

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 **eleven (11)** Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code § 1-309.06(d)(2); 2001 Ed.

VACANT: **3D07**
 5C10, 5C11
 6B11
 8B02, 8B03, 8C05, 8C06, 8E01, 8E06

Petition Circulation Period: **Tuesday, September 13, 2005 thru Monday, October 3, 2005**
Petition Challenge Period: **Thursday, October 6, 2005 thru Thursday, October 13, 2005**

VACANT: **1D02**

Petition Circulation Period: **Tuesday, August 30, 2005 thru Monday, September 19, 2005**
Petition Challenge Period: **Thursday, September 22, 2005 thru Wednesday, September 28, 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**.

District of Columbia
BOARD OF ELECTIONS AND ETHICS

Monthly Report
of
Voter Registration Statistics
for the period ending
August 31, 2005

Covering Citywide Totals by:

WARD, PRECINCT, and PARTY

One Judiciary Square
441 - 4th Street, NW, Suite 250N
Washington, DC 20001
(202) 727-2525
<http://www.dcboee.org>

8541

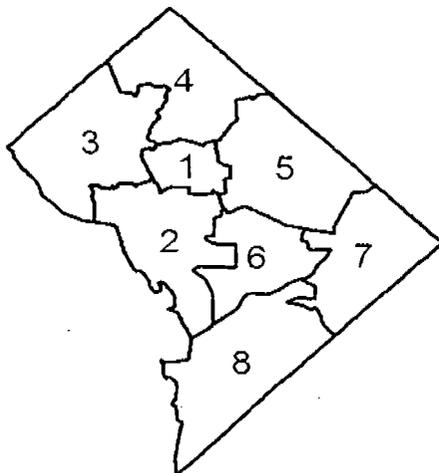
D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

CITYWIDE SUMMARY

Party Totals and Percentages by Ward for the period ending August 31, 2005

WARD	DEM	REP	STG	N-P	OTH	TOTALS
1	29,293	2,599	951	8,753	234	41,830
2	24,432	5,284	489	8,490	190	38,885
3	29,708	7,906	439	9,025	139	47,217
4	41,242	2,802	642	7,513	211	52,410
5	40,165	2,172	629	6,546	218	49,730
6	33,580	4,614	629	7,358	197	46,378
7	38,263	1,692	505	5,463	159	46,082
8	31,200	1,615	553	5,157	176	38,701
TOTALS	267,883	28,684	4837	58,305	1524	361,233
<i>TOTAL Percentage (by party)</i>	<i>74.2%</i>	<i>7.9%</i>	<i>1.3%</i>	<i>16.1%</i>	<i>0.4%</i>	<i>100.0%</i>

Wards



**D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS**

PRECINCT STATISTICS

Ward 3

For the Period Ending: August 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
7	921	395	16	406	7	1,745
8	1,950	711	33	609	4	3,307
9	854	589	7	364	2	1,816
10	1,567	570	21	570	7	2,735
11	2,584	745	54	1,048	25	4,456
12	448	196	4	175	5	828
26	2,275	455	39	727	10	3,506
27	2,130	328	22	472	7	2,959
28	2,000	724	30	730	9	3,493
29	1,027	279	18	295	2	1,621
30	1,058	307	12	228	2	1,607
31	1,887	409	25	492	9	2,822
32	2,327	445	30	538	8	3,348
33	2,397	432	48	618	13	3,508
34	2,801	587	37	930	17	4,372
50	1,757	343	19	377	6	2,502
138	1,725	391	24	446	6	2,592
TOTALS	29,708	7,906	439	9,025	139	47,217

D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS

PRECINCT STATISTICS

Ward 4

For the Period Ending: August 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
45	1,823	98	31	310	15	2,277
46	2,499	105	38	456	11	3,109
47	2,148	161	43	556	16	2,924
48	2,359	155	40	432	8	2,994
49	620	35	16	145	4	820
51	2,885	608	41	585	9	4,128
52	1,149	279	8	233		1,669
53	951	94	21	227	4	1,297
54	1,859	131	36	405	17	2,448
55	2,298	112	29	361	18	2,818
56	2,712	102	39	581	15	3,449
57	2,209	105	33	382	16	2,745
58	2,049	65	34	326	6	2,480
59	2,393	95	32	346	12	2,878
60	1,534	99	28	536	13	2,210
61	1,478	72	21	250	3	1,824
62	2,982	187	40	338	8	3,555
63	2,713	129	68	461	15	3,386
64	2,152	86	17	288	10	2,553
65	2,429	84	27	295	11	2,846
TOTALS	41,242	2,802	642	7,513	211	52,410

**D.C. BOARD OF ELECTIONS AND ETHICS
MONTHLY REPORT OF VOTER REGISTRATION STATISTICS**

PRECINCT STATISTICS

Ward 7

For the Period Ending: August 31, 2005

PRECINCT	DEM	REP	STG	N-P	OTH	TOTALS
80	1,150	52	15	181	8	1,406
92	1,209	65	19	184	8	1,485
93	1,176	56	13	177	5	1,427
94	1,538	75	21	199	5	1,838
95	1,269	41	25	197	2	1,534
96	1,680	74	30	269	4	2,057
97	978	44	19	158	2	1,201
98	1,409	49	19	181	9	1,667
99	1,064	44	16	169	7	1,300
100	1,349	66	21	200	4	1,640
101	1,413	49	13	175	6	1,656
102	1,814	83	25	217	9	2,148
103	2,749	124	37	415	13	3,338
104	1,964	99	32	299	12	2,406
105	1,606	71	26	225	6	1,934
106	2,570	103	31	336	5	3,045
107	1,178	69	13	208	4	1,472
108	1,027	46	7	99	5	1,184
109	923	42	10	92	3	1,070
110	3,377	138	38	427	12	3,992
111	1,712	67	25	313	7	2,124
112	1,742	72	21	258	11	2,104
113	1,819	86	15	261	7	2,188
132	1,547	77	14	223	5	1,866
TOTALS	38,263	1,692	505	5,463	159	46,082

DEPARTMENT OF HEALTH

PUBLIC NOTICE

The District of Columbia Board of Respiratory Care hereby gives notice of the change of its regularly scheduled monthly meeting dates pursuant to § 405 of the District of Columbia Health Occupation Revision Act of 1985, effective March 25, 1986 (D.C. Law 6-99; D.C. Official Code § 3-1204.05 (b)) ("Act").

Beginning Monday, September 12, 2005 the District of Columbia Board of Respiratory Care will now hold its regularly scheduled monthly meetings on the second Monday of each month at 9:00 a.m. The Board of Respiratory Care meets at 717 14th Street, NW, 10th Floor, Washington, D.C. 20005.

THE DISTRICT OF COLUMBIA HOUSING AUTHORITY

**NOTICE OF WAIVER OF REGULATIONS TO FACILITATE THE
HOUSING OF FAMILIES DISPLACED BY HURRICANE KATRINA**

President Bush has declared a state of emergency in the States of Louisiana, Mississippi and Alabama and authorized the Federal Emergency Management Agency to coordinate all disaster relief efforts for the purpose of alleviating the hardship and suffering caused by the disaster in these Gulf States. Hurricane Katrina devastated a large swath of the area along the Gulf Coast; the massive flooding that followed required the complete evacuation of New Orleans residents, including a large number of public housing residents. The flooding that has required the total evacuation of the City of New Orleans is anticipated to last at least several months and quite possibly longer and the need to rebuild infrastructure and homes there as elsewhere in the Gulf States could take a year or more. The flooding, loss of infrastructure and destruction of homes, including public housing communities, has created unhealthful and dangerous conditions that will require extensive reconstruction before evacuated residents can return to New Orleans and other parts of the Gulf States devastated by Hurricane Katrina. The government of the District of Columbia is working with the Federal Emergency Management Agency to provide accommodations for at least 400 evacuees. These families are now arriving in the District through efforts initiated by the District and coordinated with the Federal Emergency Management Agency.

In order to expedite the provision of stable housing assistance to eligible victims of the hurricane who have been evacuated to the District of Columbia, the Executive Director has determined that it is essential that certain provisions of the local regulations governing the maintenance of the public housing waiting list be waived. Section 6105.3 of Title 14 of the DCMR, authorizes the Executive Director of the District of Columbia Housing Authority (DCHA) to waive the date and time of application in selection of families from the public housing waiting list emergency category when there is a federally or locally declared disaster. Moreover, Section 6003 of Title 14 of the DCMR provides that the Executive Director may waive any provisions of the public housing rules subject to any federal or local statutory limitation.

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NOTICE OF WAIVER OF REGULATIONS TO FACILITATE THE HOUSING OF FAMILIES DISPLACED BY HURRICANE KATRINA

Given the acknowledged severity of the devastation in New Orleans and the surrounding Gulf States area, the obvious need for a national response and the express desire of the Executive Director and the DCHA Board of Commissioners to respond to the need for housing families displaced to the District of Columbia due to this disaster, the Executive Director hereby finds good cause for the waiver of certain local regulations as herein specified. Therefore, I, Michael P. Kelly, Executive Director of the District of Columbia Housing Authority, hereby waive the provisions of Title 14 of the District of Columbia Municipal Regulations, Sections 6105.2(a)(3), limiting the number of units annually available for emergency applicants, and the date and time of application requirements of Section 6105.3, to allow for the admission of up to 100 families displaced to the District of Columbia by the Hurricane Katrina federally declared disaster.

Michael Kelly, Executive Director
District of Columbia Housing Authority

Date 9/16/05

Approved for Form and Legal Sufficiency:

Margaret McFarland, General Counsel
District of Columbia Housing Authority

Date

ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA**Z.C. ORDER NO. 05-07****Case No. 05-07****(Proposed Zoning Map Amendment to rezone Lots 24 and 25 in Square 5684
from R-1-B to C-2)****April 11, 2005**

On February 11, 2005, the Office of Zoning received an application from Joseph Washington ("Applicant") requesting Zoning Commission review and approval of a Zoning Map Amendment to change Lots 24 and 25 in Square 5684 ("Subject Property") from a Residence (R-1-B) zone district to a Neighborhood Shopping (C-1) zone district. At its public meeting on April 11, 2005, the Commission voted 5-0-0 to dismiss the application without a public hearing pursuant to 11 DCMR § 3011.3.

FINDINGS OF FACT

1. The Subject Property is located at 3700 Southern Avenue, S.E. It totals 0.15 acres (6,738 square feet) in size, and is developed with one single-family detached dwelling. Public alleys abut the Subject Property to the northwest and southwest. Properties to the southeast and across Southern Avenue are outside the jurisdiction of the District of Columbia.
2. Single-family detached residential is the predominant land use in the square.
3. The Subject Property and surrounding lots in the square are in a Residence (R-1-B) zone district.
4. The Comprehensive Plan's Generalized Land Use Map¹ designates the Subject Property and surrounding properties for low-density residential development, characterized by single-family detached and semi-detached housing as predominant uses.
5. The Applicant requested a map amendment to change the zoning classification for the Subject Property from Residence (R-1-B) to Neighborhood Shopping (C-1). The Applicant later modified his request to request a change to a Community Business Center (C-2) classification at the Zoning Commission's public meeting.

¹References to the "Comprehensive Plan" are to the District Elements of the Comprehensive Plan for the National Capital.

6. Residence (R-1) zone districts are designed to protect quiet residential areas now developed with one-family detached dwellings and adjoining vacant areas likely to be developed for those purposes. Neighborhood Shopping (C-1) zone districts are designed to provide convenient retail and personal service establishments for the day-to-day needs of a small tributary area, with a minimum impact upon surrounding residential development. Community Business Center (C-2) districts are designed to provide facilities for shopping and business needs, housing, and mixed uses for large segments of the District of Columbia outside of the central core.

8. Pursuant to 11 DCMR § 3011.1, and by memorandum dated February 23, 2005, the Office of Zoning referred the petition to the District of Columbia Office of Planning (“OP”) for a preliminary report and for recommendation as to whether the application had sufficient merit to warrant authorization of a public hearing.

9. By memorandum (preliminary report) dated March 25, 2005, OP recommended that the Zoning Commission not set the application down for a public hearing. OP concluded that the requested map amendment was inconsistent with the Comprehensive Plan because the allowing commercial uses as a matter of right (as permitted in a C-2 Zone District) would be inconsistent with Generalized Land Use map designation of low-density residential development for the Subject Property and surrounding area. In addition, OP noted that the proposed rezoning would be inconsistent with the Comprehensive Plan’s Major Themes of stabilizing, maintaining, and improving residential neighborhoods, 10 DCMR § 102, and with the Ward 7 objective of preserving residential neighborhoods, 10 DCMR § 1828.1.

10. On April 11, 2005 at its regular monthly meeting, the Commission considered the application to determine whether to schedule a public hearing and voted unanimously to dismiss it.

CONCLUSIONS OF LAW

Section 492(b)(1) of the District of Columbia Home Rule Act, effective December 24, 1973 (Pub.L.No. 93-198; 87 Stat. 774; D.C. Official Code § 6-641.02 (2001)), amended § 2 of the Zoning Act of 1938 to require that the “zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital.”

The Comprehensive Plan’s Generalized Land Use Map designates low-density residential development, characterized by single family detached and semi-detached housing as predominant uses for the Subject Property and surrounding area. The zoning designation requested would permit the introduction of commercial uses into the neighborhood and is thus facially inconsistent the land use map’s designation. In addition, as noted by the Office of Planning, the rezoning requested would contravene both the Major Themes and Ward 7 Objectives of stabilizing, preserving, maintaining, and improving residential neighborhoods.

However, the fact that the rezoning proposed is inconsistent with the Comprehensive Plan does not end the inquiry. The use of the term “not inconsistent” in the District Charter connotes a

degree of discretion that would permit the Commission to allow a rezoning even in the case of the most blatant inconsistency. Section 1 of the Zoning Act of 1938 authorized the Commission to regulate the uses of property in order to “promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital.” D.C. Official Code § 6-641.01 (2001). Although a facial inconsistency creates a presumption against a proposed rezoning, there may be instances when that presumption may be successfully rebutted if the rezoning would better serve the purposes stated in that section.

However, the case presented here is not such an instance. The policy objectives stated in the Comprehensive Plan with respect to the need to stabilize residential neighborhoods are shared by the Commission. Indeed, the existing R-1-B zoning for the subject property is “designed to protect quiet residential areas now developed with one-family detached dwellings” and “intended to stabilize the residential areas,” 11 DCMR §§ 200.1 and 200.2. The rezoning proposed by the applicant would accomplish the opposite.

Lastly, the Commission believes the application seeks to accomplish illegal spot zoning. The District of Columbia Court of Appeals has defined spot zoning “as the wrenching of a small parcel from its environment for the benefit of a single owner and without benefit to the public at large or the area affected.” *Daro Realty, Inc. v. District of Columbia Zoning Com’n*, 581 A.2d 295, 299 (D.C. 1990).

The elements of spot zoning are that the proposed Commission action:

- (1) must pertain to a single parcel or a limited area -- ordinarily for the benefit of a particular property owner or specially interested part -- and (2) must be inconsistent with the city's comprehensive plan

Id. at 299, quoting, *Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n*, 402 A.2d 36, 39-40 (D.C. 1979). On the basis of the application and Office of Planning Report, the Commission finds that both elements of spot zoning are met.

The Commission is required by § 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 dismiss the application persuasive.

Under § 3 of the Comprehensive Advisory Neighborhood Commissions Reform Act of 2000, effective June 27, 2000 (D.C. Law 13-135, D.C. Official Code § 1-309.10(d)(3)(a)) (“the ANC Act”), the Commission must give great weight to the issues and concerns raised in the written report of the affected Commission. Pursuant to § 3012.5 of the Commission’s rules of procedures, no report of an ANC is due until seven (7) days in advance of a hearing. Since this Application was not advertised for a hearing, the affected ANC was neither expected to nor did file a report. Nevertheless, the Commission does not interpret the ANC Act as precluding the

Z.C. ORDER NO. 05-07

Z.C. CASE NO. 05-07

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summary dismissal of an application that cannot be granted as a matter of law, as is the case here.

DECISION

Upon consideration of the reasons set forth herein, the Zoning Commission for the District of Columbia, pursuant to 11 DCMR § 3011.3 hereby **DISMISSES** the application in Z.C. Case No. 05-07 without a public hearing.

Vote of the Zoning Commission taken at its regular monthly meeting on April 11, 2005: **5-0-0** (Carol J. Mitten, Anthony J. Hood, Kevin Hildebrand, Gregory Jefferies, John G. Parsons to dismiss the application without a public hearing).

In accordance with 11 DCMR §3028, this order is final and effective upon publication in the D.C. Register, on SEP - 9 2005.

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

DISTRICT OF COLUMBIA MUNICIPAL REGULATIONS (DCMR)

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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
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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
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**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
Page 3

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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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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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.

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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,		)	FOR PUBLICATION
Local 872,)	
)	
	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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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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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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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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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,	)	FOR PUBLICATION
)	
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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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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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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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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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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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, restrain, 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

_____)	
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.)	
)	
_____)	

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,	)	PERB Case No. 05-UM-01
)	
and	)	Opinion No. 786
)	
National Association of Government)	
Employees/SEIU, AFL-CIO,	)	FOR PUBLICATION
)	
and.)	
)	
Communication Workers of)	
America, Local 2336,)	
)	
)	
Labor Organizations.)	
_____)	

**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 Employees 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