

EXECUTIVE OFFICE OF THE MAYOR
Serve DC

PUBLIC NOTICE

NOTICE OF FUNDING AVAILABILITY

DISTRICT OF COLUMBIA
COMMISSION ON NATIONAL AND COMMUNITY SERVICE

K-12 Learn and Serve America School-Based Homeland Security Grants

Summary: Serve DC, the DC Commission on National and Community Service, announces the availability of K-12 Learn and Serve America School-Based Homeland Security funds for **grants up to \$7,500**. Applicants must provide a total of 25% match of the total project budget in cash or in-kind non-Federal sources. The actual number and dollar amount of the awards will depend upon the number of approved applications received.

Learn and Serve America is a program of the Corporation for National and Community Service that supports service-learning in K-12 schools, higher education institutions, and community-based organizations. Service-learning activities engage young people as change agents and civic learners through addressing community needs. Proposed programs will strengthen communities through partnership development, address specific community needs, and promote positive youth development. Awards will be made to K-12 public schools including charter schools in the District of Columbia to incorporate service-learning as an educational strategy in the classroom. This initiative will support program activities that focus on **homeland security issues and disaster preparedness**. Applicants will be required to develop service-learning programs in support of two national service days, One Day's Pay (September 11, 2007) and Martin Luther King, Jr. Day (January 21, 2008).

Criteria for eligible applicants: Eligible applicants are K-12 public schools including public charter schools in partnership with at least one additional community partner organization. Public school partners may include private/independent schools, for-profit businesses, institutions of higher education, and other non-profits including faith-based organizations. Schools and partnership organizations are responsible for implementation, replication, and/or expansion of service-learning activities in the school and local community. All projects must operate a service-learning program within the District of Columbia. Current Learn and Serve sub-grantees receiving funds during the program period of June 1, 2007 through January 31, 2007 are not eligible to apply.

An organization described in Section 501 (c) (4) of the Internal Revenue Code, 26 U.S.C. 501 (c) (4), that engages in lobbying activities is not eligible to apply, serve as a host site for youth participants, or act in any type of supervisory role in the program. **Individuals are not eligible to apply.**

All eligible applicants must meet all of the applicable requirements contained in the application guidelines and instructions. The Request for Application (RFA) will be released

on March 9, 2007 at 9:00 a.m. **The deadline for submission to Serve DC is April 27, 2007 at 5:00 p.m. There will be no exceptions made for late applications.**

Serve DC has scheduled three **optional, recommended** technical assistance sessions for mini-grant applicants. The schedule for technical assistance sessions is as follows: One Judiciary Square, 441 4th Street NW, Conference Room 1114 South, from 5:00-6:30 PM on March 21, 2007, March 26, 2007, and April 9, 2007. To RSVP for a training session, contact Kristen Henry, Serve DC Learn and Serve Coordinator, at (202)-727-8003 or kristen.henry@dc.gov. Frequently Asked Questions will be posted on the Serve DC website and updated throughout the application period.

Applications can be obtained starting at 9:00 AM on March 9, 2007 from the Serve DC office at 441 4th Street NW, Suite 1140N, Washington, DC 20001 or downloaded from the Serve DC website at www.serve.dc.gov. For additional information please call Kristen Henry, Learn and Serve Coordinator at (202) 727-8003.

Millicent Williams
Executive Director
Serve DC

EXECUTIVE OFFICE OF THE MAYOR
Serve DC

PUBLIC NOTICE

NOTICE OF FUNDING AVAILABILITY

DISTRICT OF COLUMBIA
COMMISSION ON NATIONAL AND COMMUNITY SERVICE

Learn and Serve America Community-Based Summer Mini-Grants

Summary: Serve DC, the DC Commission on National and Community Service, announces the availability of Learn and Serve America Community-Based Summer funds for **grants up to \$7,500**. Awards will be made to up to 20 non-profit organizations in the District of Columbia to incorporate service-learning into summer programming in June-August 2007. Applicants must provide a total of 25% match of the total project budget in cash or in-kind non-Federal sources. The actual number and dollar amount of the awards will depend upon the number of approved applications received.

Learn and Serve America is a program of the Corporation for National and Community Service that supports service-learning in K-12 schools, higher education institutions, and community-based organizations. Service-learning activities engage young people as change agents and civic learners through addressing community needs. Proposed programs will strengthen communities through partnership development, address specific community needs, and promote positive youth development.

Criteria for eligible applicants: Eligible applicants are 501 (c) (3) non-profit organizations or community-based organizations in partnership with at least one additional community organization. Service-learning programs must operate within the District of Columbia. Partners may include public/private/independent schools, for-profit businesses, institutions of higher education, and other non-profits including faith-based organizations. The lead applicant and partnership organizations are responsible for implementation, replication, and/or expansion of service-learning activities in the school and local community. Learn and Serve America Community-Based sub-grantees receiving Learn and Serve America funding during the mini-grant program period of May 29, 2007-August 31, 2007 are not eligible to apply.

An organization described in Section 501 (c) (4) of the Internal Revenue Code, 26 U.S.C. 501 (c) (4), that engages in lobbying activities is not eligible to apply or act in any type of supervisory role in the program. Individuals are not eligible to apply.

All eligible applicants must meet all applicable requirements contained in the application guidelines and instructions. The Request for Application (RFA) will be released on March 9, 2007 at 9:00 a.m. **The deadline for submission to Serve DC is April 13, 2007 at 5:00 p.m. No late applications will be accepted.**

Serve DC has scheduled three **optional**, recommended technical assistance sessions for mini-grant applicants. The schedule for technical assistance sessions is as follows: One

Judiciary Square, 441 4th Street NW, Conference Room 1114 South, from 5:00-6:30 PM on March 21, 2007, March 26, 2007, and April 9, 2007. To RSVP for a training session, contact Kristen Henry, Serve DC Learn and Serve Coordinator, at (202)-727-8003 or kristen.henry@dc.gov. Frequently Asked Questions will be posted on the Serve DC website and updated throughout the application period.

Applications can be obtained starting at 9:00 AM on March 9, 2007 from the Serve DC office at 441 4th Street NW, Suite 1140N, Washington, DC 20001 or downloaded from the Serve DC website at www.serve.dc.gov. For additional information please call Kristen Henry, Learn and Serve Coordinator, at (202) 727-8003.

Millicent Williams
Executive Director
Serve DC

FRIENDSHIP PUBLIC CHARTER SCHOOL
REQUEST FOR PROPOSALS
LEGAL SERVICES FOR SPECIAL EDUCATION

Interested parties shall MAIL the response to this RFP by submitting (4 copies, 1 original inclusive) sealed qualification statements and by addressing the specific proposal requirements as requested in this RFP in an envelope clearly marked "**RFP — SPECIAL EDUCATION LEGAL SERVICES**" to

Ms. Valerie Holmes
Friendship Public Charter School (FPCS)
Suite 200
120 Q Street, NE
Washington, DC 20002

By no later than: March 30, 2007

Introduction

FPCS is soliciting proposals and qualifications statements from interested parties having specific interest and qualifications in the areas identified in this solicitation. A selection committee will review and evaluate all qualification statements and proposals and may request that the bidders make oral presentations by phone or in person and or provide additional information. The selection committee will rely on the qualification statements and proposals in selection of finalists and, therefore, bidders should emphasize specific information considered pertinent to this solicitation and submit all information requested.

Friendship Public Charter School Inc. ("Friendship") reserves the right to reject any and all qualification statements, to cancel this solicitation, and to waive any informalities or irregularities in procedure.

DC Based Law Firms and "LSDBE" contractors are encouraged to submit proposals

Project Scope

It is the intent of this RFP to identify a law firm to provide legal counsel to Friendship Public Charter School. The firm must be capable of providing legal counsel for but, not limited to special education laws, and IDEIA 2004. The firm must also, possess a strong understanding of Chapters 25 and 30 dealing with compliances. The firm must be able to provide legal counsel on other matters, such as, due process issues, litigation, file review and other legal support as needed.

Proposal Requirements

Proposals shall include, at a minimum, the following information organized as follows in a qualification statement:

1. A brief discussion of the company/firm, its history, and services offered.
2. Resumes of the attorneys who will provide services.
3. Years of experience in Washington, DC
4. Names and contact information of at least three non-profit clients.
5. A proposed unsigned engagement letter, which includes: terms, fees, estimated hours, and amount contract will not to exceed.

Law firms must meet the following qualifications:

Special Education law counsel clients' must include at least one charter school in the District of Columbia.

For further information, contact Ms. Valerie Holmes at 202-281-1722.

DEPARTMENT OF HEALTH

NOTICE OF CERTIFICATION AND DECERTIFICATION

The Director of the Department of Health, pursuant to the authority set forth in Reorganization Plan No 4 of 1996, hereby gives notice of certification of six drugs and decertification and removal of five drugs from the formulary of the District of Columbia Acquired Immunodeficiency Syndrome Drug Assistance Program (ADAP). The drugs that have been approved by the Food and Drug Administration and certified for inclusion in the ADAP program are Zyvox (linezolid), oral forms only, approved April 18, 2000; Geodon (ziprasidone hydrochloride), oral form only, approved March 29, 2006; Seroquel (quetiapine fumarate), approved September 22, 1997; Abilify (aripiprazole), approved November 15, 2002; Haldol (haloperidol), oral forms only, approved April 12, 1967; and Cogentin (benztropine), oral forms only, approved March 5, 1954.

The drugs that have been decertified and removed from the ADAP formulary are Didanosine (Videx) buffered tablets, Zalcitabine (Hivid), Saquinavir (Fortovase) soft gel 200 mg., Amprenavir (Agenerase), and Lopinavir/ritonavir combination (Kaletra) 133/33 mg. soft gel caps. The HADAC recommended decertification and removal of the listed drugs from the formulary because the drugs are no longer being manufactured or have been replaced with more effective formulations.

The drugs listed above have been certified or decertified on the recommendation of the HIV/AIDS Drugs Advisory Committee (HADAC) at meetings held on July 19, 2006, and January 17, 2007.

ADAP is designed to assist low income individuals with Acquired Immunodeficiency Syndrome (AIDS) or related illnesses to purchase certain physician-prescribed, life-sustaining drugs that have been approved by the U.S. Food and Drug Administration for the treatment of AIDS and related illnesses. Rules for this Program may be found at 29 DCMR § 2000 *et seq.*

For further information, please contact Gerry Rebach, Public Health Analyst AIDS Drug Assistance Program, Administration for HIV/AIDS Administration on (202) 671-4949.

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

_____)
In the Matter of:)
)
Metropolitan Police Department,)
)
	Petitioner,)
)
	and)
)
Fraternal Order of Police/Metropolitan Police)
Department Labor Committee,)
)
	Respondent.)
_____)

PERB Case No. 04-A-04
Opinion No. 795
FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

The Metropolitan Police Department ("Agency" or "MPD") filed an Arbitration Review Request ("Request"). MPD seeks review of an Arbitration Award ("Award") that sustained a grievance filed by the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union"). FOP filed a class grievance alleging that MPD violated Articles 24 and 30 of the parties' collective bargaining agreement ("CBA") by changing the work shift of five bargaining unit members without satisfying a fourteen-day notice requirement. Arbitrator Michael Wolf found that Article 24 of the CBA was violated and awarded the Grievants overtime pay at the rate of time and a half for unscheduled hours worked. MPD is appealing the Award claiming that on its face it is contrary to law and public policy. FOP opposes the Request.

The issue before the Board is whether "the award on its face is contrary to law and public policy". D.C. Code § 1-605.02 (6) (2001 ed.).

Decision and Order
PERB Case No. 04-A-04
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II. Discussion

Article 24 of the CBA, requires that MPD shall provide officers with fourteen days notice prior to making any changes in their work schedules. Between July 25 and August 5, 2002, five police officers were given notice of a change in their regularly scheduled hours of work. The notice was not given fourteen days in advance, as required by Article 24, Section 1.¹ As a result, the five officers requested overtime pay for the hours worked in excess of their previously scheduled shift. The requests were denied by their respective supervisors. Therefore, on August 6, 2002, FOP filed a class grievance on behalf of the five bargaining unit members alleging a violation of Articles 24 and 30² of the CBA. The grievance stated that between July 26 and August 5, 2002, the five police officers named in the grievance "were required, without prior notification by their respective supervisors to work hours in excess of their regularly scheduled tours of duty." (Award at p. 4). Consistent with the language in Article 24, Section 1 of the CBA, FOP argued that the Grievants and all other similarly situated employees were entitled to "overtime pay at the rate of time and a half" for each hour the Grievants worked outside of their regular schedule.

MPD countered that pursuant to a Congressional mandate, the overtime provisions in the CBA have been suspended and are superseded by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* In light of this, MPD asserted that it was barred by the FLSA from paying the Grievants overtime pay at the rate of time and a half. (Award at p. 6). As a result, MPD denied the grievance.

FOP appealed the grievance to arbitration. At arbitration, MPD argued that the overtime provisions in the CBA were rendered inoperative by a December 27, 1996 Order of the District of Columbia Financial Responsibility and Management Assistance Authority ("Control Board"). Specifically, MPD asserted that this Order suspended the overtime provisions found in Article 24 and Article 30 of the CBA and mandated that overtime must be paid pursuant to the provisions of the

¹Article 24, Section, "Scheduling", states: "Notice of any changes to [. . .] days off or tours of duty shall be made fourteen (14) days in advance. *If notice is not given of changes fourteen (14) days in advance the member shall be paid, at his or her option, overtime pay or compensatory time at the rate of time and one half, in accordance with the provisions of the Fair Labor Standards Act.*" (Emphasis added).

²Article 30, "Overtime/Compensatory Time", states as follows: "Compensatory time and overtime shall be governed strictly by the [FLSA]." With regard to this language, Article 30 notes that: "[The prior language of Article 30] is recognized by the parties to be inoperative as the result of an Order dated December 27, 1996, from the former District of Columbia Financial Responsibility and Management Assistance Authority, that was subsequently ratified and approved by an Act of Congress, signed by the President on July 24, 2001." (Emphasis added).

Decision and Order

PERB Case No. 04-A-04

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FLSA.³ Furthermore, MPD claimed that the Control Board's Order was made permanent by Congress in Section 156(a) of the FY 2001 Appropriations Act. (Award at p. 8). Finally, MPD contended that the FLSA allows overtime pay only after employees actually work 40 hours in a workweek or, for uniformed personnel, after completing their tour of duty. *Id.* §207(a)(1). Therefore, MPD argued that the Grievants were not entitled to a remedy because there was no allegation that they had worked beyond their tour of duty. (Award at pgs. 8-9).

FOP countered that the Grievants' right to obtain overtime pay under Article 30 of the CBA was not permanently rescinded as a result of the enactment of the FY 2001 Appropriations Act. Specifically, FOP asserted that the Appropriations Act was operative only for the duration of fiscal year 2001, expiring on September 30, 2001. Therefore, FOP argued that the language of Article 30 which makes reference to the Appropriations Act ceased to be effective as of that date. (Award at p. 7). As a result, the overtime provisions of the FLSA no longer supersede the parties' CBA.

MPD argued that pursuant to Article 30 of the CBA and the FLSA, the Grievants would be entitled to overtime *only* if they worked beyond their full tour of duty. Arbitrator Wolf concluded, however, that the case could be decided exclusively on the basis of the language contained in Article 24, Section 1 of the CBA. After reviewing the stipulated facts, Arbitrator Wolf found that MPD violated Article 24 of the CBA. As a result, he ordered that the Grievants be compensated at the rate of time and a half. In view of the above, the Arbitrator opined that it was "unnecessary to decide whether Article 30, as originally negotiated, remains effective." (Award at p. 11). He considered and rejected MPD's argument, cited above, finding that it would render the remedy provision of Article 24 of the CBA meaningless. (Award at p. 15). Therefore, Arbitrator Wolf found the time and one half premium under Article 24 to be the proper remedy for MPD's decision to change the Grievants' schedule without complying with the fourteen day notice requirement contained in the CBA. (Award at p. 17).

³On December 27, 1996, the control Board issued an order which provided that "District [government] employees would receive overtime only pursuant to the [Fair Labor Standards Act] notwithstanding any [District of Columbia] law, rule, regulation or collective bargaining agreement." (Specifically, District employees were only entitled to overtime after they worked 40 hours of work in a work week). This Order was successfully challenged in court by Unions representing employees of the University of the District of Columbia. The United States Court of Appeals for the District of Columbia ruled that the Control Board's order abrogated the provisions of Article 30, Section 1 through 5 of the parties' CBA and that the Control Board did not have the authority to abrogate a collective bargaining agreement. In response to the Court of Appeals' ruling, Congress retroactively ratified the Control Board's Order of December 27, 1996. This ratification was part of the FY 2001 Appropriations Act for the District of Columbia. (Citations omitted). See *MPD v. FOP/MPD Labor Committee*, ___ DCR. ___, Slip Op. No. 784, PERB Case No. 04-A-13 (March 31, 2005).

Decision and Order
PERB Case No. 04-A-04
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MPD takes issue with the award. As a result, MPD filed an Arbitration Review Request arguing that Arbitrator Wolf's award "on its face is contrary to law and public policy" because he relied solely on Article 24 when reaching his decision. Specifically, MPD argues that the Arbitrator should have applied Article 30 in conjunction with Article 24. (Request at p. 3). Moreover, MPD claims that the Arbitrator should have interpreted Article 30 in light of the FY 2001 Appropriations Act, which permanently rendered Article 30 inoperative and triggered the overtime provisions of the FLSA. (See Request at pgs. 2-3). In light of the above, MPD claims that overtime must be paid pursuant to the FLSA.

In the present case, MPD merely takes issue with the Arbitrator's interpretation of the CBA by asserting that the Arbitrator should have applied Article 30 in conjunction with Article 24. We believe that MPD's ground for review only involves a disagreement with the Arbitrator's interpretation of Articles 24 and 30 of the CBA. This Board has held that "[b]y agreeing to submit the settlement of [a] grievance to arbitration, it [is] the Arbitrator's interpretation, not the Board's that the parties have bargained for." *University of the District of Columbia and University of the District of Columbia Faculty Association/NEA*, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992). In addition, we have found that by submitting a matter to arbitration, "the parties agree to be bound by the Arbitrator's interpretation of the parties' agreement and related rules and regulations, as well as his evidentiary findings and conclusions upon which the decision is based. *Id.* Also, we have held that a disagreement with the Arbitrator's interpretation . . . does not render the award contrary to law and public policy. See, *AFGE, Local 1975 and Dep't of Public Works*, 48 DCR 10955, Slip Op. No. 413, PERB Case No. 95-A-02 (1995).

As a second basis for review, MPD argues that Section 156(a) of the 2001 Appropriations Act was permanent legislation, rendering Article 30 of the CBA inoperative and giving rise to the overtime provisions of the FLSA. In *MPD v. FOP/MPD Labor Committee*, Slip Op. No. 784, PERB Case No. 04-A-13 (March 31, 2005), we previously addressed the question of whether Article 30 became permanently inoperative under §156 of the FY 2001 Appropriations Act. In that case, the arbitrator found that MPD violated the parties' CBA by failing to implement Article 30 after the end of FY 2001. MPD argued that the Control Board's Order of 1996 became permanent when it was ratified by Congress in the FY 2001 Appropriations Act, permanently rendering Article 30 of the CBA inoperative. MPD filed a Request for Review of Arbitrator Louis Aronin's award. As a result, we rejected MPD's argument and found that § 156 expired at the end of FY 2001. *Id.* pgs. 8-10.

The possibility of overturning an arbitration decision on the basis of public policy is an 'extremely narrow' exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. See *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). The exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.' *Id.* at p. 8. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, at 43(1987); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 1234, 1239 (D.C. Cir.

Decision and Order
PERB Case No. 04-A-04
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1971). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result." *MPD v. FOP/MPD Labor Committee*, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000), citing *AFGE, Local 631 and Dep't of Public Works*, 45 DCR 6617, Slip Op. 365 at p. 4 n, PERB Case No. 93-A-03 (1998). However, MPD has failed to point to any clear or legal public policy which the Award contravenes. Instead, MPD requests that we adopt their interpretation of the parties' CBA. This is not a sufficient basis for overturning the Arbitrator's award.

After a careful review, we find that the Arbitrator's conclusion is based on a thorough analysis and cannot be said to be clearly erroneous or contrary to law and public policy. Therefore, no statutory basis exists for setting aside this Award. As a result, we deny MPD's Arbitration Review Request.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Metropolitan Police Department's Arbitration Review Request is denied.
- (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.

July 21, 2005

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:)	
)	
Carlton Butler, Nila Ritenour, Charlene Carter,)	
Isaac Jones, John Busby, Jr., and Derrick Randolph,)	
)	
Complainants,)	PERB Case No. 02-S-08
)	
v.)	Opinion No. 797
)	
Fraternal Order of Police/Department of)	
Corrections Labor Committee,)	FOR PUBLICATION
)	
Respondent.)	
)	

DECISION AND ORDER

I. Statement of the Case

Carlton Butler, *et al.*, ("Complainants") filed a Standards of Conduct Complaint and a Request for Preliminary Relief in the above-captioned matter. The Complainants alleged that the Fraternal Order of Police/Department of Corrections Labor Committee's ("Respondent" or "FOP") conduct concerning an internal election for union officers was in violation of the standards of conduct provisions of the Comprehensive Merit Personnel Act ("CMPA"). The Board denied the Complainants' Request for Preliminary Relief and referred the case to a Hearing Examiner.

A hearing was held and the Hearing Examiner issued a Report and Recommendation ("R&R"), in which she recommended that the Complaint be dismissed. The parties did not file exceptions to the R&R. However, the Respondent filed a document styled "Motion for an Award of Costs and Sanctions Against Carlton Butler" ("Motion"). The Complainants filed an Opposition asserting that: (1) they had proven their case against the Respondent; (2) PERB should rule on the facts of this case, and (3) the Request for Sanctions and Costs should be denied.

The Hearing Examiner's R&R and the Respondent's Motion for Costs and Sanctions are before the Board for disposition.

Decision and Order
PERB Case No. 02-S-08
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II. Background:

In August 2001, three of the five members of FOP's executive board were terminated from their employment as a result of a reduction-in-force. The Complainants argued that pursuant to FOP's by-laws, a special election was required within thirty days of August 2001, in order to fill the three vacancies on the executive board. However, the election did not occur until approximately nine months later. (Complaint at p. 4). Specifically, a general election for union officers was held on May 16, 2002. Each of the Complainants ran for various offices in the May 16, 2002 election.

On July 20, 2002, Carlton Butler, Nila Ritenour, Lorraine Ellis¹, Charlene Carter, Isaac Jones, John Busby, Jr., and Derrick Randolph filed a complaint entitled "Standards of Conduct Complaint and Request for Preliminary Relief" ("Complaint"). The Complainants alleged that FOP, through its current and former executive board, including but not limited to William Dupree, George Noble, Irving Robinson and Garfield Cunningham, violated the standards of conduct for labor organizations contained in the CMPA. Specifically, the Complainants alleged that FOP violated D.C. Code § 1-617.03(a)(1) and (4) and D.C. Code §, 1-617.04(a)(1), (2), (3) and (4)² by: (a) failing to hold a special election in August 2001; (b) appointing Luis White to serve as chairman of the election committee; and (c) failing to comply with FOP's by-laws. The Complainants also alleged that the manner in which the union officials conducted the May 2002 election for new officers was in violation of the standards of conduct.

The Complainants asked the Board to: (1) grant their request for preliminary relief; (2) order FOP to comply with its by-laws; (3) order FOP to cease and desist from violating the CMPA; and (4) void FOP's May 2002 elections. Also, the Complainants requested that the Board order a new supervised election. (See, Complaint at p. 12). The Respondent filed an Answer denying the allegations contained in the Complaint. In addition, the Respondent opposed the Request for Preliminary Relief and argued that the Board should dismiss the allegations concerning the special election because they were untimely.

¹Ms. Ellis testified at the hearing that she no longer wanted to be part of the Complaint.

²See the Hearing Examiner's R&R for the full text of the D.C. Code sections that the Complainants alleged were violated, as well as the provisions of the Union's by-laws and PERB rules. (R&R at pgs. 3-5). In summary, the Complainants alleged *inter alia* that the Respondent violated D.C. Code §1-617.03 (2001 ed.) "Standards of conduct for labor organizations"; (prior codification at D.C. Code § 1-618.3 (1981 ed.)); D.C. Code § 1-617.04(b) "Unfair labor practices" (prior codification at D.C. Code § 1-618.4(a) (sic) (1981 ed.)); and PERB Rules 544.2(a), 544.2(e) and 544.11. The Complainants also alleged a violation of the "By-Laws of the Fraternal Order of Police/Department of Corrections Labor Committee": Article V "Election and Appointment of Officers" and Article IX "Committees"; and also "FOP/DOC Labor Committee 2002 Election Rules," Sections 11 and 13.

Decision and Order
PERB Case No. 02-S-08
Page 3

On November 4, 2002, the Board issued a "Decision and Order" in this matter (Slip Op. No. 695), denying the Complainant's Request for Preliminary Relief. The Board concluded that the allegations did not satisfy the criteria required by Board Rule 544.15 for preliminary relief. Also, the Board found that the allegations regarding the special election were untimely. The remaining allegations were referred to a Hearing Examiner. Hearings were held on January 28, 2003, February 26, 2003 and March 31, 2003.

The Complainants argued before the Hearing Examiner that the May 2002 election was rampant with procedural violations and improprieties which individually and collectively affected the outcome of the election. (Complaint at pgs. 8-11). Specifically, they alleged that the election was in violation of the CMPA because, *inter alia*, a member who was not in good standing was allowed to vote; the election ballots were not properly secured; Mr. White carried some ballots from one location to another; Pamela Chase - the new incumbent president - addressed roll call on or before the date of the election; some union observers were not permitted to observe the counting of the ballots except from afar; the League of Women Voters ("League"), who conducted the election, forgot to include a box of ballots until after the initial count ended; and the League did not give the Union any suggestions for conducting future elections, although this was part of its agreement with the Union.

III. The Hearing Examiner's Report and Recommendation:

The Hearing Examiner indicated that the Board's authority to review complaints alleging the failure of a labor organization to comply with standards of conduct mandated by D.C. Code § 1-617.03 (2001 ed.) is contained in PERB Rule 544.2. In addition, the Hearing Examiner noted that: (1) Board Rule 550.15 requires that the Complainants prove their case by a preponderance of the evidence, and (2) the Board has held that Complainants bear the burden of proof in standards of conduct cases. *See Dupree and Butler v. FOP/DOC Labor Committee*, 47 DCR 1431, Slip Op. No. 605, PERB Case Nos. 98-S-08 and 98-S-09 (1999). After a review of the evidence in the record, the Hearing Examiner determined that the Complainants did not meet their burden of proof in this matter. As a result, she recommended that the Complaint be dismissed.

Based on the pleadings and the record developed in the hearing, the Hearing Examiner concluded that at least one person was allowed to vote who should not have voted. In addition, she found that: (1) there were two people (a candidate and an observer), who could not see the ballots being counted, and (2) Ms. Chase had spoken at roll call concerning the election, as alleged. Also, she determined that there were errors in the initial tally of votes. Nonetheless, she concluded that these facts did not establish a violation of the standards of conduct. Furthermore, she found that there was no evidence establishing that the appointment of Mr. White as Chairman of the Election Committee had violated any standards of conduct.

Decision and Order
PERB Case No. 02-S-08
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In light of the above, the Hearing Examiner determined that the Complainants failed to establish that there was not "substantial regulation" of the 2002 election or that it was not conducted in a fair and honest manner in keeping with D.C. Code § 1-617.03(a)(1) and (4). In reaching this conclusion, the Hearing Examiner considered the fact that the League did not offer suggestions to the Union for improving future elections and determined that this did not establish a standards of conduct violation. In addition, she indicated that even if there was a breach of the Union's by-laws, and none was established in this case, the Board has held that a mere breach, standing alone, is not sufficient to find a standards of conduct violation. *Ernest Durant v. FOP/DOC Labor Committee*, 49 DCR 782, Slip Op. No. 430, PERB Case Nos. 94-U-18, 94-S-02 (1995).

Relying on *Buckley v. American Constitutional Law Foundation, Inc.*, the Hearing Examiner found that the League maintained control of the election and used safeguards to ensure the integrity of the process "to deter fraud and diminish corruption." 527 U.S. 182, at 204-205 (1999). As a result, she concluded that the "Complainants did not establish that [the League] was biased in favor of, or controlled by the Union." (R&R at p. 11). Finally, the Hearing Examiner determined that no evidence was presented of any violation of D.C. Code § 1-617.04 pertaining to unfair labor practices. In view of the above, she found no violation of the CMPA and recommended that the complaint be dismissed.

The Respondent requests that the Board adopt the Hearing Examiner's findings in their entirety and impose sanctions and costs on Carlton Butler, personally. The Complainants argue in their Opposition to the Request for Sanctions and Costs that: (1) they have proven their case and (2) the Board should set aside the Hearing Examiner's R&R and make a determination on the findings of fact in this matter. However, these arguments cannot be considered because they are untimely. Notwithstanding the fact that the Complainants' arguments are untimely, for the reasons discussed below we find that their arguments also lack merit. Pursuant to Board Rule 556.3: "Within fifteen (15) days after service of the [R&R], any party may file . . . written exceptions with the Board." In this case, the R&R was served on June 11, 2003. In the present case, the Complainants' submission was not filed until July 22, 2003. In light of this, their submission did not satisfy the filing requirements of Board Rule 556.3. Therefore, the argument that the Hearing Examiner's findings should be set aside was not timely filed and cannot be considered here.

Also, after reviewing the arguments raised by the Complainants, we find that they make no viable substantive challenges to the Hearing Examiner's report. As a result, we believe that the Complainants' arguments are nothing more than a disagreement with the Hearing Examiner's findings of fact. The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Doctors Council of the District of Columbia and Henry Skopek v. D.C. Commission on Mental Health Services*, 47 DCR 7568, Slip Op. No. 636 at p. 4, PERB Case No. 00-U-06 (2000). Also see *Tracey Hatton v. FOP/DOC Labor Committee*, 47 DCR 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995). Therefore, a

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mere disagreement with the Hearing Examiner's findings is not a sufficient ground for the Board to reject the Hearing Examiner's finding.

Pursuant to D.C. Code § 1-617.03(a)(4), labor unions must conduct fair elections. The facts presented here do not establish a lack of fairness by the Respondent when conducting the May 2002 election. Rather, the facts establish that there was substantial regulation of the election. Further, there is no evidence that there was a breach of the Union's by-laws. As a result, there is no basis to find that the Union violated the standards of conduct with regard to the May 2002 election. Therefore, we find that the Hearing Examiner's determination that the Respondent did not violate the statutory standards of conduct is supported by the record.

Pursuant to D.C. Code § 1-617.03(a)(1) (2001 ed.) and Board Rule 544.14, we have reviewed the findings, conclusions and recommendations of the Hearing Examiner and we find them to be reasonable, persuasive and supported by the record. As a result, we hereby adopt the Hearing Examiner's findings and conclusions that the Respondent did not violate the Comprehensive Merit Personnel Act.

IV. Motion for Award of Costs and Sanctions Against Carlton Butler:

Concerning the Respondent's request that we sanction Mr. Butler by ordering him to pay the Respondent's reasonable costs, the Respondent did not make this motion before the Hearing Examiner. Therefore, the Hearing Examiner was unable to consider the arguments now raised by the Respondent or make findings on the factual allegations contained in the request. As a result, the Respondent is now barred from raising this issue. In view of the above, the request for sanctions and costs is denied.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainants' Standards of Conduct Complaint is dismissed.
- (2) The Respondent's request for award of costs is denied.
- (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.

August 17, 2005

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:

District of Columbia Water and Sewer
Authority,

Petitioner,

and

American Federation of Government Employees,
Local 872,

Respondent.

PERB Case No. 04-A-10

Opinion No. 798

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case

The District of Columbia Water and Sewer Authority ("WASA") filed an Arbitration Review Request ("Request") in the above captioned matter. WASA seeks review of an arbitration award ("Award") which rescinded the termination of twenty-two bargaining unit members ("Grievants"). Specifically, the Arbitrator found that WASA violated the parties' collective bargaining agreement ("CBA"). As a result, the Arbitrator ordered the reinstatement of the Grievants to the status quo. WASA contends that the: (1) Arbitrator exceeded his jurisdiction; and (2) Award is contrary to law and public policy. (See Request at pgs. 3 and 6). The American Federation of Government Employees, Local 872 ("Union") opposes the Request.

The issue before the Board is whether "the arbitrator exceeded his jurisdiction" or whether "the award on its face is contrary to law and public policy." D.C. Code § 1-605.02(6) (2001 ed).

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II. Discussion

"During September and October of 2001 [WASA terminated] individuals who did not possess the required Commercial Drivers License ("CDL") . . . from duty until they obtained their [Commercial Drivers License,] or CDL permit." (Award at p. 30)¹. The Union filed a grievance alleging that WASA violated Article 23 (Job Descriptions) of the parties' CBA. Specifically, the Union claimed that WASA made changes in the job descriptions of twenty-two employees without first notifying the Union, as required by Article 23 of the CBA. WASA denied the grievance. As a result, the Union invoked arbitration on behalf of the Grievants.

At arbitration WASA argued that the: (1) CDL requirement had existed since 1992; and (2) Union failed to demonstrate the existence of a contractual violation. (See Award at pgs. 32-33). The Union countered that: (1) it did not receive notice of the changes in the job descriptions as required by Article 23 of the CBA; (2) only a "regular license" has been required by WASA; and (3) no CDL requirement previously existed in the job descriptions. (See Award at p. 26). As a result, the Union asked that "the Arbitrator sustain the grievance in its entirety, and requested that [WASA] make every one [sic] affected by the 'CDL requirement' whole in a manner consistent with the [CBA] . . ." (Award at p. 28).

In an Award dated February 20, 2004, the Arbitrator stated that he was "generally liberal in admitting evidence at arbitrations. However, in the instant case, the position descriptions [introduced by WASA] were in a different type and, therefore, [the Arbitrator] considered the descriptions to be incompetent and unreliable." (Award at p. 55). Therefore, the Arbitrator excluded the position descriptions WASA attempted to submit into evidence . . . [at the hearing] due to apparent alterations on the position descriptions. As a result, Arbitrator Donegan found that the weight of the evidence indicated that the requirement of a CDL had not existed since 1992. (See Award at p. 54).

In addition, the Arbitrator determined that "[WASA] did not notify the Union of the changes in the position descriptions. . . . [These changes] required [that] bargaining unit members . . . obtain a [CDL]." (Award at p. 53). The Arbitrator also concluded that "[WASA] did not prove that it gave notice to the Union to bargain over changes in the CBA and concerning the job descriptions." (Award at p. 53). Furthermore, the Arbitrator found that "[WASA] made unilateral changes in the CBA in violation of its duty to bargain, which was in violation of the CBA." (Award at p. 53). Lastly, the Arbitrator directed that "the adverse actions that occurred as a result of the CDL requirement [be] rescinded and the employees . . . [be] returned to the status quo that existed before the adverse actions." (Award at pgs. 54-55). The Arbitrator further determined that "there can be no changes in the job descriptions until the parties have an adequate opportunity to bargain over the proposed changes in the job descriptions." (Award at p. 55).

¹ "CDL" refers to Commercial Drivers License as defined in the Code of Federal Regulations, Title 49 CFR Part 383 § 5. See Attachment "A".

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As a remedy the Arbitrator directed that WASA should "give proper notice to the Union of its intention to make the CDL a requirement of the . . . job descriptions." (Award at p. 57). In addition, the Arbitrator determined that both parties had a duty to bargain and that all adverse decisions by WASA were rescinded. (See Award at p. 55). Therefore, the Arbitrator directed that all employees be returned to the status quo pending the outcome of "good faith bargaining." (Award at p. 57).

In its Request, WASA takes issue with the Arbitrator's Award. Specifically, WASA asserts that the the Arbitrator exceeded his jurisdiction by: (1) not admitting certain proffered evidence; and (2) requiring in the remedy that WASA bargain over changes in job descriptions. In addition, WASA contends that the Award is contrary to law and public policy. (See Request at p. 3 and p. 6).

The Union opposes the Request claiming that: (1) possessing a CDL had never been a requirement of the grievants' employment; (2) a CDL requirement had never been in the Grievants' job descriptions; and (3) the "Request fails to state proper grounds for appealing an arbitrator's award." (Respondent's Opposition at p. 3). In addition, the Union argues that the Arbitrator was within his authority to rescind the CDL requirement where WASA had failed to provide notice to the Union. (See Respondent's Opposition at pgs. 3-4). In light of the above, the Union is asking that the Board deny WASA's Request.

When a party files an arbitration review request, the Board's scope of review is extremely narrow. Specifically, the Comprehensive Merit Personnel Act ("CMPA") authorizes the Board to modify or set aside an arbitration award in only three limited circumstances:

1. If "the arbitrator was without, or exceeded, his or her jurisdiction";
2. If "the award on its face is contrary to law and public policy"; or
3. If the award "was procured by fraud, collusion or other similar and unlawful means."

D.C. Code § 1-605.02(6) (2001 ed.).

In the present case, WASA contends that the Arbitrator exceeded his jurisdiction because the Award violates Part II, Article 58, § H(3), of the CBA, which provides that "*[t]he arbitration hearing shall be informal and the rules of evidence shall not strictly apply.*" (Request at pgs. 3-4). (emphasis added). At arbitration, WASA attempted to introduce documentary evidence of position descriptions from 1992, purportedly containing the CDL requirement. The Arbitrator did not admit the position descriptions into evidence due to apparent alterations of the document. (See Award at p. 55). WASA argues that "by refusing to admit [WASA's] evidence or allow for testimony to determine the veracity of the proposed exhibits, Arbitrator Donegan eliminated the very basis of [WASA's] defense and acted contrary to the [CBA], which requires the liberal admission of evidence." (Request at p. 4). For the reasons discussed below, we disagree.

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We have held and the District of Columbia Superior Court has affirmed that, “[i]t is not for [this Board] or a reviewing court...to substitute their view for the proper interpretation of the terms used in the [CBA].” *District of Columbia General Hospital v. Public Employee Relations Board*, No. 9-92 (D.C. Super Ct. May 24, 1993). See also, *United Paperworkers Int’l Union AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Furthermore, an arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *Misco, Inc.*, 484 U.S. at 38. Also, we have explained that:

[by] submitting a matter to arbitration “the parties agree to be bound by the Arbitrator’s interpretation of the parties’ agreement, related rules and regulations, as well as the evidentiary findings and conclusions on which the decision is based.”

District of Columbia Metropolitan Police Department v. Fraternal Order of Police/ Metropolitan Police Department Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 3, PERB Case No. 00-A-04 (2000); *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee (Grievance of Angela Fisher)*, 51 DCR 4173, Slip Op. No. 738, PERB Case No. 02-A-07 (2004).

“It is not for PERB or the reviewing court . . . to substitute their view for the proper interpretation of the terms used in the collective bargaining agreement.” *District of Columbia General Hospital v. Public Employees Relations Board*, No. 9-92 (D.C. super. Ct. May 24, 1993). Also see, *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987). Also, “the Board will not substitute its own interpretation or that of the Agency for that of the duly designated Arbitrator.” *District of Columbia Department of Corrections and International Brotherhood of Teamsters*, Local Union No. 246, 34 DCR 3616, Slip Op. No. 157 at p. 3, PERB Case No. 87-A-02 (1987). An arbitrator’s decision must be affirmed by a reviewing body “as long as the arbitrator is even arguably construing or applying the contract.” *Misco, Inc.*, 484 U.S. at 38.

Furthermore, with respect to the Arbitrator’s findings and conclusions, we have stated that resolution of “disputes over credibility determinations” and “assessing what weight and significance such evidence should be afforded” is within the jurisdictional authority of the Arbitrator. See, *American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and District of Columbia General Hospital*, 37 DCR 6172, Slip Op. No. 253 at p. 2, PERB Case No. 90-A-04 (1990).

In light of the above, we find that WASA’s argument represents a disagreement with the Arbitrator’s interpretation of Article 58, Section H(3) of the parties’ CBA, and does not provide a sufficient basis for concluding that the Arbitrator exceeded his jurisdiction. WASA merely requests that: (1) we adopt its interpretation of Article 58, Section H(3) of the CBA; and (2) accept as credible the proffered position descriptions which allegedly require the Grievants to possess a CDL.

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This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, WASA claims that the Arbitrator exceeded his jurisdiction when, as a remedy, he directed WASA to bargain over the changes in the job descriptions prior to implementation. (See Request at p. 4). In support of this argument, WASA claims that the Arbitrator's equitable power regarding remedies is limited by Article 58, Section H(8) of the parties' CBA. (See Request at pgs. 4-5). Section H(8) provides as follows: "[t]he arbitrator shall not have the power to add to, subtract from or modify the provisions of this agreement or the Authority regulations or policies through the award." Furthermore, WASA asserts that Article 23 of the CBA requires that the Union be given notice concerning changes in the job description², but does not require the parties to bargain over the changes. (See Request at p. 5). WASA contends that the Arbitrator exceeded his jurisdiction by adding the additional requirement that the parties bargain over changes in the job description. (See Request at pgs. 5-6). Therefore, WASA argues that the Arbitrator modified Article 23, by adding a bargaining requirement. We agree.

This Board has held that an arbitrator's authority is derived from "the parties' agreement and any applicable statutory or regulatory provision." *D.C. Department of Public Works and AFSCME, Local 2091*, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, "[o]ne of the tests that the Board has used when determining whether an Arbitrator has exceeded his jurisdiction and was without authority to render an award is 'whether the Award draws its essence from the collective bargaining agreement.' " *D. C. Metropolitan Police Department and Fraternal of Police, Metropolitan Police Department Labor Committee*, 49 DCR 810, Slip Op. No. 669 at p. 4, PERB Case No. 01-A-02 (2002) (citing *D.C. Public Schools v. AFSCME, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at 5, PERB Case No. 86-A-05 (1987)). See also, *Dobbs, Inc. v. Local No. 1614, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 813 F.2d 85 (6th Cir. 1987). The Board has adopted what is meant by "deriving its essence from the terms and conditions of the collective bargaining agreement" from the U.S. Court of Appeals for the Sixth Circuit in *Cement Division, National Gypsum Co. v. United Steelworkers of America, AFL-CIO, Local 135*, where the Court explained the standard by stating the following:

An arbitration award *fails* to derive its essence from a collective bargaining agreement when the: (1) award conflicts with the express terms of the agreement; (2) award imposes additional requirements that are not expressly provided in the agreement; (3) award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) award is based on general considerations of

²WASA argued before the Arbitrator that the Notice provisions of Article 23 had been met, as the CDL requirement was not a new requirement, but had been in place since 1992. This contention is based on the aforementioned position descriptions which were rejected by the Arbitrator.

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fairness and equity, instead of the precise terms of the agreement. 793 F.2d 759, 765 (6th Cir. 1986).³

In the present case, Article 23 of the CBA provides in pertinent part that:

Section A: Copy of Job Description

Each employee covered by this Agreement shall be supplied with a copy of his/her job description. The Local Unions shall be supplied with a copy of each job description upon request. The Local Unions shall be given the opportunity to review substantial changes in job descriptions prior to implementation.

It is clear from the above language of Article 23, that the CBA does not require the parties to bargain prior to implementing changes in the employees' job descriptions. Instead, Article 23 only requires that the Union be given an opportunity to "review substantial changes in job descriptions." As a result, we believe that Article 23 requires that the Union be given notice of the changes prior to implementation. Therefore, we find that the portion of the Award requiring WASA to bargain before implementing changes in job descriptions: (1) conflicts with the express terms of the CBA; (2) imposes the additional requirement to bargain over changes in job descriptions; and (3) cannot be rationally derived from the terms of the CBA. Also, we believe that the portion of the Award which requires WASA to bargain over changes in job descriptions prior to implementation fails to derive its essence from the parties CBA, and therefore, does not meet the *Cement Division* standard. Moreover, the Board can find no evidence identifying the source of the Arbitrator's authority to require the parties to bargain prior to implementation. Therefore, the Board reverses that portion of the Arbitrator's Award requiring the parties to bargain prior to implementation of changes in the position descriptions.

As a third basis for review, WASA contends that the Award is contrary to law and public policy because: (a) the Grievants were required to have a CDL pursuant to federal regulations;⁴ (b) the decision to change the job descriptions is a management right, pursuant to D.C. Code § 1-617.08(a)(1); (c) the Award would infringe on this management right by requiring bargaining; and (d) the awarded remedy of *status quo ante*, returning the Grievants to their positions, is contrary to Board precedent in cases concerning management rights. (Request at pgs. 2, 6, 7 and 8).

In support of this argument, WASA contends that pursuant to the Code of Federal

³*MPD and FOP/MPD Labor Committee*, 49 DCR 810, Slip Op. No. 669, PERB Case No. 01-A-02 (2001).

⁴CFR, Title 49 CFR Part 383.

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Regulations, Title 49 CFR Part 383, its employees have been required since 1992 to possess and maintain a valid CDL as a condition of their employment. In addition, WASA asserts that the Arbitrator's Award is contrary to law because it rescinds the discharge of employees who, by federal regulation, were required to possess a CDL. WASA also claims that returning these employees to work would place WASA in violation of the CDL requirement. For the reasons discussed below, we disagree.

"[T]he possibility of overturning an arbitration decision on the basis of public policy is an "extremely narrow" exception to the rule that reviewing bodies must defer to an arbitrator's interpretation of the contract. "[T]he exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of Public Policy." *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 789 F.2d 1, 8 (D.C. Cir. 1986). Furthermore, to set aside an award as contrary to law and public policy, the Petitioner must present applicable law and definite public policy that mandates that the arbitrator arrive at a different result. *AFGE, Local 631 and Dept. Of Public Works*, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993). Also, a petitioner must demonstrate that the arbitration award "compels" the violation of an explicit, well defined, public policy grounded in law or legal precedent. See *United Paperworkers Int'l Union, AFL-CIO v. Misco Inc.*, 484 U.S. 29, 43 (1987). Lastly, the petitioning party has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000); See also *District of Columbia Public Schools and American Federation of State, County and Municipal Employees, District Council 20*, 34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987).

In the present case, WASA argues, as it did before the Arbitrator, that the evidence supports its contention that a CDL requirement had been part of the position descriptions since 1992. However, as noted above, the Arbitrator found that there was no such CDL requirement in the employees' job descriptions. WASA's argument, therefore, merely represents a disagreement with the Arbitrator's findings and conclusions. This Board has held that an employer's disagreement with an arbitrator's findings of fact does not render an award contrary to law and public policy. *District of Columbia Department of Corrections and Fraternal Order of Police/Department of Corrections Labor Committee*, 46 DCR 6284, Slip Op. No. 586, PERB Case No. 99-A-02 (1999). In addition, WASA has the burden to specify applicable law and definite public policy that mandates that the Arbitrator reach a different result. *MPD v. FOP/MPD Labor Committee*, 47 DCR 717, Slip Op. No. 633, PERB CASE No. 00-A-04 (2000). However, WASA only specifically cites 49 CFR Part 383, Section 5, which is a definition section of the Commercial Driver License Standards, Requirements and Penalties. (See Attachment A). This section, by itself, does not mandate that WASA's employees possess a CDL. Furthermore, WASA did not point to any other particular provision in 49 CFR Part 383 requiring that the WASA employees involved in this case be terminated if they did not possess a CDL. Consequently, WASA has not presented a statutory basis for review. As a result, the Board cannot reverse the Award on this ground.

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WASA also argues that the remedy is contrary to law and public policy because it requires the parties to bargain over a management right in violation of the CMPA.⁵ As discussed above, the portion of the Award which requires WASA to bargain over changes in the job descriptions prior to implementation fails to derive its essence from the parties CBA. Therefore, we found that the Arbitrator, in this case, exceeded his jurisdiction. As a result, we determined that there was a statutory basis for granting WASA's Request with respect to that portion of the Award. Since we have reversed that portion of the Award, we believe it is not necessary to consider whether the Arbitrator's Award requiring the parties to bargain is a violation of the management rights provisions of the CMPA.

Lastly, WASA argues that the Arbitrator's Award is in violation of law and public policy because the remedy of reinstating the grievants is improper under the law. Relying on *American Federation of Government Employees, Local 872 v. District of Columbia Department of Public Works*, 49 DCR 1145, Slip Op. No. 439, PERB Case No. 94-U-02 and 94-U-08 (2002), WASA argues that a *status quo ante* remedy in this case is improper.⁶ In the *AFGE, Local 872* case, this Board noted that a *status quo ante* remedy which would return employees to their previous positions was inappropriate where: (1) a RIF has already occurred; (2) the duty to bargain only concerns the impact and effect bargaining; (3) the results of such bargaining would have no effect on the RIF; and (4) the record clearly establishes that rescission of the RIF would disrupt or impair the agency's operations.

As noted above, the *AFGE Local 872* case involves a RIF and the duty to bargain concerning impact and effects of the RIF. However, the facts in the *AFGE Local 872* case are not applicable to the present case. Here, the case pertains to the remedy in an Arbitration Award. Moreover, this Board has previously upheld a *status quo ante* remedy in an arbitration award. See, *D.C. Department of Public Works and AFGE, Local 872, 1975 and 2553, AFL-CIO*, 49 DCR 1140, Slip Op. No. 438, PERB Case No. 95-A-08 (2002).

In the present case, WASA had the burden to specify applicable law or definite public policy that would mandate that the Arbitrator arrive at a different result. Instead, WASA merely disagrees with the Arbitrator's interpretation of the CBA. We have held that a disagreement with the Arbitrator's interpretation of the agreement does not render an award contrary to law. *D.C. Department of Public Works and AFGE, Local 872, 1975 and 2553, AFL-CIO, supra.*

⁵Specifically, WASA contends the Award violates the management rights provisions of D.C. Code § 1-617.08(a)(1), giving management the right to direct employees of the agency. (See Request at p. 6).

⁶In *AFGE, Local 872*, management unilaterally implemented a reduction in force without providing notice to the union. The union in *AFGE, Local 872* filed an unfair labor practice charge against DPW for failure to bargain in good faith concerning the impact and effects of a reduction in force ("RIF"). In the complaint, the Union had requested a *status quo ante* remedy. This Board found that a *status quo ante* remedy which would return employees to their previous positions was inappropriate.

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Consequently, WASA has not presented a statutory basis for review. As a result, the Board cannot reverse the Award on this ground.

Pursuant to Board D.C. Code § 1-605.02(6) (2001 ed.), the Board finds that the Arbitrator exceeded his jurisdiction and was without authority to direct that WASA engage in bargaining with the Union prior to implementing changes in position descriptions. As a result, we grant in part, WASA Arbitration Review Request. Therefore, pursuant to Board Rule 538.4, the Board orders that the Arbitrator's Award be modified to reflect this ruling.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Water and Sewer Authority's Arbitration Review Request is hereby granted in part and denied in part. Specifically, WASA's request for reversal of the Arbitration Award is denied to the extent it requests that the Board overturn the entire Arbitration Award. However, the request is granted in part to the extent that the Board finds that the Arbitrator exceeded his jurisdiction and lacked authority to direct the parties to bargain prior to WASA's implementation of changes in the position descriptions.
- (2) Pursuant to D.C. Code § 1-605.02(6) (2001 ed.) and Board Rule 538.4, the portion of the Arbitration Award that requires the parties to bargain is reversed. Therefore, the Arbitrator's Award is modified to reflect this ruling.
- (3) Pursuant to D.C. Code § 1-605.02(6) (2001 ed.) And Board Rule 538.4, the Board sustains the Arbitrator's decision that: (1) WASA violated the CBA, by not providing the Union the opportunity to review the proposed changes to position descriptions; and (2) that WASA violated the CBA by discharging the grievants. Furthermore, we sustain the Arbitrator's ruling that the grievants be reinstated to their former positions.
- (4) 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.
July 24, 2006

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ATTACHMENT "A"

The following are pertinent excerpts of Title 49 CFR Part 383.

TITLE 49-TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

PART 383 COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES --

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Subpart A-General

Sec. 383.5 Definitions.

As used in this part:

Administrator means the Federal Motor Carrier Safety Administrator, the chief executive of the Federal Motor Carrier Safety Administration, an agency within the Department of Transportation.

Commercial driver's license (CDL) means a license issued by a State or other jurisdiction, in accordance with the standards contained in 49 CFR part 383, to an individual which authorizes the individual to operate a class of a commercial motor vehicle.

Commercial driver's license information system (CDLIS) means the CDLIS established by FMCSA pursuant to section 12007 of the Commercial Motor Vehicle Safety Act of 1986.

Commercial motor vehicle (CMV) means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle-- (a) Has a gross combination weight rating of 11,794 kilograms or more (26,001 pounds or more) inclusive of a towed unit(s) with a gross vehicle weight rating of more than 4,536 kilograms (10,000 pounds); or (b) Has a gross vehicle weight rating of 11,794 or more kilograms (26,001 pounds or more); or (c) Is designed to transport 16 or more passengers, including the driver; or (d) Is of any size and is used in the transportation of hazardous materials as defined in this section.

Driver applicant means an individual who applies to a State to obtain, transfer, upgrade, or renew a CDL. **Driver's license** means a license issued by a State or other jurisdiction, to an individual which authorizes the individual to operate a motor vehicle on the highways.

Eligible unit of local government means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law which has a total population of 3,000 individuals or less.

Employee means any operator of a commercial motor vehicle, including full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors (while in the course of operating a commercial motor vehicle) who are either directly employed by or under lease to an employer.

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Employer means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle.

Endorsement means an authorization to an individual's CDL required to permit the individual to operate certain types of commercial motor vehicles.

Gross combination weight rating (GCWR) means the value specified by the manufacturer as the loaded weight of a combination (articulated) vehicle. In the absence of a value specified by the manufacturer, GCWR will be determined by adding the GVWR of the power unit and the total weight of the towed unit and any load thereon.

Gross vehicle weight rating (GVWR) means the value specified by the manufacturer as the loaded weight of a single vehicle.

Hazardous materials means any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

Out-of-service order means a declaration by an authorized enforcement officer of a Federal, State, Canadian, Mexican, or local jurisdiction that a driver, a commercial motor vehicle, or a motor carrier operation, is out-of-service pursuant to Sec. Sec. 386.72, 392.5, 395.13, 396.9, or compatible laws, or the North American Uniform Out-of-Service Criteria.

Representative vehicle means a motor vehicle which represents the type of motor vehicle that a driver applicant operates or expects to operate.

State means a State of the United States and the District of Columbia.

State of domicile means that State where a person has his/her true, fixed, and permanent home and principal residence and to which he/she has the intention of returning whenever he/she is absent.

Tank vehicle means any commercial motor vehicle that is designed to transport any liquid or gaseous materials within a tank that is either permanently or temporarily attached to the vehicle or the chassis. Such vehicles include, but are not limited to, cargo tanks and portable tanks, as defined in part 171 of this title. However, this definition does not include portable tanks having a rated capacity under 1,000 gallons.

United States the term United States means the 50 States and the District of Columbia.

Vehicle means a motor vehicle unless otherwise specified. Vehicle group means a class or type of vehicle with certain operating characteristics.

[52 FR 20587, June 1, 1987, as amended at 53 FR 27648, July 21, 1988; 53 FR 39050, Oct. 4, 1988; 54 FR 40787, Oct. 3, 1989; 59 FR 26028, May 18, 1994; 61 FR 9566, Mar. 8, 1996; 61 FR 14679, Apr. 3, 1996; 62 FR 37151, July 11, 1997; 67 FR 49756, July 31, 2002; 68 FR 23849, May 5, 2003].

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:

Cassie Lee,

Complainant,

v.

American Federation of Government Employees,
Local 872,

Respondent.

PERB Case No. 04-S-07

Opinion No. 802

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

Cassie Lee ("Complainant") filed a standards of conduct complaint and an amended standards of conduct complaint against the American Federation of Government Employees, Local 872 ("AFGE, Local 872," "Local 872," "Union" or "Respondent"). The Complainant alleges that AFGE, Local 872 violated the Comprehensive Merit Personnel Act ("CMPA") by failing to: (1) conduct required elections; (2) pay the American Federation of Government Employees Headquarters ("AFGE Headquarters") more than \$75,000.00 in dues; and (3) disclose financial information. In addition, the Complainant claims that the Respondent violated the CMPA by illegally using membership dues and having a non-union member serve as an officer of AFGE, Local 872. The Complainant is asking the Board to order AFGE, Local 872 to: (1) hold a new election; (2) make the Union's financial records available to the Complainant for review; (3) forward the Union's financial records to John Gage, National President, American Federation of Government Employees; (4) suspend all of AFGE, Local 872's current officers until a new election and audit are completed; (5) cease and desist from violating the CMPA; (6) pay attorney fees; and (7) order any other remedy that the Board deems appropriate. (See Compl. at pgs. 5-6 and Amended Compl. at pgs. 6-7). Also, the Complainant is requesting that AFGE, Local 872 be directed to conduct an audit and to reimburse the local for any monies that were inappropriately spent by the local's president. (See Compl. at p. 6). The Respondent filed an answer denying all of the allegations.

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This matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation ("R & R"). In her R & R the Hearing Examiner found that the Respondent violated the standards of conduct provision of the CMPA. The parties did not file exceptions to the Hearing Examiner's R&R. The Hearing Examiner's R&R is before the Board for disposition.

II. Background

AFGE, Local 872 is a labor organization that was certified to represent a unit of employees employed by the District of Columbia Water and Sewer Authority ("WASA"). During the period of time relevant to this matter, Christopher Hawthorne has served as the president of AFGE, Local 872. The Complainant is employed as an administrative assistant with WASA and claims that since 2002 she has been a member of AFGE, Local 872.

The Complainant asserts that AFGE, Local 872 has violated the CMPA by failing to conduct elections. Specifically, she contends that AFGE, Local 872 is required to hold elections "every two or three years." (Compl. at p. 3). However, in January 2000, Jocelyn Johnson, former president of AFGE, Local 872, appointed Christopher Hawthorne to serve as the local's acting president. (Compl. at p. 3). The Complainant alleges that Mr. Hawthorne has failed to hold elections for officers.

In addition, the Complainant contends that "Mr. Hawthorne and his officers have failed to pay the AFGE Headquarters office the union's per capita requirements for the past three years. [As a result, the Complainant alleges that] Local 872 owe[s] the American Federation of Government Employees Headquarters office over seventy five thousand dollars (\$75,000.00) in . . . per capita dues. . . The Complainant asserts that this] money is unaccounted for and that there has been no financial disclosure regarding any of the local's funds. [Furthermore, the Complainant claims that] Mr. Hawthorne and his officers have failed to give financial reporting of the income and use of membership dues, including the \$75,000.00 owed to AFGE [Headquarters]." (Compl. at p. 4). The Complainant alleges that on several occasions, she has requested a report concerning how much money the local has received and how the money is being spent. However, she claims that AFGE, Local 872 has failed to provide her with any financial disclosures. Also, she contends that: (1) AFGE, Local 872 is not holding monthly meetings; (2) Mr. Hawthorne and his officers are not providing the membership with any financial information concerning how members' dues are being spent; and (3) Mr. Hawthorne and his officers have illegally used membership dues for their own personal use and gain.¹

¹The Complainant claims that Mr. Hawthorne used members' dues to: (1) pay the salary of AFGE, Local 872's former president Jocelyn Johnson when she lost her job with SEIU; (2) pay his own salary when he was suspended by WASA for misconduct; (3) make illegal payments to Ms. Johnson and to other individuals; and (4) pay employee witnesses to testify at arbitration cases concerning WASA. (See

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Finally, the Complainant asserts that Miley Jones, the current treasurer of AFGE, Local 872, is not a member of AFGE, Local 872. Specifically, the Complainant claims that Miley Jones left WASA on or about September 26, 2001. As a result, the Complainant alleges that Miley Jones has not been a member of AFGE, Local 872 since September 2001. Therefore, the Complainant contends that Miley Jones cannot serve as an officer of AFGE, Local 872. Furthermore, the Complainant notes that since Miley Jones "left the Washington [, D.C.,] metropolitan area, [t]here has been no election held for the office of treasurer." (Amended Compl. at p. 5).

In light of the above, the Complainant filed a standards of conduct complaint and an amended standards of conduct complaint with the Public Employee Relations Board ("Board"). In her submissions, the Complainant alleges that by the conduct noted above, AFGE, Local 872 has violated the standards of conduct for labor organizations contained in the CMPA. AFGE, Local 872 filed an answer denying the allegations and opposing the request for relief. In addition, AFGE, Local 872 filed a Motion to Dismiss.

III. Hearing Examiner's Report and Recommendations

As noted above, the Respondent filed a Motion to Dismiss. Therefore, the first issue to be determined by the Hearing Examiner was whether to grant the Respondent's Motion to Dismiss. In their motion, the Respondent raised two arguments. First, it claimed that the Complainant did not have standing since many of the allegations concern conduct that took place before she became a member of the Local in December 2002. After considering the pleadings and the record established at the hearing, the Hearing Examiner concluded that the Complainant did not become a member of Local 872 until December 9, 2002. As a result, she found that the Complainant lacked standing concerning any matters which took place before December 9, 2002. Therefore, the Hearing Examiner indicated that she would not consider any conduct which took place before the Complainant became a member of AFGE, Local 872 in December 2002. However, she found that the Complainant had standing concerning any conduct that took place or continued to take place after December 9, 2002.²

The second argument raised in the Motion to Dismiss focused on the Respondent's claim that the Complainant failed to establish any injury. Relying on Board precedent, the Hearing Examiner determined that the Complainant did establish that as a dues-paying member, the alleged denial of the right to participate and the alleged misuse of funds did cause the

Amended Compl. at pgs. 4- 5)

²Consistent with this finding, the Hearing Examiner indicated that she did not review payments made, cancelled checks issued or minutes of meetings held before December 9, 2002 (the date when the Complainant became a member of Local 872). (See R & R at p. 9).

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Complainant harm. Specifically, the Hearing Examiner noted that in "Butler, Durant, Rosser and Temoney v. Fraternal Order of Police/Department of Corrections Labor Committee, [46 DCR 4409], Slip. Op. No. 580, PERB Case No. 99-S-02 (1999), the Board held that while a standards of conduct violation is not established by a 'mere breach' of a union's by-laws or constitution, a cause of action will be found if the violation 'has the proscribed effect set forth in the asserted standards of conduct.' See also, Corboy, et al. v. FOP/MPD Labor Committee, [48 DCR 8505,] Slip. Op. No. 391, PERB Case No. 93-S-01 (1996). [The Hearing Examiner observed that in the present case, the] Complainant's challenges, e.g., regarding lack of fair elections and fiscal integrity as required by PERB Rule 544.2, if proven, would constitute violations." (R&R at p. 9). Relying on the above-referenced cases, the Hearing Examiner concluded that the Respondent cannot prevail on the second argument raised in their motion. (See R&R at p. 9). In light of the above, the Hearing Examiner granted the Respondent's "motion in part and denied it in part." (R&R at p. 9).

We have reviewed the Hearing Examiner's ruling concerning the Respondent's Motion to Dismiss and find it to be reasonable, persuasive, supported by the record and consistent with Board precedent. As a result, we adopt this finding.

Concerning the Complainant's substantive claims, the Hearing Examiner citing Board Rule 544.11 noted that the Complainant has the burden of proving her standards of conduct allegations by a preponderance of evidence. (See R&R at p. 8). In addition, the Hearing Examiner indicated that the "Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 111, frequently utilized by the Board in assessing standards of conduct issues, has as its primary purpose to ensure that 'unions [are] democratically governed and responsive to the will of their membership.' Finnegan v. Leu, 456 U.S. 431, 436 (1982). It requires 'full and active participation by the rank and file in the affairs of the union.' Musicians Federation v. Wittstein, 379 U.S. 1713 (1964)." (R & R at p. 8).

In the present case, the Complainant raises a number of allegations which, if proven, constitute violations of D.C. Code § 1-617.03 (2001 ed.). First, the Complainant contends that AFGE, Local 872 failed to obtain approval from the membership for monthly expenditures in excess of \$500.00. AFGE, Local 872 countered that the expenditures did not negatively impact on the Complainant. In addition, AFGE, Local 872 claims that it only needs approval if an individual expenditure exceeds \$500.00, and that approval was obtained from members at meetings at the Bryant Street location. With regard to AFGE, Local 872's first argument, the Hearing Examiner found that if funds were improperly spent, it would negatively impact on the Complainant since her payment of dues was used improperly. (See, R&R at p. 10). As a result, the Hearing Examiner determined that AFGE, Local 872's first argument lacked merit.

AFGE, Local 872's second argument is based on Section 6(e) of the Local's Constitution. Section 6(e) provides as follows:

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Expenditures by the Executive Board in excess of \$500.00 per month must have prior approval of the local's members either as authorized by the budget approved by the local or by separate vote of the local's members. All expenditures authorized by the Executive Board will be reported in writing at the next regular meeting of the local. Upon request a copy of such report will be made available to any member in good standing of the local.

The Hearing Examiner indicated that Section 6(e) "can be interpreted to mean that [either] total monthly expenditures exceeding \$500.00 requir[e] approval, as [the] Complainant contends; or that individual expenditures each month that exceed \$500.00 require approval, as the Local argues." (R&R at p.10). However, after reviewing a July 27, 2004, letter from the AFGE General Counsel to the National Vice President, the Hearing Examiner concluded that the correct interpretation of Section 6(e) is that unless the funds are within the annual budget, total monthly expenditures in excess of \$500.00 must be approved by the membership. (See R&R at p. 10).

After determining that Section 6(e) provides that total monthly expenditures in excess of \$500.00 must be approved by the membership, the Hearing Examiner focused on whether the Respondent had complied with Section 6(e). Reviewing the evidence on the record, the Hearing Examiner found that the following expenses were neither approved by the members nor were they items that appeared in the local's annual budget:

\$ 125.00	Christopher Hawthorne (meal allowance) (1/4/03)
\$ 450.00	Federal Mediation and Conciliation Service (1/4/03)
\$ 150.00	Christopher Hawthorne (meal allowance) (2/2/03)
\$ 375.00	Federal Mediation and Conciliation Service (5/5/03)
\$ 400.00	Federal Mediation and Conciliation Service (8/6/03)
\$ 2,221.00	Christopher Hawthorne (9/6/03)
\$ 87.50	Howard Coles (meal allowance) (3/3/04)
\$ 225.00	Christopher Hawthorne (meal allowance) (4/12/04)
\$ 150.00	Howard Coles (meal allowance) (4/12/04)
\$ 187.50	Christopher Hawthorne (meal allowance) (5/1/04)
\$ 112.50	Howard Coles (meal allowance) (5/1/04)
\$ 87.50	Howard Coles (meal allowance) (6/1/04)

The Hearing Examiner determined that in both January 2003, and September 2003 AFGE, Local 872's monthly expenditures exceeded \$500.00. Specifically, the Hearing Examiner noted that in January 2003, \$125.00 was paid to Christopher Hawthorne as a meal allowance and \$450.00 was paid to the Federal Mediation and Conciliation Service ("FMCS"). The Hearing Examiner found that both of these items were neither listed in the annual budget nor approved by the members of AFGE, Local 872. The Hearing Examiner observed that although the payment to FMCS appeared to be a legitimate expense, once it was added to

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another expenditure and the total exceeded \$500.00, approval by the membership was required. As a result, the Hearing Examiner determined that these funds were spent without the required authorization. (See R&R at p. 11). We believe that the Hearing Examiner's finding regarding the monthly expenditures for January 2003, is reasonable and supported by the record. As a result, we adopt this finding. The Hearing Examiner's finding concerning the \$2,221.00 check issued to Christopher Hawthorne, is discussed below.

As to the Respondent's alleged failure to hold meetings, the Hearing Examiner observed that AFGE, Local 872's revised By-Laws provide that regular meetings of the local shall be held on the third Thursday of each month at 4:05 p.m. at the Bryant Street location, and on the third Friday at 5:15 p.m. at the First Street location. (See R&R at p. 9). The Hearing Examiner noted that the Complainant and her witnesses testified that regular meetings were not held at the First Street location. In addition, the Hearing Examiner indicated that Local 872 did not present evidence to contradict this fact. Also, the Hearing Examiner determined that records of the regular meetings were limited to the meetings at the Bryant Street location. Furthermore, the Hearing Examiner found that the Complainant and her witnesses presented credible testimony that although they may not have attended every meeting, they did attend many meetings and meetings were not scheduled on a monthly basis. The Hearing Examiner concluded that the "failure of Local [872] to allow full participation by all members, not only the [union] members employed at the Bryant Street location, is harmful [to all members] and violates the standards of conduct required of the Local." (R&R at p. 13). In view of the above, the Hearing Examiner concluded that Local 872 violated D.C. Code §1-617.03 by failing to hold monthly meetings at both the First Street and Bryant Street locations.

As noted above, Section 2 of the revised by-laws provides that regular meetings of the local shall be held on the third Thursday of each month at 4:05 p.m. at the Bryant Street location, and on the third Friday of each month at 5:15 p.m. at the First Street location. In addition, Section 7 of the revised by-laws provides in pertinent part that [u]nless otherwise specified by law. . . or by [the] constitution, all questions before the local will be decided by a vote of the members present. . . . [In addition,] [m]embers shall not vote on the same issue at both the third Thursday and third Friday meetings. (Emphasis in original.) Therefore, we concur with the Hearing Examiner's finding that Local 872 violated their revised by-laws by not holding successive meetings on the third Thursday and the third Friday of each month at both the Bryant Street and First Street locations. We have previously considered the question of whether a breach of a labor organization's by-laws or constitution constitutes a standards of conduct violation under the CMPA. "We have held that the mere breach of union by-laws or constitution is not, standing alone, sufficient to find a standards of conduct violation." Dupree and Butler v. FOP/DOC Labor Committee, [47 DCR 1431], Slip Op. No. 605 at p. 6, PERB Case Nos. 98-S-08 and 98-S-09 (1999). Moreover, in order to establish a violation, the "Complainant must establish that the labor organization's action or conduct had the prescribed effect set forth in the asserted standard." Corboy, et al. v. FOP/MPD Labor Committee, [48 DCR 8505], Slip Op. No. 391 at n. 3, PERB Case No. 93-S-01 (1994). Furthermore, we have stated that to find a standards of conduct violation, "there must be evidence of actual injury resulting from the

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alleged impropriety. . .". Dupree and Butler v. FOP/DOC Labor Committee, *supra*. We find that the record in this case clearly supports the Hearing Examiner's findings and conclusions that Local 872's failure to hold monthly meetings at both the Bryant Street and First Street locations, prevented full participation by all members, was harmful to all members and violates the standards of conduct required of the union pursuant to D.C. Code §1-617.03. Therefore, we adopt this finding.

Also, the evidence introduced at the hearing revealed that in September 2003, Mr. Hawthorne received a loan in the amount of \$2,221.00. The Hearing Examiner noted that while the Complainant may rightfully question the appropriateness of a loan to an officer of the local, the evidence presented established that members at the Bryant Street location approved the loan. As a result, the Hearing Examiner concluded that the \$2,221.00 loan to Christopher Hawthorne did not violate the standards of conduct. (See R&R at p. 11). We disagree with this finding. As discussed above, the "failure of Local [872] to allow full participation by all members, not only the [union] members employed at the Bryant Street location, is harmful [to all members] and violates the standards of conduct required of the Local." As noted above, Section 2 of the revised by-laws provides that regular meetings of the local shall be held on the third Thursday of each month at 4:05 p.m. at the Bryant Street location, and on the third Friday of each month at 5:15 p.m. at the First Street location. In addition, Section 7 of the revised by-laws provides in pertinent part that [u]nless otherwise specified by law. . . or by [the] constitution, all questions shall not vote on the same issue at both the third Thursday and third Friday meetings. (Emphasis in original.) We believe that reading Sections 2 and 7 together, clearly indicates the intent of the by-laws that separate successive votes should be taken on the same issue by the membership at each of the regular monthly meetings held at the Bryant Street and First Street locations. In addition, the members can only vote once on a particular issue. Therefore, by limiting only members at the Bryant Street location to vote on the question of whether or not a loan should be made to the president of the local, the Respondent denied dues paying members at the First Street Location, the right to participate in a decision concerning whether their union dues could be used to make such a loan. We believe that by not allowing union members at the First Street Location to participate in a decision concerning the use of union funds, Local 872 caused harm to those dues paying members and violated D.C. Code §1-617.03. For the reasons discussed above, we reject the Hearing Examiner's finding regarding the loan to Mr. Hawthorne.

In her submissions, the Complainant also challenged payments to Jocelynn Johnson. Specifically, the Complainant asserted that Ms. Johnson continued to receive payments after she left her position as president of Local 872 and after she left WASA. The Hearing Examiner found that the cancelled checks presented established that payments to Ms. Johnson did not exceed \$500.00 for the months that the cancelled checks were presented. Therefore, the Hearing Examiner concluded that approval by the members was not required. Also, the Hearing Examiner notes that Section 20 of AFGE, Local 872's "Revised By-Laws, authorizes the Local President to hire and pay for a Local Representative or Business Agent at the discretion of the Local President, with expenses reimbursed by the Local. [The Hearing Examiner indicated that]

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Ms. Johnson testified, and the evidence supports the conclusion that Ms. Johnson acted as a Local Representative." (R&R at p. 11). In light of the above, the Hearing Examiner determined that the Complainant did not meet her burden of proof regarding this charge. Therefore, she concluded that the payments made to Ms. Johnson did not violate the CMPA. With respect to the Hearing Examiner's finding that this allegation should be dismissed, we have reviewed the issues of fact with respect to the relative weight attributed to certain evidence in support of the Hearing Examiner's conclusion that no standards of conduct violation had been committed by the Respondent concerning this allegation. We believe that the Hearing Examiner fully considered all relevant issues of fact in her Report and Recommendations in reaching this conclusion which we find fully supported by the record. Moreover, we "have previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." American Federation of Government Employees, Local 872, [38 DCR 6693], Slip Op. No. 266 at p. 3, PERB Case Nos. 89-U-15, 89-U-16, 89-U-18 and 90-U-04 (1991). Also see, University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, [39 DCR 6238], Slip Op. No. 285, PERB Case Nos. 88-U-33 and 88-U-34 (1991). Furthermore, we have held that a Hearing Examiner's findings based on competing evidence does not give rise to a proper exception where as here, the record contains evidence supporting the Hearing Examiner's finding. See, Clarence Mack v. D.C. Department of Corrections, [43 DCR 5136], Slip Op. No. 467 at p. 2, PERB Case No. 95-U-14. In light of the above, we adopt the Hearing Examiner's recommendation that this allegation should be dismissed.

Next, the Hearing Examiner considered the Complainant's claim concerning AFGE's alleged failure to produce financial records to the Complainant upon request. The Hearing Examiner noted that "fiscal integrity requires that 'accounting and financial controls and regular financial reports or summaries' be available to members. Similarly [she indicated that] Article VIII, Section 3 of the Local's Constitution requires that a copy of a report of expenditures authorized by the Executive Board 'be made available to any member in good standing of the local.'" (R&R at p.12). The Hearing Examiner found that the Complainant is harmed if she is required to pay dues, but is not permitted to find out how her money is being used. Furthermore, the Hearing Examiner determined that the Complainant established, through her own testimony and the testimony of her witnesses, that numerous good faith efforts were made to obtain this information, and that the leadership of Local 872 was not responsive. Moreover, the Hearing Examiner found that the only documents received by the Complainant were received in response to the *subpoenas* issued in preparation for the hearing in this case. In view of the above, the Hearing Examiner concluded that the Complainant met her burden of proof regarding this allegation. As noted above, we "have previously stated that the relative weight and veracity accorded both testimonial and documentary evidence are for the Hearing Examiner to decide." American Federation of Government Employees, Local 872, supra. Also see, University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia, supra. Furthermore, we have held that a Hearing Examiner's findings based on competing evidence

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does not give rise to a proper exception where as here, the record contains evidence supporting the Hearing Examiner's finding. See, Clarence Mack v. D.C. Department of Corrections, supra.

In light of the above, we believe that the Hearing Examiner's finding concerning this allegation is reasonable and supported by the record. As a result, we adopt the Hearing Examiner's finding that by failing to produce financial documents Local 872 violated D.C. Code § 1-617.03(5).

Concerning the Complainant's allegation that officers of Local 872 issued checks without obtaining two signatures, the Hearing Examiner observed that "Article V of the Local By-Laws require that checks be signed by the Treasurer and President and if one cannot sign, another officer may sign." (R&R 12). Also, the Hearing Examiner acknowledged that the Complainant presented checks that were signed by only one officer; however, the Hearing Examiner notes that the Complainant did not allege that the failure to obtain two signatures caused any harm. Therefore, the Hearing Examiner found that the failure to have two signatures constitutes a technical violation of the By-laws. Nonetheless, she concluded that under the circumstances presented, this technical violation does not violate the standards of conduct required of Local 872. It is clear from the record that the Respondent has not complied with the requirements of Article 5 of Local 872's by-laws. As previously noted, a violation of the standards of conduct provision is not established by the mere breach of a labor organization's internal by-laws or constitution. Specifically, the "Complainant must establish that the labor organization's action or conduct had the prescribed effect set forth in the asserted standard." Corboy, et al. v. FOP/MPD Labor Committee, supra. We believe that the record clearly supports the Hearing Examiner's findings and conclusions that AFGE, Local 872's conduct did not contravene any of the alleged standards of conduct for labor organizations. Therefore, we adopt this finding.

The Hearing Examiner next focused on the Complainant's allegation that the Local owed AFGE Headquarters more than \$75,000.00. The Respondent argued that "a decision was made that since Headquarters staff was not being responsive to the Local's request for assistance, particularly at a time when Local membership was being drastically reduced due to a RIF, the Local had decided to forego that payment and instead [decided to] pay legal fees to the attorneys who were assisting the Local with these issues. (R&R at p.12). The Hearing Examiner concluded that this decision appears to have been made in the best interest of the members. In addition, the Complainant has submitted no evidence to indicate that the issue of Local 872's financial obligation to the national union (AFGE Headquarters), is anything other than a matter between those two bodies. Accordingly, we agree with the conclusion reached by the Hearing Examiner that there was no evidence that the decision violated the standards of conduct provision of the CMPA.

Regarding the Complainant's claim that AFGE, Local 872 failed to hold elections, the Respondent acknowledged that an election was not held in 2003 as required. However, it contends that it could not hold an election until it either had members serving on the election

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committee or assistance from the international. The Hearing Examiner notes that the Complainant did not contradict the Respondent's assertion that it was not until 2004 that it received the necessary assistance, and that the election was then held. In light of the above, the Hearing Examiner found that the failure to conduct the election may be a technical violation. Nonetheless, the Hearing Examiner opined that the reasons offered appeared valid and mitigate the violation. As a result, the Hearing Examiner concluded that the Respondent's failure to conduct an election in 2003 did not violate the standards of conduct provisions of the CMPA. We believe that the record clearly supports the Hearing Examiner's findings and conclusions regarding this finding. Therefore, we adopt the Hearing Examiner's finding that this allegation should be dismissed.

In her submissions, the Complainant claims that Mylie Jones improperly served as Treasurer after her retirement. The Respondent denied this allegation. The Hearing Examiner observed that the Local's position was unclear since Ms. Jones testified that she stopped being an officer in May 2003, but also that she continued to act as Treasurer by signing checks in order to assist Mr. Hawthorne until new officers were appointed. In addition, the Hearing Examiner noted that there was no testimony presented by Ms. Jones regarding her retirement. Also, the Hearing Examiner indicated that neither party cited to the Local's Constitution or By-laws to support their positions regarding whether Ms. Jones could continue to serve as Treasurer. The Hearing Examiner noted that since new officers were not appointed until the 2004 elections, "it appears that Ms. Jones continued to hold the office of treasurer." (R&R 13). Relying on the language contained in Section 22 of Local 872's revised by-laws, the Hearing Examiner opined that "Section 22 of the Local's Revised By-Laws permits retired members to continue paying dues. [Therefore, the Hearing Examiner concluded that] in the absence of explicit language to the contrary, it appears that this provision [of the by-laws] allows retired employees to remain active members [and] are not prohibited from serving as Local officers." (R&R 13). In light of the above, the Hearing Examiner concluded that the Complainant did not meet her burden of proof regarding this charge. As a result, the Hearing Examiner is recommending that this allegation be dismissed. We find that this finding is reasonable and is supported by the record. As a result, we adopt this finding.

Pursuant to D.C. Code § 1-605.02(9) and Board Rule 544.14, we have reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner's findings with the modifications noted above. Therefore, we find that AFGE, Local 872 violated the Comprehensive Merit Personnel Act by failing to: (1) obtain prior approval for monthly unbudgeted expenditures exceeding \$500.00; (2) hold regular monthly meetings at both the Bryant Street and First Street locations; (3) provide financial disclosure requested by the Complainant; and (4) allow members at the First Street location to participate in a decision concerning the use of union funds to make a loan of \$2,221.00 to Christopher Hawthorne.

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With respect to the Hearing Examiner's findings that the other allegations should be dismissed, we have reviewed the issues of fact with respect to the relative weight attributed to certain evidence in support of the Hearing Examiner's conclusion that no standards of conduct violation had been committed by the Respondent concerning these allegations. We believe that the Hearing Examiner fully considered all relevant issues of fact in her Report and Recommendations in reaching this conclusion and believe that these findings are fully supported by the record. Therefore, we adopt the Hearing Examiner's recommendation that the other allegations should be dismissed.

IV. Remedy

Having determined that Local 872's violations caused the Complainant "actual injury," the Hearing Examiner focused on what is the appropriate remedy in this case. After considering this question, the Hearing Examiner recommends that the Board require Local 872 to post notices regarding these violations. In addition, the Hearing Examiner recommends that Local 872 be directed to comply with the standards of conduct requirements of the CMPA by: (1) holding monthly meetings at both the Bryant Street and First Street locations; (2) obtaining prior approval of unbudgeted monthly expenditures exceeding \$500.00; and (3) providing financial information upon request to members. (See R&R at p. 14).

Concerning the posting of a notice, we adopt the Hearing Examiner's remedy requiring that Local 872 post a notice acknowledging that they have violated the CMPA. The Board has previously noted that, "the overriding purpose and policy of relief afforded under the CMPA, for [conduct which] violates employee rights, is the protection of rights that inure to all employees". Charles Bagentose v. D.C. Public Schools, [41 DCR 1493], Slip Op. No. 283 at p. 3, PERB Case No. 88-U-33 (1991). Moreover, "it is the furtherance of this end, i.e., the protection of employee rights,...[that] underlies [the Board's] remedy requiring the posting of a notice to all employees concerning the violation found and the relief afforded. . . ." Id. Therefore, we believe that it is appropriate to require Local 872 to post a notice. Specifically, if Local 872 is not required to post a notice, the CMPA's policy and purpose of guaranteeing the rights of all employees is undermined. Moreover, those employees who are most aware of Local 872's illegal conduct and thereby affected by it, would not know that exercising their rights under the CMPA is indeed fully protected. Also, a notice posting requirement serves as a strong warning against future violations. Furthermore, Local 872 has not presented a compelling reason for removing the notice posting requirement recommended by the Hearing Examiner.

In her submissions, the Complainant requests that the Board award: (1) attorney fees; and (2) any other remedy that it deems appropriate. (See Amended Standards of Conduct Complaint at p. 7). In her Report and Recommendation, the Hearing Examiner did not address the issue of attorney fees and did not indicate whether any other remedy was appropriate. We believe that the Hearing Examiner's failure to address these two issues may have been an oversight on her part. As a result, we will address these two issues.

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The Complainant, a pro se litigant, without providing any support for such a request, has requested attorney fees. The Board's case law has not provided for attorney fees. See, International Brotherhood of Police Officers, Local 1446, AFL-CIO v. District of Columbia General Hospital, [39 DCR 9633], Slip Op. No. 322, PERB Case No. 91-U-14 (1992); and University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, [38 DCR 2463], Slip Op. 272, PERB Case No. 91-U-10 (1991). Therefore, the Complainant's request for attorney fees is denied.

As noted above, the Complainant requested that the Board award any other remedy it deemed appropriate. Therefore, pursuant to D.C. Code §1-617.13(d), we will consider whether the Complainant should be awarded reasonable costs in this case. The Board first addressed the circumstances under which the awarding of costs to a party may be warranted in AFSCME, D.C. Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, [37 DCR 5658], Slip Op. No. 245, PERB Case No. 89-U-02 (1990). In that case, the Board concluded that it could, under certain circumstances, award reasonable costs.³ Specifically, the Board observed:

. . . First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the nub of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively cataloged. We do not believe it possible to elaborate in any one case a complete set of rules or earmarks to govern all cases, nor would it be wise to rule out such awards in circumstances that we cannot foresee. What we can say here is that among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged action is the

³ The Board has made it clear that attorney fees are not a cost.

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undermining of the union among the employees for whom it is the exclusive bargaining representative. *Id.* at pgs. 4-5.

In the present case, it is clear from the record that the Complainant made numerous requests for financial records and financial reports, and that AFGE, Local 872 did not comply with the Complainant's requests. Moreover, the only documents provided to the Complainant by AFGE, Local 872, were provided after the Complainant filed her standards of conduct complaint and in response to the *subpoenas* issued in preparation for the hearing in this case. Furthermore, Local 872 offered no legitimate explanation as to why it did not provide the financial records and financial reports requested by the Complainant. As a result, we concur with the Hearing Examiner's finding that Local 872 violated the CMPA by not providing the Complainant with the requested financial records and financial reports. In light of the above, we find that Local 872's position concerning this allegation was wholly without merit. Therefore, we believe that awarding costs in this case is in the interest of justice and consistent with our holding in AFSCME, Council 20, *Id.* (See also, Teamsters Local 639 and 670, International Brotherhood of Teamsters v. District of Columbia Public Schools, Slip Op. No. 804, PERB Case No. 02-U-16 (2005)). In light of the above, we are awarding the Complainant reasonable costs.

Consistent with the above discussion, the Hearing Examiner's recommended remedy is modified.

ORDER

IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees, Local 872 ("AFGE, Local 872"), its officers and agents shall cease and desist from failing to maintain recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization under the governing rules of AFGE, Local 872 in accordance with basic democratic principles, as codified under D.C. Code §1-605.02 (9) (2001 ed.).
2. AFGE, Local 872, its officers and agents shall cease and desist from failing to maintain fiscal integrity in the conduct of the affairs of the organization, by failing to provide regular financial reports or summaries to members in violation of the Comprehensive Merit Personnel Act ("CMPA") standards of conduct for labor organization as codified under D.C. Code §1-617.03(a)(5) (2001 ed.).
3. AFGE, Local 872, its officers and agents shall cease and desist from failing to adopt, subscribe, or comply with the standards of conduct for labor organizations prescribed under the CMPA in any like or related matter.

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4. AFGE, Local 872 shall adhere to its by-laws with respect to holding monthly meetings at both the Bryant Street and First Street locations, and presenting issues for votes at both locations.
5. AFGE, Local 872 shall adhere to the standards of conduct for labor organization prescribed under the CMPA by providing financial information upon request to union members as required by D.C. Code §1-617-03(a)(5). Within ten (10) days from the service of this Decision and Order, AFGE, Local 872 shall turn over to the Complainant all records she requested prior to the filing of her Complaint.
6. AFGE, Local 872 shall adhere to its by-laws by obtaining prior approval from members at both locations for unbudgeted monthly expenditures that total in excess of \$500.00.
7. Since the loan to the president of AFGE, Local 872 and unbudgeted expenditures that total in excess \$500.00 have not been considered by the local's membership at properly constituted membership meetings, AFGE, Local 872 shall within thirty (30) days of the service of this Decision and Order submit these matters to such properly constituted membership meetings where the membership shall take such action as the members deem appropriate.
8. AFGE, Local 872 shall post conspicuously, within ten (10) days from the service of this Decision and Order, the attached Notice where notices to bargaining-unit employees are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
9. The Complainant shall submit to the Board within fourteen (14) days from the date of this Decision and Order, a statement of actual costs incurred processing this action. The statement of costs shall be filed together with supporting documentation. Local 872 may file a response to the statement within fourteen (14) days from service of the statement upon it.
10. Local 872 shall pay the Complainant the reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of the reasonable costs.
11. Within fourteen (14) days from the issuance of this Decision and Order, AFGE, Local 872 shall notify the Public Employee Relations Board ("Board"), in writing, that the Notice has been posted accordingly. Also, AFGE, Local 872 shall notify the Board of the steps it has taken to comply with paragraphs 5, 7 and 8 of this Order.

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

February 9, 2006



Public Employee Relations Board

Government of the District of Columbia

Suite 1150 Washington, D.C. 20005

[202] 727-1822/23 Fax: [202] 727-9116



MAR 23 2007

NOTICE

TO ALL BARGAINING UNIT MEMBERS OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 872, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 802, PERB CASE NO. 04-S-07 (February 9, 2006).

WE HEREBY NOTIFY our members that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.03 (2001 ed.) by the actions and conduct set forth in Slip Opinion No. 802.

WE WILL cease and desist from refusing to provide financial information upon request to union members as required by D.C. Code § 1-617.03(a)(5) (2001 ed.).

WE WILL cease and desist from applying our by-laws and otherwise operating the labor organization in a manner that fails to define and secure the rights of individual members to participate in the affairs of the organization in accordance with basic democratic principles, as codified under D.C. Code § 1-617.03 (2001 ed.).

WE WILL NOT, in any like or related manner, interfere, restrain or coerce, employees in their exercise of rights guaranteed by the Labor-Management subchapter of the District of Columbia Comprehensive Merit Personnel Act.

American Federation of Government Employees, Local 872

Date: _____

By: _____
President

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 717 14th Street, N.W., Suite 1150, Washington, D.C. 20005. Phone: (202) 727-1822.

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

February 9, 2006

2608

Government of the District of Columbia

Public Employee Relations Board

_____)
 In the Matter of:)
)
 Teamsters Local Unions 639 and 670,)
 International Brotherhood of Teamsters, AFL-CIO,)
)
 Complainants,)
)
 v.)
)
 District of Columbia Public Schools,)
)
 Respondent.)
 _____)

PERB Case No. 02-U-26

Opinion No. 804

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

On July 9, 2002, Teamsters Locals 639 and 670, International Brotherhood of Teamsters, AFL-CIO, (“Unions” or “Complainants”) filed an Unfair Labor Practice Complaint (“Complaint”) in the above-referenced case. The Complainants alleged that the District of Columbia Public Schools (“DCPS” or “Respondent”) violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) failing to provide information necessary to perform their duty as the bargaining unit representative, and (2) refusing to bargain over the impact and effect of privatization (i.e., converting full-time positions to part-time positions). In its Answer to the Unfair Labor Practice Complaint (“Answer”), the Respondent denied that it failed to provide information or that privatization took place. As a result, the Respondent requested dismissal of the Complaint.

This case was assigned to a Hearing Examiner who determined that the Respondent failed to provide information upon request in violation of D.C. Code § 1-617.04(a)(1) and (5) and granted the Complainants costs on this basis. However, the Hearing Examiner also found that the Complainants failed to show that the Respondent privatized the positions in question or changed bargaining unit positions from full-time to part-time. Therefore, the Hearing Examiner dismissed the portion of the Complaint concerning the Respondent’s duty to bargain over the impact and effects of the alleged privatization. The Complainants filed Exceptions to the Hearing Examiner’s

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Report and Recommendations (“R&R”) and requested sanctions and costs. Specifically, the Complainants took exception to the Hearing Examiner’s factual findings that there was no privatization and his conclusion that the Respondent had no duty to bargain over the impact and effects of the alleged privatization.

There are two issues for the Board’s consideration: (1) whether the Hearing Examiner’s R&R should be adopted in light of the Exceptions filed by the Complainants, and (2) whether the request for sanctions and costs should be granted.

II. Background

The Complainants have been certified by this Board as the exclusive representatives of several positions employed by the Respondent. (Complaint at pgs. 2-3). On February 19, 2002, Local 639 President John Catlett notified Superintendent Paul Vance that he had heard rumors that the bargaining unit work in the individual schools, at Penn Center, and at Kramer Annex would be contracted out. Mr. Catlett requested information about the proposed privatization and requested bargaining over the impact and effects of contracting out bargaining unit work. (Complaint at p. 3, R&R at p. 2). On June 7, 2002, DCPS responded to the Complainants, as will be discussed below.

The Complainants made several more requests for information between February and June 2002. Further, the Unions identified two requests to negotiate over the impact and effects of contracting out bargaining unit work. In the first request to bargain dated February 19, 2002, Mr. Catlett stated to the Respondent:

I am again receiving reports that DCPS management has plans to contract out Teamster bargaining unit work. . . . This letter is a formal request to negotiate over the effect of any and all proposed changes and efforts that may impact on Teamster bargaining unit work. (R&R at p. 2).

In the Complainants’ second alleged request to bargain, by letter dated June 20, 2002, Mr. Catlett stated:

It has come to my attention that DCPS is advertising for part-time custodians for employment in the school system. These part-time custodians will be doing the work of Teamsters DCPS custodians who you are terminating.

This letter serves as a class action grievance for:

1. The terminations of all Teamster custodians you are firing under the guise of “budgetary pressures”.

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2. The unlawful transferring of Teamster bargaining unit work to non-Union, part-time employees. This is a clear contract violation.
3. The contracting out of Teamster bargaining unit work in violation of the Labor Agreement. (TR. at p. 13, R&R pgs. at 6-7).

Mr. Catlett considered this June 20, 2002 communication to be a request to bargain. DCPS did not respond to this request. (R&R at p. 7).

In light of the above, the Complainants filed an unfair labor practice Complaint on July 9, 2002. The Complainants asserted that the Respondent violated D.C. Code § 1-617.04(a)(1) and (5) by: (1) failing to provide the requested information; (2) refusing to bargain over the impact and effects of the privatization of bargaining unit work; and (3) replacing full-time employees with part-time employees. The Complainants requested that the Board order the Respondent to: (1) provide the requested information; (2) cease and desist from privatizing any bargaining unit work without first negotiating in good faith over the impact and effects of such privatization; (3) bargain with the Unions over the privatization of bargaining unit work; and (4) pay costs associated with this Complaint. (Complaint at pgs. 4-5).

On August 5, 2002 (after this Complaint was filed), the Respondent replied to the Unions concerning their request to bargain as follows: "Pursuant to your letter of June 20, 2002, please be advised that the District of Columbia Public Schools has not contracted out services in lieu of the recent transformation of central office and part of the reduction in force." (Answer p. 3, R&R at p. 5).

Also, on August 5, 2002, the DCPS filed its Answer to the unfair labor practice Complaint ("Answer"), asserting that it had responded to the Unions' request for information to the extent the information existed and that it had not privatized work performed by employees represented by the Complainants. (Answer at pgs. 2-3). In its Answer, DCPS further argued that: (1) it responded on August 5, 2002; to the June 20th request regarding contracting out services (Answer at p. 2); (2) it provided the names, grades and work title of each employee who received a letter of abolishment or reduction in force as a result of the central office transformation (Answer at p.2); and (3) there was no privatization of bargaining unit work performed by bargaining unit employees. (Answer at p. 3). As a result, the Respondent requested that the Complaint be dismissed. (Answer at p. 4).

III. Hearing Examiner's Report

The Complainants argued before the Hearing Examiner that they repeatedly made requests for information and for impact and effects bargaining over the conversion of bargaining unit work from full-time to part-time. However, they received some of the information late and did not receive some of the information at all. In addition, the Complainants offered: (1) a May 30, 2002 letter giving notice of position abolishment to a custodial employee and (2) a Master Vacancy List as of

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June 11, 2002, listing a few part-time positions (Complaint, Exhibit 8) - as proof that the Respondent had contracted out bargaining unit work and converted full-time positions into part-time positions. In its defense, the Respondent argued before the arbitrator that it did not convert any bargaining unit positions from full-time to part-time and that all the information requested by the Unions had been provided.

On January 31, 2003, the Hearing Examiner issued the R&R in this matter. The Hearing Examiner considered the Unions' argument that DCPS did not respond to their requests for information in a timely manner, or did not respond at all. He stated that as part of its obligation to bargain in good faith, an agency must provide information requested by a union that is relevant and necessary for the union to carry out its responsibilities as exclusive representative of employees, and must provide the information in a timely manner. (R&R at p. 10). Citing *Doctors Council of D.C. General Hospital v. D.C. Health and Hospitals Public Benefit Corp.*,¹ the Hearing Examiner noted that this Board has held that an agency does not satisfy its statutory obligation by eventual but belated responses to requests for information, particularly responses that are provided only after an unfair labor practice complaint has been filed. He stated that it is not enough that the agency respond, but it must do so in a timely manner. After reviewing the evidence, he determined that in this case DCPS did not respond to some of the Unions' requests and responded to others only after the Unions filed a Complaint. As a result, the Hearing Examiner concluded that the failure of DCPS to respond to the Unions' Request Nos. 2 through 6 violated D. C. Code § 1-617.04(a)(1) and (5). Further, he concluded that the Respondent's position [concerning its unfounded belief that the Unions had received the requested information] was wholly without merit and accordingly, the Complainants are entitled to reimbursement of reasonable costs from the Respondent. (R&R at p. 14).

The Complainants also argued that the Respondent had a duty to bargain over the impact and effects of the privatization of bargaining unit work and conversion of full-time positions to part-time positions. The Hearing Examiner held that the Respondent's failure to negotiate with the Unions was an unfair labor practice only to the extent that a duty to bargain existed. But, here, the Respondent denied the factual premise of the Complainants request to bargain.

Upon reviewing the evidence, the Hearing Examiner found that the Unions did not prove that any bargaining unit work was contracted out or that any bargaining unit position was converted from full-time to part-time. Specifically, he found that "the letter of position abolishment simply indicat[es] that a custodial employee's position was being abolished; nothing in the letter shows that the position was restructured or reestablished as a part-time position. The master Vacancy List does identify a handful of vacant positions as part-time, but there is nothing contained in the list to

¹47 D.C. Reg. 10108, Slip Op. No. 641, PERB Case No. 00-U-29 (2000). See also, *Providence Hospital and Mercy Hospital and Massachusetts Nurses Association*, 320 NLRB 790, 794 (1996).

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support a conclusion that these positions had previously been full-time.” (R&R at p. 14) In the absence of such evidence, the Hearing Examiner concluded that the Complainants did not meet their burden of proof in this regard. On this basis, he concluded that to the extent the Unions letters dated February 19, 2002, and June 20, 2002, were requests to bargain over the contracting out of bargaining unit work, no obligation to bargain existed because the underlying premise - that work had been contracted out or that bargaining unit positions were changed from full-time to part-time - had not been proven. (R&R at pgs. 13-14). In view of his findings, he concluded that the Respondent’s failure to bargain was not an unfair labor practice. (R&R at pgs. 14-15).

The Complainants filed Exceptions to the Hearing Examiners R&R concerning the issue of the Respondents failure to negotiate over the impact and effects of contracting out or converting bargaining unit work from full-time to part-time. The Respondent did not file an Opposition. The Complainants’ Exceptions can be divided into exceptions pertaining to the Hearing Examiners factual findings, (Exception Nos. 1-3),² and exceptions pertaining to the legal conclusions resulting from his findings of fact. (Exceptions Nos. 4-5).³ Specifically, the Complainants take issue with the Hearing Examiner’s finding that no bargaining unit positions were converted from full-time to part-time and argue that he failed to consider all the relevant evidence. (Exceptions at p. 7). The Complainants contend that the Hearing Examiner should have extrapolated from the facts presented that bargaining unit work was being converted from full-time to part-time and should have recommended a remedy accordingly. They further assert that “the Hearing Examiner relied upon a denial not properly in the record to find that the Respondent had no obligation to bargain regarding the conversion of unit work”. (Exceptions, p. 11). The Complainants would have the Hearing Examiner reject the Respondent’s August 6, 2002 Answer to their Complaint.

²The Complainants challenged: “(1) *The Hearing Examiner’s finding that the Respondent asserted that no bargaining unit positions were in fact converted from full-time to part-time as this finding is not supported by the record.* (2) *The Hearing Examiner’s finding that Complainants presented no persuasive evidence to refute Respondent’s purported assertion that no bargaining unit positions were in fact converted from full-time to part-time.* (3) *The Hearing Examiner’s failure to draw logical inferences from the record and from the factual findings he did make.*” (Emphasis added). (Exceptions, pgs. 1-2).

³The Complainants also challenged: “(4) *The Hearing Examiner’s conclusion and recommendation that the Respondent had no obligation to bargain over the conversion of bargaining unit positions from full-time to part-time, and* (5) *[His] failure to address and recommend appropriate remedies based on his conclusion that Respondent had no obligation to bargain including that PERB order DCPS to cease and desist from unilaterally altering the agreed-upon bargaining units, including the transfer and conversion of bargaining unit work from full-time bargaining unit employees to part-time, before negotiating in good faith with the Union concerning the impact of its transfer and conversion of such work on bargaining unit employees.*” (Emphasis added). (Exceptions, p. 2).

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Pursuant to Board Rule 520.11, "the party asserting a violation of the CMPA, shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Upon a review of the evidence in this matter, the Hearing Examiner found insufficient evidence to establish that the Respondent contracted out or converted bargaining unit work from full-time to part-time.

A review of the record reveals that the Complainants' Exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. This Board has held that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the findings where they are fully supported by the record. *See, American Federation of Government Employees, Local 874 v. D.C. Department of Public Works*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also rejected challenges to the Hearing Examiner's finding based on: (1) competing evidence; (2) the probative weight accorded evidence; and (3) credibility resolutions. *American Federation of Government Employees v. Local 2741 v. D.C. Department of Recreation Parks*, 46 D.C. Reg. 6502; Slip Op. No. 588, PERB Case No. 98-U-16 (1999); *American Federation of Government Employees v. District of Columbia Water Authority*, Slip Op. 702, PERB Case No. 00-U-12 (2003). Similarly, we have held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451, at p. 4, PERB Case No. 95-U-02 (1995). *See also, University of the District of Columbia Faculty Association/NEA v. University of the District of Columbia*, 39 D.C. Reg. 6238, Slip Op. No. 285, PERB Case No. 86-U-16 (1992); and *Charles Bagenstose, et al. v. D.C. Public Schools*, 38 D.C. Reg. 4154, Slip Op. No. 270, PERB Case No. 88-U-34 (1991).

We conclude that the Hearing Examiner's findings that no work was contracted out and that no bargaining unit positions were converted from full-time to part-time are reasonable and supported by the record. Therefore, we also conclude that the Respondents did not commit an unfair labor practice by refusing to bargain concerning the contracting out of bargaining unit work or converting bargaining unit positions from full-time to part-time.⁴

In the present case, DCPS failed to comply with some of the Unions' requests for information, and did not comply with other requests until after the Complaint was filed. "[The Board has] previously held that an agency's failure to provide requested information in a timely manner, constitutes a violation of D.C. Code § 1-618.4(a)(1) and (5)." *Doctors Council of D.C.*

⁴It was not enough for the Complainants to state that DCPS had plans to contract out bargaining unit work. Even if this were true, the Board has held that where an employer decides not to implement or suspends implementation of a management right decision, no duty to bargain over its impact and effects exists. *See Fraternal Order of Police v. Metropolitan Police Department*, 47 D.C. Reg. 1449, Slip Op. No. 607, PERB Case No. 99-U-44 (1999), where MPD proposed a change, but later decided not to implement the change. Under the facts of *FOP v. MPD*, the Board found that it was premature to conclude that MPD had violated the Comprehensive Merit Personnel Act "CMPA" by failing to bargain over a proposed, but unimplemented change. *Id.*

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General Hospital v. D.C. General Hospital, Slip Op. No. 482, PERB Case Nos. 95-U-10, 95-U-18 (1996); *Doctors Council of the D.C. General Hospital v. D.C. General Hospitals Public Benefit Corporation*, 47 D.C. Reg. 10108, Slip Op. No. 641, PERB Case No. 00-U-29 (2000). As a result, the Hearing Examiner found that DCPS's failure to provide the Unions with the requested information and its failure to provide the information in a timely manner violated the CMPA.

The Complainants have requested that costs be awarded. D.C. Code § 1-618.13(d) provides that "The Board shall have the authority to require the payment of reasonable costs incurred by a party to a dispute from the other party or parties as the Board may determine." Further, we have articulated an interest of justice criteria in *AFSCME, D.C. Council 20, Local 2776 v. D.C. Department of Finance and Revenue*, 73 D.C. Reg. 5658, Slip Op. No. 245 at pgs. 4-5, PERB Case No. 98-U-02 (2000). In *AFSCME, Council 20*, we addressed the criteria for determining whether a successful unfair labor practice complainant should be awarded costs in its Decision and Order:

First, any such award of costs necessarily assumes that the party to whom the payment is to be made was successful in at least a significant part of the case, and that the costs in question are attributable to that part. Second, it is clear on the face of the statute that it is only those costs that are "reasonable" that may be ordered reimbursed. . . . Last, and this is the nub of the matter, we believe such an award must be shown to be in the interest of justice.

Just what characteristics of a case will warrant the finding that an award of costs will be in the interest of justice cannot be exhaustively catalogued. . . . What we can say here is that among the situations in which such an award *is* appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonable foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive representative.

In the present case, it is clear that the Unions made requests for information repeatedly and DCPS did not comply with some of the requests at all and did not comply with others until *after* the Unions filed their Complaint. Therefore, the Unions prevailed in their unfair labor practice complaint regarding the failure of DCPS to provide information. Further, the Hearing Examiner found that DCPS offered no explanation as to why it could not provide the necessary and relevant information requested by the Unions (regarding Requests 1, 5, and 6) or why it could not provide the responses in a timely manner (Requests 2, 3, and 4). As a result, the Hearing Examiner concluded that DCPS's position was wholly without merit and recommended that the Board award costs in this case. We find that the Hearing Examiner's findings as to the awarding of reasonable

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costs is supported by the record, reasonable and consistent with our holding in *AFSCME, Council 20, Id.* Therefore, we grant the Complainants' request for reasonable costs.

Pursuant to D.C. Code § 1-605.02 (3) (2001) and Board Rule 520.14, the Board adopts the Hearing Examiners Report and Recommendations.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Hearing Examiner's findings and recommendations are adopted. Therefore, that portion of the unfair labor practice complaint filed by Teamsters Local Unions 639 and 670, International Brotherhood of Teamsters, AFL-CIO ("Teamsters, Local 639 and 670") against the District of Columbia Public Schools ("DCPS") alleging a refusal to bargain over the conversion of full-time bargaining unit positions to part-time, is dismissed.
2. The Hearing Examiner's findings and recommendations that DCPS failed to provide relevant and necessary information to Teamsters, Local 639 and 670, in violation of D.C. Code § 1-617.04(a)(1) and (5) (2001), are adopted to the extent that this information is not moot.
3. The Hearing Examiner's findings and recommendations that DCPS failed to provide relevant and necessary information to Teamsters, Local 639 and 670, in a timely manner, in violation of D.C. Code § 1-617.04(a)(1) and (5) (2001), are adopted to the extent that this information is not moot.
4. DCPS, its agents and representatives, shall cease and desist from interfering with, restraining or coercing employees in the exercise of their rights under the Comprehensive Merit Personnel Act ("CMPA") in any like or related matter.
5. DCPS shall post conspicuously within ten (10) days from the service of this Decision and Order, the attached Notice, admitting the above noted violations where notices to employees are normally posted.
6. DCPS shall notify the Public Employee Relations Board ("PERB"), in writing, within fourteen (14) days from the date of this Decision and Order that the Notice has been posted accordingly. In addition, DCPS shall notify PERB of the steps it has taken to comply with the directives in paragraphs 2, 3, 4 and 5 of this Order.

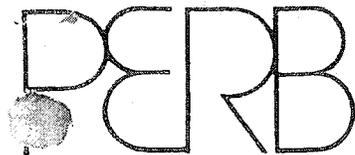
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7. The Complainant shall submit to the PERB, within fourteen (14) days from the date of this Order, a statement of actual costs incurred processing this action. The statement of costs shall be filed together with supporting documentation. DCPS may file a response to the statement within fourteen (14) days from service of the statement upon it.
8. DCPS shall pay the Complainants their reasonable costs incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.
9. 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.

December 16, 2005

MAR 23 2007



Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W. Washington, D.C. 20004 [202] 727-1822/23 Fax: [202] 727-9116



NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS (DCPS), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 804, PERB CASE NO. 02-U-26 (December 16, 2005).

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) and (5) by the actions and conduct set forth in Slip Opinion No. 804.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act (CMPA) to freely: (a) form, join, or assist any labor organization and (b) bargain collectively through representatives of their own choosing.

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

District of Columbia Public Schools

Date: _____ By _____
Director

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions they may communicate directly with the Public Employee Relations board, whose address is: 717 14th Street, N.W., 11th Floor, Washington, D.C. 20005. Phone: (202) 727-1822

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 16, 2005

2618

Government of the District of Columbia

Public Employee Relations Board

In the Matter of:

American Federation of Government Employees,
Local 1403,

Complainant,

v.

Government of the District of Columbia,
Office of Corporation Counsel, and Office of
Labor Relations and Collective Bargaining,

Respondent.

PERB Case No. 02-U-28

Opinion No. 805

FOR PUBLICATION

DECISION AND ORDER

I. Statement of the Case:

The American Federation of Government Employees, Local 1403 ("Complainant" or "Union") filed an unfair labor practice complaint in the above-captioned matter. The Complainant alleges that the Government of the District of Columbia, the Office of the Corporation Counsel ("OCC")¹, and the Office of Labor Relations and Collective Bargaining ("Respondents" or "OLRCB", failed to bargain in good faith in violation of D.C. Code § 1-617.04(a)(1) and (5). Specifically, the Complainant alleges that the Respondents refused to negotiate with the Complainant over the distribution of monies that were made available to the OCC in the Fiscal Year 2002 Supplemental Budget Request Act.

¹The Office of the Corporation Counsel OCC is now called the Office of the Attorney General.

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The Hearing Examiner held a hearing in this matter² and issued a Report and Recommendations ("R&R") where he found that the Respondent did not violate the Comprehensive Merit Personnel Act ("CMPA"). Therefore, he recommended that the unfair labor practice complaint be dismissed. The parties did not file exceptions. The Hearing Examiner's R&R is before the Board for disposition.

II. Discussion

On November 2, 2001, this Board certified the Complainant as the exclusive representative for a unit consisting of "All attorneys employed by the [OCC]." (PERB Certification No. 121).³ Although the Board certified the Complainant as the exclusive representative for the OCC bargaining unit, the appropriate compensation unit was not determined at this time.⁴

On December 21, 2001, the District of Columbia appropriated money to the OCC stating, that "no less than \$353,000 shall be available to the Office of the Corporation Counsel to support increases in the Attorney Retention Allowance."⁵ Also, on April 11, 2002, the Mayor signed the "Fiscal Year 2002 Supplemental Budget Request Act of 2002" (known as the "FY 2002

²In a separate Complaint (PERB Case No. 02-U-23), the Union also alleged that the Respondents violated D.C. Code §§ 1-617.04(a)(1) and (5) and 1-617.07. In that case, the Union claimed that the Respondents did not act in a timely manner to implement dues withholding as requested by the Union for those employees who authorized such withholding. PERB Case No. 02-U-23 and PERB Case No. 02-U-28 were consolidated. A hearing was held on the consolidated matter. The Hearing Examiner determined in PERB Case No. 02-U-23 that the Respondents violated §§ 1-617.04(a)(1) and 1-617.07 by not acting in a timely manner to implement dues withholding. In addition, he concluded that these actions did not constitute a failure to bargain in violation of D.C. Code §1-617.04(a)(5). The Respondents filed exceptions to the Hearing Examiner's findings in PERB Case No. 02-U-23. However, before the Board could consider the consolidated matter, the parties entered into a settlement agreement concerning PERB Case No. 02-U-23. As a result, PERB Case No. 02-U-23 was withdrawn with prejudice. Therefore, only the Hearing Examiner's findings in PERB Case No. 02-U-28 are before the Board for disposition.

³See PERB Case No. 01-RC-03 (November 2, 2001).

⁴Labor organizations are initially certified by the Board under the Comprehensive Merit Personnel Act ("CMPA") to represent units of employees that have been determined to be appropriate for the purpose of non-compensation terms-and-conditions bargaining. Once this determination is made, the Board then determines the compensation unit in which these employees should be placed. Unlike the determination of a terms-and-conditions unit, which is governed by criteria set forth under D.C. Code § 1-617.09 (2001 ed.), unit placement for the purpose of authorizing collective bargaining over compensation is governed by D.C. Code § 1-617.16(b) (2001 ed.).

⁵Public Law 107-96 "FY 2002 Appropriation" under the heading "Governmental Direction and Support".

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Supplemental” (D.C. Act 14-322).⁶ The FY 2002 Supplemental amended the above-cited provision of the FY 2002 Appropriation. (See n. 5). The amendment provided that “not less than \$353,000 shall be made available to the Office of the Corporation Counsel to support attorney compensation *consistent with performance measures in a negotiated collective bargaining agreement.*” (Emphasis added).

Subsequently, on May 20, 2002, OLRCB submitted non-compensation proposals to the Union. In response to OLRCB’s non-compensation proposals, the Union submitted a compensation proposal on June 3, 2002, for immediate disposition of the \$353,000 appropriated to the attorneys in the OCC. However, OLRCB did not respond to the Union’s compensation proposal. As a result, on July 29, 2002, the Union filed the unfair labor practice complaint at issue in this case. In the complaint, the Union alleged that the Respondents refused to bargain over the disbursement of the appropriated funds. The Respondents filed an Answer⁷ denying the allegations.

On August 2, 2002, OLRCB declared the compensation proposal to be non-negotiable because it sought to negotiate terms and conditions of employment on behalf of non-bargaining unit employees within the OCC. In response to this declaration, on August 19, 2002, the Union amended its compensation proposal. The amended proposal limited the proposed disbursement of the appropriated funds to bargaining unit members only. In September 2002, the Union also made proposals pertaining to other compensation issues. OLRCB did not make any counter proposals concerning compensation. The negotiations resulted in an agreement regarding a number of non-compensation issues. However, no compensation issues were resolved by September 26, 2002.

On October 30, 2002, this Board made a determination concerning the appropriate compensation unit for attorneys represented by the Union. These attorneys were placed in Compensation Unit 33,⁸ which was a newly created unit. Thereafter, in November 2002, the Respondents proposed a comprehensive compensation package.

In its complaint, the Complainant asserts that the Respondents violated D.C. Code § 1-617.04(a)(1) and (5) by failing to negotiate upon demand over the disbursement of the money that was appropriated in order to increase the salaries of the attorneys in the OCC. In support of its position, the Complainant claims that: (1) in Certification No. 121, Local 1403 was certified as the exclusive bargaining representative of attorneys at OCC for collective bargaining over terms and conditions of employment *as well as* compensation matters; (2) OLRCB’s position, that it must wait

⁶D.C. Act 14-322 became effective on August 2, 2002, when it was signed by the President as Public Law 107-206.

⁷The Answer was filed on August 14, 2002.

⁸Slip Op. No. 694, PERB Case No. 02-CU-01 (October 30, 2002).

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for the Board to certify a compensation unit before negotiating over compensation, is contrary to D.C. Code §1-617.17(m) - because this provision imposes no restriction on how soon bargaining may commence; (3) the FY 2002 Appropriations Act contains mandatory language and the Home Rule Act and the Anti-Deficiency Act require that the \$353,000 be distributed in the same year that the money was appropriated; and (4) the FY 2002 Appropriations Act created a special bargaining situation that was an exception to the collective bargaining provisions of the CMPA. As a remedy, the Complainant requested that the Board order the Respondents to bargain in good faith, post a notice acknowledging that they violated the CMPA and impose sanctions.

In their Answer, the Respondents argue that: (1) compensation negotiations could not begin until after the Board determined the appropriate compensation unit for attorneys in the OCC bargaining unit, pursuant to D.C. Code §1-617.17(m);⁹ (2) the duty to bargain did not arise until after the FY 2002 Supplemental was finalized on August 2, 2002 when it was signed by the President; (3) in the alternative, a duty to bargain did not arise until after the Union made a legal compensation proposal by excluding the non-bargaining unit attorneys from its compensation proposal, on August 19, 2002; and (4) the disbursement of the \$353,000.00 must be consistent with performance measures in a multi-year negotiated collective bargaining agreement. Finally, the Respondents argue that a complete compensation package was proposed in November 2002 - proof that they were not refusing to bargain over compensation.

The Hearing Examiner found that there was "no real dispute that [the] Respondents did not bargain with [the] Complainant over the distribution of the \$353,000 provided in the FY 2002 Supplemental . . . before June 29, 2002, when [the] Complainant filed the unfair labor practice complaint. [Further] [i]n order for this failure to constitute an unfair labor practice in violation of D.C. Code § 1-617.04(a)(1) and (5), [the] Respondents must have had an obligation to bargain during this period." (R&R at p. 17). However, the Hearing Examiner concluded that they had no such obligation for several reasons.

⁹In "Respondents' Post-Hearing Brief", in support of this proposition, the Respondents cited *American Federation of Government Employees, Local 2725, and District of Columbia Department of Housing and Community Development*, 28 DCR 1966, Slip Op. No. 11, PERB Case No. 80-U-06 (1981). (Post Hearing Brief at p. 10). In *AFGE, Local 2725*, the Union alleged that the Respondent violated the CMPA by its refusal to engage in collective bargaining. The Respondent in that case declined to continue with negotiations because the Complainant's proposals included *compensation* as well as non-compensation issues prior to this Board's determination of the appropriate compensation bargaining units for the District. This Board held that "[a]s to the required simultaneous bargaining of terms and conditions of employment issues and compensation issues, [once we] made [a] determination of [the] appropriate compensation bargaining units in [Slip Op. No. 5, PERB Case No. 80-R-08] (February 6, 1981, as amended February 19, 1981), [this] removed any impediment to the simultaneous bargaining of terms and conditions of employment issues with compensation issues." *Id.* at p. 2.

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First, the Hearing Examiner noted that D.C. Code § 1-617.17(m) provides that “[w]hen the Public Employee Relations Board is required to determine an appropriate bargaining unit for the purpose of compensation negotiations, . . . negotiations for compensation . . . shall begin no later than 90 days after the Board’s determination.” Relying on this provision, the Hearing Examiner determined that “under the scheme set forth in D.C. Code § 1-617.17, compensation bargaining cannot begin until [the Board] has established an appropriate compensation unit for affected employees.” (R&R at p. 17). Based on the record, the Hearing Examiner concluded that the Board did not certify a *compensation* unit for the employees represented by the Complainant until October 30, 2002, well after the Complainants filed their complaint. See PERB Case No. 02-CU-01 (2002).

The Hearing Examiner determined that this Board’s first certification of the Complainant as the exclusive bargaining representative of the attorneys at OCC for terms and conditions as well as compensation in PERB Case No. 01-RC-03 (November 2, 2001), was not to be confused with the mandate that the Respondents bargain upon demand. He found that “[t]he certification language merely provided that if and when an obligation to bargain over such matters with respect to attorneys at OCC arose, Local 1403 would have the exclusive entitlement to represent those attorneys. Other events had to occur, however, for that bargaining obligation to be triggered, including [the Board’s] establishment of a *compensation* unit that includes attorneys at OCC which, as noted, did not occur until October 30, [2002].” (R&R p. 17).

In addition, the Hearing Examiner identified a second event which had to occur before the obligation to bargain was triggered: namely, that the statutory provision for the \$353,000 had to be enacted. He found that it had not yet been enacted on June 29, 2002, when the complaint was filed and became effective only after the President of the United States signed the legislation on August 2, 2002. (R&R, p.18).

In light of the above, the Hearing Examiner rejected the argument that the amendments to D.C. Code § 1-617.17(m) (2001) made by D.C. Law 14-190, required the Respondents to bargain over the distribution of the \$353,000.¹⁰ He noted that D.C. Code § 1-617.17(m) provides that

¹⁰The language of D.C. Code § 1-617.17(m) (2001) set forth in footnote 8, was amended on April 12, 2005, by the “Labor Relations and Collective Bargaining Amendment Act of 2004”. The resulting new language is as follows: “When the Public Employee Relations Board makes a determination as to the appropriate bargaining unit for the purpose of compensation negotiations pursuant to §1-617.16, negotiations for compensation . . . shall commence as provided for in subsection (f) of this section.” (Emphasis added).

In turn, §1-617.17 (f)(1) provides in part as follows:

Collective bargaining for a given fiscal year or years shall take place at such times as to be reasonably assured that *negotiations shall be completed prior to submission of a budget for said year(s) in accordance with this section.* (Emphasis added).

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compensation bargaining shall begin no later than 90 days after the Board's determination of the appropriate compensation unit. Furthermore, he indicated that even if the amended language had been established law, "it could not have required negotiations over the distribution of monies that, in the form at issue here, had not yet been enacted". (R&R, p. 19) He also rejected the argument that the following language: "The Mayor shall negotiate agreements concerning working conditions at the same time he or she negotiates compensation issues" in D.C. Code § 1-617.17(m), overrides the requirement that this Board first establish an appropriate bargaining unit. (R&R, p. 19).

Finally, the Hearing Examiner rejected the Union's argument that implementation of the FY 2002 Supplemental was mandatory because failure to disburse the appropriated funds would violate the Home Rule Act and the Anti-Deficiency Act. He found that the Home Rule Act and the Anti-Deficiency Act are not within the Board's authority or jurisdiction. Rather, he noted that the Board is entrusted with determining whether an unfair labor practice has been committed under the provisions of the CMPA. (R&R, p. 18)

For all of these reasons, the Hearing Examiner concluded that the Respondents had no obligation to bargain with the Complainant over the disbursement of the \$353,000 and its failure to do so did not violate D.C. Code § 1-617.04(a)(1) and (5). Therefore, he recommended that the complaint be dismissed.

Section 1-617.17(f)(1) (con't):

(A) (i) A party seeking to negotiate a compensation agreement shall serve a written demand to bargain upon the other party during the period 120 days to 90 days prior to the first day of a fiscal year, for purposes of negotiating a compensation agreement for the subsequent fiscal year.

(ii) Where the compensation agreement to be negotiated is for a newly certified unit *assigned to a newly created compensation unit*, working conditions or other non-compensation matters shall be negotiated concurrently with negotiations concerning compensation. (Emphasis added).

Therefore, the above new provisions of D.C. Code § 1-617.17(m) and 617.17(f) require that compensation bargaining be completed prior to the submission of a budget for the given fiscal year. However, the Complaint in this matter was filed on July 29, 2002, and the underlying facts of this case occurred prior to the change in the law. Therefore, the language found in the 2001 edition of the D.C. Code is applicable to the facts of this case. As a result, pursuant to D.C. Code § 1-617.17(m) (2001): "When [the Board] is required to determine an appropriate bargaining unit for the purpose of compensation [bargaining] . . . negotiations for compensation . . . shall begin no later than 90 days after the Board's determination."

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The Hearing Examiner's findings and recommendations are before the Board for disposition. Specifically, we must decide whether to adopt the Hearing Examiner's finding that the Respondents' refusal to negotiate with the Complainant over the distribution of \$353,000.00 which was made available to the OCC in the Fiscal Year 2002 Supplemental Budget Request Act, did not violate D.C. Code § 1-617.04(a)(1) and (5) (2001 ed.).

The Board has previously addressed the issue of whether there is a duty to engage in compensation negotiations simultaneously with negotiations concerning terms and conditions of employment when the appropriate compensation unit has not yet been determined by PERB. We have held in *American Federation of Government Employees, Local 2725, and District of Columbia Department of Housing and Community Development, id.*, that "[a]s to the required simultaneous bargaining of terms and conditions of employment issues and compensation issues, [once we make a] determination of [the] appropriate compensation bargaining unit . . . , [this] remove[s] any impediment to the simultaneous bargaining of terms and conditions of employment issues with compensation issues." This outcome is reflected in D.C. Code § 1-617.17(m) (2001), relied upon by the Hearing Examiner, which states that "negotiations for compensation between management and the exclusive representative . . . shall begin no later than 90 days *after the Board's determination [of the appropriate compensation unit].*" (Emphasis added). Here, the OLRCB commenced compensation bargaining within 90 days after the Board's determination of the appropriate compensation unit. Therefore, we concur with the Hearing Examiner's conclusion that OLRCB's refusal to bargain before our October 30, 2002 certification of the attorney compensation unit, cannot constitute a refusal to bargain under D.C. Code § 1-617.04(a) (1) and (5).

Pursuant to D.C. Code § 1-605.02 (3) (2001 ed.) and Board Rule 520.14, we conclude that the Hearing Examiner's findings, conclusions and recommendations are reasonable, supported by the record and consistent with Board precedent. As a result, the Board hereby adopts the Hearing Examiner's recommendation that the Respondent did not violate D.C. Code § 1-617.04(a) (1) and (5) by refusing to bargain.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Hearing Examiner's findings and recommendations are adopted. The unfair labor practice complaint is dismissed.
- (2) Pursuant to Board Rule 559.2, this decision is final upon issuance.

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

November 30, 2005