

Academy Bilingual Community
1470 Irving St NW 20009
May 13, 2005

Notice of Request for Proposal

The proposed Academy Bilingual Community Charter School, in compliance with Section 22404 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits proposals for the following services for the school:

- I. **Auditing:** Services to conduct the audit in accordance with auditing standards generally accepted in the U.S and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements.
- II. **Printing Services:** For the 2005-2006 school years. (Copies per year 20,000)
- III. **Computer Support:** To provide superior computer services. Providing a wireless plan, internal server, remote capability, and an IT tech as well as other services.
- IV. **Cleaning Service:** Service to maintain a neat clean environment for the schools staff and students. Area needed to be cleaned is 15,000 sq ft.
- V. **Food Services:** Catering for breakfast (about 75 students) Catering for Lunch (about 150 students) Catering of snacks (about 150 students) and 60% free/reduced lunch. The meals must meet or exceed federal nutrition requirements and all compliance standards of the USDA. (All bid proposals must be submitted in the National School Lunch Program Format).
- VI. **Special Needs:** Services to provide: Multi-disciplinary Team to conduct evaluations/ re-evaluations as back-up to the in-house clinical team, Counseling for up to 16 students, Occupational Therapy for up to 16 students, Speech and Language for up to 16 students., and Support and Compliance level one.
- VII. **Computer Purchase:** Superior service for the purchase of laptops and desk computers.

Additional information can be obtained by calling 202-669-6345. Deadline for submissions is June 24, 2005 at 5PM

**Aim Public Charter School
1470 Irving St NW 20009
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSALS:

The proposed Aim Public Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest for the following services and products for the school:

- I. **Auditing:** Services to conduct the audit in accordance with auditing standards generally accepted in the U.S and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.
- II. **Copiers:** Needed for the 2005-2006 school year. (About 20,000 copies per year).
- III. **Computer Support:** To supply superior computer support for the 2005-2006 school year. Service includes wireless plan, internal server, remote capability, IT representative and other services.
- IV. **Cleaning Service:** To maintain a neat and clean environment for the students and staff. Area needed to be cleaned is about 27,000 sq ft, has three bathrooms, and three floors.
- V. **Food Services:** Catering for breakfast (approx. 75 students) Catering for Lunch (approx. 75 students) Catering of Snacks (approx 85 students). The meals must meet or exceed federal nutrition requirements and all compliance standard of the USDA. School Breakfast Program and the National School Lunch Program. **(All bid proposals must be submitted in the National School Lunch Program Format).**
- VI. **Special Needs:** Multi-disciplinary Team to conduct evaluations/re-evaluations as back-up to the in-house clinical team, Counseling, Occupational Therapy, Speech/Language Therapy (17%-20% students).
- VII. **Computer Sales:** Superior service for the purchase of laptop and desktop computers.

Additional Information can be obtained by calling 202-669-6345. Deadline for Submissions is June 24, 2005 at 5PM

ALTA Public Charter School
1470 Irving St NW
May 15, 2005

NOTICE OF REQUEST FOR PROPOSALS:

The proposed Alta Public Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act "), hereby solicits expressions of interest for the following services and products for the school:

I. Auditing Services Sought:

Services to conduct the audit in accordance with auditing standards generally accepted in the United States of America and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining on a test basis, and evidence supporting the amounts and disclosures in the financial statements.

II. Copiers:

Needed for the 2005-2006 school year. (copies per year 20,000)

III. Computer Support: Superior service to provide a wireless plan, IT tech, remote capability, hardware needs, and other computer services to the school.

IV. Cleaning Services: Service to maintain a neat environment for staff and students. The area needed to be serviced is 30,000 sq ft.

V. Food Services: Catering for breakfast (about 50-60) students Catering for Lunch (about 100-120 students) and (about 65% free/reduced lunch) for the 2005-2006 school year. The meals must meet or exceed all federal nutrition requirements and all compliance standards of the USDA School Breakfast Program. Vendors are required to deliver meals to schools. **(Bid proposals must be submitted in the National School Lunch Program Format).**

.VI. Computer Sales: Superior services for the purchase of laptop and desktop computers.

For additional information call: 202-669-6345. Deadline for submissions is June 24, 2005 at 5PM

The Arts & Technology Academy Public Charter School is announcing a

REQUEST FOR PROPOSAL

for

**Architectural and Engineering Design Services ("A&E")
Arts & Technology Academy Renovation and Addition**

The Arts & Technology Academy is a District of Columbia public charter school located at 5300 Blaine Street NE, Washington, DC. It serves 615 students in preschool through 6th grade. ATA received its charter in the fall of 1999. The Academy was founded on the basis that children are interested in and entitled to an education. Learning is fun, yet challenging, and becoming an educated person is a goal that is not easily attained, but eagerly sought, while simultaneously building character and strength of mind. The school is dedicated to the incorporation of arts and technology in the learning process. The website is: www.artsandtechnologyacademy.org.

The Arts & Technology Academy is currently housed in 50,000 square feet of building. The Academy is considering expanding its successful program through 8th grade and therefore its enrollment to approximately 1000. Additional space as well as renovated space is needed to accommodate the facility needs of the future operation. The Project is expected to include various classrooms, a science lab, a computer lab, an art studio, a library, performing arts spaces, and general administrative space. The amount of new construction is currently estimated in the range of 30,000 to 40,000 square feet.

ATA is soliciting proposals for the design of an addition and a renovation of the existing building. The Owner has contracted Brailsford & Dunlavy to serve as Project Manager throughout the design and construction process.

The RFP will be issued Monday, May 23rd, 2005. **All proposals are due on or before noon on Friday June 3rd, 2005.**

A copy of the RFP can be obtained through the Academy's single point of contact:

Ms. Ann Drummie
Brailsford & Dunlavy
1140 Connecticut Avenue, NW
Suite 400
Washington, DC 20036
Phone: 202.289.4455
Fax: 202.289.6461
Email: adrummie@facilityplanners.com

**Capitol City Charter School
1470 Irving Street NW 20009
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSALS:

The proposed Capitol City Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from Food Service and Special Needs for the following products and services for the school.

I. Food Services sought:

Catering of daily Breakfast (approx.35 students)

Catering of daily Lunches (approx. 115 students)

(Bid proposals must be submitted in the National School Lunch Program Format)

II. Special Needs Services Sought:

Occupational Therapist (for 81 students)

Speech and Language Therapy (for 81 students)

Psyco- Educational Evaluations (for 81 students)

III. Computer Purchase : For the purchase of superior laptop and desktop computers.

IV. Auditing Service Sought: Service to conduct the audit in accordance with auditing standards generally accepted in the United States and " Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.

For Additional Information Call 202-669-6345. Deadline for Submissions is June 24, 2005 at 5PM.

The William E. Doar, Jr. Public Charter School for the Performing Arts

705 Edgewood Street, NE

2nd Floor

Washington, DC 20017

(202) 269-4646

wedjpcs@wedjschool.uswww.wedjschool.us

May 27, 2005

Notice of Request for Proposals:

The William E. Doar, Jr. Public Charter School for the Performing Arts, in compliance with Section 2204 (C) of the District of Columbia School Reform Act of 1995 ("Act") hereby solicits expressions of interest in the form of proposals with references from qualified vendors for the following services:

1. Annual auditing – for the period of July 1, 2003 through June 30, 2005. Includes planning year and inaugural year of operation for charter school. Vendor must be on approved auditor list from DCPCSB.
2. Bookkeeping/Accounting/Financial Management Services for school year July 1, 2005- June 30, 2006.
3. Food Service for Summer School 2005 and School Year 2005-2006. Must be familiar with State Education Office and FDA standards for school food service under National School Lunch Program for Breakfast, Lunch and Snack.
4. Special Education Related Service Providers in the following areas:
Psychotherapy, Occupational Therapy, Physical Therapy, Speech and Language Pathology.
5. Interior and Exterior Building Cleaning Provider for 22,000 sq. foot internal school space and entrance ways to the building.

Questions may be e-mailed to wedjpcs@wedjschool.us with the subject line as the type of service. Proposals must be mailed to the school at the address above and should be sent to the Attention of Julie S. Doar-Sinkfield, Executive Director. Deadline for submissions is June 20, 2005. Appointments for presentations can be arranged by calling school office.

**BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES**

The District of Columbia Board of Elections and Ethics hereby gives notice that there are vacancies in **twelve (12)** Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed.

VACANT: 2F04, 3D08, 4A05

Petition Circulation Period: **Tuesday, May 31, 2005 thru Monday, June 20, 2005**

Petition Challenge Period: **Thursday, June 23, 2005 thru Wednesday, June 29, 2005**

**VACANT: 3D07
 5C11
 6B11
 8B02, 8B03, 8C05, 8C06, 8E01, 8E06**

Petition Circulation Period: **Monday, May 9, 2005 thru Tuesday, May 31, 2005**

Petition Challenge Period: **Friday, June 3, 2005 thru Thursday, June 9, 2005**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

**D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N**

For more information, the public may call **727-2525**.

E.L Haynes Public Charter School
1470 Irving St NW 20009
May 13, 2005

NOTICE OF REQUEST FOR PROPOSALS:

The proposed E.L Haynes Public Charter school in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from the following services and products for the school.

- I. **Auditing:** Services to conduct the audit in accordance with auditing standards generally accepted in the United States of America and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.
- II. **Accounting:** Needs superior service in creating of an organizational budget, periodic preparation of financial statements to school authorizer, and bookkeeping.
- III. **Computer support:** Superior Service to provide a wireless plan, internal server, remote capability, IT tech and other computer services.
- IV. **Custodial Support:** Cleaning services needed to keep the school neat and clean. The area needed to be serviced is 16,000 sq ft, has 1 floor and 3 bathrooms.
- V. **Food Service:** Catering of breakfast (approx. 41-49 students) Catering of Lunch (approx. 99-118 students) Catering of snacks (about 98-100 students). For the 2005-2006 school year. The meals must meet or exceed federal nutrition requirements and all compliance standards of the USDA School Breakfast program. Vendors will be required to deliver meals to the schools. **(All bid proposals must be submitted in the National School Lunch Program format).**
- VI. **Computer Sales:** Superior service for purchase of laptop and desktop computers.

For Additional Information call: 202-669-6345. Deadline for submissions is June 24, 2005 at 5pm

**DISTRICT OF COLUMBIA
HISTORIC PRESERVATION REVIEW BOARD**

NOTICE OF PUBLIC HEARING SCHEDULE

The D.C. Historic Preservation Review Board has scheduled public hearings on applications to designate the following properties as historic landmarks or historic districts in the D.C. Inventory of Historic Sites. This schedule is subject to change.

<u>Property</u>	<u>Case No.</u>	<u>Scheduled Hearing Date</u>
Saint Elizabeths Hospital Historic District	05-03	May 26, 2005
Danzansky Funeral Home	05-04	May 26, 2005
Old Engine Company 26 (Langdon)	02-11	June 23, 2005
Engine Company 23 (Foggy Bottom)	02-13	June 23, 2005
Engine 21/Truck 9 (Lanier Heights)	04-10	June 23, 2005
Sixteenth Street Historic District Expansion	00-04	July 28, 2005
Third Church of Christ, Scientist	91-05	July 28, 2005
Jesse Baltimore House (5136 Sherier Place)	04-09	July 28, 2005
Streetcar multiple-property document	01-14	September 22, 2005
Capital Traction Company Car Barn	01-05	September 22, 2005
Navy Yard Car Barn	01-06	September 22, 2005
Uline Arena	03-11	October 27, 2005
Grant School (School Without Walls)	01-01	November 17, 2005
Mt. Vernon Triangle multiple-property document		January 2006
King's Row	05-05	January 2006
Purveyor's Row	05-06	January 2006
Wittlin-Deckelbaum Building	05-07	January 2006
Central Auto Works	05-08	January 2006
Sixth Street South	05-09	January 2006
Hartig Motor Company	05-10	January 2006
K Street East	05-11	January 2006
K Street West	05-12	January 2006
453-455 I Street, NW	05-13	January 2006
301 I Street, NW	05-14	January 2006
444-446 K Street, NW	05-15	January 2006
Anne Archbold Hall (Reservation 13)	04-02	February 2006
Western Union Telegraph Co., Tenleytown	04-05	March 2006

Old Engine House 10	02-03	April 2006
Old Engine Company 12 (Bloomingdale)	02-04	April 2006
Engine Company 22 (Brightwood)	02-05	April 2006
Engine Company 27 (Deanwood)	02-10	April 2006
Engine Company 19 (Randle Highlands)	02-12	April 2006
Engine Company 31 (Forest Hills)	02-16	April 2006
Engine 16/Truck 3 (Franklin Square)	02-17	April 2006
Engine Company 26 (Brentwood)	02-18	April 2006
Fire Alarm Headquarters	02-19	April 2006
Engine Company 14 (Fort Totten)	02-20	April 2006

**DISTRICT OF COLUMBIA
HISTORIC PRESERVATION REVIEW BOARD**

NOTICE OF HISTORIC LANDMARK AND HISTORIC DISTRICT DESIGNATIONS

The D.C. Historic Preservation Review Board hereby provides public notice of its decision to designate the following property as historic landmarks in the D.C. Inventory of Historic Sites. The property is now subject to the D.C. Historic Landmark and Historic District Protection Act of 1978.

Designation Case No. 05-01: Dumblane

4120 Warren Street, NW (Square 1727, Lots 20, 21 and 22)

Designated April 28, 2005

Listing in the D.C. Inventory of Historic Sites provides recognition of properties significant to the historic and aesthetic heritage of the nation's capital city, fosters civic pride in the accomplishments of the past, and assists in preserving important cultural assets for the education, pleasure and welfare of the people of the District of Columbia.

Department of Housing and Community Development
Government of the District of Columbia
801 North Capitol Street, N.E.
Washington DC 20002

Notice of Request for Qualifications:
For Participating Non-Profit Affordable Housing Developers
in the Site Acquisition Funding Initiative for Affordable Housing
under the Housing Production Trust Fund

Jalal Greene, Director, District of Columbia Department of Housing and Community Development (DHCD), announces a Notice of Request for Qualifications (RFQ) for Non-Profit Affordable Housing Developers to participate in the "Site Acquisition Funding Initiative for Affordable Housing" (SAFI) under the Housing Production Trust Fund Program (HPTF), which is administered by DHCD. DHCD invites eligible non-profit affordable housing developers to respond to this RFQ, as referenced below.

A. Purpose of Initiative:

Many of the District's neighborhoods are rapidly changing due to escalating real estate prices. Non-profit affordable housing developers find it more and more difficult to quickly capture site opportunities due to lack of readily accessible resources. Resources are needed to quickly respond to market opportunities.

Through the SAFI Initiative, DHCD proposes to enter into partnership agreements with pre-qualified Participating Lenders ("Lenders"), who, in turn, will provide site acquisition and pre-development loans, purchase options, and technical assistance to non-profit affordable housing developers.

The SAFI Initiative seeks to leverage DHCD funds with private monies to provide quick-closing, easily accessible, revolving loan funds for non-profit developers committed to the preservation, rehabilitation and production of affordable housing. The Initiative proposes to:

- Leverage private resources.
- Allow DHCD to participate with Lenders which are already actively funding affordable housing development in the District.
- Allow non-profit Developers to compete in the current District real estate market.
- Provide a streamlined process to administer acquisition funding, by relying on lenders who are investing their own funds together with DHCD monies.

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Role of Lenders: DHCD will invest funds with selected Participating Lenders to leverage the Lenders' site acquisition lending activities. Each Lender will:

- Receive a Master Loan from DHCD.
- Use the proceeds of the Master Loan together with its own monies to make quick-closing site acquisition and pre-development loans, as well as purchase options, for eligible projects and Developers.
- Market, underwrite, originate and service its site acquisition loans, including sharing of risk with the District.

Role of Participating Developers: Non-profit affordable housing developers who wish to participate in the SAFI Initiative must first apply under this RFQ and be qualified as a Participating Developer. Participating Developers will:

- Apply to Lenders for funds to:
 - Purchase sites for development as affordable housing that meets the requirements of the Housing Production Trust Fund.
 - Fund predevelopment expenses and purchase options on identified sites.
- Carry out the pre-development process, and bring the eligible project to readiness to proceed with rehabilitation or construction.
- Apply for long-term gap financing to complete the eligible project, including application to any DHCD Notice of Funding Availability/Request for Proposals (NOFA/RFP), with no preferential consideration.
- Repay site acquisition loans to the Lender, as the eligible project secures construction financing.

B. Eligible Uses of SAFI Funds

1. Site Acquisition Loans;
2. Loans to acquire Purchase Options; and
3. Pre-Development Loans

C. Eligible Projects

Properties in the District of Columbia consisting of at least 10 units for development as rental housing (except for special needs housing, which shall be at least 5 units) or at least 5 units for development as ownership housing.

D. Available Funds

It is expected that Fifteen Million Dollars (\$15 Million) will be available for the SAFI Initiative in Fiscal Year 2005. Selections will be made in compliance with all pertinent statutory requirements.

E. Application Requirements

Application forms will be available from the Department of Housing and Community Development on Monday, May 23, 2005. Application requirements will be detailed in the **Request for Qualifications (RFQ): For Participating Non-Profit Affordable Housing Developers in the Site Acquisition Funding Initiative for Affordable Housing.**

MAY 27 2005

F. Application Process

Interested Developers must submit an original and five (5) copies of the completed RFQ application to DHCD by **4:00 PM, EDT on Monday, June 13, 2005**. The submittals shall not exceed 5 pages (plus any list of projects and staff resumes).

Applications shall be submitted to:

**The Development Finance Division
Second Floor, Receptionist Desk
Department of Housing and Community Development
801 North Capitol Street, N.E.
Washington, D.C. 20002**

Individuals, hand-delivering applications, must have picture identification and a transmittal letter on organization letterhead stating their name and the purpose of their visit. Failure to comply with these requirements may result in an application not being accepted.

**DEPARTMENT OF HUMAN SERVICES (DHS)
INCOME MAINTENANCE ADMINISTRATION (IMA)**

NOTICE OF FUNDING AVAILABILITY

FY 2006 TEEN PREGNANCY PREVENTION GRANT

With Temporary Assistance for Needy Families (TANF) grant funds received from the U.S. Department of Health and Human Services, the District of Columbia's Department of Human Services seeks to support programs, which prevent and reduce teenage pregnancies in the District of Columbia.

DHS intends to make multiple grant awards for the development and implementation of science-based projects that provide social, recreational, and educational services and activities designed to assist male and female youth and adolescents in avoiding pregnancy. DHS has approximately \$990,000 for programs that target youth in grades 5, 6, 7, 8, and 9.

The successful applicants will provide services in a neighborhood-based facility located in the District, especially Wards 7 and 8 or serving communities with large populations of limited English proficient at-risk youth. The project location must be easily accessible to the targeted youth. The projects will operate during the academic school year and summer.

Applications are requested from private non-profit entities including community-based and faith-based organizations.

The Request for Applications (RFA) will be released on May 31, 2005 and the deadline for submission is Monday, July 25, 2005 at 5:00 pm to Healthcare Services, 1329 Emerald Street, NE, Washington, DC 20002, Attention: Ms. Gladys Baxley. For additional information, please contact Ms. Priscilla Burnett, Department of Human Services, Office of Grants Management at 202-671-4407.

Applications may be obtained from DHS/IMA located at 645 H Street, NE, Washington, D.C., 20002. In addition, the RFA will also be available on the Mayor's Office of Partnerships and Grants Development website (<http://www.opgd.dc.gov>) under the link to the District Grants clearinghouse.

A Pre-Application conference will be held on Monday, June 20, 2005 from 9:00 am. until 12 noon at the Income Maintenance Administration, 645 H Street, NE; 5th Floor Conference Room, Washington, D.C., 20002. Applicants interested in attending the Conference should RSVP to Vickie Perry, DHS/IMA at (202) 698-4171 on or before Friday, June 17, 2005.

**Kipp Key Academy Charter School
1470 Irving Street NW 20009
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSAL:

The proposed Kipp Key Academy Charter School, in compliance with Section 2204 (c) of the District of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from the following services and products for the school.

- I. Business Service:** In the area of accounting for organizational budgeting, development of financial reporting statements, accounting, execution of payroll, and Monitoring of expenditures and accounts.
- II. Cleaning Services:** To maintain a neat and clean environment for our staff and students. Area needed to be cleaned is about 27,000 sq ft , has 1 floor and 4 bathrooms.
- III. Special Needs:** Services needed to provide school with Multi- Disciplinary Team to conduct evaluations/re-evaluations as back-up to the in-house clinical team, Counseling, Occupational or Physical Therapy for students, Speech and Language therapy and Support and Compliance Level one.
- IV. Food Services:** Catering of Breakfast, lunch, and snacks for about 320 students. The meals must meet or exceed all federal nutrition requirements and all compliance standards of the USDA School Breakfast Program. National Vendors are required to deliver meals to the school. **(All bid proposals must be submitted in the National School Lunch Program Format.)**
- V. Computer Sales:** Superior service for the purchase of laptop and desk top computers .
- VI. Auditing:** Services to conduct the audit in accordance with auditing standards generally accepted in the United States and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.

For Additional Information Call: 202-669-6345. Deadline for submissions is June 24, 2005 at 5pm

Lighthouse Academies, Inc.
Framingham, Massachusetts

REQUEST FOR PROPOSAL
Student Transportation
Pre-Plated Breakfast and Lunch Services Meals

Lighthouse Academies, Inc., and Lighthouse Academies of Indiana, Inc., invites proposals for Student Transportation and, a pre-plated meals service for the National School Lunch and Breakfast Programs for new charter schools in Washington DC, Indianapolis and Gary, Indiana.

Enrollment for each school is estimated to be 314 students in grades Pre-K-5, with annual increases of 44 students expected. The initial contract will be for the 2005-06 school year with options for 2 one year renewals.

Proposals are to be received at the corporate office of Lighthouse Academies, Inc., 1661 Worcester Road, Suite 207, Framingham, Massachusetts 01701 until, and not later than, **Tuesday, May 31, 2005 11:00 a.m.**, at which time they will be publicly opened and read.

Lighthouse Academies, Inc., and Lighthouse Academies of Indiana, Inc., are the awarding authorities and reserve the right to reject any and all proposals, which they deem not responsive to this request.

Bid specifications may be obtained from: Kalman J. Kopcsandy, Director of Purchasing, tel. 267-664-9173.

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
American Federation of Government)	
Employees, Local 631,)	
)	
Complainant,)	PERB Case No. 04-U-02
)	
)	Opinion No. 778
v.)	
)	FOR PUBLICATION
District of Columbia Water and)	
Sewer Authority,)	
)	
Respondent.)	
_____)	

DECISION AND ORDER

I. Statement of the Case:

This case involves an unfair labor practice complaint filed by the American Federation of Government Employees, Local 631 ("Complainant" or "AFGE, Local 631") alleging that the District of Columbia Water and Sewer Authority ("WASA" or "Respondent") violated D.C. Code §1.617.04(a)(1), (2), (3) and (5) (2001 ed.) by refusing to bargain with the Complainant on non-compensation issues while WASA's unit modification petition is pending. In addition, AFGE, Local 631 claims that WASA has also committed an unfair labor practice by: (a) interfering with, restraining and discriminating against employees as a result of WASA's refusal to bargain; and (b) issuing newsletters that blamed AFGE, Local 631 for delaying negotiations for a new collective bargaining.

The Respondent filed a timely answer denying AFGE, Local 631's allegations. This matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation in which she determined that WASA violated the Comprehensive Merit Personnel Act ("CMPA"). WASA filed exceptions to the Hearing Examiner's Report and Recommendation. The Hearing Examiner's Report and Recommendation ("R&R") and WASA's exceptions are before the Board for disposition.

Decision and Order
PERB Case No. 04-U-02
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II. Background

In 1976 AFGE, Local 631 was certified as the exclusive representative for a unit of professional and non-professional employees at Respondent's predecessor, the District of Columbia Water and Sewer Utility Administration ("WAUSA"). WAUSA was an agency "under the authority of the District of Columbia Department of Public Works." (R & R at p. 2)

Prior to 1996, the Complainant, with other union locals representing WAUSA employees, entered into a single master agreement addressing compensation matters, but bargained separately over non-compensation working conditions. (See, R & R at p. 2) In December 1996, WASA was established as an independent agency. Subsequently, on December 18, 1996, the five unions representing WASA employees, including the Complainant, "executed a six-year Coalition Agreement (CA) wherein they agreed, *inter alia*, to bargain for a single master labor contract covering both compensation and non-compensation terms and conditions of employment." (R&R at p. 2) The parties "stipulated that the master agreement would be effective from the date of execution and beyond, until any party provided the other signatories written notice that the Agreement would no longer be binding following the 180th day after such notice." *Id.* The five unions and WASA jointly filed for and obtained the approval of the Board for multi-party bargaining. (See, R&R at p. 2) "As a quid pro quo for the unions' cooperation, WASA withdrew a unit modification petition which was pending before the Board." (R&R at p. 2) At the same time, the unions representing an array of WASA employees filed unopposed unit consolidation petitions. These unit consolidation petitions were approved by the Board. As a result of these actions, the five unions, including AFGE, Local 631, were certified to represent various units of WASA employees. (See, R & R at p. 3)

Pursuant to the terms of the C.A., the parties entered into their first unified master agreement in June, 1998. (See, R & R at p. 3) A second master agreement was executed, effective from 2001 to September 2003. However, on February 11, 2003, Barbara Milton, President of Local 631, "served written notice to the parties, including the Respondent, that the Union was exercising its right to withdraw from the Coalition Agreement's requirement that the parties negotiate a single Master Agreement." (R & R at p. 3). Also, see Jt. Ex. 3) "While acknowledging that the Local was 'bound by the current Master Agreement,' Ms. Milton added that the Local reserved 'the right to negotiate any future Collective Bargaining Agreement separately as permissible by law' ..."*Id.*

By letter dated, June 9, 2003 to the five unions, Stephen Cook, WASA's Labor Relations Manager, proposed that negotiations begin for a successor Master Agreement. See, (R & R at p. 3). The Complainant contends that on June 11, 2003, the five unions informed WASA that they would negotiate a successor agreement. (Compl. at p. 2) As a result, on July 10, 2003, "[WASA} and the five unions met to begin face to face negotiations." (Compl. at p. 3) "When [the parties] assembled on that date, the unions, following Local 631's lead, served written notice that they also were exercising their right to bargain separately about non-compensation issues. However, they agreed that joint bargaining about compensation matters would continue, and to that end, proposed ground

Decision and Order
PERB Case No. 04-U-02
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rules to govern those sessions.” (R&R at p. 3)

The Complainant claims that on July 14, 2003, WASA indicated that it needed more time to consider the implications of the unions’ decision to negotiate separate non-compensation agreements, but promised that a more complete response would be forthcoming. (See, R & R at p. 3) “On August 15, the Respondent took its next step by filing a unit modification petition with PERB that seeks to combine the [five] locals into one, based on its claim that [the five locals] are inappropriate due to changes in the Agency’s identify and statutory authority.” (R & R at p. 3. Also see, WASA’s unit modification petition which was docketed as PERB Case No. 03-UM-03). Each WASA union filed an opposition to the petition. The Complainant claims that WASA never gave the unions a response to their request to negotiate the working conditions separately. In addition, the Complainant contends that WASA never resumed negotiations with the unions. (Compl. at p. 3).

“In an effort to avoid litigation generated by WASA’s unit modification petition, the five locals presented a settlement proposal to the Respondent offering to rescind their July 10 demand for individual bargaining and [offering to] resume coalition bargaining for a master agreement, on condition that the Respondent withdraw its petition.” (R & R at p. 3).. The Hearing Examiner noted that the Respondent rejected the proposal. Instead, the Respondent conveyed its intent to continue seeking its petition for unit modification. (See, R & R at p. 3) Consequently, the unions returned to their pre-settlement offer positions. “Thereafter, Ms. Milton speaking both for Local 631 and the other WASA unions, repeatedly, albeit unsuccessfully, urged the Respondent to engage in non-compensation bargaining.” (R & R at p. 3)

The Complainant contends that despite WASA’s “Petition for Unit Modification,” the agency is required to bargain with the Complainant concerning a successor agreement. (Compl. at p. 3) In addition, the Complainant asserts that by refusing to bargain, WASA “is attempting to discriminate, interfere [with], coerce and restrain the Complainant and other bargaining unit employees in the exercise of their rights as guaranteed by the [Comprehensive Merit Personnel Act] in violation of D.C. Code Section 1-617.04 (a)(1), (2), (3) and (5).” (Compl. at p. 5) Furthermore, the Complainant claims that WASA’s “refusal to bargain has had a demoralizing effect on Local 631 members. [Specifically, the president of AFGE, Local 631, contends] that her co-workers were keenly aware that benefits and salary increases were being awarded to non-union employees, leading them to regard the Local and its leaders as ineffective.” (R & R at. p. 4)

“The parties stipulated that on October 2, 2003 and October 7, 2003, in-house newsletters, entitled, ‘General Manager’s Update,’ signed by WASA’s General Manager, Jerry Johnson, were distributed to all employees. The two publications are identical with but one exception: a misspelled word in the first paragraph of the October 2 edition was corrected in the later version. ... {Stephen] Cook [WASA’s Labor Relations Manager] testified that he drafted the newsletter[s] in order to respond to employees’ questions about the unit modification petition. Using a question and answer form, the newsletter[s] explain[ed] that the petition seeks to consolidate the 5 local unions into one

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so that WASA can 'continue having only one collective bargaining agreement encompassing both compensation and working conditions applicable to all union employees.'" (R & R at p. 4)

The Complainant contends that the newsletters identified Local 631 as causing the delay in bargaining for a new labor agreement. In particular, the Complainant underscored the following language:

Question: Why did WASA file the PERB petition?

Answer: In 1996, WASA and the five . . . unions entered into an agreement that provided for a single 'Master Collective Bargaining Agreement'. The five . . . unions formed a coalition. . . that negotiated the last two . . . Master Agreements with WASA. However, in February. . . Local 631 gave notice to WASA and the other unions that it was pulling out of the coalition.

(R & R at p. 4)

The Complainant claims that the newsletters violate the CMPA. In view of the above, the Complainant filed an unfair labor practice complaint.

III. Hearing Examiner's Report and Recommendation and WASA's Exceptions.

Based on the pleadings, the record developed during the hearing and the parties' post hearing briefs, the Hearing Examiner identified three issues for resolution. These issues, the Hearing Examiner's findings and recommendation, and WASA's exceptions are as follows:

1. Did WASA violate D.C. Code §1.617.04(a)(1) and (5) by refusing to bargain with AFGE, Local 631 about non-compensation issues while WASA's petition for unit modification is pending?

"The Complainant alleges that WASA's refusal to respond substantively . . . to its . . . requests to engage in bargaining for a non-compensation agreement, separate and apart from the other unions, constitutes an unlawful, refusal to bargain." (R & R at p. 5)¹

WASA does not deny that it has refused to bargain. Instead, WASA defends its refusal to bargain by asserting "that after the Complainant gave notice that it would cease being bound by the

¹The Hearing Examiner noted that Barbara Milton, President, Local 631 testified without contradiction that WASA invariably provided written replies to the Union's correspondence. In addition, she observed that in the present case, WASA orally told Ms. Milton that it refused to bargain, (See, R & R at p. 5)

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C.A.'s terms, it was obliged to abide by the Agreement for another 180 days; or until August 9. WASA next contends that the Complainant's July 10th request to bargain about working conditions separately from the other unions with a suggested starting date of July 28, violated the C.A.'s 180 day waiting period." (R & R at p. 5) Finally, WASA claims that the Complainant's premature proposal constituted a breach of the C.A., thereby relieving WASA of its duty to bargain.

The Hearing Examiner found WASA's argument unpersuasive. She indicated that the "Complainant's February 11 letter served proper notice under C.A. paragraph 7 that it would no longer be bound to negotiate a non-compensation master agreement. [However,] at the same time, Local 631 guaranteed that it would continue to comply with the . . . Master Agreement due to, expire on September 30. " (R & R at p. 5) Also, the Hearing Examiner noted that Local 631 clearly "recognized that it was obliged to observe a 180 day waiting period and unequivocally registered its intent to do so." Id. In view of the above, the Hearing Examiner concluded that it "is inconceivable that WASA could reasonably conclude that the Complainant's February 11 notice, followed by its July 10th request to begin bargaining a separate non-compensation agreement on July 28, was an anticipatory breach of the 180 day provision in C.A. paragraph 7." Id. Finally, the Hearing Examiner concluded that "[s]urely, WASA could have declined to bargain until after August 9. [However,] what [WASA] could not do was declare itself totally excused from bargaining at all." Id.

In its exception to this finding, WASA claims that the "Hearing Examiner erred in finding that [WASA] had a duty to comply with [the] Complainant's [February 11, 2003 and July 10, 2003] requests to bargain separately with [the] Complainant where the uncontradicted evidence presented at the hearing revealed that [the] Complainant's only requests to bargain separately were unlawful and in violation of a contractual agreement between [the] Complainant and [WASA]." (WASA's Exceptions at p. 2)

In support of its position, WASA asserts the following:

In her Report and Recommendation, the Hearing Examiner found that on February 11 and July 10 Complainant sought to engage [WASA] in non-compensation bargaining separately from the four other unions representing WASA employees. . . The Hearing Examiner further found that [WASA] and the Complainant were parties to a negotiated Coalition Agreement ("C.A.") at the time of both requests to bargain separately, and that the C.A. required Complainant to negotiate jointly with the coalition for a single master agreement with WASA. . . The C.A. by its terms also prohibited Complainant from requesting separate bargaining. . .In contradiction to these findings, however, the Hearing Examiner found that "[i]t is inconceivable that WASA could reasonably conclude that the

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Complainant's February 11 notice, followed by its July 10th request to begin bargaining a separate non-compensation agreement on July 28, was an anticipatory breach of the 180 day provision in C.A. paragraph 7. . . . **In reaching the latter conclusion the Hearing Examiner obviously misunderstood the nature of the C.A. and the breach committed by Complainant.** Although the Hearing Examiner defined each of the requests to bargain separately in terms of an anticipatory breach of the C.A. in fact each request was an actual breach of the C.A. As explained fully at the hearing and accepted by the Hearing Examiner in the Report and Recommendations, the C.A. was in effect on both February 11 and July 10, and bound the parties until August 9. . . . **Uncontradicted evidence shows that the C.A. provided: (a) that the parties were to negotiate jointly for a single collective bargaining agreement; and (b) that no union could request separate bargaining during the C.A.'s term. . . .** The Complainant did not dispute this fact at the hearing. The Complainant's February 11 and July 10 requests to bargain separately with [WASA] plainly violated the C.A.

Because these requests for separate bargaining violated the negotiated C.A. between [WASA], the Complainant and the other unions, [WASA] did not violate the CMPA by refusing to comply with the requests. (Emphasis added).

(R & R at p. 2)

After reviewing the record, we find that WASA's argument appears to be based on its claim that: (1) the Complainant's requests to bargain separately were unlawful and in violation of a contractual agreement between the Complainant and WASA and (2) WASA did not have a duty to bargain separately in response to the Complainant's February 11th and July 10th Requests. The Hearing Examiner considered these arguments and was not persuaded that the Complainant's requests were unlawful and in violation of the coalition agreement. As a result, we believe that WASA's exception amounts to a mere disagreement with the Hearing Examiner's finding. Moreover, WASA is requesting that the Board adopt its interpretation of the evidence presented at the hearing. This Board has determined that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's finding where the finding is fully supported by the record. See, American Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Tracey Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 4541 at p. 4, PERB Case No. 95-U-02

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(1995). 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 No. 86-U-16 (1992) and Charles Bagenstone, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-34 (1991). In light of the above, we find that WASA's exception lacks merit. Therefore, WASA's exception is denied.

Relying on Washington Teachers' Union, Local 6 and D.C. Public Schools, 34 DCR 3601, Slip Op. No. 151, PERB Case No. 85-U-18 (1987), WASA also argues that it has no duty to bargain with the Complainant until the Board resolves its pending unit modification petition. However, the Hearing Examiner found that WASA's reliance on the WTU case was misplaced. (See, R & R at p. 5)

The Hearing Examiner noted that in the WTU case, the complainant filed an unfair labor practice complaint alleging that the D.C. Public Schools violated the Comprehensive Merit Personnel Act by refusing to bargain in good faith with the union concerning wages for teachers working in adult education and summer school programs. As a remedy, WTU requested that the Board compel the school system to bargain in good faith over the wages for teachers working in adult education and summer school programs. The Hearing Examiner observed that in that case, "WTU was the certified bargaining agent for a unit composed of permanent full-time and part-time teachers. Claiming that it also represented adult education and summer school teachers, WTU alleged that by refusing to bargain about wages for such persons, the [D.C. Public Schools] failed to bargain in good faith. To prove its point, WTU produced prior collective bargaining agreements that referred to the [adult education and summer school] teachers. However, [the Hearing Examiner points out that] the references were not persuasive for they pertained to the unit members' right to preferential treatment for [adult education and summer school] positions. In addition, [the Hearing Examiner notes that] the School Board found that . . . WTU's recognition clause and [the] unit description in the parties' collective bargaining agreement made no mention of [adult education and summer school] members. Further, PERB found that the existence of pay parity between WTU members and [adult education and summer] faculty did not result from bargaining; but from the exercise of the School Board's discretion. In addition, [the Hearing Examiner notes that] PERB found that there was no community of interest between the two groups. Based principally on these facts, PERB concluded that because the [adult education and summer school] staff never were a part of the bargaining unit, the Respondent had no duty to bargain with the WTU about their wages." (R & R at p. 6)

In light of the above, the Hearing Examiner concluded that the facts in the WTU case "bear no resemblance to those in the instant matter. [Specifically, the Hearing Examiner opined that] the WTU case concerned the legality of an employer's refusal to bargain with a single union over the wages of adult education and summer school teachers, who were never part of the bargaining unit. [However,] in the present case, the central issue focuses on the legitimacy of the Respondent's refusal to bargain [with the Complainant,] until the unit modification question is resolved. [As a result, the Hearing Examiner concluded that] the facts, the issue and the Board's decision in WTU v. School

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Board touch upon the appropriate unit issue so minutely that [it] is difficult to discern how that case offers any support for [the] Respondent's position." Id.

Furthermore, the Hearing Examiner indicated that the facts and principle discussed in International Brotherhood of Teamsters, Local 639 and 730 and D.C. Public Schools and AFSCME, District Council 20 and Local 2093.² 35 DCR 8155, Slip Op. No. 176, PERB Case Nos 86-U-14 86-U-17 (1988), are more applicable to the issue in the present case. The Hearing Examiner notes that in that case, PERB addressed the question of whether an employer may refuse to bargain for a successor contract while a rival union's recognition petition is pending. The Hearing Examiner observed that in resolving that question, PERB relied on the rationale set forth in RCA Del Caribe, Inc. and IBEW, Local 2333, 262 NLRB No. 116, 1369 (1982), to decide that:

[W]hile the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent ... [T]he ... policy enunciated by the [NLRB] in RCA Del Caribe with respect to the requirements for employer neutrality when an incumbent union is challenged by an "outside union" is grounded in the rationale that "preservation of the status quo through an employer's continued bargaining with an incumbent is a better way [than cessation of bargaining] to approximate employer neutrality." Id. at 1371 So, here, preservation of the status quo "is a better way" to protect both stability and employee representational choice than shortening ... [the employer's] duty to continue dealing with the incumbent union prior to that union's legal replacement through an election and Board certification. (Slip Op. at pgs 7-8).

The Hearing Examiner concluded that the reasoning in the RCA Del Caribe case, is equally applicable in the present case. Although WASA's actions involve a unit modification petition rather than a recognition petition, the Hearing Examiner determined that "the duty of the employer to preserve the status quo by bargaining with the incumbent, Local 631 is the preferred way to promote stability and employee free choice." (R & R at pgs. 6-7) WASA did not file an exception to this finding. Moreover, we believe that the Hearing Examiner's finding is reasonable, consistent with Board precedent and supported by the record. As a result, the Board adopts the Hearing Examiner's finding on this issue.

Also, WASA asserts that an employer actually commits an unfair labor practice by negotiating with a union that does not represent an appropriate unit. To support this position, WASA relies on

²The Hearing Examiner notes that although distinctions clearly exist between this case and the present one, the principle it espouses is relevant here.

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the National Labor Relations Board's (NLRB) ruling in Point Blank Body Armor, Inc., 312 NLRB 197 (1993). In that case, the NLRB ruled that an employer may not lawfully bargain for a successor labor contract where there is objective evidence that the incumbent labor union has lost its majority status. The Hearing Examiner points out that in the Point Blank Body Armor case, the NLRB found that the employer and the incumbent union possessed a petition signed by a majority of unit employees that they no longer supported the incumbent union. However, the Hearing Examiner notes that in the present case, WASA has not produced any objective evidence which demonstrates "that Local 631 had lost majority support in an appropriate unit." (R & R at p. 7) As a result, the Hearing Examiner concluded that "unless and until [this] Board ultimately rules in WASA's favor in the pending [unit] modification case, precedent dictates that the Respondent must preserve the status quo by bargaining in good faith with Local 631. [Furthermore, WASA's] failure to do so violates D.C. Code §1.617.04(a)(1) and (5)." (R & R at p.7) WASA did not file an exception to this finding. However, we believe that the Hearing Examiner's finding is reasonable and supported by the record. As a result, the Board adopts the Hearing Examiner's finding on this issue.

The Hearing Examiner notes that in "its post-hearing brief at footnote 4, WASA raises a third defense that is equally lacking in merit." (R & R at p. 7) "Specifically, the Respondent submits that it 'should not be held responsible for refusing to negotiate with the Complainant because it has failed to make a consistent and understandable request for bargaining'." Id. The Hearing Examiner found that "[i]n reviewing the Complainant's requests for and withdrawals of a return to coalition bargaining, WASA omits a crucial detail - that Local 631's final offer to engage in coalition bargaining was contingent on Respondent withdrawing its unit modification petition. [In light of the above, the Hearing Examiner concluded that] WASA's rejection of that offer automatically revived the Complainant's previous request for separate bargaining." Id.

WASA filed an exception to this finding. In their exception, WASA asserts that the "Hearing Examiner erred in finding that the Complainant made any comprehensible request to bargain separately with [WASA] after the C.A. expired or any time after Complainant submitted a written request, with the four other coalition unions, to return to coalition bargaining." (WASA's Exceptions at p. 3). Specifically, WASA claims that the "Hearing Examiner correctly found that [the] Complainant made a series of conflicting requests regarding bargaining, going back and forth between requesting coalition bargaining and requesting bargaining on an individual basis. [However,] [d]espite the plain evidence introduced by both sides at the hearing, the Hearing Examiner inexplicably found that the Authority's rejection of the union's request to return to coalition bargaining 'automatically revived the Complainant's previous request for separate bargaining'. [In light of the above, WASA claims that] this finding by the Hearing Examiner is simply unsupported." Id. at pgs. 3-4.

A review of the record reveals that the WASA's exception amounts to no more than a disagreement with the Hearing Examiner's findings of fact. As previously noted, this Board has determined that a mere disagreement with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's finding where the findings are fully supported by the record. American

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Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). Moreover, the Hearing Examiner's finding is persuasive, reasonable and supported by the record. As a result, we adopt the Hearing Examiner's finding.

2. Did WASA's refusal to bargain interfere with, restrain, coerce and discriminate against members of AFGE, Local 631, in violation of D.C. Code §1.617.04(a)(1) and (3) ?

The Hearing Examiner indicated that "Ms. Milton and a number of other employees testified about the adverse impact that WASA's refusal to bargain had on their own and their co-workers' spirits." (R & R at p.7) Specifically, she noted that it "is not surprising that employees who found themselves in a collective bargaining limbo for over a year that resulted in the withholding of their annual pay increases and non-compensation benefits would become discouraged and upset both with WASA and their union which was regarded by some as weak and ineffective." (R & R at p. 7) Furthermore, she Hearing Examiner observed that knowing that non-union employees were receiving wage increases and improvements in working conditions while they were at a standstill, did nothing to improve the union members' states of mind. In light of the above, the Hearing Examiner concluded that WASA's management, especially Mr. Cook who had years of experience in labor relations, had to foresee this outcome. Citing Cooper Thermometer Co., 154 NLRB 502, 503, N. 2 (1965)³, the Hearing Examiner noted that "even assuming that WASA harbored no intent to undermine the Complainant, its motives are irrelevant where, as here, its actions foreseeably result in interference, restraint and coercion of employee rights is alleged." (R & R at p. 7) Accordingly, the Hearing Examiner concluded that WASA's conduct had the reasonably foreseeable consequence of interfering with, restraining and coercing its employees in exercising their rights protected by the CMPA." (R & R at pgs. 7-8).

In addition, Local 631 "alleges that the effects on its members of WASA's refusal to bargain also constitutes discriminatory conduct under the CMPA."(R & R at p. 8) The Hearing Examiner acknowledged that not all discriminatory acts are unlawful; rather the unfair labor practice described in subsection (a)(3) of the DC Code prohibits only that conduct which is motivated by an intent to encourage or discourage membership in a labor organization. ⁴ However, she indicated that evidence of unlawful intent often is elusive. Therefore, she noted that the National Labor Relations Board has stated that:

³The National Labor Relations Board ruled in Cooper Thermometer that interference, restraint and coercion under Section 8(a)(1) does not turn on the employer's motivation or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which ... reasonably ... tends to interfere with the free exercise of employee rights ..."

⁴ See, Radio Officers' Union v. NLRB, 317 US 17 at 12-13 (1954)

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specific evidence of an intent to encourage or discourage is not an indispensable element of [such a violation] ... [A]n employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence, Id. at 44-45.

The Hearing Examiner concluded that the "unchallenged reactions of a number of union witnesses about their reactions to [WASA's] refusal to bargain, together with Ms. Milton's undisputed testimony that employees were questioning the Local's ability to conclude a CBA, provides sufficient evidence that the [WASA's] refusal to bargain, with its consequent negative effects on employee morale, inevitably resulted in discouraging employee support for Local 631." (R & R p. 8). In addition, the Hearing Examiner opined that it "is fair to infer that the Respondent reasonably foresaw such results." (R & R at p.8) In light of the above, the Hearing Examiner concluded that "it follows that [WASA's] conduct discriminated against Local 631 members in violation of D.C. Code 1.617.04 (a)(3)." Id.

WASA filed an exception to this finding. In their exception WASA asserts that the "Hearing Examiner erred in finding that WASA in any way violated this section of the CMPA. "(WASA's Exception at p. 8) Specifically, WASA claims that the "Hearing Examiner cites no findings of any tangible employment action taken by WASA against any employee and cites no findings of any intent by WASA to 'encourage or discourage membership in any labor organization.' Instead, WASA contends that the Hearing Examiner relied on a finding that WASA's failure to engage in separate bargaining with Complainant 'had the reasonably foreseeable consequence of interfering with, restraining or coercing its employees in exercising their rights protected by the CMPA' in holding that WASA violated Section 1-617.04(a)(3)." Id. Furthermore, WASA asserts that "putting aside the fact that the Report and Recommendations confuses the standard for finding violations of Section 1-617.04(a)(1) with the standard for finding a violation of Section 1-617.04(a)(3), and putting aside the fact that, as explained above and throughout the record, [WASA] did not unlawfully refuse to engage in separate bargaining with Complainant, the Hearing Examiner's finding in this regard still must be rejected."

A review of the record reveals that WASA's exception to this finding amounts to no more than a disagreement with the Hearing Examiner's findings of fact. Specifically, WASA is requesting that the Board adopt its interpretation of the evidence presented. As previously noted, this Board has determined that a mere disagreement with the Hearing Examiner's finding is not grounds for reversal of the Hearing Examiner's finding where the findings are fully supported by the record. American Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991) We believe that the Hearing Examiner's finding that WASA violated D.C. Code § 1-617.04(a)(3) is reasonable and supported by the record. As a result, we deny WASA's exception and adopt the Hearing Examiner's finding.

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3. Did WASA violate D.C. Code § 1-617.04(a)(1) and (3) by identifying Local 631 in its newsletters as the first union to notify WASA that it was withdrawing from the Coalition Agreement commitment to negotiate a single Master Agreement?

“The Complainant avers that in twice publishing and widely distributing a newsletter to its employees in which it identified Local 631 as the first labor organization to disavow the Master Agreement, The Respondent impliedly blamed it for precipitating the breakdown in bargaining. The Complainant further contends that the Respondent’s statement undermined the employees’ confidence in their bargaining representative.” (R & R at p. 8). Finally, the Complainant claims that by issuing newsletters that pointed a finger of guilt at Local 631, WASA engaged in conduct that violates Sec. 1617.04 (a)(1) and (3).

The Hearing Examiner found that WASA “correctly points out that established case law permits an employer to communicate with its employees concerning its position in negotiations. See, e.g. AFSCME Council 20 v. District of Columbia et al, PERB Case No. 88-U-32 Op No. 200, (12/20/88) Even negative language under some circumstances may be lawful. See, AFGE 872 v. D.C. Department of Public Works, PERB Case No. 89-U-12, Op No. 264 (12/24/90).” (R & R at p. 8)

Also, the Hearing Examiner concluded that the reference to Local 631 in the newsletters was neither inaccurate nor misleading. Specifically, the Hearing Examiner found that “although the wording chosen did not have the Local’s sensibilities in mind, the statement about Local 631’s position was simply the truth.” (R & R p. 9). In addition, she acknowledged that Local 631 was specifically named. However, she found that Local 631 was not “singled out for special opprobrium since in the following sentence, the WASA points out that all the WASA unions had declared their interest in separate bargaining.” Id. In light of the above, the Hearing Examiner is recommending that this allegation be dismissed. The parties did not file exceptions to this finding. We believe that the Hearing Examiner’s finding is reasonable, consistent with Board precedent and supported by the record. As a result, we adopt the Hearing Examiner’s finding on this issue.

The Complainant requested that it be reimbursed for their costs and attorney fees. With respect to the Complainant’s request for attorney fees, the Hearing Examiner indicated that Local 631’s “request must be denied for the Board is not authorized by statute to award such fees.” (R & R at p. 10). We have held that D.C. Code Section 1-617.13 does not authorize us to award attorney fees. See, Committee of Interns v. D.C. Dept. Of Human Services, 46 DCR 6868, Slip Op. No. 480, PERB Case No. 95-U-22 (1996). See also, University of the District of Columbia Faculty Association, NEA v. University of the District of Columbia, 38 DCR 2463, Slip Op. No. 272, PERB Case No. 90-U-10 (1991). As a result, we adopt the Hearing Examiner’s determination that the Complainant’s request for attorney fees should be denied.

Relying on the Board’s decision in American Federation of State, County, and Municipal

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Employees, District Council 20, Local 2776, AFL-CIO v. District of Columbia Department of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990), the Hearing Examiner concluded that Complainant's request for reasonable costs should be granted. Specifically, the Hearing Examiner concluded that the interest-of-justice test has been met in this case. The Hearing Examiner noted that by refusing to bargain with Local 631, its members were denied the opportunity to secure improved working conditions. In addition, she found that the Respondent could hardly fail to foresee that its refusal to bargain would undermine employee morale and lead to a loss of confidence in and support for their exclusive bargaining representative. In light of the above, the Hearing Examiner concluded that "a standard for awarding costs was met in this case." (R & R at p. 10) As a result, the Hearing Examiner is recommending that the Board direct WASA to pay reasonable costs. WASA filed an exception to this finding.

With respect to costs, 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). We observed:

[w]e believe such an award must 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. 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 conduct is the undermining of the union among employees for whom it is the exclusive bargaining representative. Slip Op. No. 245, at 5.

In the present case, the Hearing Examiner found that WASA's "conduct had the reasonably foreseeable consequence of interfering with, restraining and coercing its employees in exercising their rights protected by the CMPA." (R & R at p. 8). In addition, the Hearing Examiner concluded that the "unchallenged reactions of a number of union witnesses about their reactions to [WASA's] refusal to bargain, together with Ms. Milton's undisputed testimony that employees were questioning the Local's ability to conclude a CBA, provides sufficient evidence that the [WASA's] refusal to bargain, with its consequent negative effects on employee morale, inevitably resulted in discouraging employee support for Local 631." (R & R p. 8). As noted above, we adopted these findings. As a result, we believe that the interest-of-justice standard has been met in this case because a reasonably foreseeable result of the successfully challenged conduct was the undermining of the union among employees for whom it is the exclusive representative. In light of the above, we believe that the Hearing Examiner's finding is reasonable and supported by the record. As a result we deny WASA's exception and adopt the Hearing Examiner's finding.

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Pursuant to D.C. Code § 1-605.02(3) (2001 ed.) and Board Rule 520.4, the Board has reviewed the findings, conclusions, and recommendations of the Hearing Examiner and find them to be reasonable, persuasive, consistent with Board precedent and supported by the record. As a result, we adopt the Hearing Examiner's recommendation that WASA violated D.C. Code § 1-617.04(1), (3) and (5). In addition, we adopt the Hearing Examiner's recommendation granting Complainant's request for reasonable costs.

ORDER

- (1) The Hearing Examiner's findings and recommendations are adopted.
- (2) The District of Columbia Water and Sewer Authority (WASA), its agents and representatives shall cease and desist from refusing to bargain in good faith with Complainant, American Federation of Government Employees, Local 631 over non-compensation matters regarding a successor agreement.
- (3) WASA, its agents and representatives shall cease and desist from interfering, restraining or coercing its employees by engaging in acts and conduct that abrogate employees' rights guaranteed by "Subchapter XVII Labor-Management Relations", of the Comprehensive Merit Personnel Act, to bargain collectively through representatives of their own choosing.
- (4) WASA and the Complainant, American Federation of Government Employees, Local 631 shall within seven (7) business days from the service of this Decision and Order agree on a date for the first bargaining session concerning non-compensation matters for a successor agreement. The first bargaining session shall be held no later than fourteen (14) business days from the service of this Decision and Order.
- (5) WASA shall post conspicuously, within three (3) business days from the service of this Decision and Order, the attached Notice. The Notice shall be posted where notices to bargaining unit members are customarily posted. The Notice shall remain posted for thirty (30) consecutive days.
- (6) The Complainant's request for reasonable costs is granted. The Complainant shall submit to the Public Employee Relations Board ("Board"), within fourteen (14) business days from the date of this Decision and Order, a statement of actual costs incurred processing this matter. The statement of costs shall be filed together with supporting documentation and shall be served on WASA's counsel. WASA may file a response to the statement within fourteen (14) business days from service of the statement.

Decision and Order

PERB Case No. 04-U-02

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- (7) WASA shall pay the Complainant their reasonable costs incurred in this proceeding within ten (10) business days from the determination by the Board or its designee as to the amount of those reasonable costs.
- (8) Within ten (10) days from the issuance of this Decision and Order, WASA shall notify the Public Employee Relations Board, in writing, of the specific steps it has taken to comply with paragraphs 4 and 5 of this Order.

BY ORDER OF THE PUBLIC RELATIONS BOARD

Washington, D. C.

March 9, 2005

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

In the Matter of:)	
)	
District of Columbia Water and Sewer Authority,)	
)	
Petitioner,	)	PERB Case No. 04-A-05
and)	
	)	Opinion No. 779
)	
American Federation of Government Employees, Local 872,	)	FOR PUBLICATION
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Statement of the case

The District of Columbia Water and Sewer Authority (“WASA”) filed an Arbitration Review Request (“Request”). WASA seeks review of an arbitration award (“Award”) that ordered WASA to pay the Fiscal Year 2001 Wage Adjustment, plus applicable interest, to those employees who were on workers’ compensation at the time the adjustment was scheduled to be paid. (See, Award at p. 7) WASA contends that the: (1) Arbitrator was without authority to grant the Award and (2) Award on its face is contrary to law and public policy (See, Request at paragraphs 5-9 and 10). The American Federation of Government Employees, Local 872 (“AFGE, Local 872” or “Union”), opposes the Request.

The issue before the Board is whether “the award on its face is contrary to law and public policy” or whether “the arbitrator was without or exceeded his or her jurisdiction...” D.C. Code § 1-605.02(6) (2001 ed.).

II. Discussion:

In August 1999, a coalition of five bargaining units, including AFGE, Local 872, began

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PERB Case No. 04-A-05
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negotiating wages with WASA.¹ During these negotiations the parties reached impasse. As a result, the parties went to mediation. In July 2001 an Agreement was reached in mediation. However, AFGE, Local 872 did not ratify the Agreement. Subsequently, the parties went to arbitration and a tripartite arbitration panel determined, that: (1) the Agreement was binding and (2) WASA was not obligated to bargain on additional proposals.² (See, Award at p. 4) This Agreement became effective on October 4, 2001.

The new Agreement provided for retroactive wage payments. (Request at p. 2) Part A of Article I of the Agreement provides in pertinent part that “[a]s soon as practical following approval by AFGE, AFSCME, NAGE and...[WASA] of this Agreement...[WASA] shall make a lump sum payment to each employee equal [to] three tenths (0.30) of a percent of the employee’s annual base compensation for the pay period beginning December 19, 1999...up to a maximum of \$2000. Only employees who are employed by [WASA] on the date of the execution of this Agreement are entitled to the lump sum payment.” The Agreement also provided for additional wage adjustments for Fiscal Years 2000 and 2001:

Fiscal Year 2000 Wage Adjustment

Effective with the pay period beginning December 19, 1999, the salary then in effect shall be increased by three percent (3%) in accordance with past methods of increasing base salary schedules.

Fiscal Year 2001 Wage Adjustment

Effective with the pay period beginning on after October 1, 2000, the salary then in effect shall be increased by three percent (3%) in accordance with past methods of increasing base salary schedules.

The Arbitrator indicated that employees represented by AFGE, Local 872, with the exception of an undisclosed number of employees who had been temporarily on workers’ compensation,³ received payment for both periods by January 25, 2002. However, in February 2002 those employees who had been on workers’ compensation received the retroactive payment for Fiscal Year 2000 but

¹The coalition of bargaining units included, AFGE, Locals 872, 631 and 2553, AFSCME, Local 2091 and NAGE, Local R3-06.

²The tripartite panel issued their award on September 28, 2001.

³The Arbitrator used this term to distinguish these employees from those employees who retired on disability or who otherwise were no longer working for WASA as a result of their injuries or disease.

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PERB Case No. 04-A-05
Page 3

not for Fiscal Year 2001. AFGE, Local 872 filed a Step 3 group grievance alleging that WASA violated Article 1 of the Agreement and associated side agreements, when it failed to provide retroactive payment for Fiscal Year 2001 to employees who had been on workers' compensation. WASA denied the grievance and AFGE, Local 872 invoked arbitration.

In arbitration, the Union argued that nothing in the Agreement excludes employees who are on workers' compensation from being able to receive the retroactive wage adjustments. In addition, the Union claimed that two of the employees who were on workers' compensation were also negotiators for AFGE, Local 872. They asserted that those two employees had been told, orally and in writing, that they would receive the payments. WASA countered that there was no documented evidence that WASA told anyone from AFGE, Local 872 that employees on workers' compensation would receive the FY 2001 wage adjustment. Furthermore, WASA claims that nothing in the Agreement refers to payments to those on workers' compensation. As a result, WASA argued that there was no ambiguity to reconcile and no basis to allow parole evidence pertaining to the meaning of the Agreement. Also, since AFGE, Local 872 failed to introduce any side agreements, evidence concerning them should not be considered.

In an Award issued on December 22, 2003, the Arbitrator agreed with WASA that AFGE, Local 872 did not produce documentary evidence of the existence of any side agreements or additional statements about those employees who were on workers' compensation. However, he indicated that the absence of any specific language excluding employees on workers' compensation from the wage adjustment meant that the burden was on WASA to demonstrate that there was such an exclusion.

The Arbitrator noted that Article I, Section A, of the Agreement (Wages), identified those "employed by [WASA]...on the date of execution of this Agreement" as the only ones who would receive the additional bonus of 0.30 percent. He also took note of the language of Article I, Section B (Gain-sharing), which specifies that "[t]o be eligible to receive a performance award, an individual must be actively employed on the last day of the fiscal year." In light of the above, the Arbitrator concluded that when WASA wanted to limit the pool of recipients it was able to express such a limitation.

Additionally, the Arbitrator found no evidence "that those [employees] who were temporarily on workers' compensation were not regarded as employees or were not eligible for retroactive payments given to the rest of the workforce because of anything in law pertaining to the status of those on workers' compensation, because of any past practice, because of analogous treatment of such employees elsewhere in the Agreement, or because of anything else that could be considered precedential." (Award at p. 5).

The Arbitrator also noted that Mr. Cook, WASA's Labor Relations Manager, testified "that the issue of workers' compensation status did not arise during negotiations." (Award at p. 6) As a

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result, the Arbitrator found no evidence that WASA indicated to AFGE, Local 872 its intent to exclude employees on workers' compensation from receiving the wage adjustments, or that it had such an intent at all. (See, Award at p. 6). In light of WASA's demonstrated ability to specify exclusions in other provisions of the Agreement, the Arbitrator concluded that the absence of such an exclusion concerning the wage adjustment, meant that no such exclusion was intended.

As a remedy, the Arbitrator ordered WASA to pay within 60 days from the Award the FY 2001 wage adjustments that should have been paid to those employees who were on workers' compensation. (See, Award at p. 7) In addition, he ordered interest on such back pay in the amount prescribed by law when payments are not made in a timely manner because of an improper action of the employing agency. (See, Award at pgs. 6-7). Interest was to accrue from January 26, 2002. (See Award at p. 7).

WASA takes issue with the Award. As noted above, WASA claims that the: (1) Award is contrary to law and public policy and (2) Arbitrator exceeded his authority.

WASA contends that the Arbitrator "exceeded his authority by expanding the payment obligations of [WASA] beyond the provisions of the governing agreement." (Request at paragraph 5). In WASA's view, there was no indication in the Agreement that the FY 2001 three percent wage adjustments would apply to those persons on workers' compensation. In fact, WASA asserts the following:

the Agreement specifically provides that wage adjustments and other payments are based on salary and earnings during the previous pay period. Employees absent on workers' compensation during the applicable time period did not receive a salary and thus there is no basis upon which to calculate their wage adjustment. By enlarging the contract to include persons on workers' compensation, the Arbitrator has improperly gone beyond the express terms of the Agreement and imposed additional responsibilities on [WASA]...that are not contemplated in the contract.

(Request at paragraph 7.)

We have 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, 37 DCR 5666, Slip Op. No. 248 at pgs. 3-4, PERB Case No. 90-A-02 (1990). Also, 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." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

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Given that the Arbitrator was interpreting terms of the parties' CBA in finding that the FY 2001 three percent wage adjustment would apply to those employees on workers' compensation, we must affirm the Award. We have held and the District of Columbia Superior Court has affirmed that, "[i]t is not for PERB or a 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 Employee 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). 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.

In light of the above, we find that WASA's assertion that the Arbitrator exceeded his authority by finding that employees who were on workers' compensation were entitled to the FY 2001 three percent wage adjustment, involves only a disagreement with the Arbitrator's findings and conclusions as to the interpretation of Article 1, Section A of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority.

In addition, we have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Dept. 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, we have held that an Arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.⁴ See D.C. Metropolitan Police Department and Fraternal Order of Police/MPD Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, WASA does not cite any provision of the parties' Agreement that limits the Arbitrator's equitable power. Therefore, once the Arbitrator determined that employees who were on workers' compensation were entitled to the FY 2001 wage adjustment, he also had the authority to direct that WASA should, within 60 days, pay them the adjustment, including any applicable interest.

In view of the above, we find that WASA's assertion that the Arbitrator exceeded his authority by ordering payment within 60 days and imposing interest, involves only a disagreement with the Arbitrator's findings and conclusions as to the meaning of the provisions of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator exceeded his authority.

As a second basis for review, WASA claims that the Award is contrary to law and public policy because it is in direct conflict with applicable District of Columbia Workers' Compensation

⁴We note that if the parties' collective bargaining agreement limits the arbitrator's equitable power, that limitation would be enforced.

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PERB Case No. 04-A-05
Page 6

Law.⁵ Specifically, WASA claims the following:

Workers' compensation payments are made in lieu of regular pay....Those workers absent on workers' compensation are not receiving their regular salaries. Instead, they are being compensated for their injuries. There is nothing on which [WASA] can base any wage adjustments because the absent workers did not receive any salary while they were on workers' compensation. [Footnote omitted] Thus, to require...[WASA] to provide wage adjustments to persons on workers' compensation is not only impractical, but it is inconsistent with the purposes and functions of workers' compensation.

(Request at paragraph 10.)

We have held that "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." MPD v. FOP/MPD Labor Committee, 47 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993), and W. R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983). The Arbitrator implicitly recognized that the wage adjustment payments he found authorized by the Agreement to employees who were on workers' compensation, were adjustments to the salaries of record on which the workers' compensation payments were based. Specifically, the Arbitrator indicated that "although the insurance carrier is the entity that physically made payments, the amount of payments was attributable to the information supplied by WASA." (Award at p. 7.) After reviewing WASA's public policy argument, we find that WASA fails to cite any specific public policy or law that was violated by the Arbitrator's Award. WASA merely cites to the entire of the workers' compensation law, Chapter 15 of Title 32, D. C. Code, and asserts, without specific citation, that the Award violates the intent of this law. Thus, WASA has failed to point to any clear public policy or law that the Award contravenes. Instead, WASA is requesting that we adopt their interpretation of the parties' CBA. Therefore, it is clear that WASA's argument involves a disagreement with the Arbitrator's finding. This Board has held that a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." AFGE Local 1975 and Dept. of Public Works, Slip Op. No. 413, PERB Case No. 95-A-02 at p. 2-3 (1995). Furthermore, WASA has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). In the present, case WASA failed to do so.

In view of the above, we find that there is no merit to either of WASA's arguments. Also,

⁵ See, the District of Columbia Workers' Compensation Act of 1979, D.C. Law 3-177 as codified under D.C. Code § 32-1501 et seq.

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PERB Case No. 04-A-05
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we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to public law or policy, or in excess of his authority under the Agreement. Therefore, no statutory basis exists for setting aside this Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The District of Columbia Water and Sewer Authority'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.

April 15, 2005

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
American Federation of Government Employees,)	
Local 872,)	
)	
)	
Petitioner,	)	PERB Case No. 04-A-07
and)	
	)	Opinion No. 780
)	
District of Columbia Water and Sewer Authority,)	
)	
Respondent.)	
)	
_____)	

DECISION AND ORDER¹

I. Statement of the case

On February 24, 2004, the American Federation of Government Employees, Local 872 ("AFGE, Local 872") filed an Arbitration Review Request ("Request"). AFGE, Local 872 seeks review of an arbitration award ("Award") that found the District of Columbia Water and Sewer Authority ("WASA") did not violate the parties' collective bargaining agreement when it restricted leave during peak winter months. AFGE, Local 872 contends that the Award is, on its face, contrary to law and public policy (See, Request at paragraphs 5 through 9). WASA 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.).

¹Board Member Walter Kamiat recused himself from this case. As a result, he did not participate when the Board considered this matter.

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PERB Case No. 04-A-07
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II. Discussion:

AFGE, Local 872, along with two other AFGE locals, a local of the American Federation of State, County and Municipal Employees, and a local of the National Association of Government Employees, are parties to a master collective bargaining agreement ("CBA") with WASA.

On July 16, 2002, WASA issued a memorandum, titled "Winter Planning and Scheduling." That memorandum required that leave requests for the peak winter months, November 2002 through February 2003, should be submitted by July 27, 2002.² AFGE, Local 872 argued in arbitration that these actions violated the following provisions of the parties' CBA:

- Article 35B, which requires management to approve timely leave requests, except in case of emergency. AFGE, Local 872 argued that the CBA states that requests for leave needed to be submitted three days in advance.
- Article 19, which prohibits various types of discrimination. AFGE, Local 872 claimed that some management officials had their leave requests approved, while those of employees it represented had not been.
- Article 4, which requires that WASA give the president of each local union that is party to the CBA, including AFGE, Local 872, advance written notice of changes in personnel policies or working conditions affecting employees covered by the CBA and an opportunity to bargain.

In an Award issued February 1, 2004, the Arbitrator found that WASA did not violate any of the cited provisions of the CBA. He noted that Article 35 of the CBA permits an exception in cases of emergency, but does not define the term "emergency". He found that WASA's invocation of emergency circumstances to restrict leave use during winter months to be appropriate. In his award the Arbitrator noted as follows:

Generally, the arbitral community has defined emergencies as events, activities, circumstances, conditions, or situations that are outside the control of management. Moreover, these types of situations may well be unforeseen, and they may be regarded as "acts of God." In addition, Management generally is given flexibility in such instances in order to meet legitimate

² There is some ambiguity in the Award concerning the date of WASA's memorandum that led to the grievance and arbitration at issue here. In some cases, the Arbitrator states that the memorandum was issued on July 16, 2002, in other cases July 16, 2001. The internal evidence suggests that the actual date was July 2002. However, this factual ambiguity has no bearing on the legal analysis in this Decision and Order.

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PERB Case No. 04-A-07
Page 3

operational needs. In like manner, such standards have a degree of applicability to an employee. In the instant case, Management has sought to require employees to submit annual leave requests as much as seven months in advance in order to maintain efficient business operations during the peak winter period. The issuance of [these requirements] are within Management's right to insure the efficient use of annual leave to meet documented operational needs... (Award at p. 10)

The Arbitrator rejected Local 872's contention that WASA violated the non-discrimination provisions of Article 19 of the CBA. He noted that this article, prohibits discrimination based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, disability, source of income and place of residence or business. The Arbitrator found that "[w]hile Article 19 applies to numerous aspects of discrimination, it does not specify a classification and bargaining unit of employees. [As a result he concluded that] [i]t would appear that the Union's argument is not persuasive since it is not covered under the provisions of Article 19." (Award at p. 12).

Finally, the Arbitrator found no violation of the provisions of Article 4 of the CBA. Article 4 requires that WASA provide written notification to AFGE, Local 872 of changes in working conditions. The Arbitrator concluded that "[b]ecause the emergency circumstances involved in this case, it was not possible for the Director to give the Union President advance written notice. The record shows that the Director has the authority to declare emergencies when the operational efficiency of the Agency may be seriously impaired." (Award at p. 13).

In its request, AFGE, local 872 claims that the Award is contrary to several provisions of the District of Columbia Comprehensive Merit Personnel Act. In Local 872's view, WASA's actions, although approved by the Arbitrator, violated D.C. Code § 1-617.04(a)(5), which prohibits WASA from "[r]efusing to bargain collectively in good faith with the exclusive representative," and D.C. Code § 1-617.06(a)(3), which gives employees the right "[t]o bargain collectively through representatives of their own choosing." AFGE, Local 872 concedes that D.C. Code § 1-617.08(a)(6) permits WASA to "take whatever actions may be necessary to carry out [its] mission in emergency situations," but argues that "there was plenty of time to bargain between July, 2001 and November 15, 2001. [As a result, AFGE, Local 872 claims that] the fact of the emergency claimed by the Arbitrator to negate bargaining is totally invalid" (Request at paragraph 8).

Although AFGE, Local 872 asserts as the sole basis for its Request that the Award is contrary to law and public policy, it is clear that it is the Arbitrator's interpretation of the Agreement that is actually at issue. We have held that a "disagreement with the Arbitrator's interpretation of the parties' contract does not make the Award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at p. 3, PERB Case No. 95-A-02 (1995). Moreover, this Board has held that "to set aside an award as contrary to law and public

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PERB Case No. 04-A-07
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policy, the Petitioner must present applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. Fraternal Order of Police/MPD Labor Committee, 42 DCR 7217, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000). See also, AFGE, Local 631 and Dept. of Public Works, 45 DCR 6617, Slip Op. No. 365, PERB Case No. 93-A-03 (1993), and W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757 (1983).

In the present case, we find that AFGE, Local 872's disagreement with the Arbitrator is over his conclusion that the CBA provides WASA with the authority to: (1) restrict otherwise permissible leave and (2) make changes in conditions of employment without advance written notice to AFGE, Local 872 in undefined emergency circumstances. We have held 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." University of the District of Columbia and University of the District of Columbia Faculty Association, 39 DCR 9628, Slip Op. No. 320 at p. 2, PERB Case No. 92-A-04 (1992).

AFGE, Local 872's disagreement with the Arbitrator's determination that WASA was faced with an emergency when it took the action at issue, is little more than disagreement with his interpretation of the parties' CBA. This is not a sufficient basis for concluding that the Arbitrator's interpretation is clearly erroneous nor that it is contrary to law and public policy. For these reasons, we find that no statutory basis exists for setting aside the Award.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The 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.

May 2, 2005

Government of the District of Columbia
Public Employee Relations Board

_____)	
In the Matter of:)	
)	
Bernice Rink,)	
)	
Complainant,		)	PERB Case No. 03-U-09
v.)	
		)	Opinion No. 783
)	
District of Columbia Department of Health,		)	FOR PUBLICATION
)	
Respondent.)	
)	
_____)	

DECISION AND ORDER

I. Statement of the Case:

Bernice Rink ("Complainant") filed an unfair labor practice complaint against the District of Columbia Department of Human Services ("Respondent" or "DHS"). The Complainant alleges that DHS violated the Comprehensive Merit Personnel Act when it terminated her from her position as a Social Service Representative. The Respondent filed an answer denying all of the allegations.

This matter was referred to a Hearing Examiner. The Hearing Examiner issued a Report and Recommendation ("R & R") in which he recommends that the complaint be dismissed. The Complainant filed exceptions to the Hearing Examiner's R & R. The Hearing Examiner's R & R and the Complainant's exceptions are before the Board for disposition.

II. Background:

The Complainant was a clerical assistant with the Department of Employment Services. On or about January 13, 2002, the Complainant accepted a position as a Social Service Representative with DHS. (R & R at p. 5) She was assigned to DHS' Income Maintenance Administration located at the Eckington Service Center. The Complainant asserts that she was a career service employee who had satisfactorily completed her one-year probationary period. Therefore, the Complainant

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PERB Case No. 03-U-09
Page 2

contends that she was not required to serve another probationary period. However, the Respondent claims that pursuant to applicable District of Columbia personnel rules, the DHS position was a career appointment requiring the Complainant to serve a 12-month probationary period. (R & R at p. 5).¹

From January 14, 2002 through July 15, 2002, the Complainant was assigned to a DHS work unit supervised by Shirley Porter, Social Service Representative Supervisor. (R & R at p. 5). During her first six months with DHS, the Complainant received initial training on DHS policy and procedures, and missed some work as a result of an off-duty automobile accident. (R & R at p. 5). "The Complainant's time away from her duties, as the result of the initial training and the accident, was taken into consideration by DHS during this first six-months of her one-year probationary evaluation period." (R & R at p. 5). On April 14, 2002 and July 15, 2002, Ms. Porter evaluated the Complainant's work performance. Each time, Ms. Porter recommended that the Complainant be retained. (R & R at p. 5).

On July 16, 2003, Diana Dupree, Section Supervisor, transferred the Complainant to another work unit under the supervision of La Shune Mitchell-Knight, Social Service Representative Supervisor. Ms. Dupree testified that Ms. Porter had five workers under her supervision while Ms. Mitchell-Knight had three. As a result, Ms. Dupree moved the Complainant to Ms. Mitchell-Knight's unit to correct the shortage of staff in Mitchell-Knight's unit. (R & R at p. 6).

The Complainant contends that prior to her transfer she requested two days of leave. The Complainant claims that Ms. Porter (the Complainant's previous supervisor), approved her leave request. After the transfer, the Complainant did not report for work on the two approved leave dates. However, Mitchell-Knight, her new supervisor, was unaware of the pre-approved leave. Consequently, Mitchell-Knight placed the Complainant in an AWOL status for the two days she took off. (R & R at p. 6). On September 20, 2002, the Complainant filed a grievance over Mitchell-Knight's decision to place her on AWOL. On October 10, 2002, Mitchell-Knight completed a third evaluation of the Complainant and recommended termination. (R & R at p. 6). On October 18, 2002, Mitchell-Knight responded to the Complainant's grievance and rescinded the AWOL. In addition, Ms. Mitchell-Knight restored two days to the Complainant's annual leave. (R & R at p. 6).

¹ The issue of whether the Complainant should or should not have been a probationary employee is not within the Board's jurisdiction. Personnel issues such as this are usually handled by the District of Columbia Office of Employee Appeals (OEA). Also, it should be noted that the Complainant did file an appeal with OEA. In the Matter of Bernice V. Rink v. Department of Human Services, OEA concluded that the Complainant "was to serve a one-year probationary period." As a result, OEA declined jurisdiction over her appeal of the Respondent's removal action based on her probationary status. See, In the Matter of Bernice V. Rink v. Department of Human Services, OEA Matter No. 1601-0025-03 at pgs. 3-4, (June 30, 2003) .

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 PERB Case No. 03-U-09
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On November 21, 2002, Sharon Cooper-DeLoatch, Deputy Administrator for Program Operations, notified the Complainant in writing that she was being terminated from her DHS position effective November 29, 2002. (R & R at p. 6)

The Complainant contends that she was terminated from her position as a result of her union activity and/or reprisal for filing a grievance against her supervisor in clear violation of D.C. Code §§ 1-617.01 (b)² and 1-617.04(a). As a result, the Complainant filed an unfair labor practice. In her Complaint, Ms. Rink is requesting that: (1) she be reinstated to the position of Social Service Representative; (2) she be awarded back pay; (3) her personnel records be modified accordingly; (4) she be free from reprisal; (5) management be trained to be sensitive to the rights of employees to pursue union activities; (6) she be awarded whatever sum the Board deems appropriate for mental anguish and defamation of character; and (7) the Respondent be directed to pay attorney fees.

The Respondent denies that it has committed an unfair labor practice. In addition, the Respondent argues that the statutory rights under the Comprehensive Merit Personnel Act (CMPA) do not accrue to probationary employees. As a result, the Respondent requests that the Complaint be dismissed.

The Hearing Examiner noted that D.C. Code § 1-617.04 prohibits the District, its agents and representatives from “[i]nterfering, restraining or coercing any employees in the exercise of rights guaranteed by this subchapter.” Furthermore, he observed that the CMPA expressly protects the fundamental collective bargaining rights of “all employees.”³ As a result, the Hearing Examiner found

² D. C. Code § 1-617.01(b) provides in pertinent part as follows:

* * *

(b) Each employee of the District government has the right, freely and without fear of penalty or reprisal:

(1) To form, join and assist a labor organization or to refrain from this activity;

* * *

(3) To be protected in the exercise of these rights.

³ § 1-617.06. **Employee rights.**

(a) all employees shall have the right:

(1) To organize a labor organization free from interference, restraint, or coercion;

(2) To form, join, or assist any labor organization or to refrain from such activity;

and

(3) To bargain collectively through representatives of their own choosing provided

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that the "plain language of D.C. Code § 1-617.01, et seq., protects 'each', 'any': and 'all employees' without limitation as to their probationary status." (R & R at p. 12). In addition, he indicated that Board case law has established that the "[Board] has jurisdiction over [unfair labor practice complaints] filed by probationary employees."⁴ Id.

The Hearing Examiner determined that "the Respondent's claim that a probationary employee's right to file an unfair labor practice complaint is circumscribed and limited by personnel regulations and personnel manual instructions, is without merit and without support in the law or [Board] precedent." Id. In addition, he observed that this claim is a restatement of the Respondent's Motion to Dismiss which was denied as a threshold matter at the hearing.

Concerning the substantive claims, the Hearing Examiner noted that the Complainant has the burden of proving her unfair labor practice allegations by a preponderance of evidence.⁵ The Hearing Examiner indicated that the Complainant has alleged that she was terminated as a result of her union activity and/or reprisal for filing a grievance against her supervisor, Mitchell-Knight. The Hearing Examiner noted that these allegations, if proven, constitute violations of D.C. Code §§ 1-617.01; 1-617.04(a)(1) and 1-617.06. He observed that in order to sustain a claim of retaliation for union activity the Complainant must demonstrate a link between her protected activity and the Respondent's termination action.⁶ The Hearing Examiner noted that to show a retaliatory discharge, the Complainant must prove that: (1) she engaged in protected union activity; (2) the Respondent knew of the activity; (3) there was animus by the Respondent; and (4) the Respondent subsequently took the termination action. The Hearing Examiner acknowledged that determining the Respondent's motivation is difficult. As a result, the Respondent's termination decision must be analyzed based on the totality of the circumstances. Furthermore, the Respondent need only rebut the presumption created by the Complainant's prima facie showing and need not prove that an unfair labor practice did not occur.⁷

After reviewing the evidence, the Hearing Examiner concluded that the Complainant failed

by this subchapter.

⁴ See, Doctors Council of the District of Columbia and Dr. Henry Skopek v. D.C. Commission on Mental Health Services, 47 DCR 7568, Slip Op. No. 636, PERB Case No. 99-U-06 (2000).

⁵ See, Board Rule 520.11.

⁶ See, Butler v. District of Columbia Department of Corrections, 49 DCR 1152, Slip Op. No. 672, PERB Case No. 02-U-02 (2002).

⁷ See, Georgia Mae Green v. District of Columbia Department of Corrections, 41 DCR 5991, Slip Op. No. 323, PERB Case No. 91-U-13 (1992).

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to meet her burden of proof that the Respondent committed an unfair labor practice by terminating her. Specifically, the Hearing Examiner indicated that the evidence establishes that during the Complainant's first six months at DHS she was supervised by Ms. Porter who twice recommended that the Complainant be retained. However, he noted that the record also reveals that for much of this time the Complainant was in training or recovering from an automobile accident. After about seven months at DHS, the Complainant was transferred to a new unit under the supervision of Mitchell-Knight. The Hearing Examiner found that the evidence revealed that the transfer was to balance out the staff in two work units and not motivated by anti-union animus. The Hearing Examiner observed that during the third quarter of the Complainant's probationary year, Mitchell-Knight determined that the Complainant was unable to meet the performance demands of her position. As a result, Mitchell-Knight recommended that the Complainant be terminated. The recommendation was adopted by DHS and the Complainant was terminated on November 29, 2002. The Hearing Examiner acknowledged that Mitchell-Knight's recommendation followed a grievance filed by the Complainant asserting that she was improperly placed in an AWOL status by Mitchell-Knight. In addition, he observed that the grievance was resolved in the Complainant's favor after she was notified of her termination. However, the Hearing Examiner found that the termination was not in retaliation.

The Hearing Examiner determined that at about the same time as her transfer to Mitchell-Knight's unit, the evidence established that the Complainant became active in the union and attended at least one shop steward's training class. The Complainant testified that Berhan Kahsay-Jones, who was two levels of supervision above Mitchell-Knight, made derogatory, anti-union statements about the union's worth in the work place and about the value of the Complainant's involvement in the union. Berhan Kahsay-Jones testified that she did not make the statements. The Hearing Examiner pointed out that only Berhan Kahsay-Jones testified that she knew of the Complainant's union activities. He noted that all other DHS Management officials testified that they were unaware that the Complainant was active in the union. In addition, the Hearing Examiner observed that the testimony of Deborah Courtney, AFSCME Local 2401 President, supports the Respondent's assertion that there was and is a harmonious relationship between DHS and the union. (R & R at p. 13)

The Hearing Examiner indicated that Mitchell-Knight testified that she recommended the Complainant's termination based on her insubordination and poor work performance, including the inability of the Complainant to adequately maintain more than 50 of 350 assigned cases. He found that her testimony, when considered in relation to the testimony of the other Respondent witnesses, particularly Berhan Kahsay-Jones and Deborah Courtney, supports the conclusion that the Complainant was terminated based on her performance and not in retaliation for filing the AWOL grievance or for union activity. (R & R at p. 13) He noted that "assuming arguendo that Berhan Kahsay-Jones' statements were made as the Complainant says, the remarks were not coercive, but casual in nature and do not constitute proof of anti-union animus on the part of the Respondent. He opined that the "remarks, even if made as the Complainant says, are not coercive of the Complainant's protected rights either." (R & R at pgs. 12-13)

In view of his findings, the Hearing Examiner recommends that the Complaint be dismissed.

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The Complainant presented numerous exceptions to the Hearing Examiner's Report and Recommendations. Essentially, the Complainant contends that the Hearing Examiner overlooked several pieces of critical evidence and ignored convincing testimony. (Complainant's Exceptions at pgs. 3-4) Specifically, the Complainant asserts that the Hearing Examiner erred in his conclusion that only one manager at DHS knew that the Complainant was active in the union. Also, the Complainant argues that the Hearing Examiner failed to find that the timing of her termination indicated anti-union animus. Additionally, the Complainant claims that the Hearing Examiner was biased because he knew Mary Leary, Director of the Office Labor Relations and Collective Bargaining. The remainder of the Complainant's exceptions dispute the Hearing Examiner's finding that DHS had a reasonable basis for terminating her.

In the present case, the Complainant has the burden of establishing that the Respondent's decision to terminate her was the result of the Respondent's anti-union animus or retaliation against the Complainant for her union activities. To prove the claim of retaliatory discharge for union activities, the Complainant must show that she engaged in protected union activities; that DHS knew of the activities; that there was animus by DHS; and that DHS subsequently took adverse action against the Complainant. See, Farmer Bros. Co., 303 NLRB 638 (1991); and D.C. Nurses Association v. D.C. Health and Hospitals Public Benefit Corporation, D.C. General Hospital, 46 DCR 6271, Slip Op. No. 583, PERB Case No. 98-U-07 (1999). The Board has observed that determining motivation is difficult. Therefore, a careful analysis must be conducted to ascertain if the stated reason is pretextual. The Board has noted that employment decisions must be analyzed according to the "totality of the circumstances";⁸ relevant factors include a history of anti-union animus, the timing of the action, and disparate treatment. We believe that the Hearing Examiner used the proper standard when determining if DHS committed an unfair labor practice.

The Hearing Examiner concluded that the Complainant presented sufficient evidence to establish that the Complainant received partial training as a shop steward. (R & R at p. 7). However, the Hearing Examiner found that only one manager at DHS knew of the Complainant's involvement with the union. In addition, the Hearing Examiner determined that the Complainant failed to show any anti-union animus on the part of DHS. In her exceptions, the Complainant claims that anti-union animus is evident in that she never received any warning from Ms. Mitchell-Knight concerning her job performance. (Complainant's Exceptions at p. 3) We believe that this fact alone cannot support a claim of retaliation, particularly when the Complainant has failed to show any consistent history of animus towards the union. See, Holiday Inn East, 1281 NLRB 573 (1986).

A review of the record reveals that the Complainant's exceptions amount to no more than a disagreement with the Hearing Examiner's findings of fact. Specifically, the Complainant argues that the Hearing Examiner erred by giving more weight to the testimony of some witnesses and by ignoring testimony that was favorable to the Complainant. This Board has determined that a mere disagreement

⁸ See, Skopek, supra., and NLRB v. Nueva, 761 F.2d 961, 965 (4th Cir. 1985).

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with the Hearing Examiner's findings is not grounds for reversal of the Hearing Examiner's finding where the findings are fully supported by the record. See, American Federation of Government Employees, Local 874 v. D.C. Department of Public Works, 38 DCR 6693, Slip Op. No. 266, PERB Case Nos. 89-U-15, 89-U-18 and 90-U-04 (1991). We have also held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner." Tracey Hatton v. FOP/DOC Labor Committee, 47 DCR 769, Slip Op. No. 451, at p. 4, PERB Case No. 95-U-02 (1995). 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 No. 86-U-16 (1992) and Charles Bagenstone, et al. v. D.C. Public Schools, 38 DCR 4154, Slip Op. No. 270, PERB Case Nos. 88-U-34 (1991). In the present case, the Hearing Examiner acknowledged that during Ms. Rink's first six months of employment she was supervised by Ms. Porter who twice recommended that the Complainant be retained. (R & R at p. 13) Nonetheless, he concluded that the Complainant failed to meet her burden. This is precisely the function of the Hearing Examiner; to determine issues of credibility and to judge the sufficiency of the evidence.

Pursuant to D. C. Code § 1-605.02(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and find them to be reasonable, persuasive and supported by the record. As a result, we adopt the Hearing Examiner's findings and conclusions that DHS did not violate the Comprehensive Merit Personnel Act.

ORDER

IT IS HEREBY ORDERED THAT:

- (1) The Complainant's unfair labor practice complaint is dismissed.
- (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.

April 21, 2005

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

<hr/>)	
In the Matter of:)	
)	
Metropolitan Police Department,)	
)	
	Petitioner,	)	PERB Case No. 04-A-13
and)	
		)	Opinion No. 784
)	
Fraternal Order of Police/Metropolitan Police		)	FOR PUBLICATION
Department Labor Committee,)	
)	
	Respondent.)	
)	
)	
<hr/>)	

DECISION AND ORDER

I. Statement of the Case:

The Metropolitan Police Department ("Agency" or "MPD") filed an Arbitration Review 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"). The grievance involved a question of whether Section 156 of the Fiscal Year 2001 District of Columbia appropriations bill continued beyond Fiscal Year ("FY") 2001 and made a provision in the parties' collective bargaining agreement ("CBA") inoperable after September 30, 2001.¹ Specifically, the grievance challenged whether Article 30 of the CBA relating to overtime/compensatory time was violated by MPD's failure to implement this provision following the end of FY 2001.

Arbitrator Louis Aronin was presented with the three following issues: (1) whether the grievance was timely; (2) whether MPD violated the parties' CBA by failing to implement Article 30 after the end of FY 2001, and if so, what the appropriate remedy should be; and (3) how should the

¹ Fiscal Year 2001 ended on September 30, 2001.

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Arbitrator's fee and expenses be apportioned.

The Arbitrator found that: (1) the grievance was timely; and (2) MPD violated the CBA by failing to implement Article 30. As a remedy, the Arbitrator ordered MPD to: (1) compensate the employees under Article 30 on and after September 30, 2001; and (2) to pay the Arbitrator's fee and expenses. MPD is appealing the Award. MPD claims that the: (1) Arbitrator was without authority or exceeded the jurisdiction granted and (2) Award on its face is contrary to law and public policy. FOP opposes the Arbitration Review Request.

The issue before the Board is whether "the arbitrator was without or exceeded his or her jurisdiction" or whether "the award on its face is contrary to law and public policy" . . . D.C. Code § 1-605.02 (6) (2001 ed.)

II. Discussion

In 1996 the United States Congress established the District of Columbia Financial Responsibility and Management Assistance Authority ("Control Board"). The purpose of the Control Board was to deal with the fiscal problems of the District of Columbia. The Control Board "was to continue to exist until there were [five] years of budgets without deficits." (Award at p. 3).

In 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."² (Request at p. 2). The Control Board's action "abrogated the provisions of Article 30, Section 1 through 5 of the parties' CBA." (Award at p. 4.) This Order was successfully challenged in court by Unions representing employees of the University of the District of Columbia. See, D.C. Faculty Association/NEA et al. v. D.C. Financial Responsibility and Management Assistance Authority, 163 F. 3d 616 (1998). Specifically, the United States Court of Appeals ruled that the Control Board did not have the authority to abrogate a collective bargaining agreement. (See, Request at p. 2 and Award at p. 4).

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 and read as follows:

SEC. 156 (a) Notwithstanding the provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139 D.C. Code 1-601.1, et. seq.), or any other District of Columbia law, statute, regulation, the provisions

² Specifically, District employees were only entitled to overtime after 40 hours of work in a work week.

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of the District of Columbia Personnel Manual, or the provisions of any collective bargaining agreement, employees of the District of Columbia government will only receive compensation for overtime work in excess of 40 hours per week (or other applicable tour of duty) of work actually performed, in accordance with the provisions of the Fair Labor Standards Act, 29 U.S. C. §201, et. seq.) .

(b) Subsection (a) of this section shall be effective December 27, 1996. The Resolution and Order of the District of Columbia Financial Responsibility and Management Assistance Authority, dated December 27, 1996, is hereby ratified and approved and shall be given full force and effect

“On October 1, 2001, the first day of fiscal year 2002, Gerald G. Neill, ... Chairman of the [FOP], wrote to the Chief of Police ‘to provide formal notice that Article 30 of the Collective Bargaining Agreement (CBA), entitled OVERTIME/COMPENSATORY TIME became operative with the closing of the District of Columbia Financial Responsibility and Management Assistance Authority (DCFRMAA)’ ... In [his] letter, ... Chairman [Neill] also requested the immediate restoration of the provisions of Article 30, and notified the Chief of Police that if he failed to do so within seven days, that the [FOP] would file a class grievance to force the implementation of Article 30 as it existed prior to the Control Board’s Order.” (Request at p. 3.)

Subsequently, on June 17, 2003, the FOP filed a class grievance on this matter. “One of the attachments to the grievance was a May 15, 2003 letter from Congressman Chaka Fattah to John Koskinen, Deputy Mayor and City Administrator for the District of Columbia. Congressman Fattah was of the opinion that the Congressional ratification of the Control Board’s Order lapsed at the end of FY 2001.” *Id.* at p. 4.

On July 7, 2003, the Chief of Police denied FOP’s grievance. Specifically, he found that the grievance was not timely. In addition, he opined “that the Congressional ratification of the Control Board’s Order did not lapse at the end of fiscal year 2001.” *Id.*

In light of the above, FOP filed for arbitration. In an Award issued on May 11, 2004, Arbitrator Louis Aronin found “that the Union had no valid basis to present a grievance regarding the reinstatement of overtime benefits until it had obtained a copy of a letter from Congressman Fattah, dated May 15, 2003. [Arbitrator Aronin reasoned that] [o]nly after obtaining that letter could the Union argue, effectively, that the suspended provisions in the parties’ agreement became operable ...” (Emphasis in original, Award at 9-10) Also, he noted that the parties’ CBA “permits a grievance to be filed within thirty (30) days of the Union’s knowledge of its occurrence.” *Id.* at p. 10. In addition, Arbitrator Louis Aronin observed that “it is a basic principle of arbitration that grievances, involving compensation, are ongoing and continuous and not time barred. Rather, such grievances are viewed as continuing in nature and a grievance, regarding compensation, may be filed at any time. [Furthermore, he indicated that] there [was] no evidence that the Employer [was] prejudiced by accepting the grievance as to which it was on notice, even before June 17, 2003.” *Id.* In light of the above, Arbitrator Aronin determined that the class grievance was timely.

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After addressing the procedural issue of timeliness, Arbitrator Aronin focused on the merits of the grievance. He noted that the parties had a longstanding contractual arrangement for payment of overtime without reference to the limits under the Fair Labor Standards Act, 29 U.S.C. §201 et seq. In addition, he acknowledged that those "provisions were suspended by the [Control Board in order] to reduce the costs to the Employer and, when the Control Board's actions were found to be ultra vires by the U.S. Court of Appeals, the Congress entered the picture by reinstating the effect of the Control Board through the inclusion of a resolution, Section 156, in its annual appropriations bill for the [District of Columbia] Government for FY 2001. [He also noted that the] resolution in Section 156 reinstated the order of the [Control Board], dated December 27, 1996." (Emphasis in original.) Id. at p. 11. In addition, Arbitrator Aronin indicated that there is a strong reluctance, by the courts and the legislature, to modify the provisions of a collective bargaining agreement. See Award at p. 12. Also, Arbitrator Louis Aronin opined that "only the most specific enactment should be held to suspend, or change, or cancel a contractual provision arrived at through collective bargaining. [Furthermore, he indicated that] [a]bsent clear and unambiguous language that Congress intended to suspend or abrogate the overtime provisions in the parties' . . . collective bargaining agreement[], we must conclude that the scope of the enactment and suspension was retroactive to its original date of issuance and that it applied until the end of the 2001 fiscal year, i.e., September 30, 2001, which was the period covered by the Congressional appropriation that included Section 156." Id.

In light of the above, Arbitrator Aronin ruled that: (1) the grievance, dated June 17, 2002, was timely filed; (2) the provisions contained in Article 30, Sections 1 through 5 inclusive, which were suspended pursuant to the Order of the Control Board and Section 156 of the Appropriations Act for FY 2001, became fully operative on and after September 30, 2001; (3) employees entitled to compensation under Article 30, Sections 1 through 5 inclusive, on and after September 30, 2001, shall be made whole for all such entitlements; and (4) since the Employer/Agency was not the prevailing party, it is responsible for all of the Arbitrator's compensation and expenses. See Award at p. 13.

MPD takes issue with the Arbitrator's ruling. Specifically, MPD contends that the Arbitrator was without authority or exceeded the jurisdiction granted by ruling that the group grievance was timely filed. (Request at pgs. 5-6)

In support of its argument, MPD cites Article 19, Part A and Article 19, Part B, Sections 2 and 3 of the parties' CBA. These sections of Article 19 provide in pertinent part as follows:

ARTICLE 19
GRIEVANCE PROCEDURE

A. PURPOSE

The purpose of this Grievance Procedure is to establish an effective mechanism for the fair, expeditious and orderly adjustment of grievances.

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Only an allegation that there has been a violation, misapplication or misinterpretation of the terms of this Agreement shall constitute a grievance under the provisions of this Grievance Procedure. Grievances not alleging violations of the contract may be grieved in accordance with the internal agency procedure as set forth in Chapter 16 of the DC Personnel Regulations.

B. PRESENTATION OF GRIEVANCES

* * *

Section 2

A grievance shall not be accepted by the Department or recognized as a grievance under the terms of this Agreement unless it is presented by the employee to management at the Oral step of this procedure not later than ten (10) days from the date of the occurrence giving rise to the grievance or within ten (10) days of the employee's knowledge of its occurrence, in the case of class grievances, by the Union no later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence at Step 2 of the grievance.

Section 3

A grievance not submitted by the employee within the time limits prescribed for each step of the procedure shall be considered satisfactorily settled on the basis of the last decision received by the employee which shall not be subject to further appeal, nor shall the Union be entitled to pursue the grievance further. . . .

MPD asserts that Arbitrator Aronin ignored the plain reading of Article 19 of the parties' CBA and "is seeking to add to these terms that the 30-day period begins when the Union has proof of the violation." (Request at p. 5) Specifically, MPD contends that the "alleged violation took place on October 1, 2001 when the old provision of Article 30, according to the Union, should have been reactivated. [As a result, MPD claims that] [u]nder the CBA the Union had 30 days in which to file a class grievance. [However,] [t]he Union missed this time period by some 20 months so the grievance is untimely and should be dismissed. [Furthermore, MPD argues that the] CBA is silent about any interplay between its statute of limitations for the filing of a grievance and the acquisition of proof to support the desired grievance. [Moreover, MPD asserts that] the Arbitrator is not allowed to fill this gap." Id. at p. 6. In view of the above, MPD opines that Arbitrator Aronin's "attempt to expand the filing period to whenever the Union might acquire this proof is a modification of the 30-day window in which the Union must file a grievance." Id.

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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).

In the present case, MPD claims that the Arbitrator exceeded his authority. As a result, the Board must determine whether Arbitrator Louis Aronin exceeded his authority and jurisdiction in finding that FOP's grievance was timely.

For the reasons noted below, we find that Arbitrator Louis Aronin did not exceed the authority granted to him by the parties' CBA when he determined that FOP's grievance was timely. Article 19, Part A, of the parties' CBA defines a grievance to be a "violation, misapplication or misinterpretation of the terms of this Agreement." Article 19, Part B, Section 2, defines the time requirements for a class grievance, of which the FOP's grievance qualifies. This Article states:

A grievance shall not be accepted by the Department or recognized as a grievance under the terms of this Agreement unless it is presented by the ...Union not later than thirty (30) days from the date of the occurrence giving rise to the grievance or within thirty (30) days of the Union's knowledge of its occurrence at Step 2 of the grievance.

Arbitrator Aronin noted that the "parties' agreement permits a grievance to be filed 'within thirty (30) days of the Union's knowledge of the occurrence'." (Award at p. 10) Also, he indicated that the grievance filed by the FOP, was a class grievance governed by Article 19, Part B, Section 2 of the parties' CBA. As a result, he found that the "Union had no valid basis to present a grievance regarding the reinstatement of overtime benefits until it had obtained a copy of the letter from Congressman Fattah, dated May 15, 2003. [Furthermore, he concluded that] [o]nly after obtaining that letter could the Union argue, effectively, that the suspended provisions in the parties' agreement became operable." (Emphasis in original, Award at pgs. 9-10.)

In view of the above, Arbitrator Louis Aronin determined that the grievance was timely under Article 19, Part B, Section 2, of the parties' CBA because the grievance was submitted within thirty (30) days of the "Union's knowledge of the occurrence." (Article 19, Part B, Section 2.)

In making this finding, Arbitrator Aronin made a procedural determination on the timeliness

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of the grievance. "It is well-settled that arbitrators are permitted to decide questions involving procedural arbitrability." UDC and AFSCME Council 20, Local 2087, 36 DCR 3344, Slip Opinion No. 219 at p. 3, PERB Case No. 88-A-02 (1989). Thus, it cannot be said that the Arbitrator exceeded his authority by making a determination that the grievance was timely. As we have explained:

[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.'

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).

Contrary to MPD's argument, Arbitrator Louis Aronin did not add to or subtract from the parties' CBA but merely interpreted the terms of the parties' CBA. Namely, Arbitrator Louis Aronin interpreted what constituted the "Union's knowledge" of an "occurrence" giving rise to the grievance under Article 19, Part B, Section 2 of the CBA. Under Arbitrator Louis Aronin's interpretation, "knowledge" meant substantiated knowledge that Article 30 had been violated. Specifically, he concluded that this substantiation was provided in a letter to the FOP from Congressman Fattah, a member of the District of Columbia Appropriations Committee. The letter stated:

[a]s a general rule, an appropriations bill is "one year" legislation. Therefore, legislative provisions that Congress intends to extend beyond a given fiscal year are either carried every year or contain language explicitly expressing permanence. Neither of these conditions has been met with regard to the section in question. In fact, since FY 2001, two subsequent D.C. appropriations bills have been enacted without this provision. (Award at p. 6).

Arbitrator Louis Aronin found that Congressman Fattah's letter made FOP aware that Section 156 of the FY 2001 District of Columbia appropriations bill had expired on September 30, 2001. As a result, he concluded that with its expiration, Article 30 of the parties' CBA became operable. Therefore, Arbitrator Aronin determined that upon receipt of Congressman Fattah's letter, FOP could effectively argue that MPD was violating the parties' CBA by not following Article 30 since September 30, 2001.

In view of the above, Arbitrator Louis Aronin opined that FOP had "no valid basis to present a grievance regarding the reinstatement of the overtime benefits [noted in Article 30], until it had obtained a copy of a letter from Congressman Fattah, dated May 15, 2003." Emphasis in original. (Award at pgs. 9-10). As a result, he found that the thirty (30) day time limit for filing a grievance was not triggered until the receipt of Congressman Fattah's letter dated May 15, 2003. Only then could the Union have effectively argued that MPD was in violation of Article 30 of the parties' CBA.

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Given that Arbitrator Louis Aronin was interpreting terms of the parties' CBA in finding the grievance to be timely, we must affirm the Award. We have held and the D.C. Superior Court has affirmed that, "[i]t is not for PERB or a 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 Employee 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). 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.

In light of the above, we find that MPD's assertion that the Arbitrator exceeded his authority by finding that FOP's grievance was timely, involves only a disagreement with the Arbitrator's findings and conclusions as to the interpretation of Article 19 of the parties' CBA. This does not present a statutory basis for review. Therefore, we cannot reverse the Award on this ground.

As a second basis for review, MPD claims that the Award is on its face contrary to law and public policy because the "Control Board's Order of 1996 that Congress ratified in 2001 was a permanent Order." (Request at p. 6). We disagree. Specifically, this Board has held that a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." AFGE Local 1975 and Dept. of Public Works, 48 DCR 10955, Slip Op. No. 413 at pgs. 2-3, PERB Case No. 95-A-02 (1995). Furthermore, MPD has the burden to specify "applicable law and definite public policy that mandates that the Arbitrator arrive at a different result." MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000).

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. American Postal Workers Union, AFL-CIO v. United States Postal Service, 789 F.2d 1, 8 (D.C. Cir. 1986). "[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.'" *Id.* at 8. 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 Misco, 484 U.S. at 43; Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971). Moreover, the violation must be so significant that the law or public policy "mandates that the Arbitrator arrive at a different result."³

³ 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); see District of Columbia Public Schools and The American Federation of State, County and Municipal Employees, District Council 20,

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In the present case, MPD has failed to specify any applicable law or definite public policy mandating that Arbitrator Aronin find that Section 156 of the FY 2001 District of Columbia appropriations bill was permanent. The Arbitrator found that Section 156 was temporary and had expired on September 30, 2001. As a result, he concluded that with the expiration of Section 156, Article 30 of the parties' CBA became operable. Therefore, he found that MPD was in violation of Article 30 since September 30, 2001.

In attempting to show that the Award violates law and public policy, MPD argues that Arbitrator Louis Aronin violated a General Accounting Office (GAO) standard which states:

[I]f Congress includes a provision that bears no direct relationship to the appropriations act in which it appears, we view that as an indication of permanence. In these cases, however, we invariably also have some other indication of permanence, such as legislative history, to support a conclusion that Congress intended the provision to have permanent effect. (Award at 7.)

Nothing in this "standard" mandates that Arbitrator Aronin make a finding of permanence. Section 156 of the FY 2001 District of Columbia appropriations bill "bears no direct relationship to the appropriations act." Thus, while the appropriations act itself expires after a single term, Section 156 could theoretically be permanent because it is unrelated to the appropriations act. However, its inclusion serves merely as an "indication" of its permanence. In order to be permanent, there must exist some other "indication" of permanence such as legislative history. In the present case, no such "indication" exists.

At arbitration, MPD relied on an Opinion from the Office of the Corporation Counsel to support its position that the legislation was permanent. However, the Arbitrator noted that the Corporation Counsel's Opinion stated that it "has been unable to locate any legislative history that specifically states that §156 is intended to be a permanent provision." (Award at 7.) The Arbitrator concluded that the absence of any legislative history makes Section 156 temporary. In finding Section 156 to be temporary, Arbitrator Aronin interpreted and applied the GAO's standard of permanence and the Corporation Counsel's Opinion on permanence and its investigation into legislative history: Specifically, Arbitrator Aronin notes the following:

In fact, the Corporation Counsel notes the absence of legislative history to establish that Section 156 was a 'permanent provision'. The Corporation Counsel's Opinion also notes a 'general disfavor against enactment of positive (permanent) law through the appropriation process.' (Award at 12.)

34 DCR 3610, Slip Op. No. 156 at p. 6, PERB Case No. 86-A-05 (1987) (same).

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A plain reading of GAO's own opinion suggests that provisions in appropriation bills are temporary and not permanent. Given there was no other "indication of permanence" which should "invariably" have been included, it cannot be said that Arbitrator Louis Aronin's Award is on its face contrary to GAO's opinion or mandate that he arrive at a contrary decision. This conclusion is buttressed by the Corporation Counsel's own opinion which recognizes a "general disfavor" against creating such a permanent law through an appropriations bill.

Since the GAO's opinion does not explicitly state that a provision accompanying an appropriations bill is permanent, we find that the public policy exception is inapplicable. *See Misco*, 484 U.S. at 43 ("violation of such policy must be clearly shown if an award is not to be enforced"); *see also American Postal Workers*, 789 F.2d at 8-9 (the public policy exception is not available where an "arbitrator's award [is] not in itself unlawful" or "the award [does] not otherwise have the effect of mandating any illegal conduct."). Since Arbitrator Aronin's Award would not require any unlawful conduct on the part of MPD, the award is not on its face contrary to law or public policy.

Furthermore, as the D.C. Court of Appeals has stated, we must "not be led astray by our own (or anyone else's) concepts of 'public policy' no matter how tempting such a course might be in a particular factual setting." *Department of Corrections v. Local No. 246*, 554 A.2d 319, 325 (D.C. 1989). Abiding by MPD's interpretation of the GAO's opinion would be substituting MPD's concept of public policy. In the present case, MPD's interpretation merely represents a disagreement with the Award. We have held that "a disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." *AFGE, Local 1975 and Dept. of Public Works*, 48 DCR 10955, Slip Op. No. 413 at pgs. 2-3, PERB Case No. 95-A-02 (2001)

The GAO opinion's susceptibility to more than one interpretation further undermines the MPD's public policy argument because MPD cannot show that a well-defined public policy is violated by the Award. *See W.R. Grace and Co. v. Local Union 759, Intern. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 766 (1983) (a public policy challenge to an arbitration award "must be well-defined and dominant"). MPD does not cite to any applicable legal precedent or public policy requiring the MPD's interpretation of the GAO opinion. Since MPD cannot *clearly* show that the award *mandates illegal conduct*, Arbitrator Aronin's Award violates neither law nor public policy.

In view of the above, we find that MPD's assertion that the Award is contrary to law and public policy, involves only a disagreement with the Arbitrator's findings and conclusions that Section 156 of the Fiscal Year 2001 District of Columbia appropriations bill was not a permanent provision. This is not a sufficient basis for concluding that the Award is contrary to law and public policy.

MPD further argues that the Arbitrator's remedy should be retroactive to thirty (30) days prior to FOP's filing the class grievance on June 17, 2003 and not September 30, 2001. This argument represents only a disagreement with the Arbitrator's Award.

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We have held that an Arbitrator's authority is derived "from the parties' agreement and any applicable statutory and regulatory provisions." D.C. Department of Public Works and American Federation of State, County and Municipal Employees, Local 2091, 35 DCR 8186, Slip Op. No. 194 at p. 2, PERB Case No. 87-A-08 (1988). Furthermore, we have found that an Arbitrator does not exceed his authority by exercising his equitable power, unless it is expressly restricted by the parties' collective bargaining agreement.⁴ See, Metropolitan Police Department and Fraternal Order of Police/Metropolitan Police Department Labor Committee, 39 DCR 6232, Slip Op. No. 282, PERB Case No. 92-A-04 (1992). In the present case, MPD does not cite to any provision of the parties' collective bargaining agreement that limits the Arbitrator's equitable power. Instead, MPD asserts that "[w]hile the Agency may agree with [the Arbitrator] that 'continuing violations' concerning compensation may be filed at any time, the Agency disagrees that they may not be time barred." (Request at p. 7). MPD's claim represents only a disagreement with the Arbitrator's award. As this Board has stated, a "disagreement with the arbitrator's interpretation . . . does not make the award contrary to law and public policy." AFGE, Local 1975 and Dept. of Public Works, Slip Op. No. 413, PERB Case No. 95-A-02 (1995). Also, Arbitrator Aronin found that FOP was not aware of the breach of Article 30 which created the cause of action until May 15, 2003. Furthermore, he opined that only upon receiving Congressman Chattah's letter did the FOP discover it had been injured. As a result, he determined that MPD violated the parties' CBA and that FOP's claim of a September 30, 2001 violation of the parties' CBA did not begin accruing until receipt of the letter. As noted above, MPD does not cite any provision of the parties' CBA that limits the Arbitrator's equitable power. Therefore, once Arbitrator Aronin determined that Section 156 was temporary and that MPD violated Article 30 of the parties' CBA, he also had the authority to fashion a remedy that he deemed appropriate to rectify MPD's violation of Article 30. We believe that the Arbitrator's Award did exactly this in making the Award retroactive to September 30, 2001.⁵

Also, in support of its statute of limitations argument, MPD relies on awards made by other arbitrators and based on other collective bargaining agreements. (Request at p. 8.) We find that reliance on these awards is improper and fails to establish a violation of law or public policy. See, e.g., Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25, 963 F.2d 388, 391 (D.C. Cir. 1992) (affirming an arbitration decision that conflicted with an earlier

⁴We note that if the parties' collective bargaining agreement limits the arbitrator's equitable power, that limitation would be enforced.

⁵Arbitrator Aronin made the remedy retroactive to September 30, 2001, recognizing that Article 30 "became operable on or after September 30, 2001." (Award at 12.) This occurred because the appropriations bill rendering Article 30 inoperable was still in effect until "the end of fiscal year 2001," which occurred on September 30, 2001. (Award at 12)

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arbitrator's decision regarding the same issue under the same contract).⁶

MPD's further contention that the Arbitrator's Award violates previous "judicial precedent" lacks merit. (See Request at p. 8.) As evidence, MPD cites William J. Davis v. William Young, 412 A.2d 1187 (D.C. 1980). In Williams, the District of Columbia Court of Appeals recognized the continuing nature of compensation claims. However the William Court also found that each new pay period without proper compensation created a new cause of action with a new statute of limitations. In making this ruling, the Court of Appeals applied "general principles developed in interpreting statutes of limitations." 412 A.2d at 1191. MPD's view of the statute of limitations in compensation claims precludes recovery before May 17, 2003 (thirty (30) days prior to filing of the class grievance on June 17, 2003). (Request at p. 7.)

Yet, MPD fails to show that the "general principles" relied upon in Williams are applicable to this case. To the contrary, these "general principles" fail to rise to the level of "well-defined" and "dominant" law that *mandates* Arbitrator Aronin limit his remedy to thirty (30) days prior to FOP's filing of the class grievance on June 17, 2003. MPD v. FOP/MPD Labor Committee, 47 DCR 717, Slip Op. No. 633 at p. 2, PERB Case No. 00-A-04 (2000) (Agency has burden to specify "applicable law . . . that mandates that the Arbitrator arrive at a different result."). See also W.R. Grace, 461 U.S. at 766 (a public policy challenge to an arbitration award "must be well-defined and dominant").

Additionally, we find that Arbitrator Louis Aronin 's award is consistent with the parties' CBA. Article 19, Part E, Section 2 of the CBA states that "[a]rbitration awards shall not be made retroactive beyond the date of the occurrence of the event upon which the grievance or appeal is based." Here, the expiration of Section 156 of the FY 2001 D.C. appropriations bill is the event upon which the FOP's grievance is based. The expiration occurred on September 30, 2001. Therefore, the arbitrator's award, making compensation retroactive to September 30, 2001 is consistent with Article 19, Part E, Section 2 of the parties' CBA. The position asserted by the MPD simply confuses the date of the occurrence giving rise to the claim and the date of the discovery of that event.

In conclusion, MPD has failed to cite any applicable law or public policy requiring that the award be retroactive to thirty (30) days prior to June 17, 2003. Therefore, Arbitrator Louis Aronin's award, making the remedy retroactive to September 30, 2001, violates neither law nor public policy.

⁶See also AFGE Local 727 and DCBP, Slip Op. No. 551 at p. 3 , PERB Case No. 98-A-01 (1998)("an [arbitration] award's inconsistency with other awards does not create conflict with law"); D.C. Public Schools and International Brotherhood of Teamsters, Local 639, Slip Op. 423 at p. 4 n., PERB Case No. 95-A-06(1995) (Absent citation to any applicable law and public policy or agreement between parties requiring use of previous arbitration awards as controlling precedent, it is the selected arbitrator that is accorded the authority to decide a given matter.)

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In view of the above, we find no merit to either of MPD's arguments. Also, we believe that the Arbitrator's conclusions are based on a thorough analysis and cannot be said to be clearly erroneous, contrary to law or public policy, or in excess of his authority under the parties's CBA. 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.

March 31, 2005

In the Matter of:)

District of Columbia Office of Unified)
Communications,)

Agency,)

and)

National Association of Government)
Employees/SEIU, AFL-CIO,)

and.)

Communication Workers of)
America, Local 2336,)

Labor Organizations.)

PERB Case No. 05-UM-01

Opinion No. 786

FOR PUBLICATION

DECISION AND ORDER ON UNIT MODIFICATION,
COMPENSATION UNIT DETERMINATION
AND DIRECTION OF ELECTION ¹

I. Statement of the Case:

On December 3, 2004, the District of Columbia Office of Labor Relations and Collective Bargaining (“OLRCB”), pursuant to section 504 of the Rules of the Public Employee Relations Board (“Board”), filed a Petition for Unit Modification (“Petition”), on behalf of the District of Columbia Office of Unified Communications. In addition, on April 12, 2005 OLRCB filed an Amended Unit Modification Petition. OLRCB is seeking to change the identity of the employing agency of two collective bargaining units which currently consist of employees previously employed by the District of Columbia Metropolitan Police Department (“MPD”) and the District of Columbia Fire and Emergency Medical Services Department (“FEMS”) due to the transfer of these employees to the new Office of Unified Communications. OLRCB is also seeking to consolidate the two units into one.

Notices were posted and comments were received from the two labor organizations which currently represent the transferred employees. The Petition is before the Board for disposition.

¹Board Member Walter Kamiat recused himself from this case. As a result, he did not participate when the Board considered this matter.

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II. Discussion:

The Office of Unified Communications Establishment Act of 2004 ("Act"), D.C. Law 15-205 as codified under D.C. Code § 1-327.51 et seq.,² created the District of Columbia Office of Unified Communications ("OUC"). OUC "is a subordinate agency under the Mayor in the executive branch of the government of the District of Columbia. . . . [The purpose of the OUC is to] centralize the customer service functions and activities of the District government's 911, 311, and 727-1000 systems, and other facilities for emergency, non-emergency, and citizen service calls, and be responsible for the operation and maintenance of the District government's radio technology and call center technology." D.C. Code § 1-327.52.

The Act requires that "[a]ll of the authority, responsibilities, duties, and functions of the agencies' call centers and radio technology shall be transferred from the agencies to the Office of Unified Communications within such reasonable period of time as the Mayor may designate.³ The transfer shall include all 911, 311 and 727-1000 call center authority, responsibilities, duties functions, and infrastructure." D.C. Code § 1-327.53. Consistent with the language in D.C. Code § 1-327.53, all call center operators are to be transferred from MPD, FEMS and the Customer Service Operations Unit to the newly created OUC.⁴ However, OLRCB claims that the non-emergency operators assigned to the Customer Service Operations Unit have not been integrated into OUC's operations. (See Amended Petition at p. 4, n. 2.) As a result, in their Amended Unit Modification Petition, OLRCB claims that it is not seeking to merge the operators at the Customer Service Operations Unit with the emergency operators from MPD and FEMS because they do not share a community of interest. (See OUC's Attachment 1). In light of the above, OLRCB contends that they are seeking the modification "[t]o reflect a change in the identity or statutory authority of the employing agency, as required by PERB Rule 504.1(a)." (Amended Petition at p. 2) OLRCB claims that the modification "is made necessary by the transfer of employment positions formerly under the authority of the [District of Columbia] Metropolitan Police Department (MPD) and the [District of Columbia] Fire and Emergency

² D.C. Law 15-205, the "Fiscal Year 2005 Budget Support Act of 2004", was introduced in the Council of the District of Columbia and assigned Bill No. 15-768, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 14, 2004, and June 29, 2004, respectively. Signed by the Mayor on August 2, 2004, it was assigned Act No. 15-487 and transmitted to both Houses of Congress for its review. D.C. Law 15-205 became effective on December 7, 2004.

³ The Act provides that "[a]gencies means the Metropolitan Police Department, the Fire and Emergency Medical Services Department, and the Customer Service Operations Unit." D.C. Code § 1-327.51 (a).

⁴ The Customer Service Operations Unit is also commonly referred to as the Mayor's City Wide Call Center.

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Medical Services Department (FEMS) to the new Office of Unified Communications." (Petition at p. 1.).

The employees who were previously employed by MPD and transferred to OUC, are currently in a non-compensation bargaining unit for which the National Association of Government Employees/International Brotherhood of Police Officers (NAGE) has been certified as the exclusive bargaining representative. This bargaining unit is described as follows:

All non-professional employees of the Metropolitan Police Department excluding wage grade employees of the Property Division and the Fleet Management Division, management executives, confidential employees, supervisors or any employees engaged in personnel work in other than in a purely clerical capacity.

BLR Case No. 0R002 (December 14, 1979).

The employees who were previously employed by FEMS and transferred to OUC, are currently in a non-compensation bargaining unit for which the Communications Workers of America, Local 2336 (CWA) has been certified as the exclusive bargaining representative. The bargaining unit description for this group of employees is as follows:

All civilian employees of the Fire Department's Communications Division, excluding management executives, confidential employees, supervisors or any employees engaged in personnel work other than in a purely clerical capacity.

BLR Case No. 7R011 (October 28, 1977).

OLRCB claims that the above-referenced unit descriptions no longer apply to the employees transferred from MPD and FEMS to OUC. (Amended Petition at p. 4) As a result, OLRCB is requesting that pursuant to Board Rule 504.1(a), these two units be merged and modified in order to reflect the change in the identity of the employing agency.

In their Petition and Amended Petition, OLRCB is requesting that the above-referenced units be consolidated into the following proposed unit:

All telephone operators, dispatchers, trainers, radio shop employees, communications technicians and clerical staff of the Office of Unified Communications excluding

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managers, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Law 2-139.

(See Petition at p. 3 and Amended Petition at pgs. 4-5)

OLRCB claims that the proposed consolidated unit will contain approximately 325 positions and the employees in the consolidated unit would be under the personnel authority of the Mayor. In addition, OLRCB asserts that the proposed consolidated unit "is appropriate because the indicated employees share a demonstrable community of interest as required by PERB rules." (Amended Petition at p. 5). Also, OLRCB is requesting that the employees in the proposed consolidated unit be included in Compensation Unit 1. (See Amended Petition at p. 5).

OLRCB indicates that the employees in the proposed consolidated unit are currently represented by NAGE and CWA. As a result, OLRCB is requesting that the Board direct an election in order to allow employees in the proposed consolidated unit to select an exclusive bargaining representative. (See Petition at p. 4 and Amended Petition at p. 5).

Consistent with Board Rule 504.3, the Board's Executive Director prepared Notices concerning the Petition. These Notices were forwarded to the agency and were posted at the job sites. Both NAGE and CWA submitted comments regarding the Petition. CWA did not object to the Petition. However, NAGE objected to the Petition by asserting that the agency had failed to demonstrate that the consolidated unit is an appropriate unit. (See NAGE's Comments at p. 3). As a result, a hearing was scheduled to address the issue raised by NAGE. Subsequently, NAGE withdrew their objection. Therefore, the hearing was cancelled. Both unions are requesting that the Board order an election.

After reviewing the Petition, the Board's Executive Director contacted OLRCB and requested clarification regarding their Petition. Specifically, the Executive Director requested information concerning, among other things, the transfer of employees from the Customer Service Operations Unit to OUC. In order to address the Executive Director's concerns, on April 12, 2005 OLRCB filed an Amended Petition for Unit Modification.⁵ In their Amended Petition, OLRCB indicated that the employees assigned to the Customer Service Operations Unit were not being transferred to OUC. As a result, OLRCB is not requesting that these employees be placed in the proposed consolidated unit.

⁵ The Amended Petition did not contain any new information concerning the proposed consolidated unit. Instead, it clarified why the proposed unit did not include employees from the Customer Service Operations Unit. As a result, it was not necessary to post new Notices.

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The Board's Executive Director contacted both labor organizations and solicited comments regarding OUC's Amended Petition. NAGE objected to the unit description noted in the Amended Petition. However, NAGE withdrew their objection. In light of the above, the issue before the Board is whether to grant OUC's Petition.

An appropriate unit under the Comprehensive Merit Personnel Act is a unit that: (1) possesses a 'community of interest' among the employees and (2) promotes effective labor relations and efficiency of agency operations. The Board has held that under D.C. Code § 1-617.09(a), "petitioning parties need only propose an appropriate unit, not necessarily the most appropriate unit, in order to meet the Comprehensive Merit Personnel Act's requirement for appropriate unit." Health and Hospital Public Benefit Corporation and All Unions Representing Units in Compensation Units 12, 20, 21, 22, 23 and 24 and employees employed by the Health and Hospital Public Benefit Corporation, 45 DCR 6743, Slip Op. No. 559 at p. 7, PERB Case Nos. 97-UM-05 and 97-CU-02 (1998). Also see, AFSCME, D.C. Council 20, AFL-CIO, and DHS, CMHS, 38 DCR 5039, Slip Op. No. 278, PERB Case No. 90-R-01 (1991). In the present case, the employees in the proposed consolidated unit were transferred from two different agencies; however, they share common working conditions, organizational structure, pay schedule and supervision. The Board has held that common overall supervision is probative of community of interest and some dissimilarity among positions need not preclude a finding of appropriateness where under the total circumstances, a general community of interest prevails. See, District Council 20, American Federation of State, County and Municipal Employeesocal and District of Columbia School of Law, 36 DCR 8203, Slip Op. No. 235, PERB Case No. 89-RC-03 (1989). After reviewing the pleadings, we conclude that sufficient factors exist for the Board to find that the employees in the proposed consolidated unit share a community of interest. Also, there is no collective bargaining agreement in effect covering the proposed consolidated unit. In view of the above, we find that the proposed consolidated unit would promote effective labor relations and the efficiency of agency operations.

Regarding the question of representation, we believe that the proposed consolidated unit is an appropriate unit for a representation election. The election will determine who will represent employees in a combined unit formed by the consolidation of two existing units that are currently represented by two different labor organizations. The establishment of this new consolidated unit from two represented bargaining units of employees, does not give rise to a question concerning whether OUC employees want to be represented or not; but, rather whether they desire to be represented by either CWA or NAGE. Therefore, consistent with D.C. Code § 1-617.10 and Board Rules 510-515, we are directing a mail ballot election in order to determine whether or not all eligible employees in the proposed consolidated unit desire to be represented by either NAGE or CWA.

The employees in the two existing bargaining units are currently in Compensation Unit 1. As a result, OLRCB is requesting that the proposed consolidated unit be placed in Compensation Unit 1. The standard under D.C. Code § 1-617.16 (2001 ed.) for determining the appropriate compensation

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unit expresses a strong preference for "broad units of occupational groups". Specifically, D.C. Code §1-617.16 (b) (2001 ed.) provides as follows:

In determining an appropriate bargaining unit for negotiations concerning compensation, **the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes.** The Board may authorize bargaining by multiple employers or employee groups as may be appropriate. (Emphasis added.)

In the present case, the two existing units are currently in Compensation Unit 1. Furthermore, OLRCB's request concerning the placement of the consolidated unit into Compensation Unit 1, reflects a: (1) change in the name of the personnel authority from MPD and FEMS to OUC and (2) consolidation of the two existing units into one. In addition, the number of compensation units would remain the same because OLRCB is not requesting that the consolidated unit be placed in a new compensation unit; but, rather that the existing compensation unit be modified to reflect a change in the personnel authority from MPD and FEMS to OUC. Consistent with D.C. Code §1-617.16 (b) (2001 ed.), we find that it is appropriate to place the proposed consolidated unit into Compensation Unit 1. Therefore, we grant OUC's Petition requesting that the proposed consolidated unit be placed in Compensation Unit 1.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Office of Unified Communications' Petition for Unit Modification of A Compensation and Non-Compensation Unit, is granted.
2. The employees previously employed by the Metropolitan Police Department and the Fire and Emergency Medical Services Department who were transferred to the District of Columbia Office of Unified Communications are consolidated into the following unit.

All telephone operators, dispatchers, trainers, radio shop employees, communications technicians and clerical staff of the District of Columbia Office of Unified Communications, excluding managers, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity and employees engaged in administering the provisions of Title XVII of the District of Columbia Comprehensive

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Merit Personnel Act of 1978, D.C. Law 2-139.

3. A mail ballot election will be held to determine whether eligible employees in the District of Columbia Office of Unified Communications desire to be represented by either the National Association of Government Employees/SEIU or the Communication Workers of America, Local 2336.
4. Compensation Unit 1 is modified to reflect a change in the identity of the statutory authority of the employing agency of the consolidated unit established under paragraph 2 of this Decision and Order, from the District of Columbia Metropolitan Police Department and the District of Columbia Fire and Emergency Medical Services Department to the District of Columbia Office of Unified Communications. Therefore, the consolidated unit established under paragraph 2 of this Decision and Order, is placed in Compensation Unit 1.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

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

May 3, 2005

**Thurgood Marshall
Public Charter School
1470 Irving Street NW
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSAL:

The proposed TMA Public charter School, in compliance with Section 2204 (c) of the District Of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest for the following services and products for the school:

- I. Auditing:** Services to conduct the audit in accordance with auditing standards generally accepted in the U.S and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.
- II. Computer Support:** Superior service to provide a wireless plan, internal server, remote capability, IT tech and other computer support services.
- III. Food Services:** Catering of Breakfast (approx. 150 students) Catering of Lunch (approx. 240 students) Catering of snacks (approx. 300 students) and approx (75% free/reduced lunches). The meals must meet or exceed the all federal Nutrition requirements and all compliance standards of the USDA School Breakfast Program and the National Vendors will be required to deliver meals to the school. **(All bid proposals must be submitted in the National School Lunch Program Format).**
- IV. Computer Sales:** Superior service for the purchase of laptop and desktop computers for the school.

For Additional Information Call: 202-669-6345. Deadline for submissions is June 24, 2005 at 5pm

DISTRICT DEPARTMENT OF TRANSPORTATION**PUBLIC MEETING****TO REQUEST THE U.S. DEPARTMENT OF TRANSPORTATION
AUTHORIZE \$32.8 MILLION TO THE DISTRICT'S SURFACE
TRANSPORTATION PROGRAM FOR FISCAL YEAR 2005****TUESDAY, JUNE 28, 2005****6:30 P.M.****6TH FLOOR CONFERENCE ROOM****FRANK D. REEVES MUNICIPAL BUILDING****2000 14TH STREET, N.W.****WASHINGTON, D.C. 20009**

The District of Columbia, Department of Transportation plans to request that the Secretary of the U.S. Department of Transportation authorize the transfer of up to 100 percent of the District's National Highway System funding for Fiscal Year 2005 (approximately \$32.8 million under the federal continuing funding resolutions through May 31, 2005) to the District's Surface Transportation Program. Additional National Highway System funds, up to 100 percent of the full National Highway System allocation, may be transferred once the Fiscal Year 2005 Federal transportation appropriations bill or reauthorization bill is approved. This transfer of funding will allow the District government to use this portion of federal aid funds for a broader range of transportation needs.

The Department of Transportation will conduct a public meeting to discuss this request and receive public comments on June 28, 2005 at 6:30 PM in the 6th Floor Conference Room at the Frank D. Reeves Municipal Building, 2000 14th Street, NW, Washington, DC 20009.

A brief summary description of this request may be obtained by contacting the Division of Transportation at 671-2730, or may be found at the Division's web site: www.ddot.dc.gov

Persons wishing to testify at the June 28, 2005 public meeting should contact the Department at 671-2730 to register to testify. Oral comments shall be limited to five (5) minutes. Written comments must be received by July 15, 2005. For further information, contact Mr. Kenneth Laden at 671-2730 or at the Department of Transportation, 2000 14th Street, NW, 7th Floor, Washington, DC 20009.

**Two Rivers Public Charter School
1470 Irving Street NW 20009
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSALS:

The proposed Two Rivers Public Charter School, in compliance with Section 2204 (c) of the District Of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from the following food and janitorial services.

I. Food Services Sought:

Catering for Breakfast (approx. 15 students)

Catering for Lunch (approx. 98 students)

The meals must meet or exceed federal nutrition requirements and all compliance Standards of the USDA. School Breakfast Program.

(All bid proposals must be submitted in the National School Lunch Program Format)

II. Cleaning Services Sought:

Superior janitorial services sought to maintain a neat and clean environment for staff And students. The Facility has about 13,000 sq ft, 3 floors, and 5 bathrooms.

(FBI fingerprint clearance and tuberculosis test required)

III. Computer Sales: Superior service for the purchase of laptop and desktop computers for the school.

IV. Auditing: Services to conduct the audit in accordance with auditing standards generally accepted in the United States and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements.

For Additional Information Call: 202-669-6345. Deadline for submissions is June 24, 2005 at 5pm

**Youth Build Public Charter School
1470 Irving Street NW 20009
May 13, 2005**

NOTICE OF REQUEST FOR PROPOSAL:

The proposed Youth Build Public Charter School, in compliance with Section 2204 (c) of the District Of Columbia School Reform Act of 1995 ("Act"), hereby solicits expressions of interest from the following services for the school:

I. Accounting Services sought: In the area of accounting for organizational budgeting, development of financial reporting statements, accounting, execution of payroll, and Monitoring of expenditures and accounts

II. Auditing Service Sought: Services to conduct the audit in accordance with auditing standards generally accepted in the United States and "Government Auditing Standards" issued by the Comptroller General of the United States. Including examining, on a test basis, and evidence supporting the amounts and disclosures in the financial statements

III. Special Needs Services Sought: Services needed to provide school with Multi-Disciplinary Team to conduct evaluations/re-evaluations as back-up to the in-house clinical team, Counseling, Occupational or Physical Therapy for students, Speech and Language therapy and Support and Compliance Level one.

IV. Computer Sales: Superior Service to provide the school with excellent computer software.

For Additional Information Call: 202- 669-6345 Deadline for submissions is June 24, 2005 at 5PM

ZONING COMMISSION ORDER NO. 04-19
Z.C. Case No. 04-19
Consolidated Planned Unit Development and Area Variances
District of Columbia Water and Sewer Authority
March 14, 2005

Pursuant to notice, the Zoning Commission for the District of Columbia held a public hearing on November 18, 2004, to consider applications from the District of Columbia Water and Sewer Authority ("WASA," or the "Applicant") for consolidated review and approval of a Planned Unit Development ("PUD") and an area variance regarding height of structures, pursuant to Chapters 1, 8, 24, and 31 of the D.C. Zoning Regulations, Title 11 of the District of Columbia Municipal Regulations. The public hearing was conducted in accordance with the provisions of 11 DCMR § 3022, contested cases. For the reasons stated below, the Commission grants the applications.

FINDINGS OF FACT

The Application, Parties, and Hearing

1. On June 14, 2004, the Applicant filed the PUD application with the Zoning Commission for the District of Columbia for the consolidated review and approval of a PUD for the property consisting of a part of Parcel 253 with an address of 5000 Overlook Drive, S.W. (the "Site"). The application requests approval to construct Egg-Shaped Digesters and auxiliary structures on a site within the Blue Plains sewage treatment plant. The subject property is zoned C-M-3, and no change of zone classification is requested.
2. On September 13, 2004, the Zoning Commission decided to schedule a public hearing to consider the application. At the setdown meeting the Commission decided, based in part on the recommendation of the Office of Planning ("OP"), that height flexibility sought in the PUD application exceeded the degree of flexibility permitted under 11 DCMR §§ 2405.1 and 2405.3. The Commission, therefore, dismissed that part of the application, but indicated that it would consider, at the same time it heard the remainder of the PUD, an application for an area variance to authorize the requested heights of the structures. The Commission also indicated that it was concerned with the lack of specificity as to the zoning flexibility required and that the only flexibility granted would be that specifically stated in the Applicant's Pre-Hearing statement.

3. Based on the Commission's decision, the Applicant submitted its Pre-Hearing Submission on the PUD on October 28, 2004 and the variance application on October 29, 2004.
4. The Applicant, the District of Columbia Water and Sewer Authority, is an independent agency of the District of Columbia government. The Authority began operations on October 1, 1996 and was created to finance, operate, and provide essential retail water distribution and wastewater conveyance and treatment services to approximately 570,000 people in the District of Columbia. WASA also provides wholesale wastewater conveyance and treatment services to approximately 1.6 million people in major suburban areas of this region.
5. After proper notice, the Zoning Commission opened the public hearing on November 18, 2004 and completed the public hearing that evening. The Commission also took proposed action to approve the PUD application at the conclusion of the public hearing. The vote on the variance application was deferred until the date when final action on the PUD would be considered.
6. The parties to the case were the Applicant and Advisory Neighborhood Commission ("ANC") 8D, within which the Site is located.
7. The proposed action of the Zoning Commission was referred to the National Capital Planning Commission ("NCPC") as required by the District of Columbia Home Rule Act. NCPC, by action dated December 23, 2004, found the proposed PUD would not affect the identified federal interests in the National Capital, nor be inconsistent with the Comprehensive Plan for the National Capital.
8. The Zoning Commission approved the variance application and took final action to approve the PUD application on January 13, 2005.
9. The Commission voted at its March 14, 2005 public meeting to re-open the record to accept: (1) recommendations made by the Commission of Fine Arts ("CFA") for design changes to the Egg-Shaped Digesters project; and (2) revised elevations showing a modified design conforming to the CFA's design recommendations. The Commission also voted to approve the design changes shown in the revised elevations at the March 14 meeting.

The Site and the Area

10. The Blue Plains Advanced Wastewater Treatment Plant ("Blue Plains" or the "Plant") is located in the southernmost part of the District of Columbia, situated generally between the Anacostia Freeway and the Potomac River. The Plant is located approximately two and one-half miles southeast of Reagan National Airport and just over five miles south of the U. S. Capitol. This location is in Ward 8 and within the boundaries of Advisory Neighborhood Commission ("ANC") 8D and has a street address of 5000 Overlook Avenue, S.W.

11. The proposed new Digesters Facility will be located to the east of the existing Solids Processing Building, in the south-central section of Blue Plains and approximately 900 feet west of the Anacostia Freeway (Interstate 295). The land area to be occupied by the proposed new facility is approximately 351,600 square feet or 8.07 acres.
12. The site is vacant, because the previous outdoor sludge composting facility on the site has been demolished. A metes and bounds drawing of the Site was submitted by the Applicant, showing the site as divided into proposed theoretical lots to be created.
13. The land uses surrounding Blue Plains are public uses, including D.C. Village, the U.S. Naval Research Laboratory, the Potomac Job Corps Center, the D. C. Police Academy and Fire Testing Facility and the Architect of the Capitol's tree nursery. The federal properties devoted to federal public uses are unzoned, e.g., the Naval Research Laboratory, Bolling Air Force Base, and Oxon Run Park. The Department of Labor's Potomac Job Corps Center and D.C. Village are zoned C-M-1.
14. The residential neighborhoods to the east of the Anacostia Freeway are predominantly zoned R-2 (single-family, semi-detached homes) and R-5-A (townhouses and garden apartments). The nearest residential neighborhood is approximately one-half mile from Blue Plains. Small areas zoned C-1 and C-2-A provide locations for neighborhood shopping and offices on major streets.

The Project

15. The eight anaerobic digesters are proposed to meet WASA's treatment capacity needs. Egg-Shaped Digesters are tall and tapered containers for mixing, heating, and processing thickened sludge. The egg shape is a most efficient shape for mixing and processing the thickened sludge. Each digester is approximately 95 feet wide at its widest point and has a volume of 4.5 million gallons. Basement space will be used for piping, electrical and mechanical equipment, control rooms, storage, and other operations.
16. In addition to the eight Egg-Shaped Digesters, the project includes four Gas Storage Tanks (Silos) as well as the following smaller, auxiliary buildings and structures: a Digester Gas Building, a Digester Control Building, two electrical control buildings, two Gas Holders, and up to three enclosed Waste Gas Flares.

Zoning Flexibility Sought

17. The first aspect of zoning flexibility sought in the PUD application is a waiver of the requirement that a principal structure must be located on a single lot of record (11 DCMR § 3202.3). In addition, the application requests flexibility with respect to certain setback requirements, as detailed in the Applicant's Pre-Hearing Submission dated September 21, 2004. No other zoning flexibility is requested.

18. There are currently no record lots at Blue Plains, and the only public street frontage -- a requirement for the creation of a record lot -- is I-295, which is located approximately 900 feet from the PUD site. Blue Plains consists of parcels of land that have not been subdivided for many years. All of the various structures at Blue Plains comprise a single facility, and the various components share parking facilities and private access roads. To try to rationalize these arrangements for the purpose of creating single buildings on single lots that meet the requirements for street frontage and building setbacks, in particular, would be impractical and would serve no useful purpose.
19. In the absence of record lots, the Applicant must (and will) subdivide the site into theoretical lots. Each theoretical lot may contain no more than a one principal structure and each such structure must comply with the matter-of-right requirements of the Zoning Regulations, as would the case if the Applicant sought to construct multiple principal structures on a single record lot pursuant to 11 DCMR § 2517. Because the structures will have no street frontage, § 2517.3 requires:
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- (b) Open space in front of the entrance shall be provided that is equivalent to the required rear yard in the zone district in which the building is located; and
- (c) A rear yard shall be required.
20. As indicated in the Applicant's Pre-Hearing submission, two of the ten (10) front and rear setbacks required on the theoretical lots do not comply with the setback requirements.
21. One of the proposed theoretical lots does not show a currently-proposed structure, but is indicated for future development of a co-generation facility or other structure. The Applicant will need to obtain a PUD modification in order to construct whatever specific structure is eventually proposed.

Public Benefits that Warrant the Zoning Flexibility Sought

22. The project is a major public interest initiative that will result in improvements to wastewater treatment that could not be achieved through matter-of-right development. This project will add a "state-of-the-art" biosolids management technology, known as advanced anaerobic treatment, to the current advanced processing operations at Blue Plains, the largest advanced wastewater treatment plant in the world.
23. Public benefits that will result from advanced anaerobic treatment are numerous and substantial, and permit the project to be found to be particularly strong in the following public benefit categories as enumerated in 11 DCMR § 2403.9:

- Uses of special value to the neighborhood or the District of Columbia as a whole (§ 2403.9 (i)) and environmental benefits (§ 2403.9 (h)). The construction of the project will achieve:
 - a. Greater treatment capacity than conventional digesters while using the same amount of land;
 - b. Elimination of approximately one half of the volume of biosolids produced;
 - c. A 1.2 million-mile annual reduction in truck traffic, due to the lesser amount of sludge that will need to be trucked off-site, and an accompanying decrease in fuel consumption, fuel emissions, and road maintenance;
 - d. Reduced odor emissions at Blue Plains and at rural land application sites;
 - e. Production of a recyclable end product and production of digester gas that can be used for power generation; and
 - f. Operations and maintenance annual savings to WASA and its regional wholesale customer and local retail customers of approximately \$16 million.
- Architecture (§ 2403.9(a)). The Digesters Facility presents a unique architectural design challenge that has been met with a proposed design that is superior. Elevated connecting walkways and their supporting members are defining elements of the Egg-Shaped Digesters. The bow-shaped supporting members for the elevated walkways have been designed in an appealing 1930s industrial deco style reflective of the character of the older buildings at the Blue Plains site. An additional cladding finish not only enhances the appearance of the eggs, but the patterned surface this produces also tends to break down their monolithic appearance and somewhat reduce the egg's overall mass. The architect has created an exterior design treatment of superior quality that will make the digesters pleasing and interesting for the public to observe. Accessory structures will fit well within the design character of other structures at Blue Plains.
- Other public benefits and project amenities and other ways in which the proposed PUD substantially advances the major themes and other policies and objectives of any of the elements of the Comprehensive Plan (§ 2403.9(j)).
 - a. Public Facilities Element. The Comprehensive Plan includes an element devoted to Public Facilities (10 DCMR Chapter 6). The new Digesters Facility will improve biosolids treatment capacity at Blue Plains while saving space for

wastewater or stormwater treatment on-site and is directly in furtherance of this element of the Plan. Section 600.3 states:

Expansion of sewage treatment capacity and construction of related stormwater management projects are essential components of the public facilities program for the next two (2) decades. High priority must be given to a solution to the District's solid waste and disposal needs. Regardless of which approach is selected, major Capital investments are anticipated.

- b. Environmental Element. Section 404 (Solid Waste Management) of the Environmental Element includes the following policies in Sections 404.2(a), (c), and (d) that strongly support approval of the Digesters Facility and this PUD: 404.2 The policies established in support of the solid waste management objective are as follows:

(a) Develop and implement a reliable program of solid waste and sludge management that is cost-effective, environmentally sound, and fully coordinated with all responsible jurisdictions and regulatory bodies;

(c) Encourage the recovery and recycling of solid waste and sewage sludge materials, for both the public and private sectors, through appropriate regulatory, management, and marketing strategies; and

(d) Promote the development of cost-effective and environmentally sound techniques to extract energy from wastes, including sludge.

24. The project is acceptable in all other § 2403.9 categories.

Consistency with the Comprehensive Plan

25. In addition to the elements of the Comprehensive Plan furthered by the PUD project discussed above, the proposal is also fully consistent with the Land Use Element in Chapter 11 of the Comprehensive Plan. That element includes the "Generalized Land Use Map," which indicates the adopted policies for future development throughout the city. The Blue Plains facility is designated as a "Local Public Facility." Clearly, the advanced wastewater treatment facilities proposed in this PUD are local public facilities and are part of the larger Blue Plains facility.

Potential for Adverse Effects

26. The PUD project will have entirely favorable effects on the surrounding area and on the Authority's services and facilities for the reasons discussed in the

preceding section. The addition of the Digesters Facility at Blue Plains will in fact lessen the impacts of operations on the community. As to potential visual effects, the views of the proposed Egg-Shaped Digesters will be softened by the large distances from the relevant vantage points over the Potomac River, by the low elevation of the site, and by trees on the landward side that provide screening and large land areas devoted to public, generally institutional uses.

27. With respect to the impact of the requested zoning flexibility, the Commission concurs with the Applicant and the Office of Planning that the purpose of setbacks is normally to protect the light, air, and privacy of abutting properties. In this case, there are no abutting properties to Blue Plains that are affected, and shadows cast by digesters upon each other are irrelevant to the functioning of the system.

The Area Variance

28. WASA also requested an area variance from the height limit of 90 feet in the C-M-3 District.
29. The Egg-Shaped Digesters have engineering requirements for proper internal functioning that dictate their size and shape. The proposed digesters are 145 feet in height and will be sunk in the ground to a depth of 44 feet. This results in a height above finished grade of 101 feet. Other elements of the complex are somewhat higher, and several components and buildings in the Project are within the 90-foot height allowed in the C-M-3 District. The heights of the various components are shown in the chart below:

<u>Structure</u>	<u>Height Above Finished Grade</u>	<u>Zoning Compliance</u>
Egg Digesters	101	11' Variance
Elevated Walkways	101	11' Variance
Gas Domes	107	17' Variance
Access Towers	118	28' Variance
Silos	101	11' Variance
Other Structures/Buildings	60 or less	Within 90'

30. The Egg-Shaped Digesters Facility must be located at Blue Plains, where all of the wastewater is received for treatment
31. The digesters cannot function unless they are adjacent to the Solids Building, where the staging of solids occurs.
32. Because of the high water table at Blue Plains, especially on this site close to the Potomac River, the Digesters cannot feasibly be sunk farther into the ground without exorbitant expense.

33. An equally serious constraint is that a major conduit – 50' wide x 15' deep – runs through the site and cannot feasibly be moved. It is in the way of sinking the digesters farther.
34. Pipes beneath the digesters must be connected to adjacent treatment facilities without an excessive difference in elevation.

Office of Planning Report

35. By report dated November 8, 2004 and by testimony presented at the public hearing, the Office of Planning (“OP”) recommended approval of the PUD and variance applications. OP stated that the digester facility “is an important and needed public facility improvement. This unique facility has a creatively designed egg shape intended to minimize its height and bulk with a visually striking effect.” With respect to the variance standard, OP cited similar uniqueness and practical difficulties as those relied upon by the Applicant, referring to the high water table at the site, the engineering requirements related to the height of the digesters, location and elevation of underground pipes, and the uniqueness of Blue Plains as the central wastewater treatment plant.

Advisory Neighborhood Commission 8D

36. The Commission received a letter dated November 16, 2004 from Advisory Neighborhood Commission 8D that did not indicate whether the position stated therein was adopted at a properly noticed meeting at which a quorum was present.

District Department of Transportation Report

37. On November 5, 2004, the District Department of Transportation (“DDOT”) submitted a report addressing the transportation elements of the Proposal. In its report, DDOT indicated that it supported the Digester project, because it would reduce truck traffic as a consequence of reduced volume of biosolids requiring transport from the Blue Plains facility.

Commission of Fine Arts Recommendation

38. The Commission of Fine Arts (“CFA”) reviewed the Project plans at its meeting of November 18, 2004, and again at its meeting of January 25, 2005.
39. The CFA granted concept approval, subject to recommended design modifications.

CONCLUSIONS OF LAW**PUD**

1. Pursuant to the Zoning Regulations, the PUD process is designed to encourage high-quality development that provides public benefits that cannot be achieved under matter-of-right development. 11 DCMR § 2400.1. The overall goal of the PUD process is to permit flexibility of development and other incentives, provided that the PUD project "offers a commendable number or quality of public benefits, and that it protects and advances the public health, safety, welfare, and convenience." 11 DCMR § 2400.2.
2. Under the PUD process of the Zoning Regulations, the Zoning Commission has the authority to consider this application as a consolidated PUD. The Commission may impose development conditions, guidelines, and standards that may exceed or be less than the matter-of-right standards identified for height, FAR, lot occupancy, parking, loading, yards, and courts.
3. The development of this PUD project carries out the purposes of Chapter 24 of the Zoning Regulations in that it will result in significant improvements to a critical governmental function not achievable under matter-of-right development.
4. The proposed PUD meets the minimum area requirements of § 2401.1 of the Zoning Regulations.
5. The impact of the project on the surrounding area is acceptable and its impact on the operation of District services is beneficial.
6. The Project's public benefits are a reasonable trade-off for the zoning flexibility requested on the site.
7. Approval of this PUD is not inconsistent with the Comprehensive Plan, including the designation of the site for use and development of "Local Government Facilities" in the Generalized Land Use Map of the Land Use Element.
8. The approval of the Application will promote the orderly development of the site in conformity with the entirety of the District of Columbia zone plan as embodied in the Zoning Regulations and Zoning Map of the District of Columbia.

Height Variance

9. Section 8 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, 799, as amended; D.C. Official Code § 6-641.07(g)(3) (2001), permits variances from

the strict application of the Zoning Regulations provided that the property owner¹ demonstrates that (1) the property is unique because of its size, shape, topography, or other extraordinary or exceptional situation or condition inherent in the property; (2) the applicant will encounter practical difficulty or undue hardship if the Zoning Regulations are strictly applied; and (3) the requested variances will not result in substantial detriment to the public good or the zone plan. See *Gilmartin v. District of Columbia Bd. of Zoning Adjustment*, 579 A.2d 1164, 1167 (D.C. 1990).

10. Section 840.1 of the Zoning Regulations provides that the height of building or structures in a C-M-3 zone district shall not exceed 90 feet. WASA seeks the following height variances:

<u>Structure</u>	<u>Height Above Finished Grade</u>	<u>Zoning Compliance</u>
Egg Digesters	101	11' Variance
Elevated Walkways	101	11' Variance
Gas Domes	107	17' Variance
Access Towers	118	28' Variance
Silos	101	11' Variance.

11. Since WASA is seeking an area variance, it need only make the lesser showing of "practical difficulties," and not the more difficult showing of "undue hardship," which applies in use variance cases. *Palmer v. D.C. Board of Zoning Adjustment*, 287 A.2d 535, 541 (D.C. 1972). Therefore, in order to be granted any variance, the Applicant must show an exceptional condition or "uniqueness" of the property, practical difficulties in complying with the Zoning Regulations arising out of this uniqueness, and no detriment to the public good or impairment of the zone plan.

Exceptional Condition

12. With respect to the first prong of the variance test, the District of Columbia Court of Appeals has recognized that the inability to use property in conformity with the Zoning Regulations may stem from the existence of a structure on the land. See *Clerics of Saint Viator, Inc. v. District of Columbia Bd. of Zoning Adjustment*, 320 A.2d 291, 294 (D.C. 1974); *Draude v. District of Columbia Bd. of Zoning Adjustment*, 582 A.2d 949, 955-56 (D.C. 1990). The Court of Appeals has also noted that:

¹ Although the municipal corporation that constitutes the District of Columbia government, as a whole, and that includes WASA as one of its agencies, retained legal title to Blue Plains after the creation of WASA, WASA was given the exclusive use of the facility. D.C. Official Code § 34-2202.07. Therefore, WASA is appropriately viewed as the property owner for the purposes of the variance analysis.

[W]hen a public service has inadequate facilities and applies for a variance to expand into an adjacent area in common ownership which has long been regarded as part of the same site, then the Board of Zoning Adjustment does not err in considering the needs of the organization as possible "other extraordinary and exceptional situation or condition of a particular piece of property."

Monaco, 407 A.2d at 1099.

13. Thus, in *Draude, supra*, the Court of Appeals sustained the grant of a density variance to allow the expansion of an ambulatory care center that was adjacent to the owner's hospital. The court found that the need to maintain this proximity, together with the institutional need of the owner to expand its ambulatory center, constituted an exceptional condition. Similarly, the Board of Zoning Adjustment found the institutional need of Sibley Hospital to expand its oncology center to be an exceptional condition when granting density and rear yard variances. *Application of the Lucy Webb Hayes Training School for Deaconesses and Missionaries d/b/a Sibley Memorial Hospital*, BZA No. 16654, 48 DCR 4811 (2001).
14. WASA has clearly demonstrated an institutional (and public interest) need to improve its biosolids management. Certainly there is no place other than the Blue Plains facility to locate the Digesters and there is no place at Blue Plains to construct the facility other than adjacent to the Blue Plains Solids Building where all of the staging of solids occurs. The high water table at Blue Plains and the presence of a major conduit running through the site limit the extent to which structures can be economically extended into the subsurface.
15. The Commission finds that WASA's institutional needs, the existing configuration of its facilities, and the dewatering problems associated with excavation on the site constitute exceptional circumstances with respect to its property.

Practical Difficulties

16. WASA has demonstrated that the engineering requirements of the digesters dictate the height of these facilities. Because of the unique subterranean water characteristics at the facility, the Digesters cannot be economically sunk farther into the ground. Even if farther excavation were feasible, the fact that the pipes beneath the digesters must be connected to adjacent treatment facilities without an excessive difference in elevation further limits the extent to which height could be reduced.
17. The Commission thus finds that strict compliance with the 90-foot height limitation will pose practical difficulties for WASA.

The Requested Height Variances Will Not Detrimentially Affect the Public Good or the Zone Plan

18. The Digesters project will have only favorable affects on the public good by treating greater amounts of biosolids on the same amount of land, eliminating about half of the volume of biosolids produced, reducing odor emissions and truck traffic, producing a recyclable end product and gas used for power generation, and saving WASA customers approximately \$16 million annually. The proposed use is industrial in nature and permitted as a matter of right in the C-M-3 industrial zone in which it is located. While the height of the structures exceeds the matter-of-right height limit, its effect is minimized by their remote location and low elevation. The Commission accepts the Applicant's representation that there has been no opposition to the proposed height communicated to it even after meeting with the Advisory Neighborhood Commissioners in Ward 8, the U.S. Commission of Fine Arts, the National Capital Planning Commission, the Office of Planning, and the City of Alexandria, Virginia.

General Findings

19. The Commission is required under § 5 of the Office of Zoning Independence Act of 1990, effective September 20, 1990 (D.C. Law 8-163; D.C. Official Code § 6-623.04 (2001)), to give great weight to OP recommendations. The Commission carefully considered the OP report and, as explained in this decision, finds its recommendation to grant the applications persuasive.
20. Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Code § 1-309.10(d)(3)(a)), the Commission must give great weight to the issues and concerns raised in the written report of the affected Commission.
21. Unfortunately the letter provided by the affected ANC cannot be considered a report to which great weight can be given, because the ANC letter does not satisfy the requirements of 11 DCMR § 3012.5. Namely the letter does not state whether the ANC adopted its position at a meeting for which proper notice was given and at which a quorum was present. These prerequisites ensure that the Commission only gives great weight to positions lawfully adopted by an ANC in accordance with the notice and meeting requirements set forth in the ANC Act.
22. The Application is subject to compliance with D.C. Law 2-38, the Human Rights Act of 1977.

DECISION

In consideration of the Findings of Fact and Conclusions of Law contained in this Order, the Zoning Commission for the District of Columbia orders **APPROVAL** of the Applications for consolidated review of a Planned Unit Development to construct an Egg-Shaped Digesters Facility and auxiliary structures and for an area variance regarding height of certain structures in that facility on property located within the Blue Plains Advanced Wastewater Treatment Plant at 5000 Overlook Drive, S.W. (part of Parcel 253). This approval is subject to the following guidelines, conditions and standards:

1. The PUD shall be developed in accordance with the plans prepared by Sorg and Associates, Architects, dated September 21, 2004, as supplemented by drawings dated October 28, 2004 and February 15, 2005, marked as Exhibits 13, 16, and 37, respectively, in the record, as modified by the guidelines, conditions, and standards herein.
2. The Applicant may not proceed with construction of any structure on the theoretical lot indicated for a future "co-generation building" without first obtaining Commission approval of a PUD Modification pursuant to 11 DCMR § 2409.9.
3. The Applicant shall have flexibility with the design of the PUD in the following areas:
 - a. To vary the location and design of all interior components provided that the variations do not materially change the exterior configuration of the structures;
 - b. To vary the final selection of the exterior materials within the color ranges and material types as proposed, based on availability at the time of construction, without reducing the quality of the materials; and
 - c. To make refinements to exterior materials, details and dimensions railings, roof, architectural embellishments and trim, or any other changes to comply with the District of Columbia Building Code or that are otherwise necessary to obtain a final building permit or any other applicable approvals.
4. No zoning relief has been granted to the Applicant other than the height, setbacks, and minor design flexibility expressly stated in this Order.
5. The Applicant shall abide by the terms of the executed Memorandum of Understanding with the D.C. Office of Local Business Development in order to achieve, at a minimum, the goal of thirty-five percent (35%) participation by local, small, and disadvantaged businesses in the contracted development costs in connection with the design, development, construction, maintenance, and security for the project to be created as a result of the PUD project.

6. The Applicant shall abide by the terms of the executed First Source Employment Agreement with the Department of Employment Services (DOES).
7. No building permit shall be issued for this PUD until the Applicant has recorded a covenant in the land records of the District of Columbia, between the owners and the District of Columbia that is satisfactory to the Office of the Attorney General and the Zoning Division of the Department of Consumer and Regulatory Affairs (DCRA). Such covenant shall bind the Applicant and all successors in title to construct on and use this property in accordance with this order or amendment thereof by the Zoning Commission.
8. The Office of Zoning shall not release the record of this case to the Zoning Division of the Department of Consumer and Regulatory Affairs until the Applicant has filed a copy of the covenant with the records of the Zoning Commission.
9. The PUD approved by the Zoning Commission shall be valid for a period of two (2) years from the effective date of this Order. Within such time, an application must be filed for a building permit. Construction shall begin on the facility within three (3) years after the effective date of this Order.
10. The Applicant is required to comply fully with the provisions of the Human Rights Act of 1977, D.C. Law 2-38, as amended, and this order is conditioned upon full compliance with those provisions. In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code § 2-1401.01 et seq., (Act) the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, or place of residence or business. Sexual harassment is a form of sex discrimination that is also prohibited by the Act. In addition, harassment based on any of the above protected categories is also prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action. The failure or refusal of the Applicant to comply shall furnish grounds for the denial or, if issued, revocation of any building permits or certificates of occupancy issued pursuant to this Order.

On January 13, 2005, the Commission voted to approve the height variance application by a vote of 5-0-0 (Carol J. Mitten, Anthony J. Hood, Gregory N. Jeffries, John G. Parsons, and Kevin L. Hildebrand to approve).

On January 13, 2005, the Commission voted to approve the PUD application by a vote of 5-0-0 (Carol J. Mitten, Kevin L. Hildebrand, Anthony J. Hood, Gregory N. Jeffries, and John G. Parsons to approve).

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On March 14, 2005, the Commission voted to re-open the record to consider recommendations made by the Commission of Fine Arts, and elevation drawings submitted by the Applicant showing a revised design, by a vote of 5-0-0 (Carol J. Mitten, Kevin L. Hildebrand, Anthony J. Hood, Gregory N. Jeffries, and John G. Parsons to approve). The Commission also voted to approve the revised design by a vote of 5-0-0 (Carol J. Mitten, Kevin L. Hildebrand, Anthony J. Hood, Gregory N. Jeffries, and John G. Parsons to approve).

In accordance with the provisions of 11 DCMR § 3028, this Order shall become final and effective upon publication in the *D.C. Register*; that is on _____.

**OFFICE OF DOCUMENTS AND ADMINISTRATIVE ISSUANCES
PUBLICATIONS PRICE LIST**

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS (DCMR)

TITLE	SUBJECT	PRICE
1	DCMR MAYOR AND EXECUTIVE AGENCIES (JUNE 2001).....	\$16.00
3	DCMR ELECTIONS & ETHICS (JUNE 1998).....	\$20.00
4	DCMR HUMAN RIGHTS (MARCH 1995).....	\$13.00
5	DCMR BOARD OF EDUCATION (DECEMBER 2002).....	\$26.00
6A	DCMR POLICE PERSONNEL (MAY 1988).....	\$8.00
7	DCMR EMPLOYMENT BENEFITS (JANUARY 1986).....	\$8.00
8	DCMR UNIVERSITY OF THE DISTRICT OF COLUMBIA (JUNE 1988).....	\$8.00
9	DCMR TAXATION & ASSESSMENTS (APRIL 1998).....	\$20.00
10	DCMR DISTRICT'S COMPREHENSIVE PLAN (PART 1, FEBRUARY 1999).....	\$33.00
10	DCMR PLANNING & DEVELOPMENT (PART 2, MARCH 1994) w/1996 SUPPLEMENT*.....	\$26.00
11	DCMR ZONING (FEBRUARY 2003).....	\$35.00
12	DCMR CONSTRUCTION CODES SUPPLEMENT (2003).....	\$25.00
13B	DCMR BOILER & PRESSURE VESSEL CODE (MAY 1984).....	\$7.00
14	DCMR HOUSING (DECEMBER 2004).....	\$25.00
15	DCMR PUBLIC UTILITIES & CABLE TELEVISION (JUNE 1998).....	\$20.00
16	DCMR CONSUMERS, COMMERCIAL PRACTICES & CIVIL INFRACTIONS (JULY 1998) W/DECEMBER 1998 SUPPLEMENT.....	\$20.00
17	DCMR BUSINESS, OCCUPATIONS & PROFESSIONS (MAY 1990).....	\$26.00
18	DCMR VEHICLES & TRAFFIC (APRIL 1995) w/1997 SUPPLEMENT*.....	\$26.00
19	DCMR AMUSEMENTS, PARKS & RECREATION (JUNE 2001).....	\$26.00
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