AFSCME's request that the Board conduct its own de novo review of the existing record and rule on the unfair labor charge, is denied.
4. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

December 20, 2006

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<sup>3</sup>In light of this ruling, we will not consider AFSCME's request that we review the Hearing Examiner's ruling bifurcating the two cases and ordering Mr. Zenian to show cause why the unfair labor practice complaint should not be dismissed.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order for the Interlocutory Appeal in PERB Case No. 04-U-30 was transmitted via Fax and U.S. Mail to the following parties on this the 20<sup>th</sup> day of December 2006.

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Certificate of Services  
PERB Case No. 04-U-30 and 03-RD-02  
Page 2

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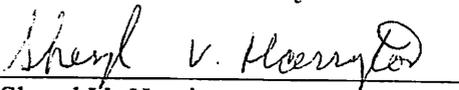
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